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DISQUALIFICATION FOR NON-COMPLIANCE WITH PUBLIC TENDER CONDITIONS

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1 Introduction

In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders.¹ Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.²

Is compliance with tender conditions however a hard and fast rule? Must a procuring entity, for example, disqualify a tender that is not signed by a bidder, such tender amounting to a non-conforming or non-responsive tender? Or would the non-signing of the tender amount to what may be termed a mistake and one which the bidder should be allowed to correct? What if a particular bidder submits a copy of a tax clearance certificate and not an original one as stipulated in the tender invitation? Would such an omission amount to a mistake and one which the bidder should be allowed to correct or respond to? What if, furthermore, the price in words in a

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¹ The term "procuring entities" is used here to refer broadly to government or public entities and for South African purposes specifically those entities that are bound by the procurement clause in s 217 of the *Constitution of the Republic of South Africa*, 1996 and by relevant procurement laws.

² See generally Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 650-673; Cibinic and Nash *Formation of Government Contracts* 537-592.

tender and the price in numbers differ? Would such a "clerical" mistake entitle the relevant bidder to correct the mistake? In other words, where should the line be drawn? Should a procuring entity always enforce strict compliance with tender conditions or does it in some instances exercise discretion to condone mistakes or omissions in a tender? And if procuring entities do have discretion in this regard, how should such discretion be exercised? What criteria should be applied in the exercise thereof? Can a procuring entity, furthermore, be told by a court of law that it should have exercised its discretion in a particular way, for example by allowing the bidder in question to correct the particular mistake or omission? When may a court interfere in the exercise of the discretionary powers of procuring entities?

Given the longstanding uncertainty in practice around the level of compliance with tender conditions required in South African public procurement law, and particularly in view of the most recent Supreme Court of Appeal decision on the matter in *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality*,³ this paper will be devoted to the subject of compliance with tender conditions. First, attention will be given to the meaning of a conforming / compliant / responsive tender. Reference will first be made to the *UNCITRAL Model Law on Public Procurement* (2011),⁴ the World Bank Procurement Guidelines,⁵ and United States procurement law. Thereafter, attention will be given to the legal position in South Africa. The international regimes will be considered due to their recognized standing in international law. The *UNCITRAL Model Law on Public Procurement* is a framework law and was adopted as a template for developing and reforming regulatory systems for public procurement. It has proven to be very successful and has formed the basis of procurement law in more than 30 countries across the world.⁶ The World Bank Procurement Guidelines will serve as an example of the treatment of "responsiveness" by an international development institution,

³ *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality* 2013 ZASCA 186 (29 November 2013) (*Dr JS Moroka Municipality* case).

⁴ *UNCITRAL Model Law on Public Procurement* (2011).

⁵ World Bank 2011 <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html> (World Bank Procurement Guidelines).

⁶ See Arrowsmith and Nicholas "UNCITRAL Model Law on Procurement" ch 1.

and the United States public procurement system is one of the oldest and most advanced systems in the world. Having canvassed the meaning of a conforming / compliant / responsive tender, the paper will continue with a historical overview of the South African courts' treatment of compliance with tender conditions. Comments will then be made on the most recent decision in the *DR JS Moroka Municipality* case and guidance will be offered on the treatment of compliance with tender conditions in the South African context.

2 The meaning of a conforming / compliant / responsive tender

2.1 The UNCITRAL Model Law on Public Procurement, the World Bank Procurement Guidelines and United States procurement law

The *UNCITRAL Model Law on Public Procurement* deals with the examination and evaluation of tenders in Article 43, and provides in pertinent part as follows:

1. (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law.
- (b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.
2. The procuring entity shall reject a tender:
 - (c) If the tender is not responsive.

The World Bank Procurement Guidelines similarly provide as follows:

The Borrower shall ascertain whether the bids (a) meet the eligibility requirements specified in paragraph 1.8, 1.9, and 1.10 of these Guidelines, (b) have been properly signed, (c) are accompanied by the required securities or required declaration signed as specified in paragraph 2.14 of the Guidelines, (d) are substantially responsive to the bidding documents; and (e) are otherwise generally in order. If a bid, including with regard to the required bid security, is not substantially responsive, that is, it contains material deviations from or reservations to the terms, conditions and specifications in the bidding documents, it shall not be considered further. The bidder shall neither be permitted nor invited by the

Borrower to correct or withdraw material deviations or reservations once bids have been opened.⁷

In United States procurement law there are statutory provisions which stipulate that an award must be made to the bidder "whose bid conforms to the solicitation".⁸ The Federal Acquisition Regulations (US FAR)⁹ further deal with the "responsiveness of bids",¹⁰ and state that:

[t]o be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.¹¹

Under United States procurement law, therefore, non-responsiveness is also defined in terms of the materiality of the nonconformity. A bid that contains "minor informalities" is not considered non-responsive. A minor informality or irregularity, in turn, is defined as:

one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.¹²

The decision as to whether or not a particular nonconformity constitutes a minor deviation or informality under US procurement law has sometimes been characterised as a discretionary one, but at the same time the Comptroller General has in some instances required a waiver and has suggested the award to the

⁷ Para 2.48 of the World Bank Procurement Guidelines. The Guidelines makes use of the term "bid" as opposed to the term "tender". These two terms are, however, interchangeable. In the South African context, use is primarily made of the term "tender", but in some instances government documents also make reference to the term "bid".

⁸ 10 USC § 2305(b)(3); 41 USC § 253(c)(c).

⁹ United States 2014 <http://www.acquisition.gov/far/> (US FAR).

¹⁰ The term "responsiveness" should not be confused with the term "responsibility" as used in United States procurement law. For more on this, see Cibinic and Nash *Formation of Government Contracts* 545-553.

¹¹ US FAR 14.301(a).

¹² US FAR 14.405. Also see the rest of the Regulation for examples of minor informalities or irregularities.

aggrieved bidder even though the procuring entity 'in its discretion' had refused to waive the nonconformity.¹³ The Comptroller has also in a number of cases focused on the *prejudice* to other bidders rather than on the *degree* of nonconformity in determining if a bid is nonresponsive. A material nonconformity that gives the bidder in question no advantage or that operates to the disadvantage only of the bidder will thus not result in rejection.¹⁴ The Comptroller General has in other words under limited circumstances required the waiver of an otherwise significant deviation where no competitive advantage would result.¹⁵ Of note is that the Comptroller General has found that in the case of material nonconformities, it is "immaterial whether the nonconformity is deliberate or occurs by mistake, or whether the bidder is willing to correct or modify the bid to conform to the terms of the invitation".¹⁶ The Comptroller General has also sanctioned awards in instances where all the bids submitted are non-responsive, the preferred bid satisfies the Government's requirements, and no competing bidder would be prejudiced as a result of the award.¹⁷

Types of bids that are generally regarded as non-conforming under US procurement law include bids that offer *materially* different products or services from those solicited; bids that fail to conform to the delivery schedule; bids that impose conditions which alter the requirements of the bid invitation or that limit the rights of the government; bids that are indefinite, uncertain or ambiguous; bids that do not include items or information required for bid submission and sufficient information is not otherwise contained in the bid to determine the missing information; bids that are inaccurately completed – though bids may be accepted if the deficiency is *not* material and the obligations of the parties are not amended. An unsigned bid may

¹³ See Cibinic and Nash *Formation of Government Contracts* 543, who refer to a number of cases.

¹⁴ Cibinic and Nash *Formation of Government Contracts* 544.

¹⁵ Cibinic and Nash *Formation of Government Contracts* 545.

¹⁶ Cibinic and Nash *Formation of Government Contracts* 557.

