20 SEPTEMBER 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

NEW SERIES

PUBLIC LAW:
RECENT JUDICIAL DEVELOPMENTS IN PREFERENTIAL PROCUREMENT LAW

Prior to the inception of the 2017 Preferential Procurement Regulations, our courts were recently confronted with the question of the extent of an organ of state's powers to cancel a tender where there is a material irregularity. Specifically, on 29 March 2017, the Supreme Court of Appeal addressed this issue in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC* [2017] ZASCA 30 in light of the 2011 Preferential Procurement Regulations.

TIME [FOR THE] BAR

Prescribed; time barred; extinguished: all music to the ears of a defendant.

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CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
RECENT JUDICIAL DEVELOPMENTS IN PREFERENTIAL PROCUREMENT LAW

NEW SERIES

This is the last alert in a series of five exploring the changes to South African procurement law occasioned by the publication of revised Preferential Procurement Regulations.

The decision to cancel and re-advertise the tender was irrational and unjustified in terms of regulation 8(4) of the 2011 Regulations as none of the listed grounds for cancellation was factually present.

Prior to the inception of the 2017 Preferential Procurement Regulations (Revised Regulations), our courts were recently confronted with the question of the extent of an organ of state's powers to cancel a tender where there is a material irregularity. Specifically, on 29 March 2017, the Supreme Court of Appeal (SCA) addressed this issue in *Head of Department, Mpumalanga Department of Education v Valozone 268 CC* [2017] ZASCA 30 in light of the 2011 Preferential Procurement Regulations (2011 Regulations).

In *Valozone*, the Head of the Department of Education, Mpumalanga (Department) had invited service providers to submit bids for a tender aimed at procuring services to "implement and manage the National School Programme". The tender closed on 11 September 2013 and was subsequently awarded. The unsuccessful bidders took the decision to award the tender on review to the High Court, on account of irregularities which existed in the tender process and award.

The High Court set aside the award of the tender and ordered that the bid be reconsidered and re-adjudicated, following which the Department appointed a Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) to assist for this purpose. The BEC found irregularities in the tender process and resolved not to continue as it could lead to further unnecessary litigation. The BEC recommended that the BAC consider re-advertising the tender. The BAC agreed with the recommendation on 23 June 2016, and the Department accepted the recommendations and resolved to cancel and re-advertise the tender.

Unsatisfied with the Department's decision, the dissatisfied bidders instituted proceedings to have the 2016 decision reviewed and set aside. The High Court found in favour of the bidders.

On appeal, the SCA found that the High Court correctly placed an obligation on the Department to reconsider the bids submitted. However, the decision to cancel and re-advertise the tender was irrational and unjustified in terms of regulation 8(4) of the 2011 Regulations as none of the listed grounds for cancellation was factually present, thus the Department was not empowered to cancel (and re-advertise) the tender.

In coming to this finding, the SCA relied on the Constitutional Court's decision in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) which set the precedent that an organ of state cannot confer upon itself more powers than those to which it is entitled in terms of regulation 8(4). The Constitutional Court effectively restricted the extent to which an organ of state could employ its discretion not to award a tender to the grounds listed in regulation 8(4).

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PUBLIC LAW:
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CONTINUED

Under the Revised Regulations, it is now permissible to cancel a tender and commence the tender process anew in the event of material irregularities in the tender process.

The third alert in this series previously discussed the new, additional ground on which a tender may be cancelled in the Revised Regulations which specifically provides for a tender to be cancelled if there is a material irregularity in the tender process. Thus, where the tender process is rendered unfair by a material irregularity, the tender may be cancelled and the process started afresh. This is vastly different to the position under the 2011 Regulations, in terms of which *Valozone* was decided.

Therefore, under the Revised Regulations, it is now permissible to cancel a tender and commence the tender process anew in the event of material irregularities in the tender process, contrary to the position in *Valozone*. However, due to the conflicting judicial interpretation of what constitutes 'material', the additional ground could result in a further litigation and this avenue for cancellation should be approached with caution.

Lionel Egypt, Malerato Motloung and Sabrina de Freitas

This schedule briefly outlines the focus of, and provides links to, the previous instalments in this series.

