

DISPUTE RESOLUTION ALERT

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“FOREGONE CONCLUSION” WON’T SAVE UNFAIR BIDDING PROCESS

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The Supreme Court of Appeal (SCA) considered whether differential treatment of bidders in the procurement evaluation process was procedurally unfair, particularly where the result of the bid evaluation is a "foregone conclusion".

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In the recent case of *CTP JV and another v The Director-General Department of Basic Education and another* (447/2018) [2018] ZASCA 156, the Supreme Court of Appeal (SCA) considered whether differential treatment of bidders in the procurement evaluation process was procedurally unfair, particularly where the result of the bid evaluation is a "foregone conclusion".

Facts

The National Treasury invited bids for the distribution of workbooks to public school learners across South Africa for a period of three years, with the possibility of a two-year extension. The tender documents included special conditions which provided for bidder assessment in a four-phase process.

Firstly, the bidder needed to comply with the mandatory bid requirements. Secondly, the functionality of bidders would be assessed against a pre-determined set of criteria measuring the ability of the bidder to perform the work (functionality assessment). Thirdly, if the bidder obtained a functionality score of at least 80%, the price and empowerment credentials would be assessed. Thereafter, a recommendation and an award would be made.

The CTP JV and Lebone Consortium were the only two entities who met the mandatory requirements and proceeded to the functionality assessment stage. The Bid Evaluation Committee (BEC) assessed the bids, making a recommendation to the Bid Adjudication Committee (BAC) and then the Director-General of the Department of Basic Education made the final award, which was awarded to Lebone Consortium.

The CTP JV instituted proceedings in the High Court seeking to review and set aside the Director-General's decision on the grounds that, among other things, there were material irregularities in the scoring process. The High Court dismissed the review and CTP JV appealed against the decision.

Procedural unfairness

In conducting the functionality assessment, the BEC adopted a consensus seeking approach where the five BEC members would each reveal their individual scores for the bidders and an average score would be given to each bidder. CTP JV's initial score was an average of 80% (just meeting the threshold requirement) and Lebone Consortium's score was an average of 92.6%.



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The High Court held that the BEC’s differential treatment of the two bids was rational, fair and consistent with s217 of the Constitution.



The BEC decided to conduct a discussion and moderation of CTP JV’s bid score, resulting in CTP JV receiving an average score of 79%. CTP JV accordingly no longer met the functionality assessment threshold of 80% and no longer qualified for the tender. No similar moderation was conducted in respect of Lebone Consortium, and its initial average score of 92.6% was considered final. CTP JV argued that the differential treatment in the methodology rendered the tender process unfair, unreasonable and anti-competitive, contrary to the provisions in s217 of the Constitution.

Lebone Consortium argued that given its high score of 92,6%, it far exceeded the threshold and thus there was “no realistic possibility that the discussion of its bid would have pushed it below 80%”. According to Lebone Consortium, the scrutinising of the individual scores would have been “a foregone conclusion and waste of time”.

The High Court held that the BEC’s differential treatment of the two bids was rational, fair and consistent with s217 of the Constitution. It supported Lebone

Consortium’s reasoning and held that there was no need to moderate or reassess the score of Lebone Consortium, as given its initial score and historical performance of the tender, it was highly unlikely that it stood any chance of being disqualified on functionality.

The SCA disagreed and held that the High Court’s conclusion was at odds with and compromised the “no difference principle” in *AllPay Consolidated Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & Others* 2014 (1) SA 604 (CC) (AllPay). The SCA held:

[The High Court] conflates procedure and merit by considering that it was inconsequential and made no difference to the outcome, by predicting that the result would be a foregone conclusion. It committed the error identified in *All Pay* in that it considered that the inevitability of a certain outcome is a factor that should be considered in determining the validity of the administrative action.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



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This SCA judgment makes it clear that regardless of how obvious the outcome of a tender process may be, it is of paramount importance that bidders are subjected to the same evaluation process in order for the tender award to pass constitutional muster.



In *AllPay*, the Constitutional Court confirmed the role procedural requirements play in ensuring even treatment of all bidders. The Constitutional Court further held that “if the process leading to the bid’s success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed”.

The SCA concluded that for the High Court to find that it was not necessary to subject Lebone Consortium’s bid to moderation because the result would have been a foregone conclusion, compromised the process leading to the bid’s success. The SCA held that it could not be said that, viewed objectively, the exclusion of CTP JV was fair in all the circumstances of the case and that administrators making a decision which constitutes administrative action must be held to a high standard – a standard which the BEC in this instance failed to meet.

Conclusion

The decision to award the tender to Lebone Consortium was held to be constitutionally invalid as it violated the equity, transparency and objectivity under s217 of the Constitution. However, the SCA suspended the declaration of invalidity while a new tender is undertaken, to avoid a disruption of the provision of school workbooks to learners across the country and protect the learners right to basic education.

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Anja Hofmeyr and Ashleigh Gordon

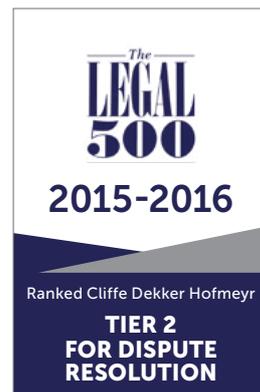


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