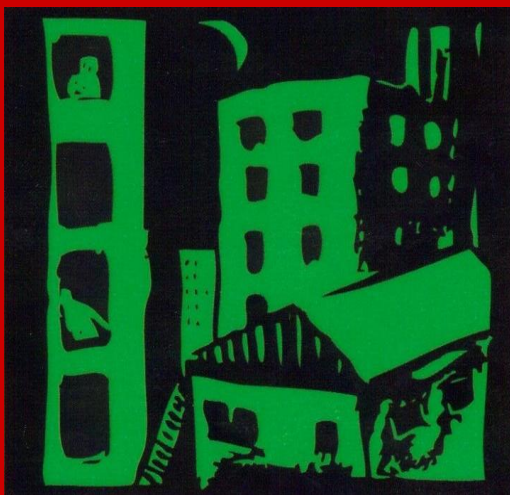
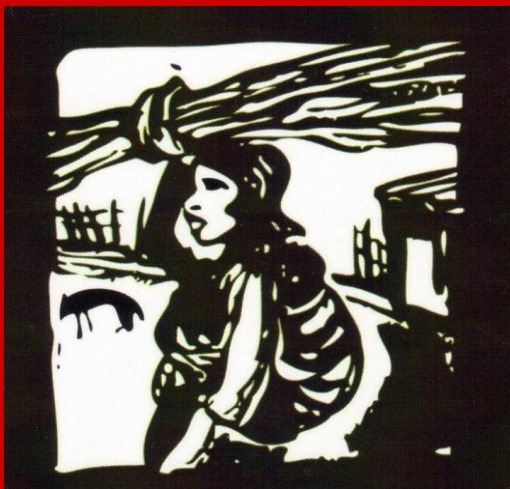


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## The extension of public tender validity periods

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### ABSTRACT

*This article examines the legal position surrounding tender validity periods in South African public procurement law. It traces the evolution of jurisprudence on this issue from early High Court judgments to recent Supreme Court of Appeal decisions. The article highlights the established principle that a procurement process ends when the tender validity period lapses without extension or award. It explores the requirements for a valid extension, including the timing of requests and the necessity of bidder consent. The article critically analyses conflicting interpretations in recent case law, particularly regarding which bidders must consent to an extension. It argues that the approach taken in the Aurecon case (where only bidders still under consideration need to be involved in the extension process) is the most logical and one most aligned with constitutional principles. The article proposes a comprehensive rule for handling tender validity periods, emphasising the obligation of organs of state to act proactively as expiration approaches. It concludes that a procurement process should be able to continue if at least one qualifying bidder extends their tender validity period, thereby balancing the*

*constitutional principles of competitiveness and cost-effectiveness in public procurement.*

**Keywords:** tender validity periods; public procurement; review of tender awards

## 1 INTRODUCTION

The relatively simple question of what happens when a tender validity period in a public procurement process lapses without the tender being awarded has proven to be particularly difficult to answer in South African law.

When an organ of state invites tenders for the acquisition of goods or services from private suppliers, the tender invitation routinely includes a prescribed period of time during which the bid must remain valid (that is, open for acceptance). That is referred to as the tender validity period, or bid validity period, and typically runs for a set number of days from the date of the close of tenders (that is, the deadline for submitting bids). It is effectively the period during which the organ of state can adjudicate the submitted bids and award the tender. During this period, bidders<sup>1</sup> are bound to the terms of their bids, notably the price stated in their tenders.

However, it has become fairly common for organs of state to run out of time during the evaluation and adjudication of tenders.<sup>2</sup> The end of the tender validity period often approaches without the organ of state having completed the prescribed procurement processes. The result is that the organ of state is not in a position to award the tender before the end of the tender validity period. The question then arises: What should the organ of state do?

Even though South African courts, including the Supreme Court of Appeal (SCA), have grappled with this question for well over a decade now, a clear answer remains elusive. In this contribution, I analyse the case law dealing with tender validity periods with a focus on the possibility of extending the validity period. I note that recent pronouncements by the SCA have caused unfortunate uncertainty in this area and merit reconsideration.<sup>3</sup>

## 2 EARLY HIGH COURT JUDGMENTS

Two High Court judgments have long defined the basic understanding of tender validity periods in South African public procurement law. These are the judgments in *Telkom SA*

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<sup>1</sup> The terms “bidders” and “tenderers” are used interchangeably.

<sup>2</sup> A distinction is typically drawn between the evaluation and adjudication phases of a tender process, depending on the exact nature of the procurement procedure. From the perspective of the bid validity period, such a distinction makes no difference and is thus irrelevant in how the law treats validity periods. In this article, the entire period during which the contracting authority considers the bids received and arrives at a final decision to award or not award the contract, is generally referred to as adjudication. In all instances, it is the accounting officer or accounting authority that holds the original power to take the award decision. See Public Finance Management Act 1 of 1999, sections 38(1) and 51(1); Local Government: Municipal Finance Management Act 56 of 2003, section 115.

<sup>3</sup> The legal treatment of tender validity periods is currently premised on case law since there is no statutory provision governing this aspect of public procurement. It is noteworthy that the Public Procurement Act 28 of 2024, which is not yet in operation, requires the Minister of Finance to make regulations under the Act pertaining to tender validity periods, albeit that no such regulations have been published to date.

*Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited*<sup>4</sup> and *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*.<sup>5</sup> The third judgment has become the classic case on the effect of the lapse of a tender validity period.

### 2.1 The *Merid Training* case

In *Telkom v Merid Training*, the invitation to submit bids included a tender validity period of 120 days from the closing date. When the validity period lapsed on 12 April 2008, the organ of state had narrowed down the bids received to 15 but had not yet awarded the tender. On 24 June 2008, the organ of state requested the 15 shortlisted bidders to extend their tender validity periods to 12 August 2008. Several bidders agreed to the extension.<sup>6</sup> The organ of state proceeded with the adjudication of the bids, and on 14 November 2008 finally decided to award tenders to six bidders. In the ensuing litigation, the main question was whether the organ of state could proceed to take an award decision after the tender validity period had lapsed. In the court's words: "The principal issue raised in this case is the legal consequence of a failure by a public body to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received."<sup>7</sup>

The court held that such a step would be contrary to section 217 of the Constitution of the Republic of South Africa, 1996 (Constitution).<sup>8</sup> In the court's view, the tender process came to an end when the validity period for the tenders expired without any tender being awarded. If the organ of state continued to engage with the bidders after that date, it would not be acting within a valid tender process; accordingly, its actions would not be transparent, equitable or competitive, and the procurement process would no longer be in compliance with section 217. The only avenue open to the contracting authority at such a point would be to call for fresh tenders. Based on this reasoning, the court remarked notably that "negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive."<sup>9</sup>

The judgment in *Telkom v Merid Training* thus clearly established the position that a procurement process comes to an end when the tender validity period lapses. However, it is not entirely clear from the judgment whether an organ of state can save the procurement process from this fate by way of an extension of the validity period or by setting the conditions for such extension. The passage from paragraph 14 in the judgment quoted above may be read to suggest that an organ of state can never extend a tender validity period by way of engagement with only some of the tenderers. On the facts of the case, however, the attempted extension of the validity period occurred *after* the original validity period had lapsed and the final award decision was taken *after* the

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<sup>4</sup> *Telkom SA Limited v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Limited* [2011] ZAGPPHC 1 (7 January 2011).

<sup>5</sup> *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* [2014] ZACPEHC 19 (25 March 2014).

<sup>6</sup> The question of whether all bidders should agree to an extension is discussed in section 6 below.

<sup>7</sup> See *Merid Training* (2011) at para 4.

<sup>8</sup> See *Merid Training* (2011) at para 14.

<sup>9</sup> *Merid Training* (2011) at para 14.

lapse of the extended validity period. On the facts, it thus seems clear that reliance on an extension of the tender validity period was simply not possible.

## 2.2 The *Joubert Galpin* case

The judgment of Plasket J in *Joubert Galpin Searle v RAF* that followed *Telkom v Merid Training* brought more clarity to the applicable legal position. In this case, the organ of state invited bids from attorneys to be placed before a panel to render litigation services to the organ of state on an ongoing basis. The invitation to bid included a tender validity period of 90 days from the closing date. The organ of state failed to complete the adjudication process before the validity period lapsed. When it subsequently realised that the validity period had lapsed, it requested all shortlisted bidders to amend their bids and extend their bid validity period to one year. The majority of shortlisted bidders agreed to this extension. The organ of state thus continued to adjudicate the bids and eventually awarded tenders to several bidders within the amended and extended tender validity period. Several disappointed bidders later challenged the organ of state's conduct in review proceedings, basing their argument on the fact that the procurement process had come to an end at the moment when the original tender validity period lapsed.

The court formulated the core issue before it as follows:

The central issues to be decided are the effect on the tender process of the expiry of the tender validity period and whether, if the expiry of the tender validity period put an end to the tender process, it could subsequently be "revived" by the RAF. In other words, the issue to be decided ultimately is this: if the expiry of the tender validity period put an end to the tender process, did the RAF have the lawful authority to "revive" it?<sup>10</sup>

Plasket J agreed with the reasoning of the court in *Telkom v Merid Training* to the effect that once the tender validity period lapses, the procurement process comes to an end. Importantly, Plasket J also held that it was not possible to extend the tender validity period *after* it had lapsed.<sup>11</sup> Unlike the court in *Telkom v Merid Training*, which based its reasoning on section 217 of the Constitution, Plasket J drew his arguments from general administrative law, and, arguably, from general contract law. The court held that once the procurement process comes to an end due to the expiry of the tender validity period, the organ of state simply has no power to request an extension. That is, the power to request an extension of the tender validity period is part and parcel of the procurement process and thus also comes to an end when the validity period expires. Any subsequent attempt to extend the validity period lacks authorisation and hence is unlawful. Framed somewhat differently, the court noted that once the tender validity period had lapsed, there were no bids left open for the organ of state to accept and hence create a contract.

Following the judgment in *Joubert Galpin Searle v RAF*, the legal position regarding tender validity periods in public procurement entailed that a tender process comes to an end when the validity period lapses without a final decision having been taken, or without the extension of the validity period. The judgment also confirmed that an extension of the tender validity period could only properly occur before the original validity period had lapsed.

<sup>10</sup> *Joubert Galpin* (2014) at para 61.

<sup>11</sup> *Joubert Galpin* (2014) at para 74.

