

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCA/0049/2018

In the matter between:

EXR CONSTRUCTION LESOTHO (PTY) LTD

APPLICANT

And

**THE PRINCIPAL SECRETARY, MINISTRY OF
LOCAL GOVERNMENT AND CHIEFTAINSHIP**

1ST RESPONDENT

**THE CHAIRMAN, PROCUREMENT UNIT, MINISTRY
OF PUBLIC WORKS AND TRANSPORT**

2ND RESPONDENT

**CHAIRMAN OF THE TENDER PANEL AND
EVALUATION COMMITTEE PROCUREMENT UNIT**

3RD RESPONDENT

THE MINISTER OF PUBLIC WORKS AND TRANSPORT 4TH RESPONDENT

**CHINA GEO ENGINEERING CORPORATION (LESOTHO)
(PTY) LTD**

5TH RESPONDENT

THE ATTORNEY GENERAL

6TH RESPONDENT

Neutral Citation: EXR Construction Lesotho (Pty) Ltd v P.S. Min. of Local Government and Chieftainship and 5 ORS [2022] LSHC 202 Comm. (31 August 2022)

JUDGMENT

CORAM: MATHABA J
HEARD ON: 1st June 2022
DELIVERED ON: 31st August 2022

SUMMARY:

Tender – Whether a tender can be rejected at the review stage – Whether a Procurement Unit has discretionary powers to condone non – Compliance with the requirements of tender invitation – Regulation 28 couched in peremptory terms and overly rigid – A tender must be rejected at a review stage if it is non – Compliant with the requirements of tender invitation.

ANNOTATIONS:

STATUTES

Interpretation Act NO. 19 of 1977

Public Procurement Regulations 2007

Preferential Procurement Policy Framework Act No. 5 of 2000

CASES

LESOTHO

SCIG-SMCG-TIM Joint Venture and One v Unik Construction Engineering (Pty) Ltd C of A (CIV) 50/2020

SOUTH- AFRICA

All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of The South African Social Security Agency and Others 2014 (1) SA 604 (CC).

Dr JS Moroka Municipality & others v Betram (Pty) Ltd & another [2013] ZASCA 186; [2014] 1 All SA 545 (SCA)

Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others 2008 (2) SA 481 (SCA).

Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd 2004 (1) SA 308 (SCA)

Nkisimane & others v Santam Insurance Co Ltd 1978 (2) SA 430

Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd [2018] ZACSA 50

Sutter v Scheepers 1932 AD 165

I. INTRODUCTION:

[1] This case is about a challenge to the award of a tender. The controversy arises from the disqualification of the applicant (“EXR”) from the

tender process. The case was instituted as an ordinary application on the 15th August 2018 wherein the applicant sought a review and declaratory orders. The contract borne by the impugned tender had already been performed at the time the matter was argued. As a result, the applicant abandoned prayers 1, 2, 3 and 6 in the notice of motion as they were no longer of any value.

[2] By consent, prayers 4 and 5 in the notice of motion were refined. Consequently, the Court is asked to declare the decisions of the 1st to the 4th respondents to exclude the applicant from tender process before evaluation irregular, irrational and unlawful, as well as to declare the award of the tender to the 5th respondent irregular.

II. BACKGROUND FACTS:

[3] On the 14th September 2017, the 1st respondent invited bids under contract titled “Upgrading of the Maputsoe Urban Roads – Contract No: ITT: 01 of 2016/2017”¹. The parties are on common ground with respect to the following facts:

¹ Pleadings – pages 10 and 42, Annexures B page 21.

- 3.1 The closing and opening date for the bids was the 1st November 2017.²
- 3.2 The applicant participated in the tender and submitted the lowest tender in the amount of M170,050,000.00 while that of the 5th respondent was M214,688,703.31³. The tender was awarded to the 5th respondent.
- 3.3 The bids invitation document amongst others required bidders to submit certified copies of their valid trader's license.
- 3.4 The applicant submitted a bid without a certified copy of a trader's license as a result of which the bid was rejected and not evaluated⁴. At the time of the submissions, the applicant still had a valid trader's license.
- 3.5 On the 3rd November 2017 the applicant wrote a letter to the 1st respondent acknowledging the error and providing a certified copy of the license with a request for its bid not to be

² Pleadings – page 42, Annexures K & L pages 48 & 49, respectively

³ Pleadings – page 10 and 43.

