REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE : YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

_____ _____
DATE SIGNATURE

CASE NO: 2014/35650

In the matter between:

WESTINGHOUSE ELECTRIC BELGIUM **Applicant**

and

ESKOM HOLDINGS **First Respondent**

and

AREVA NP INCORPORATED IN FRANCE **Second Respondent**

JUDGMENT

CARELSE J:

[1] On 27 March 2015 I gave my order in this matter and told the parties that my reasons would follow within 10 days of the order. These are my reasons:

Introduction

[2] In 2010 the First Respondent Eskom ("Eskom") knew that it would have to replace six steam generators that power its Koeberg nuclear power station. Effect was given to this need in June 2012 when Eskom called for expressions of interest in a tender process to replace the generators. Applicant ("Westinghouse") and Second Respondent ("Areva") submitted tenders. Eskom had to decide on 12 August 2014 whether to award the contract to Westinghouse or Areva. It decided to award the contract worth approximately R 5 billion to Areva. Dissatisfied with the decision Westinghouse has brought this review by way of an urgent application in which it attacks the tender process and seeks an order setting aside the award to Areva and in the event of this order being granted, that the tender be awarded to it.

Background Facts

[3] The replacement generators can only be installed during a scheduled shut down in the course of routine maintenance that is held every eighteen months. A non-negotiable requirement of the tender was that Westinghouse and Areva be able to meet the 2018 shutdowns (referred to as the X23 deadline).

[4] The tender initially was divided into three lots. Lot 1 was for the manufacture and delivery of the replacement generators. Lot 2 was for the installation of the generators and associated tasks. Lot 3 was for the engineering and safety analyses following the replacements.

[5] Eskom's final decision as to who would get the contract would be made by its Board Tender Committee ("BTC") whose members are mainly non-executive directors with limited nuclear experience. The initial evaluation of the tenders was referred to an in house technical committee sometimes referred to as the Koeberg team.

[6] The technical committee scored the tenders based on criteria identified in the tender documents. Westinghouse obtained the highest scores for Lot 1 and Lot 3. This included price. The technical committee recommended that Westinghouse be awarded the contract for these Lots. With reference to Lot 2 it recommended that the

tender be awarded to Areva. These recommendations were then considered by Eskom's Executive Procurement Sub Committee ("Excops"), a subcommittee of the BTC. On 14 January 2013 Excops accepted the technical committee's findings and recommended to the BTC that it act in terms thereof. At a BTC meeting held on 6 February 2013, the BTC decided that it did not have the technical expertise to decide between Westinghouse's and Areva's tender, both of whom had the technical expertise to perform the contract work. The BTC accordingly decided to obtain the advice of an independent technical expert.

[7] Effect was given to this decision in March 2013 when the BTC appointed AF Consult ("AFC") to assist it in evaluating the tenders. AFC'S terms of reference, which were wide *inter alia* included assessing the need for the replacement of the steam generators, a reconsideration of the technical specifications in the tender process, and a reconsideration of the evaluation process that involved the exclusion of certain options.

[8] On 12 August 2013 the BTC considered AFC's report. This report confirmed that both Westinghouse and Areva were technically able to perform the contract. AFC went on to recommend that:

1. options that had been excluded by Eskom's technical committee should be re-evaluated. Of particular importance is that this included the re consideration of Shanghai Electric Nuclear Power Equipment Company

("SENPEC") as a subcontractor to Areva, whose use had been rejected by the technical committee.

2. instead of awarding the contract in separate lots consideration should be given to making a single award to either Westinghouse or Areva.

3. the method of evaluation be reconsidered. This included the introduction of "strategic criteria" for example: "Eskom's experience with past projects with the proposed suppliers; Building relations with countries that may provide services (equipment, expertise, financial support) for new nuclear build" and that bidders should be given an opportunity to improve their Supplier Development & Localisation (SD&L) benefits." [1]

[9] After referring the report to the technical committee for comment, the BTC decided at a meeting held on 24 October 2013 to act on the AFC report. It *inter alia* decided that the technical bids should be reopened; that Westinghouse and Areva should give an indicative composite price for all the work and that they should indicate any additional value in terms of SD & L. In clarification of this decision the BTC stated that existing bids would stand and that excluded options would be evaluated. Pursuant to this decision and on 13 December 2013 Eskom requested Westinghouse and Areva to submit a composite offer.