¹⁷ Cibinic and Nash *Formation of Government Contracts* 559.

for example fall into the category of a minor informality if there are other indications in the bid that the bidder intended to be bound.¹⁸

It is clear therefore that under all the international instruments discussed, the treatment of the level of compliance with tender conditions is by and large the same. In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender. In the United States the focus is also sometimes on the *prejudice* to other bidders rather than on the *degree* of non-conformity in determining the responsiveness of a tender.

2.2 South Africa

In South Africa, public procurement is extensively regulated.¹⁹ Section 217(1) of the *Constitution*²⁰ provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. Procurement may, however, be used as a policy tool and section 217(3) of the *Constitution* makes provision for the enactment of legislation to provide a framework for such use. This legislation has been enacted in the form of the *Preferential Procurement Policy Framework Act* (PPPFA)²¹ and its accompanying Regulations.²² The courts have further held that the solicitation,

¹⁸ Cibinic and Nash *Formation of Government Contracts* 561-592. Of note is that the Canadian courts also adopt a flexible approach and allow for the consideration of bids that are *substantially* compliant. See *inter alia* *British Columbia v SCI Engineers and Constructors Inc* 1993 22 BCAC 89; *Health Care Developers Inc v Newfoundland* 1996 135 DLR 4th 609 629. Also see Seddon *Government Contracts* 344-345; 363-364.

¹⁹ See generally Bolton *Government Procurement*. Also see Quinot and Arrowsmith *Public Procurement Regulation* ch 9, 178; De la Harpe *Public Procurement Law*; Penfold and Reyburn "Public Procurement"; and the regular updates on developments in public procurement regulation by Geo Quinot in the *Juta's Quarterly Review*.

²⁰ Section 217(1) of the *Constitution of the Republic of South Africa*, 1996.

²¹ *Preferential Procurement Policy Framework Act* 5 of 2000.

²² *Preferential Procurement Regulations* (GN R502 in GG 34350 of 8 June 2011).

evaluation and award of public tenders amount to "administrative action" within the meaning of section 33 of the *Constitution* and the *Promotion of Administrative Justice Act* (PAJA).²³ An unsuccessful bidder also has *locus standi* to challenge public procurement decisions by means of an application for judicial review. An unsuccessful bidder can challenge procurement decisions on the grounds of lawfulness, reasonableness and procedural fairness.²⁴ An unsuccessful bidder can also challenge procurement decisions on the basis of the reasons given for such decisions.²⁵

For the present purposes, different legislation and government documents in South Africa emphasize the importance of compliance with tender conditions. In general, reference is made to the term "acceptable" tender as opposed to the terms "conforming" / "compliant" / "responsive" tender which, as noted above, are commonly used in international instruments. This does not mean that the terms "conforming" / "compliant" / "responsive" tender are never employed by procuring entities or in the case law. The official legislative term used in South African law, however, is the term "acceptable" tender. The PPPFA provides that procuring entities should consider only "acceptable" tenders. An "acceptable" tender, in turn, is defined in section 1(i) of the Act as:

... any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

There are also other government documents that attempt to shed light on the meaning of an "acceptable" tender in South African law. The National Treasury in one of its Circulars²⁶ notes that a tender will be "acceptable" if:

- (a) [i]t complies in all respects with the specification[s] and conditions of the [tender];
- (b) the bidder completed and signed all the prescribed [tender] forms to enable the principal to evaluate the submitted [tender];

²³ *Promotion of Administrative Justice Act* 3 of 2000. See *inter alia* *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) 867 para 39, 871 para 9; *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA) para 5.

²⁴ *Road Accident Fund v Smith* 2007 1 SA 172 (SCA) para 7.

²⁵ *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) paras 10-12.

²⁶ National Treasury 2005 <http://www.treasury.gov.za/legislation/pfma/circulars/> para 1.

- (c) the bidder submitted the required original tax clearance certificate and other clearance / registration forms as prescribed by various acts and / or in the [tender] documentation; and
- (d) the bidder has the necessary capacity and ability to execute the contract.

The Circular states further that:

[w]hen any [tender] is passed over or regarded as non-responsive, the reasons for passing over such [tender] must be defensible in any court of law. Examples in this regard may include negative banking reports, non-submission of tax clearance certificates, not having the necessary capacity and / or capability, being listed on the Register for Tender Defaulters, etc. Deviation by more than a predetermined percentage from the cost estimate of the project / commodity cannot be regarded as a justifiable reason for the rejection of a [tender] and has, therefore, not been approved as an evaluation norm by the National Treasury.²⁷

What is immediately clear from the definition of an "acceptable tender" in South African procurement law is that it differs remarkably from the definitions used in the *UNCITRAL Model Law on Public Procurement*, the World Bank Procurement Guidelines and the US FAR. As noted above, the latter regimes provide (only) for "material" or "substantial" compliance with tender conditions. South African procurement law, however, provides for compliance with tender conditions "in all respects". Provision is also not made in the PPPFA for the waiver of "minor informalities" or "minor deviations" as is done in the international instruments. On a literal interpretation of the definition of an "acceptable tender" in the PPPFA, therefore, it would appear that procuring entities in South Africa "must" exclude tenders that fail to comply with the exact requirements of the tender conditions. The legislature does not appear to afford procuring entities any discretion in the matter. We will return to this point further below.

It is noteworthy that the amended Regulations to South Africa's State Tender Board Act²⁸ adopt a different approach from the one adopted in the PPPFA. The Regulations were amended in 2003, ie after the enactment of the PPPFA, and provide as follows:

²⁷ National Treasury 2005 <http://www.treasury.gov.za/legislation/pfma/circulars/> para 1.

²⁸ Amended Regulations to the State Tender Board Act in terms of Section 13 (GN R1733 in GG 25766 of 5 December 2003) (the Amended Regulations).

3. (5)(a) If the [Tender] Board is of opinion that a person –
- (i) has amended ... an offer after the closing time for receipt of offers but before he has been notified of its acceptance; ...
 - (ii) the Board may, in addition to any other legal remedies it may have, resolve that no offer from the person concerned should be considered during such period as the Board may stipulate.²⁹

The Regulations, however, provide further that:

- When, at the invitation of the Board, offers are submitted for the purpose of concluding an agreement referred to in section 4 (1) (a) of the Act –
- (a) the Board shall not be obliged to accept the lowest or any offer;
 - (b) the Board may, where an offer relates to more than one item, accept such offer in respect of any specific item or items;
 - (c) the Board may accept any offer notwithstanding the fact that the offer was not made in response to any particular tender invitation, or does no[t] comply with the tender conditions set out in any specific tender invitation in respect of which the offer has been made.³⁰

In terms of the amended State Tender Board Regulations, therefore, the Tender Board should, as a rule, not allow the amendment of a tender before the award (for example the correction of a mistake or omission), but at the same time it is afforded wide discretionary powers. The Tender Board may "debar" a bidder for an extended period of time,³¹ it may accept an unsolicited tender,³² and it may accept a tender even though it does not comply with the tender conditions. Therefore it would appear that in those instances where procuring entities opt to procure goods or services through the State Tender Board (as opposed to the vast array of procurement legislation currently in place) or in those instances where the Tender Board has specific powers of procurement, the latter will be in a position to accept a tender even though it does not strictly comply with the conditions of tender. The amended Regulations afford the Tender Board express discretionary powers to do so. The position under the amended Regulations is therefore more in tune with the

²⁹ Reg 3(5)(a) of the Amended Regulations.

³⁰ Reg 5 of the Amended Regulations.

³¹ "Debarment" refers to the exclusion of a supplier from government contract awards for an extended period of time. Different terms are sometimes employed for this kind of exclusion, for example "blacklisting", "exclusion" or "suspension". For South African literature, see Bolton *Government Procurement* ch 13; Williams and Quinot 2008 *SALJ*. Also see Williams-Elegbe *Debarment as an Anti-corruption Tool*.