⁴ Pleadings – pages 11, 41 and 45

disqualified⁵. The letter was not responded to until the applicant directed another letter to the secretary of the tender board in the Ministry of Local Government and Chieftainship on the 9th November 2017⁶.

3.6 The letter drew a response from Procurement Manager of the Ministry. The response indicated that the applicant's tender "was not evaluated as upon opening of tenders and read out, one of the mandatory documents such as the trader's license as per ITB 11.1 {B} was not attached in the bid document". It further reminded EXR that the requirement for certified copy of trader's licence was a requirement in terms of the invitation to bid⁷.

3.7 There was further communication by the applicant⁸ and his legal representative⁹ still contesting that the bid should have been evaluated. The letters drew the same response from the Procurement Manager who insisted that the applicant did not

⁵ Pleadings – page 12 – Annexures C1 and C2 page 21 to 23

⁶ Pleadings – page 12 – Annexure D page 24.

⁷ Pleadings – page 12 – Annexure E2 page 28

⁸ Pleadings – page 13 – Annexure F page 29

⁹ Pleadings – page 14 – Annexure H & I pages 31 to 36

submit a trader's license contrary to mandatory requirements. He referred to regulations 14(2) to (3)¹⁰, 28(3) and 31¹¹ of Public Procurement Regulations 2007, (*"the regulations"*) to justify the rejection of the tender.

III APPLICANT'S CASE:

[4] It is EXR's contention from its papers that its tender was substantially responsive and that the omission to file a copy of trader's license is not a material deviation, reservation or omission of the tender conditions¹². Accordingly, so contends EXR, this was a perfect case for the 1st respondent to have waived the non – conformity in terms of the provisions of clause 28 to 30 of the bidding documents¹³ and allowed EXR to rectify its bid by submitting a copy of the license. Taking all facts into account, so goes the argument, it was irrational of the 1st respondent not to evaluate the tender that was substantially responsive.

[5] EXR also cries foul that its tender was not rejected before or during the opening of the tenders. Counsel for EXR contended that though regulation

¹⁰ Pleadings – page 13 – Annexure G page 30

¹¹ Pleadings – page 14 – Annexure J page 37

¹² Pleadings – page 11

¹³ Pleadings - Annexure A pages 19 to 20.

28(3) provides for rejection of a tender that does not meet the requirements set out in the invitation to tender, it is not prescriptive. It was strongly argued that submission of a certified copy of trader's license was not set out in the invitation to tender as a mandatory criterion or as a requirement without which tenderers were going to be disqualified in line with regulation 14(2).

[6] Counsel voraciously argued that in assessing materiality of compliance with the tender requirements it was imperative to link the question of compliance to the purpose of the relevant provision in the tender document. In this regard reliance was placed in **All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of The South African Social Security Agency and Others** 2014 (1) SA 604 (CC). Counsel sought to draw the distinction in the approach followed between **All Pay, supra**, and **SCIG-SMCG-TIM Joint Venture and One v Unik Construction Engineering (Pty) Ltd** C of A (CIV) 50/2020. The distinction is not obvious to me as the Court of Appeal considered both the principles enunciated in **All Pay, supra**, and **Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others** 2008 (2) SA 481 (SCA).

[7] To reinforce the contention that the error was inconsequential, it was contended that what is key in terms of regulation 29(4) in evaluating tenders was

price, as a result of which it was permissible during evaluation for tenderers to submit documents which do not affect the substance of a tender or the tendered price.

[8] The following additional complaints appear in EXR's papers¹⁴:

- 8.1 contrary to regulation 30(2) EXR was not informed when a tenderer who submitted the most favourable tender was invited to enter into a contract;
- 8.2 the tender was not rejected before opening or at the opening of the tenders;
- 8.3 the 5th respondent did not offer unsuccessful tenderers debriefing nor were other tenderers informed that they were unsuccessful and advised of their lack of success.

Though no submissions were made regarding these complaints, they were not withdrawn. Consequently, I still have to consider them.

IV RESPONDENTS' CASE:

¹⁴ Pleadings - page 11

[9] The respondents' case is that they did not only consider the tendered price as the government is not bound to accept the lowest bid in terms of regulation 30¹⁵. The respondents assert that the first consideration is compliance with tender documents followed by evaluation to assess technical and financial capacity of a bidder¹⁶. They contend that evaluation emanates from the results of compliance wherein EXR was found to be non – compliant.