**3 THE SCA ENTERS THE FRAY**

In 2015, the question of tender validity periods came before the SCA in the case of *Aurecon South Africa (Pty) Ltd v Cape Town City*.<sup>12</sup> In this matter, the organ of state invited tenders with a tender validity period of 60 days from the closing date. When the organ of state realised that it would not conclude the adjudication process before the expiry of the validity period, it sought to extend the validity period for a further 60 days. At this stage of the adjudication, five of the six bids received had already been eliminated for not meeting the tender criteria. The organ of state's procurement policy allowed for the extension of tender validity periods, "provided that the original validity period ... has not expired, that all tenderers are given an opportunity to extend it and that the extension is agreed to by the tenderer in writing."<sup>13</sup>

Acting in terms of this provision, the organ of state requested, in writing, the single remaining bidder to extend the tender validity period of its bid prior to the expiry of the original 60-day period. The bidder agreed (also in writing) to such an extension, also prior to the expiry of the original validity period. The tender was subsequently awarded to the bidder during the extended tender validity period.

In a subsequent application for the review of the award decision, it was argued that the tender validity period had not been validly extended and that the award was thus unlawful. The SCA rejected this argument, finding that the formal requirements for extension of the tender validity period in terms of the organ of state's procurement policy were adhered to.<sup>14</sup> Most notably, the SCA also rejected the argument that the organ of state should have requested all bidders to extend their validity period and not only the single, qualifying bidder. Writing for the court, Maya ADP stated in this regard: "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."<sup>15</sup> The SCA judgment in *Aurecon* thus in effect confirmed the legal position as determined in *Joubert Galpin Searle v RAF*.<sup>16</sup>

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<sup>12</sup> *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209 (9 December 2015).

<sup>13</sup> *Aurecon* (2015) at para 21.

<sup>14</sup> *Aurecon* (2015) at para 23.

<sup>15</sup> *Aurecon* (2015) at para 23.

<sup>16</sup> This basic legal position was followed in *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* [2015] ZAGPPHC 1 (16 January 2015); *Citiconnect Business Solutions v City Manager of the City of Tshwane Metropolitan Municipality N.O. and Others* [2015] ZAGPPHC 115 (4 March 2015); *Secureco (Pty) Ltd v eThekweni Municipality and Others* [2016] ZAKZDHC 14 (1 April 2016); *Tactical Security Services CC v eThekweni Municipality* 2017 JDR 1558 (KZD); *Defensor Electronic Security Services (Pty) Ltd v Head of Department Northern Cape Department of Health* [2017] ZANHC 24 (17 March 2017); *Raubex Construction (Pty) Ltd v Road Agency Limpopo SOC and Another* [2018] ZALMPPHC 1 (18 January 2018); *eThekweni Municipality v Mantengu Investments CC and Others* [2020] ZAKZDHC 11 (6 May 2020); *Ilex South Africa (Pty) Ltd v National Health Laboratory Service and Others* [2020] ZAGPJHC 368 (15 September 2020); *Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd and Another* [2021] ZAFSHC 315 (3 December 2021); *Wattpower Solutions CC and Another v Transnet SOC Ltd and Another* [2021] ZAKZDHC 46 (20 December 2021); *VZ Contractors CC v King Cetshwayo District Municipality and Others* [2023] ZAKZDHC 72 (9 March 2023); *Makhathini Medical Waste (Pty) Ltd and Another v MEC for Health, KwaZulu-Natal and Others* [2023] ZAKZPHC 151 (3 August 2023).

The *Aurecon* judgment also clarified a further aspect of the extension of tender validity periods: that only those bidders that can still be awarded the tender need be requested to extend their validity periods, rather than every single bidder that originally submitted a bid. In Justice Maya's words, those bidders that "were out of the picture" at the stage when extension is sought need not be asked to extend. The SCA thus interpreted the provision of the organ of state's procurement policy requiring "that all tenderers are given an opportunity to extend" as referring only to those tenderers still in the running and not all the tenderers that had ever participated.

#### 4 A SEGUE: ALLOWING A VALIDITY PERIOD TO LAPSE

An addition to the legal position pertaining to tender validity periods following *Aurecon* was made in *Defensor Electronic Security Services (Pty) Ltd v Head of Department Northern Cape Department of Health*.<sup>17</sup> This relates to the interaction between the cancellation of a tender and the allowing of a tender validity period to lapse.

In this matter, the organ of state failed to award the bid within the tender validity period, despite having made two extensions to that period. The organ of state consequently took the position that it could not award the bid since the validity period had lapsed. When the failure to award the bid was challenged in a review application, the court held that the organ of state's failure to adjudicate the tender in a timeous manner and to take a decision prior to the lapse of the validity period amounted to a cancellation of the tender.<sup>18</sup> That is, the court held that allowing a tender validity period to lapse is tantamount to cancellation. The decision to allow a tender validity period to lapse (or conversely, a failure to decide on the tender before the expiry of the validity period) can thus be challenged in the same way that a decision to cancel a tender may be challenged.