³² This is a tender that is received by the procuring entity without the latter having called for tenders.

position under the *UNCITRAL Model Law on Public Procurement*, the World Bank Procurement Guidelines and the US FAR even though the Regulations are still lacking in detail when compared to the latter instruments.

3 Historical overview of the South African courts' treatment of compliance with tender conditions

In what follows, a historical overview will be given of the South African courts' treatment of compliance with tender conditions. First, attention will be given to the legal position before 1994. Next, the focus will be on the period 1994-2007. Thereafter, detailed attention will be given to the 2008 Supreme Court of Appeal decision in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*³³ and the cases that followed. Lastly, attention will be paid to the most recent decision of the Supreme Court of Appeal in the *DR JS Moroka Municipality* case.

3.1 Compliance with tender conditions: pre-1994

For starters, it is important to remember that the rules which apply to the amendment of a tender before its award by the procuring entity would generally apply also to the correction of a mistake or an omission in a tender. In both instances the tender would effectively be amended before award. In practice, the possibility for the amendment of a tender by a bidder would usually, first and foremost, depend on whether or not the tender in question is irrevocable, ie whether or not it is a "firm bid".³⁴ If it is, the procuring entity is, as a rule, not obliged to allow the bidder to amend its tender. The procuring entity is entitled to accept the tender and compel the bidder to carry out the contract on the terms tendered. On the other hand, if the tender has not been accepted and there is no agreement to

³³ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) (the *Millennium Waste Management* case).

³⁴ See Garner *Black's Law Dictionary* 171, where a firm bid is defined as "[a] bid that, by its terms, remains open and binding until accepted or rejected. A firm bid commonly contains no unusual conditions that might defeat acceptance".

the effect that after submission, tenders are irrevocable,³⁵ a tender may be amended provided that the time for doing so has not expired.³⁶ In South Africa the period for which tender offers are to remain valid and binding is usually:

... indicated in the tender documents and is calculated from the closing time on the understanding that offers are to remain in force and binding until the close of business on the last day of the period calculated and if this day falls on a Saturday, Sunday or public holiday, the tender is to remain valid and binding until the close of business on the following working day.³⁷

As far back as in 1968 the South African courts were confronted with the amendment of a tender before award. In *Dominion Earthworks (Pty) Ltd v State Tender Board*,³⁸ the Tender Board was of the view that a certain bidder's tender was "on the low side" and the bidder was asked to confirm the correctness of its tender. The bidder informed the Board that its tender contained a clerical error and it submitted a corrected tender. The Board was then of the view that the error was *bona fide* and allowed the rectification (the amendment).³⁹ The question before the court was whether the Board acted wrongfully and unlawfully in allowing the rectification of the tender. The court referred to the 1965 State Tender Board Regulations,⁴⁰ which at the time found application to the tender process, and held that Regulations 51(1) and 51(2) conferred on the Board discretion whether or not to allow the correction of the tender. Regulation 51(1) read as follows:

³⁵ Such tenders or bids are usually referred to as "open bids" and are defined in Garner *Black's Law Dictionary* 171 as "[a] bid that the bidder may alter after submission so as to meet competing bids".

³⁶ Goldsmith *Canadian Building Contracts* 18-19. Also see a 41(3) of the *UNCITRAL Model Law on Public Procurement* (2011), which provides that "[u]nless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for presenting tenders".

³⁷ Para 16 of the Provincial Tender Board: General Conditions and Procedures (Provincial Tender Board 1994 <http://capeonline.org/cmstender/kst36.pdf>). Also see clauses 154-156 of the City of Cape Town: Supply Chain Management Policy (City of Cape Town 2013 http://www.capetown.gov.za/en/SupplyChainManagement/Documents/SCM_Policy_%28Approved-31-Jul-2013%29.pdf), which provide for validity periods.

³⁸ *Dominion Earthworks (Pty) Ltd v State Tender Board* 1968 4 SA 151 (T) (the *Dominion Earthworks* case).

³⁹ *Dominion Earthworks* case 156G-157D.

⁴⁰ State Tender Board Regulations (GN R957 in GG 1168 of 2 July 1965).

If a [bidder] varies his tender after the due date and hour but before he is notified of its acceptance he shall forfeit any deposit which may have been required with the tender or pay the Government any additional expense incurred by its having to invite fresh tenders or to accept any less favorable tender or to make any less favorable arrangements. Provided that the Board *may* in its discretion waive or vary the enforcement of this sub-regulation as the circumstances warrant [emphasis added].

Regulation 52(1) stated further that:

[i]f the Board is satisfied that any person –
(e) has varied his tender after [the] due date and hour but before he has been notified of its acceptance;
the Board *may* after consideration of all the circumstances resolve –
(iii) that no tender from that person shall be considered during such a period as it may decide [emphasis added].

The court held that the above two Regulations conferred discretionary powers on the Board. The Board accordingly did not act unlawfully.⁴¹ Under the 1965 State Tender Board Regulations, therefore, the Tender Board had discretionary powers insofar as compliance with tender conditions were concerned. It is noteworthy that the current Regulations to South Africa's State Tender Board Act afford similar discretionary powers on the Tender Board.⁴²

3.2 Compliance with tender conditions: 1994-2007

With South Africa's transition to democracy in 1994, a new public procurement regime was put in place. As noted above,⁴³ public procurement was constitutionalized and a policy of preferential treatment in contract awards was introduced. For the present purposes, and as noted above, section 1(i) of the PPPFA defines an "acceptable tender" as:

... any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

A number of cases have grappled with the meaning to be assigned to this provision, one of the first being the Supreme Court of Appeal decision in *Metro Projects CC v*

⁴¹ *Dominion Earthworks* case 158B-D.

⁴² See para 2.2 above.

⁴³ Para 2.2.

Klerksdorp Local Municipality.⁴⁴ In this case a tender was awarded to a bidder who had been given an opportunity by a municipal official to supplement its tender after the closure of the tender process in order to ensure its acceptance. The court referred to *Logbro Properties CC v Bedderson*,⁴⁵ where Cameron JA referred to the "ever-flexible duty to act fairly" that rested on a provincial tender committee. The court then noted that:

[f]airness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a [bidder] to explain an ambiguity in its tender; it may be fair to allow a [bidder] to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.⁴⁶

In the present case, the court held that the process was not fair. The deception in question:

... stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not.⁴⁷

The court went further and noted that the PPPFA defines an "acceptable tender" as one that "in all respects complies with the specifications and conditions of tender as set out in the tender document".⁴⁸ In this regard, the court admitted that:

[t]here are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be said to have been compliance with 'the specifications and conditions of tender' may not be an easy question to answer.⁴⁹

In the present case, however, the court found that there was no difficulty, as the offer put before the procuring entity was not the one made in the second respondent's tender. It did not comply with the specifications and tender

⁴⁴ *Metro Projects CC v Klerksdorp Local Municipality* 2004 1 SA 16 (SCA) (the *Metro Projects* case).

⁴⁵ *Logbro Properties CC v Bedderson* 2003 2 SA 460 (SCA) paras 8, 9 466H-467C.

⁴⁶ *Metro Projects* case para 13.

⁴⁷ *Metro Projects* case para 14.

⁴⁸ *Metro Projects* case para 15.