[10] In response to the argument that they failed to invoke clauses 28 – 30, the respondents contend that they were not forced to accept the bid and subject it to evaluation. They argue that they had a discretion in terms of clause 30 to accept or reject the bid. Had EXR subsequently provided its license, that would constitute an unfair competition, so argues the respondents¹⁷. They contend further that regulation 28(3) clearly stipulates that a tender which does not meet the requirements in the tender invitation shall be rejected as a result of which they were not obliged to inform EXR of the rejection¹⁸.

[11] Regarding the argument that the tender was not rejected before or during the opening of the tenders, the respondents refer to regulation 27(3) which

¹⁵ Pleadings – page 43

¹⁶ Pleadings – page 46

¹⁷ Pleadings – page 44

¹⁸ Pleadings – page 43

according to them sets out the steps and what should happen at the review stage. They accordingly argue that it was not possible to reject the tender before or during the opening stage of the tenders. They contend further that the decision not to accept EXR's tender for review was correct based on regulations 23(3)(f)¹⁹ read with regulation 28²⁰.

[12] The respondents rely on regulation 28(3) in dealing with the complaint that contrary to regulation 30(2), EXR was not informed when a tenderer who submitted the most favourable tender was invited to enter into a contract. They argue that since the tender was rejected in terms of regulation 28(3), they did not have an obligation to inform EXR when the most favourable tender was invited to enter into contract.

[13] Regarding EXR's assertion that the 5th respondent did not offer unsuccessful tenderers debriefing, the respondents argue that in terms of regulation 32(1), it is not the successful tenderer, but the procuring ministry or department that has to offer unsuccessful tenderers and a winning tenderer debriefing at the time the contract is placed with a successful tenderer and unsuccessful tenderers are advised of their lack of success.

¹⁹There is no regulation 23(3)(f) in the regulations. But looking at the context this must be sleep of a pen. In the heads of argument, Counsel for respondents refers to regulation 27(3)(f).

²⁰ Pleadings – page 45

V ISSUE FOR DETERMINATION:

[14] What the Court is called upon to determine is whether EXR was correctly excluded from evaluation and thereby disqualified from the tender process and whether the award of the tender to the 5th respondent, (“China GEO”) should be declared irregular.

VI THE LAW AND DISCUSSIONS:

[15] I turn to consider whether EXR was correctly excluded from evaluation. This requires a consideration of the regulations, the invitation to bid as well as bidding documents which lie at the heart of the dispute. The relevant part of the invitation to bid reads as follows:

“ALL BIDS SHALL BE ACCOMPANIED BY A TENDER SECURITY TO THE VALUE OF ONE PERCENT (1%) OF THE TENDER’S TENDER PRICE. BIDDERS SHALL ALSO SUBMIT ALONG WITH THEIR BIDS CERTIFIED COPIES OF VALID CERTIFICATE OF INCORPORATION, TRADER’S LICENSE, AND TAX CLEARANCE CERTIFICATE.”²¹

[Underlining added for emphasis]

²¹ Pleadings – Annexure K page 48

[16] It is common cause that, contrary to the requirement in the tender invitation, EXR did not submit a certified copy of its trader's license concurrently with its bid. The 1st respondent therefore correctly determined that EXR had not complied with the requirement to submit a certified copy of trader's license. In **Dr JS Moroka Municipality & others v Betram (Pty) Ltd & another** [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) the Court said the following regarding the municipality's prerogative to determine the prerequisites for a valid tender where a tenderer's failure to submit an original tax certificate was in issue:

“[10]... Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an “acceptable tender” under by (sic) the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.

[11] The requirement that tenders should only be awarded to persons whose tax affairs have been declared by SARS to be in order echoes loudly throughout the statutes and regulations mentioned above, and there is no hint on the papers of any contention that this is in any way unconstitutional, unreasonable, irrelevant or immaterial. Nor is it suggested that it was unreasonable, irrelevant or immaterial for the appellants to have required an original, rather than a copy, of a tax clearance certificate. Counsel for the first respondent therefore correctly accepted that the lawfulness of the municipality's condition set out in the tender invitation imposing an original SARS clearance certificate as a minimum qualifying requirement could not be challenged. He submitted, however, that the appellants should have been satisfied with the copy provided and that the failure to provide an original was something which the appellant could and should have condoned.