In the matter, the court held that the failure to adjudicate on the tender before the expiry of the tender validity period was unlawful and thus reviewable. The court noted in relation to the organ of state's statements that its relevant internal structures (its Bid Evaluation Committee and Bid Adjudication Committee) did not meet in time to finalise the process and that "[i]t cannot be in the interests of fair administrative action to be as nonchalant as that".<sup>19</sup> In its final conclusion, the court stated that

the HOD's failure to ensure that the committees sit and evaluate and adjudicate upon the bid within the prescribed time limits coupled with her failure to make a decision and by nonchalantly allowing the validity period to lapse was arbitrary and hence unlawful and unconstitutional.<sup>20</sup>

The implication of the *Defensor Electronic Security Services* judgment is that an organ of state has an obligation either to complete the adjudication of tenders within the tender validity period or to extend the validity period. It may not simply allow a tender validity period to lapse and walk away from the tender process without doing more. This means that when the end of the tender validity period approaches, and an organ of state is

<sup>17</sup> *Defensor Electronic Security Services (Pty) Ltd v Head of Department Northern Cape Department of Health* [2017] ZANHC 24 (17 March 2017).

<sup>18</sup> *Defensor Electronic* (2017) at paras 37–39.

<sup>19</sup> *Defensor Electronic* (2017) at para 22.

<sup>20</sup> *Defensor Electronic* (2017) at para 42.

unable to take a decision to award the tender before the end of that period, it would have to either seek the extension of the validity period or decide to cancel the tender.

### 5 THE SCA ENTERS THE FRAY A SECOND TIME

The ostensibly settled nature of procurement law relating to extension of tender validity periods was notably disturbed by the SCA's more recent judgment in *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others*.<sup>21</sup>

In this matter, the organ of state invited bids with a closing date of 11 June 2020 and a 120-day tender validity period. On the very day that the tender validity period came to an end, 9 October 2020, the organ of state sent an email to all 24 bidders that submitted bids, requesting that they extend the validity period to 31 December 2020. All bidders, except for one, agreed to the extension. Four bidders confirmed their agreement to extend the validity period after 9 October. Regardless of whether bidders agreed to the extension or not, the organ of state continued to adjudicate all the bids received. On 24 November 2020, the tender was awarded.

In a subsequent challenge of the award decision in a review application, it was argued that the award was unlawful since it was made after the tender validity period had lapsed. The organ of state argued in response that the line of cases on tender validity periods (starting with *Telkom v Merid Training*) was to be distinguished from the current matter in that the organ of state had in fact requested bidders to extend the tender validity period before the original validity period expired.<sup>22</sup>

The SCA began its analysis by confirming the basic position regarding tender validity periods: the procurement process will come to an end once the validity period has lapsed without timely extension.<sup>23</sup> The court next turned its attention to what "timely extension" means. It held that the process of extension must be complete before the lapse of the validity period if the procurement process is to be kept alive.<sup>24</sup> It is not enough for the organ of state to request an extension of the validity period from bidders prior to expiry. The organ of state must also receive the confirmation of such extension from the bidders prior to the expiry of the validity period. Before the receipt of such confirmation, there is no extension of the validity period. It follows that if the original validity period lapses in the interim, there is nothing left to extend. Thus, receipt of the confirmation of extension after the original validity period had lapsed is, according to the SCA, exactly the same as requesting an extension after the expiry of the validity period.

The court held that one of the primary reasons for this legal position is simply that a bid amounts to an offer. This can only be accepted through the awarding of the tender and the creation of a contract while the offer is still open (that is, it takes place within the validity period).<sup>25</sup> Once the validity period has lapsed, there is no longer an offer on the

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<sup>21</sup> *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others* [2022] ZASCA 82 (3 June 2022).

<sup>22</sup> *Takubiza* (2022) at para 10.

<sup>23</sup> *Takubiza* (2022) at para 11.

<sup>24</sup> *Takubiza* (2022) at para 11.

<sup>25</sup> *Takubiza* (2022) at para 12.

table to accept and a subsequent agreement to extend cannot resuscitate the lapsed offer.

Up to this point, the SCA judgment is fully in line with the earlier jurisprudence, while adding the requirement that confirmation of the extension must also be received prior to expiry of the original validity period. However, the court then (at least potentially) departed from the earlier cases. In paragraph 13, the SCA stated that “the consent of all the participants to the tender process is required. Unless there is a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end.”

This statement creates the impression that *all* bidders should be requested to extend the validity period, including those that have already been disqualified by the time extension of the validity period is sought. Furthermore, the statement creates the impression that the procurement process can proceed only if *all* the bidders consent to the extension. The SCA referred to the High Court judgment in *Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd*<sup>26</sup> in support of this finding. However, in the paragraph of the High Court judgment in *Centlec* referenced by the SCA, the High Court referred to the award of “the tender to the second respondent after expiry of the tender validity period and without a prior request for extension and approval of all *relevant* bidders”.<sup>27</sup>

The reference to “all relevant bidders”, as opposed to “all bidders”, is quite an important difference between the High Court and SCA judgments. The former implies that consent is required only from those bidders that could still win the tender, that is, those that have not already been disqualified. The latter, in contrast, may imply that consent from all bidders would be required. It is evident that this latter approach is in direct tension with Justice Maya’s pronouncement in *Aurecon* that extension of the validity period is required only from those bidders that are still under consideration, as opposed to all bidders.

## 6 REQUESTING AN EXTENSION FROM ALL OR ONLY SOME BODIES

The SCA judgment in *Takubiza Trading* has resulted in considerable uncertainty as to whether consent to extend a tender validity period must be sought from all bidders or only from some. This is evident from the slew of High Court judgments that followed in the wake of *Takubiza Trading*.