⁴⁹ *Metro Projects* case para 15.

conditions.⁵⁰ The award of the tender to the second respondent was accordingly set aside. The Supreme Court of Appeal in *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*⁵¹ also expressed its view on the meaning of an "acceptable tender" in the PPPFA and held that:

[t]he definition of 'acceptable tender' in the [PPPFA] must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective". In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values.⁵²

In this case, the winning bidder submitted tenders containing nominal prices for some work because it knew that such work would not have to be done since it would be done by another contractor. An unsuccessful bidder then argued that the winning bidder's tender was not an "acceptable tender" within the meaning of the PPPFA; the tender did not meet all the requirements of the tender call and should not have been considered. The court agreed and held that merely because the winning bidder in this case priced all the items it tendered for does not mean that its tender was "acceptable". It is imperative that all bidders tender for the same contract. By tendering on the basis that some work in the tender invitation would not be required, the winning bidder was able to reduce its price to the detriment of other bidders who tendered on the basis that all the work had to be done. The court held that the winning bidder's tender offended each of the core values which section 217(1) of the Constitution sought to uphold.⁵³ Its tender was accordingly not an "acceptable tender" within the meaning of the PPPFA.

Another case in point is the Supreme Court of Appeal decision in *Minister of Social Development v Phoenix Cash & Carry – Pmb*.⁵⁴ In this case, the procuring entity disqualified the applicant's tender because it did not meet the requirements of the

⁵⁰ *Metro Projects* case para 15.

⁵¹ *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2005 4 All SA 487 (SCA) (the *JFE Sapela Electronics* case).

⁵² *JFE Sapela Electronics* case para 14.

⁵³ *JFE Sapela Electronics* case para 14.

⁵⁴ *Minister of Social Development v Phoenix Cash & Carry – Pmb* 2007 3 All SA 115 (SCA) (the *Phoenix Cash & Carry* case).

tender relating to financial resources. More specifically, the procuring entity argued that the applicant failed to provide it with audited financial statements, bank statements and a letter from the bank containing sufficient information.⁵⁵ Its tender was therefore excluded on the ground that it had "no financial resources".⁵⁶ The court made some general observations with respect to compliance with section 217(1) of the *Constitution* and:

... stress[ed] the need [for procuring entities] to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.⁵⁷

The court also referred to the remarks of Conradie JA in the *Metro Projects*⁵⁸ case pertaining to the ever-flexible duty of a tender committee to act fairly, and that fairness must be decided on the circumstances of each case. In the present case it was clear that the applicant submitted a letter from its bank attesting to its financial resources. The letter also made it clear that the procuring entity was free to contact the bank for clarification or further information. The court held that in this case it was clear that undue emphasis had been placed on form at the expense of substance. This was also the approach adopted by the Supreme Court of Appeal in *Millennium Waste Management*, to which this paper now turns. This case is discussed under a separate heading, given its significance in relation to the most recent Supreme Court of Appeal decision in the *DR JS Moroka Municipality* case.

3.3 Compliance with tender conditions: Millennium Waste Management 2008

The *Millennium Waste Management* case was decided in 2008 and concerned the award of a tender by the Department of Health and Social Development (the second respondent) for the provision of services relating to the removal, treatment and disposal of healthcare waste material from hospitals in the province of Limpopo. The

⁵⁵ *Phoenix Cash & Carry* case para 12.

⁵⁶ *Phoenix Cash & Carry* case para 13.

⁵⁷ *Phoenix Cash & Carry* case) para 2.

⁵⁸ *Metro Projects* case para 13.

appellant was an unsuccessful bidder and claimed that its tender should not have been disqualified simply because it never signed a certain document that had to be submitted with its tender. The document that needed signature was a "declaration of interest" form and required bidders to indicate whether they had any links to the procuring entity (the second respondent). The appellant had initialed each page of the form, but failed to put its signature on the last page. There are two grounds upon which the tender committee disqualified the appellant's tender: (1) it believed that it did not have authority to condone the appellant's non-compliance with the tender conditions; and (2) it was of the view that the appellant's tender was not an "acceptable" one within the meaning of the PPPFA. The court rejected both grounds. With regard to the first ground, it referred to Regulation 5(c) of the Regulations to the Northern Transvaal Tender Board Act,⁵⁹ which expressly provides that:

... the Board may accept any offer notwithstanding the fact that the offer was not made in response to any particular tender invitation, or does not comply with the tender invitation in respect of which the offer has been made.

In other words, the tender committee did have the necessary discretion to condone the appellant's omission.⁶⁰ The court further noted 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 benefit the provision was enacted.⁶¹

In the present case, the court held that condoning the appellant's failure to sign the form would have served the public interest because it would have facilitated competition among the bidders. The condonation would have promoted the values of fairness, competitiveness and cost-effectiveness in section 217(1) of the *Constitution*.⁶² The appellant had, furthermore, submitted a tender at a significantly lower cost than the winning bidder.⁶³ With regard to the second ground for

⁵⁹ *Northern Transvaal Tender Board Act* 2 of 1994.

⁶⁰ Also see *Total Computer Services v Municipal Manager, Potchefstroom Local Municipality* 2008 4 SA 346 (T), where the court held that the tender specifications were permissive and discretionary and afforded the municipality discretion in relation to formal defects.

⁶¹ Referring to *SA Eagle Co Ltd v Bavuma* 1985 3 SA 42 (A) 49G-H.

⁶² *Millennium Waste Management* case para 17.

⁶³ *Millennium Waste Management* case para 17.

disqualifying the appellant's tender, ie the "acceptability" of the appellant's tender within the meaning of the PPPFA, the court noted that:

[w]hen Parliament enacted the [PPPFA] it was complying with the obligation imposed by s 217(3) of the Constitution which required that legislation be passed in order to give effect to the implementation of a procurement policy referred to in s 217(2). Therefore the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which promotes "the spirit, purport and objects of the Bill of Rights" as required by s 39(2) of the Constitution.⁶⁴

The court also referred to the *JFE Sapela Electronics* case,⁶⁵ where Scott JA noted that the definition of an "acceptable tender" in the PPPFA must be interpreted against the values laid down in section 217(1) of the *Constitution*. The court then held that:

[i]n this context the definition of [acceptable] tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight.⁶⁶

The court went on and said that in order to determine the "acceptability" of the appellant's tender, it was important to take into account the purpose of the declaration of interest form in relation to the tender process in question.⁶⁷ In this respect, the second respondent argued that the purpose of the form was to curb corruption. The court, however, held that it was clear that the appellant had no intention to misrepresent any facts – it had inserted its name on the form and had omitted to sign the last page. The court further noted that since the evaluation and adjudication of tenders constitutes administrative action, there must be compliance with the requirements in PAJA. The court then held that:

[c]onditions such as the one relied on by the tender committee should not be mechanically applied with no regard to a [bidder's] constitutional rights. By insisting on disqualifying the appellant's tender for an innocent omission, the tender committee acted unreasonably. Its decision in this regard was based on the committee's error in thinking that the omission amounted to a failure to comply

⁶⁴ *Millennium Waste Management* case para 18.

⁶⁵ See para 3.2 above.

⁶⁶ *Millennium Waste Management* case para 19.

⁶⁷ *Millennium Waste Management* case para 19.

with a condition envisaged in the [PPPFA]. Consequently, its decision was "materially influenced by an error of law" contemplated in section 6(2)(d) of PAJA, one of the grounds of review relied on by the appellant. Therefore, the tender process followed by the department was inconsistent with PAJA.⁶⁸

3.4 Compliance with tender conditions: 2008-2013

After the decision in the *Millennium Waste Management* case, it is particularly in the context of the submission of tax clearance certificates as a tender condition that there has been a lot of controversy. As background, attention will first be given to the legislative provisions dealing with the submission of tax clearance certificates. Thereafter, attention will be given to the courts' approach on the matter. The focus will first be on the period 2008-2011, and thereafter attention will be given to the most recent Supreme Court of Appeal decision in the *DR JS Moroka Municipality* case.

