REVISITING THE JURISPRUDENCE ON BID VALIDITY EXTENSIONS

INTRODUCTION

The public procurement landscape in South Africa, continues to raise numerous legal debates. The question of Bid Validity extensions surprisingly continues to preoccupy our courts despite what one thought was a settled debate on the matter since the two seminal decisions in Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and others[1] ("Telkom")and Joubert Galpin Searle Inc and Others v Road Accident Fund and Others[2] (" Joubert Galpin Searle").

What is clear from these judgements is that:

- the validity of a bid can only be extended before the expiration of the bid validity period that was specified in the bid documents;
- failure to timeously extend the bid validity results in the automatic lapsing of the entire tender process; and
- all the bidders must be invited to respond to the request to extend the bid validity.

Notwithstanding the above, the questions that have recently caused some consternations are whether in extending the bid validity, should:

- the invitation/request to extend the bid validity period be sent to all the bidders that submitted bids, or should the request exclude the bidders that have been disqualified during the course of the evaluation? and

[1] [2011] ZAGPPHC.
[2] [2014] 2 All SA 604 (ECP).

- all the bidders consent to the extension of the bid validity period? Put differently, if one or more bidders do not consent to the extension of the bid validity, does the entire tender process collapse, necessitating starting afresh?

This article interrogates these questions by analysing the import of the recent judgement of the North Gauteng High Court in Philips South Africa Commercial (Pty) Ltd v State Information Technology Agency Ltd and Others[3] ("Phillips South Africa"), on the question of whether all bidders must be requested to extend.

Lastly the article juxtaposes decision in City of Ekurhuleni v Takubiza[4] ("Takubiza") against the recent Supreme Court of Appeal judgement in Aventino Ecotropers v Gauteng Department of Roads and Transport[5] ("Aventino").

WHO MUST BE REQUESTED TO EXTEND THE BID VALIDITY?

In the light of the Telkom and Joubert Galpin Searle cases, the answer would sound as simple as saying that all the bidders that submitted their bids should be sent notices requesting them to extend their bid validity.

However, this question came up again for consideration in the recently unreported judgement of Phillips South Africa where the court pronounced as follows:

> "Based on authorities to which I have referred, in particular Wattpower and Aurecon, I have no difficulty in finding that there was no need for SITA to seek and obtain any written consent

[3] [2024] ZAGPPHC 1378

[4] 2023 (1) SA 44 SCA

[5] (1233/23) unreported

for the extension of the bid validity period from the rest of other bidders who were no longer participants in the tender process[6].

In reaching this conclusion, the court relied on amongst others, the Supreme Court of Appeal judgment of Aurecon South Africa (Pty) Ltd v Cape Town City[7] where the following was held:

> "It is unnecessary to require a 'formal' request from the tenderer in the present circumstances. Clause 140 merely requires an agreement by the affected tenderer in writing, and a decision by the chairperson before the expiration date, both of which were achieved in this case… And the complaint relating to the other tenderers has no merit whatsoever for the simple reason that they had already been found ineligible at that stage and were out of the picture."

Whilst acknowledging that the SCA in Aurecon is the one that laid the basis for the proposition espoused in Phillips South Africa, this article argues that this position:

- leads to serious practical difficulties in bid evaluation/adjudication; and
- negates some of the established legal interpretations of what constitute an administrative action for the purposes of the Promotion of Administrative Justice Act[8] ("PAJA").

Practical Difficulties in the bid evaluation/adjudication

When bidders submit their bids, organs of state in the normal cause, only communicate the outcome of their final position to the bidders once the Bid Adjudication Committee (" the BAC")

[6] Para 86.
[7] 2016(2) SA 199 SCA at para 23.
[8] Act 3 if 2000.

or relevant delegated authority has approved the recommendations of the Bid Evaluation Committee and/or the BAC.

Unless and up until the organ of state has rejected or communicated the unresponsiveness of particular bids, it is argued that all bids submitted as at the closing date, all stand on the same footing and are entitled to the same communication on the further conduct of the bid disposal process.