In *Aptitude Trading Enterprise (Pty) Ltd and Others v The City of Tshwane Metropolitan City and Others*,<sup>28</sup> the organ of state invited tenders with a closing date of 7 September 2021 and a bid validity period of 90 days (that is, up to 6 December 2021). On 29 November 2021, the organ of state issued a letter stating that the bid validity period would be extended to 5 March 2022. When the eventual award of the tender was

<sup>26</sup> *Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd* [2021] ZAFSHC 315 (3 December 2021). This case should not be confused with the matter in *Defensor Electronic Security Services* (2017) involving the same applicant and noted above.

<sup>27</sup> *Centlec* (2021) at para 8, emphasis added.

<sup>28</sup> *Aptitude Trading Enterprise (Pty) Ltd and Others v The City of Tshwane Metropolitan City and Others* [2022] ZAGPPHC 924 (28 November 2022).

challenged in review proceedings, there was no evidence of consent by any bidders to the extension of the validity period.

The court held that the bid validity period was not validly extended and that the award thus had to be set aside since it was made after the lapse of the original validity period, among others with reliance on the *Takubiza Trading* judgment.<sup>29</sup> In reaching this conclusion, the High Court reasoned that “consent or rejection by the bidders to the extension” was required prior to the expiry of the original tender validity period.<sup>30</sup>

The court thus ostensibly followed the approach adopted in *Takubiza Trading* that the extension process must be completed before expiry of the original validity period, including the response from the bidders. Interestingly, unlike the SCA’s statement in *Takubiza Trading* that a “favourable response from all the tenderers” is required to extend the validity period,<sup>31</sup> the court in *Aptitude Trading* took a wider view and formulated the response requirements as “consent or *rejection* by the bidders to the extension”.<sup>32</sup> The court did not elaborate on what the effect of a rejection from (some) bidders would be or whether a failure to respond at all could be construed as such a rejection.

The effect of the absence of one bidder’s participation in the extension of a tender validity period, while all others agreed to the extension, came to the fore in *Beyond Forensics (Pty) Ltd v National Commissioner, South African Police Service*.<sup>33</sup> In this matter, the request to extend the bid validity period was mistakenly sent to the wrong email address of one of the bidders. That bidder thus did not receive the request to extend and did not respond to the request to extend: in fact, the bidder was completely unaware of any such extension. In a challenge against the award of the bid, the excluded bidder argued that there was accordingly no valid extension of the validity period and that the award during the extended validity period was thus unlawful.

Interestingly, the court rejected this argument on the basis that this mistake had no influence on the adjudication. This is because the bid evaluation committee was unaware of the specific bidder’s failure to consent to the extension and evaluated its bid along with all other qualifying bids as if it had extended its bid’s validity period. The tender was nevertheless awarded to another bidder. The court thus held that the applicant “was not prejudiced in any way because of this error, as its bid was properly evaluated”.<sup>34</sup> The judgment suggests that actual consent (or even participation) from all bidders in relation to an extension of the tender validity period is not strictly required for the successful conclusion of the procurement process.

In ostensible contrast to the judgment in *Beyond Forensics*, the High Court held in *Mamayile Business Enterprise CC v MEC for the Department of Transport and Community*

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<sup>29</sup> *Aptitude Trading* (2022) at para 45.

<sup>30</sup> *Aptitude Trading* (2022) at para 33.

<sup>31</sup> *Takubiza Trading* (2022) at para 11.

<sup>32</sup> *Aptitude Trading* (2022) at para 33 (emphasis added).

<sup>33</sup> *Beyond Forensics (Pty) Ltd v National Commissioner, South African Police Service* [2024] ZAGPPHC 82 (1 February 2024).

<sup>34</sup> *Beyond Forensics* (2024) at para 24.

*Safety Limpopo Province*<sup>35</sup> that a favourable response from all bidders to a request for extension of the tender validity period is required before expiry of the original validity period in order for the procurement process to continue. In this matter, the closing date for the submission of bids was 1 September 2023 and the tender validity period, 90 days: the validity period thus expired on 30 November 2023. On 1 December 2023, the organ of state attempted to extend the validity period by way of a notice in the provincial tender bulletin and eventually awarded the tender.

In a challenge to the tender award, the court held that the failure of the organ of state to issue “a timeous request to and favourable response from all the bidders” meant that the procurement process came to an end on 30 November.<sup>36</sup> Notably, the court emphasised that the organ of state failed to show that a request for extension was sent to all 208 bidders that submitted bids. On this basis (and with reference to *Takubiza Trading*), the court invalidated the award.<sup>37</sup>

The tensions between the different judgments above were faced head-on in *Siemens (Pty) Limited v Eskom Holdings SOC Limited*.<sup>38</sup> In this matter, three bidders (Siemens, GE and Hitachi) submitted bids in response to an invitation from the organ of state (Eskom Holdings). The tender validity period was repeatedly extended until the contract was finally awarded to GE. Since Hitachi did not consent to the final request to extend the tender validity period and the award was made during this final period of extension, the central question before the court was what happens when one bidder does not consent to an extension of the validity period.