3.4.1 Tax compliance as a tender condition

In practice, procuring entities usually include a condition in their tender documents that bidders must submit tax clearance certificates issued by the South African Revenue Service (SARS) in order to qualify for evaluation. There are also a number of legislative provisions dealing with the importance of tax compliance when evaluating tenders. Under the new public procurement regime, among the first pieces of legislation that provided for the submission of tax clearance certificates are the (now repealed) 2001 Regulations to the PPPFA.⁶⁹ Regulation 16 stated that:

... no contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from [SARS] certifying that the taxes of that person to be in order [sic] or that suitable arrangements have been made with SARS.

The National Treasury in its 2005 Circular⁷⁰ further stipulates that a bid will be "acceptable" for the purposes of s1 (i) of the PPPFA if:

⁶⁸ *Millennium Waste Management* case para 21.

⁶⁹ Preferential Procurement Regulations (GN R725 in GG 22549 of 10 August 2001).

⁷⁰ National Treasury 2005 <http://www.treasury.gov.za/legislation/pfma/circulars/> para 1.

(c) the bidder submitted the required original tax clearance certificate and other clearance/registration forms as prescribed by various acts and/or in the [tender] documentation.

The Circular also states that:

[w]hen any [tender] is passed over or regarded as non-responsive, the reasons for passing over such [tender] must be defensible in any court of law. Examples in this regard may include ... non-submission of tax clearance certificates.⁷¹

The National Treasury had moreover sent out a communication in 2006⁷² stating that if a procuring entity is already in possession of a supplier's original tax clearance certificate, then there is no need for the entity to request a new one, provided that the closing date for the quotation or tender falls within the expiry date of the certificate in its possession. The National Treasury's General Conditions of Contract, amended in July 2010, similarly provide that a procuring entity must not contract with a bidder whose tax matters are not in order. The procuring entity must be supplied with an original tax clearance certificate issued by SARS.⁷³ The current 2011 PPPFA Regulations, in contrast, simply state that:

[n]o tender may be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order.⁷⁴

Thus, whereas the 2001 PPPFA Regulations and subsequently issued government documents provide for the submission of an "original" tax clearance certificate, the current 2011 Regulations simply provide for proof of tax compliance. No indication is given in the 2011 Regulations as to how or the precise manner in which this should be done. It is noteworthy that the 2005 Regulations to the Public Finance Management Act (PFMA)⁷⁵ also simply provide that an accounting officer/authority must reject the tender of a bidder who fails to provide written proof from SARS that it has no outstanding tax obligations or that it has made arrangements to pay

⁷¹ National Treasury 2005 <http://www.treasury.gov.za/legislation/pfma/circulars/> para 1.

⁷² See National Treasury 2006(3) <http://www.treasury.gov.za/legislation/pfma/practice%20notes/scm/Practice%20note%20SCM%203%20of%202006.pdf>.

⁷³ Clause 32.3 of the General Conditions of Contract (National Treasury 2010 <http://www.treasury.gov.za/divisions/ocpo/sc/GeneralConditions/>).

⁷⁴ Reg 14 of the Preferential Procurement Regulations (GN R502 in GG 34350 of 8 June 2011).

⁷⁵ Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities (GN R225 in GG 27388 of 15 March 2005).

outstanding taxes.⁷⁶ At local government level the Supply Chain Management Regulations to the Municipal Finance Management Act (MFMA)⁷⁷ also simply provide that a municipality's supply chain management policy must enable an accounting officer to reject any tender from a bidder whose municipal rates and taxes or municipal service charges are in arrears for more than three months.⁷⁸ Regulation 43 further states that:

- (1) [t]he supply chain management policy of a municipality or municipal entity must, irrespective of the procurement process followed, state that the municipality or municipal entity may not make any award above R15 000 to a person whose tax matters have not been declared by the South African Revenue Service to be in order.
- (2) Before making an award to a person, a municipality or municipal entity must first check with SARS whether that person's tax matters are in order.
- (3) If SARS does not respond within seven days such person's tax matters may for purposes of subregulation (1) be presumed to be in order.

From the wording used in the PFMA and MFMA Regulations, therefore, all that appear to be required is the submission of proof that a bidder's tax matters are in order. As is the case under the 2011 PPPFA Regulations, no express reference is made to the submission of an "original" tax clearance certificate. From a legislative perspective, therefore, it is only the 2001 PPPFA Regulations and a few other government documents that expressly provide for the submission of an "original" tax clearance certificate. In what follows, attention will be given to the courts' approach to the requirement of tax compliance, first in the period 2008-2011, and thereafter in the recent *DR JS Moroka Municipality* case.

3.4.2 Views from the courts 2008-2011

There are only two cases that dealt with tax compliance in the period 2008-2011.⁷⁹ In *Imvusu Trading 134 v Dr Ruth Mompoti District Municipality*⁸⁰ the court held that

⁷⁶ Reg 16A9.1(d) of the Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities (GN R225 in GG 27388 of 15 March 2005).

⁷⁷ Municipal Supply Chain Management Regulations (Gen N 868 in GG 27636 of 30 May 2005).

⁷⁸ Reg 38(1)(d)(i) of the Municipal Supply Chain Management Regulations (Gen N 868 in GG 27636 of 30 May 2005).

⁷⁹ The first case to deal with tax compliance in the public procurement context was decided in 2004. In *Basadi Joint Venture v MEC of Education for the Province of the Free State* 2004 ZAFSHC 74 (29 July 2004) the court adopted a strict approach to the submission of tax clearance certificates and disqualified a bidder who had failed to submit proof of tax compliance.

the decision to disqualify or recommend the disqualification of a bidder for the non-payment of taxes should not be taken lightly. In this case, the municipality invited tenders for the second time for the provision of water metered connections and precast toilets for 450 stands in Huhudi after its first call for tenders attracted no interest. The bid evaluation committee (BEC) recommended to the bid adjudication committee (BAC) that the bid be awarded to the applicant even though it was ranked second, because the first ranked bidder, the fifth respondent, furnished an outdated tax clearance certificate. The BAC, however, "sent the documentation back [to the BEC]" in order for the fifth respondent's tax status to be verified.⁸¹ The fifth respondent was then allowed to replace its outdated certificate with a new one and was awarded the tender. The applicants argued that the conduct of the bid committees contravened section 217 of the *Constitution* in that the process was not fair, transparent, competitive and cost-effective. They accordingly asked the court to review and set aside the award of the tender to the fourth and fifth respondents.⁸²

The court referred to a number of Supreme Court of Appeal decisions which confirm the following principles: a Tender Board may condone some deficiencies;⁸³ a *bona fide* mistake should not in and of itself disqualify a bidder;⁸⁴ substance should prevail over form;⁸⁵ a distinction should be drawn between a material factor and the evidence needed to prove that factor;⁸⁶ regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and the words "acceptable tender" in the PPPFA involves a consideration of the degree of compliance with tender conditions.⁸⁷ The court then held that in the present case there was no doubt that the fifth respondent's tax clearance certificate was at all times in order and that the only problem was that it failed to provide proof thereof

⁸⁰ *Imvusu Trading 134 v Dr Ruth Mompoti District Municipality* 2008 ZANWHC 46 (20 November 2008) (the *Imvusu Trading* case).

⁸¹ *Imvusu Trading* case para 5.

⁸² *Imvusu Trading* case para 6.

⁸³ Referring to the *Millennium Waste Management* case para 58.

⁸⁴ Referring to the *Millennium Waste Management* case para 58; *Total Computer Services v Municipal Manager, Potchefstroom Local Municipality* 2008 4 SA 346 (T).

⁸⁵ Referring to the *Phoenix Cash & Carry* case.

⁸⁶ Referring to the *Phoenix Cash & Carry* case.