[12] The immediate difficulty I have with this argument relates to its underlying premise that there existed a discretion to condone a failure to comply with any of the minimum qualifying requirements set out in the tender invitation. The respondent was unable to point to such a discretion being afforded in any of the relevant legislation or regulation and, as Brand JA said in *Pepper Bay*:

“As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.”

[14] The first respondent did not seek to dispute the correctness of this decision. It also accepted that a discretion to condone a failure to comply with the peremptory requirement of an original tax clearance certificate in the present case was entirely dependent upon a proper construction of the documents forming part of the tender invitation. Although unable to refer to any specific provision in the tender invitation or the various documents included therewith (which included the bid instructions and the standard terms and conditions of bid) where mention is made of a discretion afforded to a municipal official or committee to condone a failure to comply with any prescribed condition of tender, it argued that such a discretion is implicit in clause 3 of the standard terms and conditions of bid. It reads as follows:

...

[15] This argument cannot be accepted. The clause relates to bids ‘validly submitted’ and, as is indeed stated in clause 2.5.5 of the standard terms and conditions of bid, only tenders submitted ‘in the prescribed manner may be accepted as valid bids’. That clause merely states the obvious. A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid ‘validly submitted’. Moreover, the tender process consists of various stages: first, examination of all bids received, at which stage those which do not comply with the prescribed minimum standards are liable to be rejected as invalid; second, the evaluation of all bids ‘validly submitted’ as prescribed in clause 3; and third, a decision on which of the validly submitted bids should be

accepted. The fact that all bids validly submitted are to be taken into consideration as set out in clause 3.1 affords no discretion to condone and take into account bids not validly submitted but disqualified.

[16] In these circumstances, it is clear that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an “acceptable tender” as envisaged by the Procurement Act and did not pass the so-called “threshold requirement” to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside – as was held by this Court in *Sapela Electronics*. On this basis, the appellants were perfectly entitled to disqualify the first respondent’s tender as they did.”

[17] Where the tender was correctly excluded from evaluation must also be considered in the context of the decision in **Minister of Environmental affairs and Tourism v Pepper Bay Fishing (Pty) Ltd** 2004 (1) SA 308 (SCA) where the Court said the following:

“[31] As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so (see, for example, *Le Roux and Another v Grigg-Spall* 1946 AD 244 at 252; *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997 (3) SA 236 (SCA) ([1997] 2 B All SA 321) at 241 (SA)). The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice.

[32] Once it is appreciated that the key to the question lies in the general notice as a whole, the obvious starting point is to construe the special provisions of the invitation and the instructions that Pepper Bay and Smith had failed to comply with. ...”

[18] The dictum in **Millennium Waste Management**, *supra*, at para 17 that South African law “permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted” was disapproved of at para 18 of the decision in **Dr. JS Moroka**, *surpa*, on the basis that it was inconsistent with the decision in **Pepper Bay**, *supra*, and that it offended the principle of legality.

[19] In *casu*, the tender was excluded at a review stage pursuant to regulation 28(3). EXR did not point to a discretion to condone non – compliance with the requirements of the invitation to tender, either in the invitation to tender itself or in the regulations. The applicant points to such a discretion in clause 30 of the bidding documents. The applicant’s case in this regard will be interrogated in due course.

[20] It is convenient first to determine if invocation of regulation 28(3) to exclude the tender was justifiable. The relevant regulations are reproduced below:

“Opening tenders

27. (1) The tender Panel shall publicly open all tenders received, immediately after the fixed deadline for submission of tenders.

(2) Tenderers or their representatives, or others interested bodies are entitled to attend the tender opening.

(3) At the opening of tenders, the Tender Panel shall announce and make a relevant record of the procurement in respect of –

- (a) tenderers' names;
- (b) the tendered prices;
- (c) the alternative tender prices if alternatives have been permitted;
- (d) the overall price;
- (e) price discounts offered;
- (f) whether the tender security and other mandatory documents required by the invitation to tender were submitted or not;
and
- (g) any changes to the tender or revised tender.

(4) the Unit shall sign the notes in 26(3) make it available to any interested party.

(5) Any tendered prices, price discount, alternative tendered prices or price structure offered and not announced at the opening of tenders shall not be considered in tender evaluation.