Three arguments were presented in response. Siemens argued that all bidders had to consent to the extension and that when one bidder did not consent, there could not be a valid extension. This is effectively the *Takubiza Trading* position. Eskom argued that as long as some bidders consent to the extension of the tender validity period, there is a valid extension in relation to those tenders and the process continues. The effect of the refusal of one bidder to consent to extension simply means that that bidder’s tender is no longer open for consideration. GE argued that Hitachi’s refusal to consent to the extension made no difference since Hitachi’s bid was already disqualified at the stage that extension was requested. It was therefore not necessary for the organ of state to obtain consent to the extension from Hitachi, but only from Siemens and GE, these being the only two bidders still in the running. This is effectively the *Aurecon* position, and GE relied explicitly on *Aurecon* in making this argument.

<sup>35</sup> *Mamayile Business Enterprise CC v MEC for the Department of Transport and Community Safety Limpopo Province* [2024] ZALMPPHC 32 (2 April 2024).

<sup>36</sup> *Mamayile Business* (2024) at para 40.

<sup>37</sup> *Takubiza Trading* (2022) was also followed in *Mathata General Trading CC and Others v Head of Department of Mpumalanga Department of Community Safety, Security and Liaison and Others* [2022] ZAMPBHC 49 (29 June 2022); *VZ Contractors CC v King Cetshwayo District Municipality and Others* [2023] ZAKZDHC 72 (9 March 2023); *Masakhe Media (Pty) Ltd v Mangaung Metropolitan Municipality and Others* [2023] ZAFSHC 74 (16 March 2023); *G4S Aviation Company South Africa SOC v Airports Company South Africa SOC Limited* [2023] ZAGPJHC 1494 (6 December 2023); *Fidelity Security Services (Pty) Ltd v Airports Company South Africa SOC Ltd* [2024] ZAGPJHC 561 (30 May 2024).

<sup>38</sup> *Siemens (Pty) Limited v Eskom Holdings SOC Limited* [2024] ZAGPJHC 555 (7 June 2024).

The court rejected the arguments of both Siemens and Eskom and effectively accepted GE's argument.<sup>39</sup> That is, it followed the *Aurecon* position, noting that once a bidder had been eliminated from further consideration in the adjudication process, it was no longer a "tenderer" in that process. Since the organ of state is required to obtain consent to extend the tender validity period only from "tenderers", it follows that eliminated bidders need not be asked to extend and that it does not matter whether they consent or not if asked.<sup>40</sup> Strangely, however, Unterhalter J noted in passing that "I am doubtful that *Aurecon* entrenches a principle of general application to all tenders".<sup>41</sup> The judge provided no further insight on what may inform such doubt, stating simply that "I am spared having to decide that question".

## 7 MAKING SENSE OF THE JURISPRUDENCE

It is unfortunate that *Takubiza Trading* has resulted in the level of uncertainty regarding extension of tender validity periods that is evident from the High Court judgments pronounced over the past two years. One would have thought that the question was satisfactorily settled in *Aurecon*. This legal uncertainty holds significant practical implications for how procurement officials should go about managing procurement processes. Unfortunately, this uncertainty also provides further grounds for disgruntled bidders to rush to court to have tender award decisions reviewed, something that has become all too common in South Africa.<sup>42</sup>

When one considers the different views regarding which bidders should consent to an extension of a tender validity period, it is not clear why an organ of state would need consent from those bidders that have already been disqualified to keep the procurement process alive. The organ of state has effectively already rejected the offers from those bidders (by disqualifying them), and it thus makes little difference to the continuation of the procurement process whether they keep their offers alive or not. As the court stated in *Wattpower Solutions CC v Transnet SOC Ltd*, whether disqualified bidders consent to the extension or not is immaterial in relation to the eventual procurement decision and would thus not vitiate the final decision.<sup>43</sup> At the same time, it seems impractical to allow any single bidder to determine whether the entire process

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<sup>39</sup> *Siemens* (2024) at paras 23, 28.

<sup>40</sup> *Siemens* (2024) at para 28.

<sup>41</sup> *Siemens* (2024) at para 28.

<sup>42</sup> See the remarks in *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* [2023] ZASCA 98 (14 June 2023) at paras 1–2, where Petse DP stated: "Since the advent of our constitutional democracy, the procurement of goods and services by all organs of state must now comply with certain stringent constitutional and statutory procurement prescripts. The *fons et origines* of those prescripts is s 217 of the Constitution ... This appeal is one of the multiple cases, too many to enumerate, that have served before this Court since the advent of the constitutional order ushered in by the Constitution" (footnotes omitted). More than a decade earlier, the SCA expressed the same sentiments in *Moseme Road Construction CC v King Civil Engineering CC* [2010] ZASCA 13 (15 March 2010) at para 1, where Harms DP stated: "This appeal concerns the award of a government tender. These awards often give rise to public concern – and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them."

<sup>43</sup> *Wattpower Solutions* (2021) at para 36.

is kept alive by an extension simply by refusing (or failing) to extend its own offer. Surely, a bidder may choose not to participate further in the process, that is, to withdraw, when an extension is requested, without prejudice to other bidders. The contrary view would imply that a single bidder, including one that could never win the tender, has a veto power over the continuation of the procurement process by simply refusing to consent or by failing to respond.