⁸⁷ *Imvusu Trading* case paras 7, 8, referring to the *Millennium Waste Management* case para 15.

at the closing date for tenders. The court held that allowing the fifth respondent to supply proof of its tax status amounted to the correction of a *bona fide* mistake, which the fifth respondent had made and did not render the process unfair, uncompetitive or not transparent.⁸⁸

In *VDZ Construction (Pty) Ltd v Makana Municipality*⁸⁹ the municipality called for tenders and required bidders to submit, *inter alia*, "an original and valid Municipal Billing Clearance Certificate".⁹⁰ The applicant's tender was disqualified because only page 1 of its certificate was in an original form and page 2 was a copy. The court noted that the municipality is bound by section 217 of the *Constitution* and that its decision to disqualify the applicant's tender amounted to administrative action under PAJA. The court then looked at the definition of an "acceptable tender" for the purposes of the PPPFA and placed reliance on the decision in the *JFE Sapela Electronics* case,⁹¹ where the court held that the definition of an "acceptable tender" in the PPPFA must be construed against the broad principles in section 217(1) of the *Constitution*, ie fairness, equity, transparency, competitiveness and cost-effectiveness. The court also noted that regard must be had to the purpose of the said certificate. On the facts before the court it was clear that the submission by the applicant of page 2 of the certificate in a copy form was "inadvertent", in other words, a mistake.⁹² The court then held that this mistake could have been clarified by means of "a quick telephone call to 'the municipality who issued the certificate'".⁹³ In the court's view, the mistake was one of form rather than substance and that it would have been fair to allow the applicant to correct the "obvious mistake" of filing a copy instead of the original of page 2 of the certificate.⁹⁴ The court also referred to the remark by the Supreme Court of Appeal in *Phoenix Cash and Carry*⁹⁵ in analysing section 217(1) of the *Constitution*. The court in that case "stressed ... the need to

⁸⁸ *Imvusu Trading* case paras 16, 17.

⁸⁹ *VDZ Construction (Pty) Ltd v Makana Municipality* 2011 ZAECGHC 64 (3 November 2011) (the *VDZ Construction* case).

⁹⁰ *VDZ Construction* case para 2.

⁹¹ See para 3.2 above.

⁹² *VDZ Construction* case para 15.

⁹³ *VDZ Construction* case para 16.

⁹⁴ *VDZ Construction* case para 16, referring to the *Metro Projects* case.

⁹⁵ See para 3.2 above.

appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender".⁹⁶ The court then held that the applicant obtained the highest points and it also made reference to the price tendered by the applicant. The court then concluded that:

... condonation of the applicant's failure to furnish a full original Municipal Billing Certificate would have served the public interest as it would have facilitated competition among the [bidders]. It also would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in Section 217 of the Constitution.⁹⁷

3.4.3 Summary of historical overview

From the above historical overview of the case law it is clear that overall the South African courts have adopted a flexible approach to the enforcement of compliance with tender conditions. Most notable is that even though the term "acceptable tender" is very narrowly defined in the PPPFA (tenders must "in all respects" comply with the specifications and conditions of tender), the courts up to the 2011 case of *VDZ Construction* afforded the term a wide meaning and allowed procuring entities discretion when evaluating compliance with tender conditions. The courts moreover linked the definition of an "acceptable tender" in the PPPFA to the requirements in section 217(1) of the *Constitution* and generally emphasized that procuring entities should draw a distinction between formal and substantive shortcomings in a tender. The Amended Regulations to the State Tender Board Act of course make express provision for the exercise of discretion by procuring entities when evaluating compliance with tender conditions.⁹⁸ It is submitted, however, that even though the PPPFA does not provide such express discretionary powers, section 217 of the *Constitution*, and in particular, section 217(1), comes to the rescue, because procuring entities are obliged to interpret the definition of an acceptable tender with reference to the principles in section 217(1). This interpretation of the definition is further in line with the approach adopted under the *UNCITRAL Model Law on Public*

⁹⁶ *VDZ Construction* case para 2.

⁹⁷ *VDZ Construction* case para 17.

⁹⁸ See para 2.2 above.

Procurement, the World Bank Procurement Guidelines as well as United States procurement law.⁹⁹ It will be recalled that these regimes emphasise "substantial or material compliance" with specifications and conditions of tender and allow procuring entities to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contains errors or oversights that can be corrected without touching on the substance of the tender. The Supreme Court of Appeal in the recent case of *DR JS Moroka Municipality*, however, adopted a different approach.

3.4.4 Compliance with tender conditions: DR JS Moroka Municipality 2013

The municipality in this case called for tenders and required bidders to submit, *inter alia*, a valid original tax clearance certificate as a minimum requirement to qualify for evaluation. Tenders were received and the municipality disqualified the first respondent's tender because a copy of its tax clearance certificate was submitted and not an original. The tender was then awarded to the second respondent whose tender was almost R2 million higher than that of the first respondent. The first respondent approached the court and argued that its tender was erroneously disqualified. The court *a quo* agreed and held that even though the tender invitation specified that an original tax certificate be submitted, the disqualification of the second respondent's tender was administratively unfair. It then granted relief similar to that issued in the *Millennium Waste Management* case and ordered that the municipality evaluate the second respondent's tender, compare it to that of the winning bidder and then accept whichever of the two tenders was preferable.¹⁰⁰ The court *a quo* reasoned that it was of primary importance for the municipality to determine if the first respondent's tax affairs were in order. The submission of an original tax clearance certificate was not an absolute requirement because it was incumbent on the municipality under Regulation 43 of the MFMA Supply Chain

⁹⁹ See para 2.1 above.

¹⁰⁰ *Dr JS Moroka Municipality* case para 7.

Regulations to check with SARS whether a bidder's tax affairs were in order. The municipality then appealed this decision.

The Supreme Court of Appeal held that the underlying reasoning of the court *a quo* in coming to its decision was doubtful because the secrecy provisions contained in (the then) section 4 of the *Income Tax Act*¹⁰¹ would have made it difficult for the municipality to investigate the tax affairs of the first respondent, unless it gave its consent.¹⁰² However, the court did not consider it necessary to deal with this issue and instead noted that:

[e]ssentially 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 the [PPPFA] unless those conditions are immaterial, unreasonable or unconstitutional.¹⁰³

In this respect, the court noted that the first respondent was unable to prove to the court that the requirement that bidders submit original tax clearance certificates to qualify for evaluation was immaterial, unreasonable or unconstitutional. The court also noted its difficulty with the first respondent's argument that the municipality had *discretion* to condone the failure on the part of the first respondent to submit an original certificate. It noted that the first respondent "was unable to point to such a discretion being afforded in any of the relevant legislation or regulations".¹⁰⁴ The court then referred to the decision in *Pepper Bay*¹⁰⁵ where Brand JA said:

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.¹⁰⁶

¹⁰¹ *Income Tax Act* 58 of 1962.

¹⁰² This provision has in the meantime been repealed. It is now possible under s 256 of the *Tax Administration Act* 28 of 2011 for a person to whom a taxpayer has presented a tax clearance certificate to confirm such a person's tax compliance status with SARS.

¹⁰³ *Dr JS Moroka Municipality* case para 10, referring to the obiter dictum in the *Millennium Waste Management* case para 19.

¹⁰⁴ *Dr JS Moroka Municipality* case para 12.

¹⁰⁵ *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith* 2004 1 SA 308 (SCA) para 31 (the *Pepper Bay* case).

¹⁰⁶ *Pepper Bay* case para 31.

The court then noted that the tender documents themselves also did not afford the municipality any discretion to condone non-compliance with the prescribed minimum prerequisite of a valid and original tax clearance certificate. The tender submitted by the first respondent was accordingly not an "acceptable tender" under the PPPFA and did not qualify for evaluation. In response to the argument that the first respondent's tender should, for reasons of public policy, have been evaluated, the court noted that the decision in *SA Eagle Insurance Co Ltd v Bavuma*¹⁰⁷ on which the *Millennium Waste Management* case had relied in coming to its decision:

... related to a statutory provision enacted for the specific benefit of an individual or body. It was held that such a benefit may be waived by that individual or body provided that no public interests were affected thereby and that it was not open to another person, whom the statute was not intended to benefit, to insist that the provision be observed.