The following example bears testimony to the correctness of this approach:

> The BEC in its evaluation regards Bidder A as having failed a particular qualifying criterion be it mandatory stage or functionality stage. In so doing it progresses Bidders B and C to the next stage i.e evaluation for price and preference. During the price evaluation stage, it then becomes apparent that the bid validity needs to be extended.
>
> Following the <u>Aurecon</u> and <u>Phillips South Africa</u> approach, the BEC only requests Bidder B and C to extend their bid validity as Bidder A is considered to have been already disqualified. Because Bidder A was never asked to extend its bid validity, its offer lapses.
>
> The BEC recommends the appointment of Bidder C to the BAC but upon adjudication of the matter, the BAC holds the view that Bidder A was not properly disqualified and refers the matter back to the BEC for reconsideration.

In line with the authority in <u>Telkom</u> and <u>Joubert Galpin Searle</u> it will be legally impossible for the BEC to re-evaluate Bidder A's bid because at that stage there is simply no offer by Bidder A to evaluate and at this late stage, the BEC cannot even ask Bidder A to extend its bid validity period.

If one had to follow the rational of the <u>Aurecon</u> and <u>Phillips South Africa</u> judgement, the unintended consequences are that the BAC must either:

- begrudgingly accept an unmeritorious Bidder C that has been recommended by the BEC simply because Bidder A's offer has lapsed and cannot be further considered; or

- re-start the procurement process for fear of a potential litigation by Bidder A, who eventually would become aware that it was unfairly disqualified.

Any of the above options that might be chosen by the BAC will have an effect of compromising the fairness and cost effectiveness of the procurement process.

The Legal Difficulties Presented by PAJA

Other than the practical considerations as outlined above, there is a more difficult legal conundrum that arises as a result of the Aurecon and Phillips South Africa judgements. Can it truly be said that an organ of state has taken a decision as defined in PAJA if:

- the disqualification was simply a recommendation of the BEC; without

- the BAC and/or the appropriate delegated authority having finally adjudicated on the matter; and

- the organ of state concerned has not communicated the decision to the affected bidders who have been so disqualified.

If regard is had to the judicial authorities on what constitutes a "decision" which is an administrative action for the purposes of PAJA, it can hardly be said that the recommendation of the BEC to disqualify bidders for continued or further evaluation in the bid process is a decision as contemplated in PAJA. The Supreme Court of Appeal in Marine Hout Bay (Pty) Ltd v Minister of Public Works[9] held that:

> "At the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary."

Taking a cue from this authority, some of the elements that are an indication of what would constitute a decision are that:

> "A conclusion must have been reached by the authority, pursuant to the evaluative process, as to how his or her statutory or public power should be exercised in the circumstances; and
> There must have been an exercise of the statutory or public power based on the conclusion so reached."[10]

The recommendations by the BEC do not fit the above definitional requirements as they do not as yet constitute the official decisions of an organ of state.

At this early stage of the process, an organ of state has not yet formally communicated its disqualification position to the bidder because the whole procurement process has not been concluded.

Furthermore, the uncommunicated deliberations of the BEC and/or BEC do not even meet the element of "direct external legal effect" which is one of the essential components of an administrative action as contemplated in PAJA[11]. For something to have a direct effect, as De Ville argues, requires finality in the determination of rights which would exclude preliminary steps

[9] 2005 6 SA 313 (SCA) at para 22.

[10] *Bhugwan v JSE Limited 2010 (3) SA 335 (GSJ)* at para 10.

[11] See the definition of "Administrative Action" in section 1 of PAJA.

in a multi-staged decision. He further points out that external effect excludes internal administrative acts.[12]

It is for this reason that the Phillips South Africa and Aurecon approaches fail to take into account the fact that BEC and/or BAC recommendations lack the qualities of being an administrative action and also that these recommendations lack finality until the appropriate authority has accepted the recommendations and taken a final decision.

A more pragmatic and legally sound approach that will avoid all of the above conundrums, would be that all bidders must be requested to extend their bid validity until such time as the organ of state has:

- finally disposed of the tender process; or
- at the very least has officially communicated its decision to disqualify some of the bidders from the evaluation process.