This risk of a veto power was recognised in *Siemens* as one of the “two types of harm” created when one of several bidders does not consent to an extension of the validity period while others do.<sup>44</sup> As the court noted, the power of a single bidder to collapse the procurement process even though the process could still be successfully concluded under an extension would be wasteful. The second type of harm when not all bidders consent to an extension lies in the loss of competition. In *Siemens*, the court noted that if only one (or very few) of the bidders agreed to an extension while others do not, the continuation of the tender process could result in an uncompetitive procurement.<sup>45</sup> For reasons that are not clearly explained, the judge considered the risk of lacking competition to be more significant and thus held that “securing the consent of all tenderers to an extension is the more compelling rule of general application to secure the competitiveness of a tender”.<sup>46</sup> As a result, the “constitutionally indicated” interpretation to be given to the provisions at issue in the case was “to keep all tenderers in the process or end the process”.<sup>47</sup>

The court provides no justification for preferring the principle of competitiveness above that of cost-effectiveness in its reasoning. Section 217(1) of the Constitution requires the procurement system to adhere to both principles. If anything, the first harm seems more compelling than the second in these scenarios. That is, to allow a single bidder to collapse a tender process and force a new process by simply refusing to consent to an extension would definitely impact adversely on cost-effectiveness. In contrast, in the court’s own words, under the second harm, the process “*could* be uncompetitive and *might* privilege the least competitive bidder”.<sup>48</sup>

The adverse impact on the constitutional principle of competitiveness thus appears to be much more tentative. This is even more evident when one keeps in mind that there is no rule in South African public procurement law requiring an organ of state to abandon a procurement process when only one tender is received in response to an invitation to bid, or when, following evaluation, only one acceptable tender remains. In these circumstances, the organ of state will indeed be obliged to complete the tender process and award the bid to the single qualifying tenderer, barring any criteria stated in the tender invitation justifying a rejection of that single bid.<sup>49</sup> One wonders why the position should necessarily be different when only one qualifying bidder remains following a request to extend the tender validity period. That is, why would the

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<sup>44</sup> *Siemens* (2024) at para 21.

<sup>45</sup> *Siemens* (2024) at para 22.

<sup>46</sup> *Siemens* (2024) at para 22.

<sup>47</sup> *Siemens* (2024) at para 22.

<sup>48</sup> *Siemens* (2024) at para 22 (emphasis added).

<sup>49</sup> *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 (26 June 2015).

procurement system adopt a different rule on competitiveness at different points in the adjudication process?

It must be kept in mind that (in the *Siemens* judgment) it later emerges that the court is referring only to bidders that can still win the tender when it refers to “tenderers”.<sup>50</sup> Its analysis of the “two types of harm” thus relates only to qualifying bidders: in the words of *Aurecon*, only those bidders that are “still in the picture”. These risks emerge when one (or more) of the qualifying bidders refuse or fail to extend the validity period of their tenders. In this regard, the suggestion in *Aptitude Trading* (that the procurement process can proceed even if a bidder rejects the request to extend while other bidders consent)<sup>51</sup> is arguably the better approach in that it seems to achieve a better balance between competitiveness and cost-effectiveness.

What also seems a more principled way of dealing with this scenario than the approach adopted in the *Beyond Forensics* case is accepting that the procurement process can proceed in relation to those bidders that have agreed to an extension of the tender validity period prior to the expiry of the original validity period regardless of other bidders who have not agreed (as the court ostensibly did in *Aptitude Trading*). Viewing the legality of the extension through the lens of the eventual outcome of the procurement process creates a multitude of problems. For example, the logic of determining the lawfulness of the continued procurement process at the moment of extension based on a future decision (the award) that hinges on that very process is questionable. That is, why should the extension be lawful if the non-consenting bidder subsequently does not win the tender, but unlawful if that same non-consenting bidder subsequently does win the tender? Surely, the extension of the tender validity period must be lawful or unlawful at the moment of extension.

Furthermore, on the *Beyond Forensics* approach, what would be the point of further adjudicating the non-consenting bidder’s tender? If that bidder is eventually found to be the preferred bidder, the award cannot be made to it and no contract can be created. This is because the non-consenting bidder’s offer (in its tender) is no longer open for acceptance (through award) after it had refused or failed to extend the validity period of its tender. The question arises of whether it would be possible for a bidder to “revive” its own offer after it had lapsed because that bidder failed to consent to the extension of the validity period even though others did.

The problematic reasoning of the *Beyond Forensics* approach illustrates the importance of adhering to the Constitutional Court’s warning against conflating procedural requirements and the substantive outcome of the procurement process. In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*,<sup>52</sup> the Constitutional Court ruled against the SCA’s “notion that even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action”.<sup>53</sup> The court explained the position as follows:

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<sup>50</sup> *Siemens* (2024) at para 28.

<sup>51</sup> *Aptitude Trading* (2022) at para 33.

<sup>52</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42 (29 November 2013).

<sup>53</sup> *Allpay* (2013) at para 23.

This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed ... Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.<sup>54</sup>

This reasoning is also apposite in the context of extensions of tender validity periods. It must be possible to determine whether the procedural step of extending a validity period was regular or irregular independent of the final outcome of the procurement process. To achieve this objective, the rule regarding extensions of tender validity periods cannot rely on who wins the tender.

## 8 CONCLUSION

The flurry of High Court judgments on tender validity periods over the past two years suggests that this area of public procurement law is not as settled as one would have thought following the SCA's *Aurecon* judgment. Some aspects of the legal position on tender validity periods in public procurement seem clear.