The court then noted that reliance could not be placed on *SA Eagle Insurance* to:

... support the proposition that, if it is not inconsistent with public policy, non-compliance with a peremptory requirement of a tender can be condoned so that a tender which is 'unacceptable' as envisaged by the [PPPFA] may be accepted.

The court then held that:

... insofar as the judgment in *Millennium Waste Management* may be construed as accepting that a failure to comply with the peremptory requirement of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect.¹⁰⁸

In what follows, comments are made on the above decision and guidance is offered on the appropriate treatment of compliance with tender conditions in South African public procurement law.

¹⁰⁷ *SA Eagle Co Ltd v Bavuma* 1985 3 SA 42 (A).

¹⁰⁸ *Dr JS Moroka Municipality* case para 18.

4 Comments on the decision in the *DR JS Moroka Municipality* case and guidance on the treatment of compliance with tender conditions in the South African context

The decision in the *DR JS Moroka Municipality* case was decided in the context of the submission of tax clearance certificates, but the arguments of the court will of course be applicable also to compliance with tender conditions more generally. Effectively, the court called for strict compliance with tender conditions and dismissed the argument that the municipality in this case had some measure of discretion when evaluating compliance with tender conditions. The primary reasoning of the court included that:

- (1) the secrecy provisions contained in (the then) section 4 of the *Income Tax Act*¹⁰⁹ would have made it difficult for the municipality to investigate the tax affairs of the first respondent, unless it gave its consent;¹¹⁰
- (2) the definition of an "acceptable tender" in the PPPFA does not grant the municipality any discretion when evaluating compliance with tender conditions unless the conditions imposed are immaterial, unreasonable or unconstitutional;
- (3) the municipality's tender invitation itself did not grant any discretionary power to the municipality in the evaluation of tenders; and
- (4) with respect to public policy considerations playing a role in the evaluation of tenders, the decision in *SA Eagle Insurance* could not be relied upon in the context of the case.

It is submitted that the overall reasoning of the court is problematic for a number of reasons. In what follows, a critique is offered of the primary reasoning of the court.

¹⁰⁹ *Income Tax Act* 58 of 1962.

¹¹⁰ This was the reasoning adopted by the court *a quo*.

4.1 *The secrecy provisions contained in (the then) section 4 of the Income Tax Act*¹¹¹

It is hard to believe that the second respondent would have refused permission for the municipality to investigate its tax affairs. All bidders know that tax compliance is a precondition for the award of a public tender. The underlying reason for requiring bidders to submit tax clearance certificates is to ensure that procuring entities do not do business with unethical suppliers. Requiring bidders to submit proof of tax compliance also aims to ensure compliance with the principles of competitiveness, fairness and cost-effectiveness in section 217(1) of the *Constitution*. From a cost-effectiveness point of view, in particular, it can safely be assumed that a bidder who is unable or unwilling to pay its taxes is unlikely to render satisfactory performance under a contract and is likely to cost a procuring entity more in the long run. Bidders who do not pay their taxes also have an unfair competitive advantage over bidders who do pay their taxes because they are able to submit lower tenders. Requiring bidders to be tax compliant further ensures that procuring entities are not perceived by the general public as giving support to those who fail to pay their taxes which, in turn, enhances the integrity of the public procurement process.¹¹²

If the second respondent had been made aware of its failure to submit an original tax clearance certificate (and hence of its failure to comply with one of the tender conditions), the second respondent would simply have been put in a position to correct a "mistake" / "omission" in its tender. Doing so would also have ensured compliance with the requirements in PAJA. The mere investigation of the second respondent's tax affairs (as opposed to disqualifying its tender outright) would not have 'prejudiced' any other bidder.¹¹³ Prejudice would have occurred only if the second respondent was *not* tax compliant and was nevertheless permitted to submit and consequently win the tender in question. A distinction should in other words be drawn between allowing the correction of a mistake or omission in a tender, and

¹¹¹ *Income Tax Act* 58 of 1962.

¹¹² Also see Arrowsmith *Law of Public and Utilities Procurement* para 12.38.

¹¹³ See para 2.1 above on the treatment of tax compliance in US procurement law.

allowing the amendment of a tender which results in the submission of a new or significantly different tender that results in the unfair treatment of other bidders.

4.2 The definition of an "acceptable tender" in the PPPFA

An argument can be made that the definition of an "acceptable tender" in the PPPFA does in fact provide scope for some measure of discretion in the evaluation of compliance with tender conditions even when the imposed conditions cannot be classified as "immaterial, unreasonable or unconstitutional". It will be recalled that section 1(i) of the PPPFA defines an "acceptable tender" as:

... any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

As noted above, a literal interpretation of the above definition obliges procuring entities to exclude bidders that fail to comply with the exact requirements of the tender invitation. This approach differs remarkably from those provided for in the *UNCITRAL Model Law on Public Procurement*, the World Bank Procurement Guidelines and the US FAR. These three instruments do not provide for strict compliance with tender conditions, but rather for "material" or "substantial" compliance. The instruments further make provision for the waiver of "minor informalities" or "minor deviations". It is submitted that an argument can be made that in view of the fact that the PPPFA (as a whole) was enacted to give effect to section 217(3) of the *Constitution*, it should be read and interpreted with reference to section 217 as a whole and, in particular, the principles contained in section 217(1). Up until the recent Supreme Court of Appeal decision in the *DR JS Moroka Municipality* case, our courts have allowed some measure of discretion to procuring entities when evaluating whether or not a tender is an "acceptable" one for the purposes of the PPPFA.¹¹⁴ As noted above, the courts have held that the definition of an "acceptable tender" in the PPPFA should be read and interpreted with reference to the principles contained in section 217 of the *Constitution*. In the *Metro Projects* case the court also made reference to the ever-flexible duty of a tender committee

¹¹⁴ See the cases examined above.

to act fairly, and to the need to decide fairness on the circumstances of each case. The court noted that it may in some instances be fair to ask a bidder to explain an ambiguity in its tender or to correct an obvious mistake. It may, in a complex tender, also be fair to ask for clarifications or details to ensure the proper evaluation of the tender, provided that doing so does not affect the fairness of the process. The tender process must also remain transparent, competitive and cost-effective. The court further noted with respect to the definition of an "acceptable tender" in the PPPFA that:

[t]here are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be said to have been compliance with "the specifications and conditions of tender" may not be an easy question to answer.¹¹⁵

Also in *JFE Sapela Electronics* Scott JA said that:

[t]he definition of "acceptable tender" in the [PPPFA] must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective". In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values.¹¹⁶

Of note here is that the court in the *DR JS Moroka Municipality* case did refer to the *JFE Sapela Electronics* case in coming to its decision.¹¹⁷ It seems to have done so selectively, though, and without taking cognisance of Scott JA's view with respect to the interpretation of an "acceptable tender" as provided for in the PPPFA. The court in the *Millennium Waste Management* case also noted that:

[w]hen Parliament enacted the [PPPFA] it was complying with the obligation imposed by s 217(3) of the Constitution which required that legislation be passed in order to give effect to the implementation of a procurement policy referred to in s 217(2). Therefore the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which promotes 'the spirit,

¹¹⁵ *Metro Projects* case para 15.

¹¹⁶ *JFE Sapela Electronics* case para 14.

