

REVISITING THE JURISPRUDENCE ON BID VALIDITY EXTENSIONS

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ABSTRACT

Is it obligatory for South African organs of state to request the extension of a bid validity period to all bidders that have responded to a bid? Or can an organ of state exclude from this request, bidders who have already been disqualified during the preliminary stages of the bid evaluation and adjudication process? This article critically analyses the recent judgements in South Africa on the matter and argues that it is both practically and legally inappropriate to exclude bidders who have been disqualified but are yet to be officially informed. To do so, would have the unintended consequences of compromising the fairness and cost-effectiveness of the tender process. The fact that the disqualification has not been approved by the appropriate delegated authority and communicated to the bidder(s) begs the question whether in such circumstances, the disqualification constitutes a "decision" and is thus an administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000. The article further questions whether is it mandatory for all the bidders to consent to the extension of the bid validity period? Or does it suffice if some of the bidders consent whilst others do not? It is argued that requiring all bidders to consent so as to keep the bid validity alive, unreasonably presupposes that participants in a tender process are "joint bidders" whose individual offers must lapse if one of the "joint bidders" does not consent to the bid validity extension.

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1 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 would have 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 judgments is that:

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

Notwithstanding, questions that recently caused consternation 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?
- all the bidders consent to the extension of the bid validity period? Put differently, if one or more bidders do not consent to

¹ [2011] ZAGPPHC 1.

² 2014 (2) All SA 604 (ECP).

the extension of the bid validity, does the entire tender process collapse, necessitating that it starts afresh?

This article interrogates these questions by analysing the importance of the recent judgment of the North Gauteng High Court in *Philips South Africa Commercial (Pty) Ltd v State Information Technology Agency Ltd and Others*³ ("*Philips South Africa*") on the question of whether all bidders must be requested to extend their bid validity periods. The article, furthermore, juxtaposes the decision in *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others*⁴ ("*Takubiza*") against the recent Supreme Court of Appeal judgment in *Aventino Ecotroopers Joint Venture and Others v MEC for the Department of Roads and Transport, Gauteng Province and Others*⁵ ("*Aventino*") as to whether all bidders must consent to an extension of the bid validity period, also those who were disqualified earlier on in the process.

2 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 again came up for consideration in the recent judgement of *Philips 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 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 ("SCA") judgment in *Aurecon South Africa (Pty) Ltd v Cape Town City* 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*

³ [2024] ZAGPPHC 1378.

⁴ 2023 (1) SA 44 (SCA).

⁵ 2025 (4) SA 419 (SCA).

⁶ [2024] ZAGPPHC 1378 para 86 (own emphasis).

*whatsoever for the simple reason that they had already been found ineligible at that stage and were out of the picture."*⁷

Whilst acknowledging that the SCA in *Aurecon* is the one that laid the basis for the proposition espoused in *Philips 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 constitutes an administrative action for the purposes of the Promotion of Administrative Justice Act⁸ ("PAJA").

Each of the above points will be discussed below in more detail.

2.1 Practical difficulties in the evaluation/adjudication

When bidders submit their bids, organs of state, in the normal course of things, only communicate the outcome of their final position to the bidders once the Bid Adjudication Committee ("the BAC") or relevant delegated authority has approved the recommendations of the Bid Evaluation Committee ("the BEC") and/or the BAC.

Unless and up until the organ of state has rejected or communicated the disqualification of particular bids, it is argued that all bids submitted as at the closing date 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 in the mandatory stage or functionality stage. In so doing, it progresses Bidders B and C to the next evaluation stage for price and preference. During the price evaluation stage, it becomes apparent that the bid validity period needs to be extended. Following the *Aurecon* and *Philips South Africa* approach, the BEC only requests Bidders B and C to extend their bid validity as Bidder A is considered to have been disqualified already. Because Bidder A was never asked to extend its bid validity, its offer lapsed. 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.

⁷ 2016 (2) SA 199 (SCA) para 23 (own emphasis).

⁸ Act 3 of 2000.

In line with the authority in *Telkom* and *Joubert Galpin Searle* 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 in this late stage, the BEC cannot even ask Bidder A to extend its bid validity period.

The result of all of this is that the BAC's hand will be forced to either begrudgingly accept an unmeritorious Bidder C simply because Bidder A's offer has lapsed or to re-start the procurement process for fear of potential litigation by Bidder A, who eventually would become aware that it was unfairly disqualified. Either of the options available to the BAC has the effect of compromising the fairness and cost effectiveness of the procurement process.