(6) Following the opening of tenders, the Unit shall not enter into negotiations with tenderers on the content of the tender and the tendered price.

(7) The Unit may request a tenderer to provide explanatory notes in writing on issues relating to the tender but is prohibited from requesting or accepting changes to the content or tendered price.

(8) The Unit shall make and keep safe a written record of the explanatory notes provided from tenderers.

Review of tenders

28. (1) Following the opening of tenders, individual tenders shall be reviewed by the Unit, to check whether they satisfy the following requirements:

- (a) capacity qualifications set by the Unit;
- (b) technical specifications; and
- (c) other terms, conditions and requirements set out in the tender documents including the provision of mandatory documents such as tender security, tax certificates and the completed Certificate of Bona Fide Tendering.

(2) A tender shall be considered as apparently compliant tender when it appears at tender review to satisfy the specified conditions.

(3) Tenders which do not meet requirements set out in the invitation tender shall be rejected by the Unit.

(4) The Unit shall inform tenderers whose tenders have been rejected, by writing within 10 working days of the date of rejection.

[Underlining added for emphasis]

[21] The requirement that bids be accompanied by a certified copy of traders' license is specified in the tender invitation and is couched in mandatory

terms. It is pellucidly clear that the regulations do not provide the 1st respondent with a discretion to condone non – compliance with the tender invitation requirements. The key question lies in whether regulation 28(3) is not prescriptive as contended by Counsel for EXR. It bears repeating that the relevant provision in the invitation to tender and the regulations are couched in mandatory terms because the word “*shall*” is used. Section 14 of the Interpretation Act No.19 of 1977 provides that –

“In an enactment passed or made after the commencement of this Act, “shall” shall be construed as imperative and “may” as permissive and empowering.”

[22] In **Nkisimane & others v Santam Insurance Co Ltd** 1978 (2) SA 430 (AD) at 433H-434A-C the significance of the terms peremptory/mandatory/obligatory and directory/permissive was explained by **Trollip JA** as follows:

“Preliminary I should say that statutory requirements are often categorised as “peremptory” or “directory”. They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non- or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the

lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of VAN DEN HEEVER J in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380). Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See the authorities quoted in *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) at 587A - C.) On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non or defective compliance therewith may not have any legal consequence (see, for example, *Sutter v Scheepers* 1932 AD 165) In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *JEM Motors Ltd v Boutle & another* 1961 (2) SA 320 (N) at 327 *in fin* 328B and *Shalala's case supra* at 587F-588, and *cf Maharaj & others v Rampersad* 1964 (4) SA 638 (A) at 646C-E)."

[23] In **Sutter v Scheepers** 1932 AD 165 at 173-4, **Wessels JA** suggested the following tests, not as comprehensive but as useful guides to enable a Court to arrive at that real intention:

1. when "shall" is used in a statute, it is considered as peremptory unless there are other circumstances which negates such a construction.
2. a provision that is couched in a negative form, is to be regarded as peremptory rather than directory.

3. when a provision is couched in positive language and there is no sanction for non-fulfilment, then the presumption is in favour of an intention to make the provision only directory.
4. If when taking into account the scope and objects of a provision, it is found that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
5. The history of the legislation also will afford a clue in some cases.

[24] In my view, rejection of a tender pursuant to regulation 28(3) is a sanction or a consequence for non – compliance with the requirements of tender invitation. The use of the word “shall” in the tender invitation as well as in the provisions of regulation 28, coupled with the sanction for non – compliance, clearly demonstrates that it was peremptory to comply with the requirements in the tender invitation. In the absence of anything pointing to a discretion to excuse such non – compliance, the respondents had no option but to reject the tender before it progressed to evaluation stage. At the review stage, the tender is rejected because of non – compliance with the requirements in the tender invitation not

necessarily because of its deficiencies in relation to the requirements or criteria for evaluation.

[25] Thus, the contention that a certified copy of trader's license was not specified in the tender documents as a mandatory criteria or requirement without which tenderers will not qualify in line with regulation 14(2), is misplaced. Regulation 14 is couched as follows:

“Capacity of qualifying tenders

14. (1) The Unit shall examine and evaluate the financial resources, technical qualifications and the expertise of the tenderers according to the criteria set out in these Regulations, for the purpose of securing equal opportunities and fair competition to tenderers.
- (2) The Unit shall set out and issue as part of the tender documents the mandatory criteria and requirements consistent with these Regulations and without which businesses will not qualify.
- (3) Tenders that do not satisfy the Unit's criteria and requirements shall be rejected, and the rejection shall be notified to the tenderer in writing.”