If the bidders are not even aware that they have been disqualified, they can hardly be regarded as being "out of the picture" or "no longer participants in the tender process" as alluded to in Phillips South Africa.

MUST ALL THE BIDDERS CONSENT TO THE EXTENSION OF THE BID VALIDITY PERIOD TO BE VALID?

On the face of it, an obvious answer to this question would be a resounding "No", as it would not be sensible to expect all the bidders to affirmatively extend the bid validity period.

However, what was shockingly disturbing in the Takubiza judgment were the following remarks:

[12] *Judicial Review of Administrative Action in South Africa* (2005) 59.

> "To extend the tender validity period, the consent of all the participants from the tender is required. Unless there is timeous request and favourable response from all tenderers prior to the expiry of the tender, the tender comes to an end."

The far reacting import of these remarks are that every bidder:

- that submitted a bid must be notified to request the bid validity period; and
- must consent to the extension of the bid validity otherwise the entire tender process collapses.

This, has far-reaching and undesirous implications for tender processes undertaken on a daily basis by organs of state.

The Takubiza scenario presupposes that when bidders respond to an invitation by an organ of state, they do so as a collective to make a joint offer by all the bidders. Nothing could be further from the truth because as GB Bradfield[13] correctly points out:

> "When an organ of state invites bidders to submit bids, it is no more than a request to submit offers, and each tender is an offer that the employer calling for tenders may accept or reject at will."

Viewed against the above prism, it can hardly be argued that all the offers by bidders are "joined to the hip" such that if one bidder has failed to consent, for whatever reason, all the other offers on the table should lapse leading to the collapse of the entire tender process. Since the bidder's

[13] *Christie's Law of Contract in South Africa* (2016) 52.

offers are independent from one another, it means any time during the course of the bid validity period, any bidder acting independent from other bidders may:

- withdraw its offer; and/or
- at the timeous request by the organ of state, extend its offer beyond the original bid validity.

In addition, an organ of state may during the same bid validity period, reject any bid for late submission pending the final adjudication of the tender.

Any of the above options can be exercised without affecting the validity of the tender process because each bid stands on its own merit without being affected by the status of the offers from the other bidders.

If it is correct that each of the bid offers are self-standing and independently made from one another, how can it be that a failure by one bidder to agree to the extension of its own bid validity, should affect the validity of other bidders who consented to the extension?

If a bidder is not willing for whatever reason to extend the validity of its offer, such unwillingness should not collapse the tender process where other bidders have gladly agreed to extend their bid validity period. Any suggestion to the contrary, as implied in <u>Takubiza</u>, will have the unintended consequences of many tenders being collapsed at the behest of one bidder that is not willing to extend its own bid validity.

The Supreme Court of Appeal in Aventino has recently been offered an opportunity to correct the effects of <u>Takubidza</u>. The applicant in <u>Aventino</u>, relying on the <u>Takubidza dicta</u>, specifically raised a complaint that not all participating bidders had consented to the bid validity extension, accordingly the applicant argued that the tender issued by the Gauteng Department of Roads and Transport should collapse.

The stage was thus set for the court in Aventino to either overrule Takubiza or confirm its legal correctness. Unfortunately, the court in Aventino did not take the golden opportunity to overthrow or even confirm Takubiza because of the peculiar facts of that case. In this case, though all the bidders did not expressly consent to the extension of the bid validity period, the bid in question was governed by an SCM policy adopted by the Gauteng Department of Roads and Transport which provided that:

> "bidders may either accept or reject the extended validity period and those who do not wish to extend the validity period would be regarded as non-responsive and would be excluded from further assessment"

The import of the above is that, the court in Aventino did not have to worry about what happens to bidders who do not consent, since the SCM policy in casu had already predetermined the fate of such bidders and the survival of tender process if one or more of the bidders did not consent.

Despite the court making reference to Takubiza, albeit in a different context, there is no indication from the judgement as to whether the court was willing, outside of the narrow facts before it, to confront the vexed question of whether all bidders are required to consent to the extension of the bid validity period.