2.2 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 *Philips South Africa* judgments. Can it truly be said that an organ of state has taken a decision as defined in PAJA if:

- the disqualification was simply the views and recommendations 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 to be 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. For something to qualify as a decision, the SCA in *Marine Hout Bay (Pty) Ltd v Minister of Public Works* 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."⁹

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

"4. A conclusion must have been reached by the authority, pursuant to the evaluative process, as to how his or her

⁹ 2005 (6) SA 313 (SCA) para 22.

statutory or public power should be exercised in the circumstances; and

5. There must have been an exercise of the statutory or public power based on the conclusion so reached."¹⁰

The recommendations by the BEC in the above example do not fit the above definitional requirements as they do not as yet constitute the official decision 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, it requires finality in the determination of rights, which would exclude preliminary steps in a multi-staged decision. He further points out that external effect would exclude internal administrative acts.¹²

It is for this reason that the *Philips South Africa* and *Aurecon* approaches fail to take into account the non-administrative action nature, and lack of finality, of the BEC and/or the BAC disqualification during an ongoing evaluation process.

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 so-called "out of the picture" or "no longer participants in the tender process".¹³

3 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.

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

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

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

¹³ In the words of the *Aurecon* (para 23) and *Philips South Africa* (para 86) judgments respectively.

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

*"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."*¹⁴

The extensive import of these remarks is 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 Bradfield¹⁵ 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 so-called "joined to the hip" such that if one bidder has failed to consent, for whatever reason, all the offers on the table should lapse leading to the collapse of the entire tender process. Since the bidders' offers are independent from one another, it means that any time during the course of the bid validity period, any bidder acting independent from other bidder may:

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

¹⁴ Para 13 (own emphasis).

¹⁵ Bradfield 2016:52.

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 entire tender process where other bidders have gladly agreed to extend their bid validity period. Any suggestion to the contrary, as implied in *Takubiza*, will have the unintended consequence of many tenders being collapsed at the behest of one bidder that is not willing to extend its own bid validity.

The SCA in *Aventino* has recently been offered another opportunity to pronounce on the question whether all bidders must consent to the extension of the bid validity period. The applicant in *Aventino*, relying on the *Takubiza dictum*, specifically raised a complaint that not all participating bidders had consented to the bid validity extension, accordingly 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 did not take the golden opportunity to challenge or overthrow, or even confirm, *Takubiza* because of the peculiar facts of *Aventino*. 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.*"¹⁶

The significance of the above is that the court in *Aventino* did not have to worry about what happens to bidders who do not consent, because the SCM policy *in casu* had already predetermined the fate of such bidders

¹⁶ Para 4.14 of the SCM policy as quoted in para 11 of the *Aventino* judgment (own emphasis).

and the survival of the tender process if one or more of the bidders did not consent.

Despite the court making reference to *Takubiza*,¹ albeit in a different context, there is no indication from the judgment 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.

Can it be argued that even though there is no express overturning of *Takubiza*, the court had by implication overruled the reasoning of *Takubiza*? The rationale for such an argument might be the mere fact that *Aventino* did not take issue with the provisions of the SCM policy that disqualified non-consenting bidders, which is contrary to what was held in *Takubiza*. The court was aware that on the facts it was legally permissible for one set of consenting bidders to proceed with the tender process to the exclusion of the non-consenting ones. If the court strictly followed the reasoning in *Takubiza*,¹ 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 SCA is faced with another set of facts that do not make provision for the disqualification of non-consenting bidders, and finally overturn *Takubiza*,¹ 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*,¹ 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 bidders to request their extension of the bid validity period. The only difficulty with a scenario that covers 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 an extensions letter that explicitly disqualifies bidders who do not consent to the extension of the bid validity period.

4 Conclusion

Requests 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 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
- to 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*, *Philips South Africa* and *Takubiza* are used to exclude disqualified bidders from extending their bid validity and to require that all bidders must consent to the extension of bid validity, these judgments have the unintended consequence of compromising the fairness, transparency and cost effectiveness of the procurement process.

Aventino proffers a glimmer of hope and light that will only properly shine if the right set of facts was to present itself for future judicial pronouncement to finally correct the unintended consequences of *Aurecon*, *Philips South Africa* and *Takubiza*.

Bibliography

Books

Bradfield, G.B. 2016. *Christie's Law of Contract in South Africa* 7th ed. Durban: LexisNexis.

De Ville, J.R. 2005. *Judicial Review of Administrative Action in South Africa* Revised 1st ed. Durban: LexisNexis.

Legislation

Promotion of Administrative Justice Act 3 of 2000.

Case Law

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

Aventino Ecotroopers Joint Venture and Others v MEC for the Department of Roads and Transport, Gauteng Province and Others 2025 (4) SA 419 (SCA).

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

City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others 2023 (1) SA 44 (SCA).

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

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

Philips South Africa Commercial (Pty) Ltd v State Information Technology Agency Ltd and Others [2024] ZAGPPHC 1378 (10 December 2024).

Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and others [2011] ZAGPPHC (7 January 2011).