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## CONSTRUCTION LAW BULLETIN

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### A TAXING PROBLEM IN PROCUREMENT

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#### Introduction

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Our courts have in their recent pronouncements on public procurement processes started to emphasise the importance of tenderers complying with the tender rules laid down by organs of State.

The motivation for this is probably to try and create a more certain climate around procurement and also to try and stem the flood of cases relating to the review of tender awards.

Many such challenges involve tenderers whose prices may be the lowest, and sometimes significantly so, but who have failed to comply with one or other of the formalities laid down in the tender conditions.

At the end of November 2013 the Supreme Court of Appeal in Bloemfontein ("SCA") had to apply its mind to whether the rejection of a tender due to the tenderer failing to have submitted an original tax clearance certificate was justified.<sup>1</sup>

#### The Facts

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The Dr J S Moroka Municipality in Mpumalanga ("the Municipality") had a need for toilets.

In June 2012 the Municipality issued a tender calling upon interested parties in good standing with the South African Revenue Service ("SARS") to tender for the supply and delivery of 6 000 VIP toilets.

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<sup>1</sup> Dr S J Moroka Municipality and Others v Betram (Pty) Ltd and Another [2013] ZASCA 186 (29 November 2013).

The tender conditions contained a stipulation that a failure to submit the documents required by the tender would render a tender liable to rejection. A number of such documents were listed as constituting minimum qualifying requirements to enable tenderers to qualify for evaluation. One such requirement was a valid original tax clearance certificate.

Eleven tenders were submitted including tenders by Betram (Pty) Ltd ("Betram") and Eldocrete CC ("Eldocrete").

The Municipality's Bid Evaluation Committee disqualified Betram's tender because it had submitted a copy of its tax clearance certificate and not the original.

The tender was awarded to Eldocrete although its bid was almost R2m more expensive than Betram's.

Betram launched an urgent application to the Pretoria High Court to stop the implementation of the contract and for an order reviewing and setting aside the award to Eldocrete.

Betram contended that it had in fact submitted an original tax certificate with its bid. The Municipality denied this.

To avoid the delay that would have arisen had this crucial dispute of fact been referred for determination by oral evidence, Betram elected to argue the case on the application papers. This meant that in terms of a long established procedural rule, the Municipality's version, as the respondent in the case, had to be taken as correct.

The Pretoria High Court held that the disqualification of Betram was administratively unfair. It therefore declared that the exclusion of Betram's tender and the award of the contract to Eldocrete was invalid. It directed the Municipality to re-evaluate both tenders and then accept whichever was found to be preferable.

The Municipality appealed this decision to the SCA.

## **SCA Decision**

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The SCA observed that section 217 of the Constitution relating to public procurement policies has spawned a number of statutory provisions pertaining to procurement with interrelated regulations and policy directives. Notably amongst the latter are the directives issued by National Treasury. All of this it noted has given rise to fertile ground for litigation.

The SCA focused on the legislation and regulations apposite to the case at hand.

The regulations promulgated under the Preferential Procurement Policy Framework Act, 5 of 2000 ("the Procurement Act"), in December 2011, prescribe that a municipal tender may not be awarded "to any person whose tax matters have not been declared by SARS to be in order".

Interestingly the previous regulations had a similar provision but included a requirement that tenderers had to submit original tax clearance certificates.

The Local Government: Municipal Finance and Management Act, 56 of 2003 ("MFMA"), requires municipalities to have Municipal Supply Chain Policies covering a wide range of issues including open and transparent pre-qualification processes for tenders and other bids, bid documentation and the like.

The regulations under the MFMA contain a regulation to the effect that no tender may be awarded to a person whose tax matters have not been declared by SARS to be in order. The regulations go on to require the municipality to check with SARS whether a person's tax matters are in order and if SARS does not respond within seven days, such person's tax matters can be presumed to be in order.

The SCA summarised the Pretoria High Court's reasoning for finding in favour of Betram as follows: "the critical requirement was that a tenderer's tax affairs be in order; the municipality was required to check that with SARS; an original tax clearance certificate is not a material requirement to establish whether a taxpayer's affairs are in order; the requirement for an original tax clearance certificate was not 'critical' and accordingly exclusion of a tender on that ground was procedurally unfair."

The regulation that a municipality must check a tenderer's tax status with SARS is of course meaningless. SARS is bound by secrecy provisions and is not entitled to disclose that type of information to anyone including an organ of State.

In overruling the Pretoria High Court's decision, the SCA concluded that:

- it was for the Municipality and not the court to decide what should be prerequisites for a valid tender and whether failure to comply with prescribed conditions would disqualify a tender as not being an "acceptable tender" under the Procurement Act unless those conditions are *immaterial, unreasonable or unconstitutional*; or
- 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.

The court pointed out that there had been no suggestion in the application papers that the requirement for an original tax clearance certificate was immaterial, unreasonable or unconstitutional. The parties' counsel both accepted that this was a lawful requirement. Betram's counsel however contended that it was something that the Municipality could and should have condoned.

The court however pointed out that the tender conditions contained no provision affording the Municipality any discretion to condone any non-compliance with a prescribed minimum qualifying tender conditions.

It held that Betram's tender was not an acceptable tender because it did not include an original tax clearance certificate.

In a last roll of the dice Betram's counsel had argued that our 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 favour the provision is enacted.<sup>2</sup>

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<sup>2</sup> Millennium Waste Management v Chairperson Tender Board Limpopo Province and Others 2008(2) SA 481 SCA, para 35.

In rejecting this argument, the SCA pointed out that that principle only applies if the statutory provision has been enacted for the specific benefit of an individual or body. In this case that was not so and in any event matters of public interest were at play.

In the result the Municipality's appeal was upheld and the Pretoria High Court's order set aside.

## **Conclusion**

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It appears that the false summer during which tenderers enjoyed the opportunity of arguing their way out of non-compliance with peremptory tender requirements is over.

The road has now become very much more difficult and non-compliant tenderers will have to show that:

- the condition they failed to comply with was either immaterial, unreasonable or unconstitutional; and
- somewhere in the tender conditions the organ of State is given the discretion to condone non-compliance.

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