Is there a room to argue that even though there is no express overturning of Takubiza, the court had by implication overruled the reasoning of Takubiza?

The rationale for this argument might be that the mere fact that Aventino did not take issue with the provisions of the SCM policy that disqualified non-consenting bidders contrary to Takubiza, it means the court was alive to the fact that it is legally permissible for one set of consenting bidders to proceed with the tender process to the exclusion of the non-consenting ones. This is so because if the court strictly followed the reasoning in Takubiza, it could have easily quashed the provisions of the SCM Policy as being at odds with the legal position in Takubiza.

As attractive as the latter argument might sound, it is unsustainable because Aventino turned on the specific set of facts that was informed by a specific SCM Policy that regulated the scenario of non-consenting bidders. Until such time as the Supreme Court of Appeal is faced with another set of facts that do not make provision for the disqualification of non-consenting bidders and finally overturn Takubiza, it is submitted that we are left with the undesirable consequences of Takubiza that requires all bidders to consent to the bid validity period, failing which the entire tender process collapses.

Pending the overturn of Takubiza, it would be advisable for organs of state to at least ensure that their SCM policies provide for the survival of the tender process despite the lack of consent from other bidders.

This scenario may also be catered for in the extension letters that are issued to the bidders to request their extension of the bid validity period. The only difficulty with this scenario of covering this aspect in the extension letters, is that in most cases the extension letters do not reach all the bidders that participated in the bid process either due to incorrect addresses or administrative mishaps.

Without an SCM policy that grounds this governance framework, it will be a precarious option for an organ of state to simply rely on the contents of the extensions letters that explicitly disqualifies bidders who do not consent to the extension of the bid validity period.

CONCLUSION

Request for bid validity extensions are an integral part of the administrative processes undertaken by organs of state during the evaluation and adjudication of tenders. It also serves as a critical legal process to keep the procurement processes alive pending their finalisation.

All these processes must be undertaken in a transparent and cost-effective manner and therefore there is no need to:

- unfairly exclude bidders from extending their bid validity when such bidders have not been officially disqualified from the tender process. To do so undermines the principle of fair and equal treatment of bid participants who have a legitimate expectation of equal treatment for as long as they have not been officially excluded; and

- collapse a tender process only because some of the bidders have not consented to the bid validity period under circumstances where other bidders have timeously done so. To do so would unnecessarily hold the procurement process to ransom and compromise the cost effectiveness expected of organs of state in running a procurement process timeously and cost-efficiently.

To the extent that the decisions in Aurecon, Phillips South Africa and Takubiza are used as legal instruments to exclude disqualified bidders from extending their bid validity and requiring all bidders to consent to the extension of bid validity, such judgements have an unintended consequence of compromising the fairness, transparency and cost effectiveness of the procurement process.

Aventino proffers a glimmer of hope and light that can be properly shined by next judicial pronouncements with the right set of facts to finally correct the unintended consequences laid down in Aurecon, Phillips South Africa and Takubiza.

BIBLIOGRAPHY

Books

Bradfield GB Christie's Law of Contract in South Africa 7th edition (2016) LexisNexis

De Ville JR Judicial Review of Administrative Action in South Africa Revised First Edition (2005) LexisNexis.

Legislation

Promotion of Administrative Justice Act 3 of 2000.

Case Law

Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and others [2011] ZAGPPHC.

Joubert Galpin Searle Inc and Others v Road Accident Fund and Others [2014] 2 All SA 604 (ECP).

City of Ekurhuleni v Takubiza 2023 (1) SA 44 SCA.

Aventino Ecotropers v Gauteng Department of Roads and Transport (1233/23) unreported.

Philips South Africa Commercial (Pty) Ltd v State Information Technology Agency Ltd and Others [2024] ZAGPPHC 1378

Aurecon South Africa (Pty) Ltd v Cape Town City 2016 (2) SA 199 SCA.

Marine Hout Bay (Pty) Ltd v Minister of Public Work 2005 6 SA 313 (SCA).

Bhugwan v JSE Limited (08/32943) 2010 (3) SA 335 (GSJ).