A public procurement process cannot validly continue after the tender validity period has expired without an extension. An award made after the expiry of the tender validity period in the absence of extension will be unlawful. The extension needs to be processed before the expiry of the tender validity period. This means that the request to extend must be communicated to bidders and that bidders must consent to such extension before the expiry of the validity period. An organ of state may not adopt a supine attitude in relation to the tender validity period, but is obliged to act when the validity period is set to run out before a final decision is taken on award. The organ of state must either act to extend the validity period or cancel the procurement process.

Beyond these fixed points, there remains some uncertainty. The main point of disagreement revolves around which bidders should consent to an extension of the tender validity period. The better approach is the one expressed by Justice Maya in *Aurecon*: only those bidders that are still in the picture when the validity period is about to expiry need to participate in the extension process in order to keep the process alive. This seems a completely logical and rational approach to adopt.

If one needs a technical explanation for adopting this position, one can look to the *Siemens* judgment and contend that only those bidders that are still in the picture can be considered "tenderers" at that point in time. If the rule is that all *tenderers* must be requested to consent to an extension, it follows accordingly that only those bidders that are still in the picture should be approached. On this reasoning, there is also no conflict between *Takubiza Trading* and *Aurecon*. When the SCA declared in *Takubiza Trading*

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<sup>54</sup> *Allpay* (2013) at paras 24, 27.

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that “all the tenderers” must be involved in the extension process,<sup>55</sup> it was referring only to bidders that are still in the picture, that is, the same group as in *Aurecon*. The rule should thus be that only qualifying bidders at the point when extension of the tender validity period is sought need to be asked to extend.

The further uncertainty resided in the question of which of these qualifying bidders must consent to an extension for the process to continue. Should each and every one of these bidders consent, or can the procurement continue if only some of the bidders (potentially only one) extend their tender validity periods while others either refuse or fail to extend before expiry of the original validity period? An optimal balance must here be found between the principles of public procurement in section 217(1) of the Constitution (especially competitiveness and cost-effectiveness) and the principles for public administration in section 195(1), especially that “efficient, economic and effective use of resources must be promoted”. The approach that achieves such balance is that the process can continue as long as some bidders, or even just one, consent timeously to extend, provided of course that the organ of state acted appropriately in seeking an extension. In this regard, the statement in *Takubiza Trading* that a “favourable response from all the tenderers”<sup>56</sup> should be received to validly extend the validity period cannot be supported.

While the *Aurecon* approach seems preferable, it also has some difficulties. One particular problem is that the accounting officer, who holds the original power to award the tender, may always take a different view on the adjudication of bids to that of the preceding bid committees. That is, even if a bid committee decided that a bidder must be disqualified, the accounting officer may disagree and decide to consider that bidder’s offer.<sup>57</sup> The question arises of what would happen if there were an extension of the validity period after the disqualification of that bidder’s bid (and whose consent was accordingly not requested) but before the accounting officer’s final consideration. As noted above, it would seem pointless to consider a bidder’s bid once it had not consented to the extension of the validity period since it would not have an open offer on the table. One way around this problem may be to differentiate between the extension of the validity period to keep the procurement process alive and the extension of an individual bid’s validity period so that it can still be accepted. For the former, only some (even one) bidder needs to consent to the extension of the validity period. For the latter, however, the specific bidder needs to extend its validity period to be able to win the tender.

Thus, one may argue that as long as at least one bidder consents to the extension of the validity period, the procurement process can continue. If, during such extended period, the accounting officer wants to award to a bidder that failed to consent, such bidder could arguably be requested to consent at such later time. The effect would be that the bidder reopens its bid, which could then be accepted through award. However, if the bidder explicitly refused to consent to the initial request to extend, it would amount to an explicit withdrawal of the offer and it would not be possible to later revive such offer.

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<sup>55</sup> *Takubiza Trading* (2022) at para 13.

<sup>56</sup> *Takubiza Trading* (2022) at para 13.

<sup>57</sup> See, for example, the Local Government: Municipal Finance Management Act 56 of 2003, section 114.

This approach seems quite messy and one can think of various permutations of the scenario that may raise even further conceptual difficulties.

In my view, the rule on tender validity periods in public procurement should accordingly be as follows:

- An organ of state is obliged to take appropriate action when the tender validity period is set to expire before the completion of the procurement process (that is, without a decision on award being taken).
- The organ of state can seek either to extend the tender validity period if the tender invitation and/or the organ of state's procurement policy provides for extension, or to cancel the procurement.
- A procurement process comes to an end if the tender validity period expires without valid extension.
- The following requirements must be met for there to be a valid extension:
  - An organ of state should request an extension of the tender validity period from all bidders that are still in the picture, that is, that have not been eliminated from consideration, at the point at which an extension is sought.
  - An organ of state should request an extension well ahead of the expiry of the tender validity period in order to give qualifying bidders adequate notice of the intended extension and a reasonable opportunity to respond.
  - Bidders that wish to continue their participation in the procurement process must communicate their consent to extend the validity period of their tenders to the organ of state prior to the expiry of the original validity period.
  - At least one qualifying bidder must extend their tender validity period.
  - Any specific procedural requirements for extension contained in the tender invitation and/or organ of state's procurement policy must be adhered to.
- The procurement process can continue if there is a valid extension despite some qualifying bidders not extending their tender validity period.
- Bidders that did not extend their tender validity period prior to the expiry of the original validity period are eliminated from further consideration on that basis.

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