[26] Regulation 14(2) concerns mandatory criteria and requirements which must be set out in the tender documents for purposes of evaluation. These are the criteria and requirements that relate to the substance of a tender. A sanction for

failure to observe the ministry or procuring unit's criteria or requirements is provided for in regulation 14(3). The requirements in the tender invitation regulate the submission of the tenders and mostly relate to the form and not necessarily the substance of a tender. Regulation 28(3) is concerned with non – compliance with the requirements in the invitation tender. A requirement may appear in both the tender invitation and bidding documents as it will be demonstrated below.

[27] A full set of bidding documents has not been filed of record, except an extract covering clause 25.4 to 31.1. However, it is clear from correspondence between EXR and the Ministry of Local Government & Chieftainship Affairs²² that a copy of trader's license was not only a specified requirement in the tender invitation but it was also one of mandatory documents to be submitted as per ITB (Instructions to Bidders) 11.1 {B} of the bidding documents.

[28] In terms of regulation 27(3)(f) an announcement must be made, and a record be kept at the opening stage amongst others of “whether the tender security and other mandatory documents required by the invitation to tender were submitted or not”. The review in terms of regulation 28(1) is amongst others intended to check whether tenders satisfy “other terms, conditions and requirements set out in the tender documents including provision of mandatory documents such as tender

²² Pleadings – page 24, 28 and 37

security, tax certificates and the completed Certificate of Bona Fide Tendering”. The use of the word “such as” is clear that the list is not exhaustive. The requirement for a certified copy of trader’s license was specified both in the tender invitation and tender documents.

[29] Applicant’s argument that a copy of trader’s license was not specified as a mandatory requirement without which businesses will not qualify in terms of regulation 14(2) has obstacles too. The first hurdle is that there are no factual allegations in the founding affidavit to sustain this argument. Secondly, the relevant parts of the tender documents, ITB 11.1 {B}in particular, have not been filed of record. Consequently, the Court is not able to confirm if besides specifying a certified copy of trader’s license as mandatory, it had also been prescribed as a document without which businesses will be disqualified. It is not necessary to inquire whether the latter has to be prescribed as such or it is sufficient that the document is classified as mandatory in the bidding documents.

[30] I turn to consider the argument that the 1st respondent should have invoked the provisions of clause 28 to 30 of the bidding documents and evaluate the tender as it was responsive. It was argued that the omission was not material and that its rectification was not going to change the character of EXR’s tender. As

a result, the argument went, the 1st respondent should have evaluated the tender and allowed EXR to rectify the error in line with clause 30 of the bidding documents.

The clauses are couched as follows:

“28. Deviation, Reservations, and Omissions

28.1 During the evaluation of bids, the following definitions apply:

- (a) “Deviation” is a departure from the requirements specified in the Bidding Document;
- (b) “Reservation” is the setting of limiting conditions or withholding from complete acceptance of the requirement specified in the Bidding Document; and
- (c) “Omission” is the failure to submit part or all of the information or documentation required in the Bidding Document.

29. Determination of Responsiveness

29.1. The Employer’s determination of a bid’s responsiveness is to be based on the contents of the bid itself, as defined in ITB11.

29.2 A substantially responsive bid is one that meets the requirements of the Bidding Document without material deviation, or omission. A material deviation, reservation, or omission is one that,

- (a) if accepted, would:
 - (i) affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

- (ii) limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the proposed Contract; or
- (b) If rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive bids.

29.3 The Employer shall examine the technical aspects of the bid submitted in accordance with ITB 16. Technical Proposal, in particular; to confirm that all requirements of Section VII (Works Requirements) have been met without any material deviation, reservation, or omission.

29.4 If a bid is not substantially responsive to the requirements of the Bidding Document, it shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation, or omission.

30. Nonconformities, Errors, and Omission

30.1 Provided that a bid is substantially responsive, the Employer may waive any non-conformity in the bid.

30.2 Provided that a bid is substantially responsive, the Employer may request that the Bidder submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities in the bid related to documentation requirements. Requesting information or documentation on such nonconformities shall not be related to any aspect of the price of the Bid Failure of the Bidder to comply with the request may result in the rejection of its bid.