¹¹⁷ See *Dr JS Moroka Municipality* case para 16.

purport and objects of the Bill of Rights' as required by s 39 (2) of the Constitution.¹¹⁸

An alternative to the above wide interpretation, that is, to linking the definition of an "acceptable tender" to the requirements in section 217(1) of the *Constitution*, would be to amend the definition. An "acceptable tender" could, for example, be defined in terms that more closely reflect the definition provided for in the *UNCITRAL Model Law on Public Procurement*. As noted, the *UNCITRAL Model Law on Public Procurement* is a framework law and serves as a template for developing and reforming regulatory systems for public procurement. It has proven to be very successful and has formed the basis of procurement law in more than 30 countries across the world.¹¹⁹ The current definition in the PPPFA could hence read as follows:

1(a) subject to subparagraph (b) of this paragraph, the term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

(b) A tender may be regarded as acceptable, even if 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 or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

(c) A tender shall be rejected if it is not acceptable.

The new definition would in express terms allow procuring entities some measure of discretion when evaluating compliance with tender conditions and avoid a situation where *all* non-complying tenders must be excluded. Until such time that this amendment is effected, however, a good argument can still be made that the principles in section 217(1) of the *Constitution* should play a role when meaning is afforded to an "acceptable tender" in the PPPFA. It is submitted that the court in the *DR JS Moroka Municipality* case erred in not seeing this link. As argued above, making enquiries into the affected bidder's tax affairs would also not have "prejudiced" any other bidder. Neither would it have affected the scope, quality or performance of the contract. No changes would have been made to the risks and

¹¹⁸ *Millennium Waste Management* case para 18.

¹¹⁹ See Arrowsmith and Nicholas "UNCITRAL Model Law on Procurement" ch 1.

responsibilities under the contract and the competitive position of the bidders would have remained intact.¹²⁰

4.3 The tender invitation and the exercise of discretion

It is so that the municipality in this case did not reserve for itself discretion in the tender invitation for the evaluation of tenders. Instead, the requirement for the submission of valid and original tax clearance certificates was drafted in mandatory terms. Bearing in mind that from a legislative perspective it is only the 2001 PPPFA Regulations (and some other government documents) that specifically require the submission of an *original* tax clearance certificate,¹²¹ it would be open to procuring entities to reserve for themselves discretion in their tender invitations with respect to the level of compliance with the tender conditions that they require. They could, in other words, allow for some degree of non-compliance with tender conditions so as to avoid the consequence of not being able to consider a number of possibly promising tenders.¹²² The question as to whether or not a tender is compliant or "acceptable", and whether strict compliance is essential, would thus depend on the language used in the tender documents. A procuring entity could, for example, stipulate in its tender documents that:

... the non-submission of an original tax clearance certificate *may* result in the disqualification of a tender [emphasis added].

It is important to note, however, that any discretion reserved in the tender documents would still have to be exercised rationally and free of bias.¹²³ It should further be borne in mind that there are consequences for both the bidder and the procuring entity when a tender is rejected for non-compliance with tender conditions. If, for example, the bidder with the highest points for price and preference is excluded for non-responsiveness, ie on a strict interpretation of the definition of an "acceptable tender", the next bidder will become eligible for the

¹²⁰ For more on this, see *JFE Sapela Electronics case 722c-i*.

¹²¹ See para 3.4.1 above.

¹²² Also see Seddon *Government Contracts* 345.

¹²³ In this regard, see *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekweni Municipality, Group Five Construction (Pty) Ltd v eThekweni Municipality* 2011 ZAKZPHC 45 (24 October 2011).

award and the latter bidder's points, in particular its points for price, may differ remarkably from that of the disqualified bidder. This is precisely what happened in the *DR JS Moroka Municipality* case. The difference in price between the winning bidder and the disqualified bidder was R2 million. It is submitted that in this scenario, in particular, it would have been beneficial for the municipality to have had some measure of discretion before exercising its disqualification decision. As is clear from the facts of the case, however, there was nothing in the tender documentation that showed an intention on the part of the municipality to reserve for itself some discretion in relation to the submission of original tax clearance certificates.

4.4 Public policy considerations

The court in the *DR JS Moroka Municipality* case noted that the decision in the *SA Eagle Insurance* case cannot be relied upon in the context of the case. The court made this observation in the light of the fact that the court in the *Millennium Waste Management* case placed much reliance on this case in coming to its decision. It is submitted that it is only with respect to the public policy considerations that the reasoning of the court in the *DR JS Moroka Municipality* case is sound.

5 Conclusion

In 2008, the Supreme Court of Appeal decision in the *Millennium Waste Management* case confirmed the legal position in South Africa regarding compliance with tender conditions and the amendment of tenders before award. In essence, the court confirmed that the definition of an "acceptable tender" in the PPPFA must be construed with reference to the principles of fairness, equity, transparency, competitiveness and cost-effectiveness in section 217(1) of the *Constitution*, and when evaluating compliance with tender conditions, procuring entities should ensure that substance prevails over form. The recent decision of the Supreme Court of Appeal in the *DR JS Moroka Municipality* case, however, has moved public procurement regulation in South Africa to a point where procuring entities have very limited discretionary powers when evaluating compliance with tender conditions. They may exercise discretion when evaluating compliance with tender conditions

only if the tender conditions imposed were "immaterial, unreasonable or unconstitutional" or if they reserved for themselves discretion in the tender invitation when evaluating compliance with tender conditions. This is an unfortunate state of affairs.

It is submitted that even though it is possible for procuring entities to reserve for themselves some measure of discretion in their tender invitations when evaluating compliance with tender conditions, the definition of an "acceptable tender" in the PPPFA allows for a wide interpretation. An argument can be made that because the PPPFA aims to give effect to section 217(3) of the *Constitution*, the principles in section 217(1) in particular play a role when determining whether or not a tender is an "acceptable" one under the PPPFA. Current tax legislation further enables procuring entities to confirm the tax compliance of bidders, irrespective of whether or not they have reserved for themselves the necessary discretion in the tender invitation.¹²⁴ Procuring entities are, in other words, able to obtain confirmation from SARS to determine if a particular bidder is tax compliant, particularly in instances where a copy of a tax clearance certificate was submitted and not an original one as specified in the tender invitation. Lastly, a case can be advanced that the definition of an "acceptable tender" in the PPPFA should be amended in such a way that express provision is made for the consideration of tenders that are not strictly compliant. More specifically, the current definition could be amended to allow for minor deviations and informalities that do not materially alter or change the substance of the tender in question.

It should further be stressed that this paper is not arguing for an approach that gives the go-ahead to unsuccessful bidders to question the non-consideration or disqualification of each and every non-conforming tender. As already noted, a clear distinction should be drawn between allowing the correction of an 'obvious' mistake or omission in a tender, and allowing the amendment of a tender that results in the

¹²⁴ See s 256 of the *Tax Administration Act* 28 of 2011, which enables a person to whom a taxpayer has presented a tax clearance certificate to confirm such a person's tax compliance status with SARS.

submission of a new or significantly different tender which results in the unfair treatment of other bidders. In essence, it must be borne in mind that there is a difference between, on the one hand, non-compliance with tender specifications and other substantive requirements and, on the other hand, non-compliance with procedural formalities. It is preferable for non-compliance with procedural formalities as a rule to be dealt with in a discretionary manner. Examples here would include unsigned tenders and other prescribed forms, and the failure to submit certain certificates.

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LIST OF ABBREVIATIONS

BAC	Bid adjudication committee
BEC	Bid evaluation committee
MFMA	Local Government: Municipal Finance Management Act
PAJA	Promotion of Administrative Justice Act
PFMA	Public Finance Management Act
PPPFA	Preferential Procurement Policy Framework Act
SALJ	South African Law Journal
SARS	South African Revenue Service
SCM	Supply Chain Management
UNCITRAL	United Nations Commission on International Trade Law
US FAR	United States Federal Acquisition Regulations