
DISQUALIFICATION FOR NON-COMPLIANCE WITH PUBLIC TENDER CONDITIONS**P Bolton*****SUMMARY**

When government entities procure goods or services, they generally consider and award contracts only to bidders who complied with the specifications and conditions of tender as laid down in the tender invitation. Tenders received must in other words be conforming, compliant or responsive. This enables procuring entities to compare tenders on an equal footing and ensures equal treatment amongst bidders.

In South Africa the extent to which bidders must comply with tender specifications and conditions is a thorny issue in practice. In 2008 the Supreme Court of Appeal in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* confirmed the views of the courts in South Africa regarding compliance with tender conditions and the amendment of tenders before award. The recent 2013 decision of the Supreme Court of Appeal in *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality*, however, has moved public procurement regulation in South Africa to a point where procuring entities have very limited discretionary powers when evaluating compliance with tender specifications and conditions.

This paper argues for an approach that allows procuring entities in South Africa more discretion when evaluating compliance with tender specifications and conditions. In doing so, reliance is placed on the treatment of "responsiveness" in international instruments as well as the views of the South African courts since first they were confronted with the issue.

KEYWORDS: Acquisition; disqualification; exclusion; goods and services; government; procurement; public specifications; tenders.

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