Date of release	Topic
23 August 2017	Introduction: an overview of the Preferential Procurement Policy Framework Act, including its importance in the constitutional dispensation, and the Revised Regulations.
30 August 2017	Key changes to the Revised Regulations – Part 1: a summary of the first three changes to the Revised Regulations, namely the 80/20 and 90/10 Preference Point System; the requirement of a market-related bid price; and sub-contracting as a condition of a tender.
6 September 2017	Key changes to the Revised Regulations – Part 2: a summary of a further three changes to the Revised Regulations, namely the pre-qualification criteria based on B-BBEE levels of contribution; how functionality should be assessed; and the additional ground for the cancellation of a tender.
13 September 2017	Key changes to the Revised Regulations – Part 3: a summary of the final three changes to the Revised Regulations, namely the more circumscribed remedial powers given to an organ of state; the introduction of a conditional preference point system; and the removal of the good planning, tax clearance and declaratory provisions.
20 September 2017	**Latest Developments:** a discussion on the latest preferential procurement case.

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TIME [FOR THE] BAR

Zandspruit and Devland were caught napping, leaving little other choice but to pursue their delictual claims.

Had G4S been on the property providing services at the time of the loss, it is likely that the perpetrators would have been exposed!

Prescribed; time barred; extinguished: all music to the ears of a defendant.

If not prosecuted, civil claims normally prescribe within three years. This is according to the Prescription Act, No 68 of 1969. Freedom of contract allows parties to limit this to an even shorter period. Such limitation is hardly unusual.

But what if the parties agree to a time limit for the prosecution of claims arising out of a contract and then a claim arises not out of the contract, but related to the services provided under that contract? Are such claims also time barred?

In *G4S Cash Solutions v Zandspruit & Devland Cash & Carry* (Pty) Ltd [2016] ZASCA 113, G4S entered into identical service agreements with both Devland and Zandspruit to collect, convey, store and deliver money on their behalf.

Clauses 9.1 and 9.9 of the service agreements recorded that:

9.1 [G4S] shall not be liable for any loss... pursuant to or during the provision of Services... unless such loss... occurs while the money is in the custody of [G4S]"

9.9 [G4S] shall not be liable in respect of any claim unless ... summons has been issued and served within 12 months from the date of the event."

During 2010 and 2011, Zandspruit and Devland fell victim to theft. The perpetrators imitated G4S's procedures utilising its uniforms, identification cards and vehicles to "dupe" Devland and Zandspruit into willingly handing over large sums of money.

Although proving the breach of a contractual term would have been much simpler, Zandspruit and Devland missed the deadline for a claim arising out of the breach of a contractual term. Essentially, they were caught napping, leaving little other choice but to pursue their delictual claims. Thus, they alleged that G4S owed them a legal duty to:

- put in place procedures to ensure that its uniforms, identification cards and vehicles could not be copied; and
- advise its clients if its uniforms, vehicles and identification cards had been lost, stolen or used by someone else.

In failing to comply with this alleged legal duty, G4S was negligent – or so Zandspruit and Devland argued - and as such should have been held liable. Countering, G4S argued that, even though the claims were not based on a breach of the contract, they were still time-barred. Zandspruit and Devland hit back, arguing that the time limitation only applied to contractual claims and that their delictual claims were perfectly within time.

But, importantly, the losses suffered by Zandspruit and Devland had nothing to do with the provision of services by G4S. In fact, had G4S been on the property providing services at the time of the loss, it is likely that the perpetrators would have been exposed!

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TIME [FOR THE] BAR

CONTINUED

The Supreme Court of Appeal agreed with Zandspruit and Devland: Their claim was not caught in the crosshairs of the time-bar clause and thus capable of prosecution.

And so, the Supreme Court of Appeal agreed with Zandspruit and Devland: Their claim was not caught in the crosshairs of the time-bar clause and thus capable of prosecution.

Arguably, the parties could have extended the scope of the time-bar clause to include delictual claims at the time of negotiating the contract. While there is no guarantee that this would have been enough to get G4S over the line, it certainly would have provided a fighting chance.

Everyone has a right to approach a court for relief. Because of this, our courts are slow to deprive a party of this right in the absence of clear and unambiguous wording.

Jonathan Ripley-Evans and Fiorella Noriega Del Valle

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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