30.3 Provided that a bid is substantially responsive the Employer shall rectify quantifiable nonmaterial nonconformities related to Bid Price. To this effect, the Bid Price may be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component. The adjustment shall be made using the methods specified in Section III (Evaluation and Qualification Criteria).”

[31] The argument was so eloquently articulated by Counsel for EXR that I then found it compelling. It was reinforced with the decision in **All Pay**, *supra*. However, considering the provisions of clause 28 to 30 of the bidding documents, I am convinced that the argument conflates two stages in the procurement process, the review and evaluation. The scheme of the regulations introduces several stages in the procurement process, which include the following: opening of tenders; review of tenders; evaluation of tenders; and award of contract.

[32] A careful reading of the clauses reveals that they apply at the evaluation stage. EXR’s tender was excluded at the review stage before it could go for evaluation. Based on the scheme of the regulations, in particular regulation 29, it is apparently compliant tenders that are eligible for evaluation following the review stage. Regulation 29 reads as follows:

“Evaluation of tenders

29. (1) The Unit shall ensure that the evaluation of tenders is completed within the specified date.

(2) Where the Unit is unable to meet the set date, all apparently compliant tenderers shall be informed in writing by the Unit of the revised projected date and be asked to confirm that their tender, and where appropriate their tender security, is still valid.

(3) Where the revised projected date is outside the validity period of the tender, the tenderer shall extend the validity date accordingly.

(4) The key criterion in evaluating apparently compliant tenders shall be the tendered price.

...

(10) Apparently compliant tenders shall be evaluated by –

- (a) adjusting an arithmetical error or small amount of discrepancy in the tendered price, or reducing the tendered price subject to the price discount, the corresponding estimations shall be shown in monetary terms, and the tender evaluation price shall be determined by adding them to the tendered price;
- (b) tender document providing for a margin of preference, the comparison price of a tenderer eligible to a margin of preference shall be adjusted to include the percentage in the Granting of a Margin of Preference to Tenderers; or

- (c) all tenders ordered from the lowest to the highest taking into account whole life costs and the best long term value for money.

...”

[33] The argument that the respondents were obliged to determine the responsiveness of the tender, flies in the face of peremptory provisions of regulation 28 which dictates that following their opening, tenders must be reviewed to check, amongst others, if they satisfy tender requirements including the provision of mandatory documents set out in the tender documents. The respondents do not retain a discretion to skip this stage. Clause 28 to 30 do not qualify or override the rigid stipulations of regulation 28. Tellingly, invocation of regulation 28(3) to reject a tender that does not meet the requirements in the tender invitation is not a matter of choice, it is a duty that must be fulfilled.

[34] Notably, the tender was already excluded from evaluation on the 3rd November 2017 when EXR submitted a copy of trader’s license and made a request that its tender be considered. Though the date on which the decision to reject EXR’s tender is not specified in the pleadings, the tender was excluded at the review stage which preceded evaluation. The timeframe for evaluating tenders was fixed from the 2nd to 17th November 2017²³ pursuant to regulation 25(5).

²³ Pleadings – Annexure k and L page 48 - 49

[35] Again, the dictum in **All Pay**, *supra*, at para 28, that the materiality of deviation from legal requirements must be assessed by linking the question of compliance to the purpose of the provision, is distinguishable on the facts of this case. The relevant provisions of the regulations in *casu* that there must be a review and that non-compliant tenders be rejected, are peremptory.

[36] I am alert that the intention of the 1st respondent was not to disqualify substantially responsive tenders. It is clear from the provisions of clause 28 to 30 that the 1st respondent wanted to guard against invalidating tenders with minor deviations which if accepted would not affect in any substantial way the scope, quality, or performance of the works in the contract, or limit in any substantial way, inconsistent with the bidding documents, the respondent's rights or bidder's obligations under the proposed contract or those which would not unfairly affect the competitive position of other bidders presenting substantially responsive bids, if rectified. This is why the 1st respondent is afforded the discretion in terms of the clauses at the evaluation stage to excuse inconsequential non – compliance.

[37] However, tenders still needed to be subjected to the review process and only benefit from the provisions of clause 28 to 30 following their successful review. Should I be wrong in this view, it would then mean that there is

inconsistency between the regulations and the bidding documents. The peremptory provisions of regulation 28(3) to reject a tender which does not meet the requirements set out in the invitation to tender, as well as the provisions of regulation 29 in terms of which only apparently compliant tenders progresses to evaluation, are inconsistent with the discretion afforded to the 1st respondent in terms of clause 28 to 30. Accordingly, the peremptory provisions of the regulations take precedence as the bidding documents are subsidiary to the regulations.

[38] I do not accept EXR's complaint that contrary to regulation 30(2) it was not informed when a tenderer who submitted the most favourable tender was invited to enter into a contract. The 1st respondent's contention that EXR's tender was rejected pursuant to regulation 28(3) and therefore there was no obligation to inform EXR when the most favourable tender was invited to enter into contract, has merit. Regulation 30(2) applies to remaining tenderers following evaluation, to which EXR was not a party. Tenderers whose tenders are rejected pursuant to regulation 28(3) can only rely on regulation 28(4) if the complaint is that they were not informed of the rejection. The regulation impose an obligation on the procurement unit to inform the tenderers of the rejection in writing 10 working days from the date of rejection.

[39] Likewise the contention that the tender was not rejected before opening or at the opening stage falls to be dismissed. I accept as reasonable and consistent with the regulations the respondents' counter argument that it would not have been possible to know the contents of the tender and reject it before the opening and that regulation 27(3) clearly spells out the processes or stages and lists all that is necessary at the tender opening stage. The obligation to reject the tenders in terms of regulation 28(3) is only triggered at the review stage and not at the opening stage.

[40] EXR's assertion that the 5th respondent did not offer unsuccessful tenderers debriefing is devoid of merit. In terms of regulation 32(1), it is the procuring ministry or department that has to offer unsuccessful tenderers and a winning tenderer debriefing at the time the contract is placed with a successful tenderer and unsuccessful tenderers are advised of their lack of success. This provision applies to tenderers who would have gone through to the evaluation stage. Tenderers who got eliminated at the review stage would have already been informed of the rejection of their tenders in terms of regulation 28(4).

WAS THE AWARD TO THE 5TH RESPONDENT IRREGULAR?

[41] EXR wants the Court to declare the award to the 5th respondent irregular. However, EXR does not advance any grounds why the award should be declared irregular. According to the respondents, the award to the 5th respondent was legitimately made. Consequently, no reason exists to declare the award irregular in the absence of facts to sustain such a declaration.

VII DISPOSITION:

[42] I interpose to emphasise that while comparative analysis is good and provides a different perspective, borrowing from other jurisdictions must be done with caution. Though persuasive, South African decisions to which I was referred were informed by their Constitution, numerous interrelated statutes, regulations and directives that are not identical to procurement framework in this jurisdiction. The Preferential Procurement Policy Framework Act No. 5 of 2000 defines ‘acceptable tender’ as ‘any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document’. This definition is interpreted in such a manner that does not disqualify tenders which do not comply with conditions which are immaterial, unreasonable or unconstitutional. *See: Millennium, supra*, para 19. Differently put, a tender should not be easily invalidated on the ground that it “contains minor deviations that

do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents”. See: **Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd** [2018] ZACSA 50 at para 50.

[43] In this jurisdiction a tender which does not meet the requirements in the tender invitation has to be rejected and therefore excluded from the evaluation process. Failure to comply with the requirements in the tender invitation like failure to submit a copy of trader’s license taints the submission. Regulation 28(3) does not afford a procuring ministry or unit a discretion to condone non-compliance at the review stage. Equal bid requirements observation by bidders enhances the fairness of the process and compliance with bid requirements is necessary.

[44] I pause to observe that procurement processes are prone to corruption. This is mostly facilitated through uncontrolled discretionary powers and overly flexible approach. On the other hand, overregulation and overly rigid approach may stifle the values of competitiveness and cost – effectiveness. Regulations 14, 27 and 28 smacks of unduly rigid approach. However, these regulations are in force and must be observed. The lawfulness of the requirement in the tender invitation to provide a certified copy of trader’s license was not questioned. ERX did not

comply with this requirement and the 1st respondent appropriately invoked regulation 28(3).

Costs

[45] There is no reason why the costs should not follow the result.

VIII THE ORDER:

[46] In the circumstances, the application is dismissed with costs.

A.R. MATHABA J
Judge of the High Court

For the Applicant: Mr. M. Teele KC
For Respondents: Ms. K. Khoboko