[10] Westinghouse and Areva submitted composite offers. Over the period 12 February 2014 to 19 May 2014, there were many meetings of various bodies within Eskom that attempted to reach a consensus on the issues raised by AFC. The

[1] Record page 329 : AFC report

technical committee, Excops and a subcommittee of Eskom's executive committee called the Exco Task Team ("Exco TT) were the bodies involved. No consensus appears to have been reached. On 2 June 2014 after due consideration the BTC decided to press ahead with the award of a composite contract. It also decided to appoint a team that would hold parallel negotiations with Westinghouse and Areva but not conclude a contract with either on the basis that when all tenders have been evaluated 'there is no tender/offer which stands as the most advantageous in terms of the evaluation criteria detailed in the enquiry/ tender documentation'[2]. Time wise the BTC required that the negotiations be concluded so as not to delay Eskom's readiness for the 2018 outage and enable it to adhere to the Outage 23 Project Schedule.[3]

[11] On 13 June 2014 Westinghouse and Areva were invited to participate in negotiations with Eskom's team. Eskom had appointed Mr Koenig as an independent external negotiator of considerable experience to facilitate the process. The process was overseen by independent professional auditors and consultants, namely Sekela Xabiso and Pegasus. Negotiations took place over the period 24 June - 4 July 2014.

[12] On 11 July 2014 Westinghouse and Areva submitted their final offers. Eskom then required an unconditional acceptance of its key commercial terms by 22 July 2014. On 22 July 2014 Areva submitted a schedule indicating a three month float (buffer period), i.e. it would meet the schedule deadline, 3 months ahead of time.

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[2] Supply Chain Management (SCM) page 260 para 3.8.12.2
[3] Van Hulle (founding) page 9 para 13; page24 para 65

[13] The entire tender process was vetted by independent consultants who have confirmed that the tender process was fair, transparent, unbiased, competitive and free of any conflicts.[4] There is nothing to suggest that any stage during the process Areva or Westinghouse were unhappy with the process or that they did not understand the requirements of the bid, in particular the parallel negotiations.

[14] Over the period 19 July 2014 to 7 August 2014, various bodies within Eskom considered the merits of the two offers. On 12 August 2014, the BTC held a meeting. By way of a secret ballot it decided that the contract would be awarded to Areva. Its reasons are set out in a letter to the Minister dated 13 August 2014 in which the following is said:

14.1 On 13 August 2014 the BTC wrote to the Minister saying that:

> 'The Board's overall objective was to secure the Steam Generators required by Eskom in the most efficient and effective manner at the optimal value for Eskom.
>
> Having due consideration of all the facts presented to the BTC, it became apparent that the management of Eskom's risk was the primary driver of decisions to be made. Key considerations then became certainty on the ability of the preferred supplier to manage adherence to the critical path of Eskom's project schedule and the ability to offer benefits for South Africa to meet its strategic supplier development and localization imperatives....

[4] record page 572 para 41

Based on the information evaluated by the BTC, it is hereby confirmed that the results of the negotiations are within the ambit of the approved mandate and that both suppliers have demonstrated compliance to Eskom's technical, commercial and SD&L requirements.

In arriving at its decision, the BTC considered inter alia the following:

- both bidders are technically capable of performing the composite scope of work required for the SGR project;
- both bidders have submitted comparable bids;
- both bidders have submitted SD&L offers that meet the targets set by Eskom; ...

Notwithstanding the fact that Westinghouse has emerged as the lowest bidder with an NPV price difference of 0.99% (equivalent to R 36 808 992) the following strategic considerations were made by the BTC:

- Areva (then Framatome) was involved as the nuclear constructor as part of a consortium and became the OEM for the plant since the start of operations in 1985;
- while the original design for plants of this age is owned by Westinghouse , Areva is the original equipment manufacturer (OEM) for Koeberg and on-going support from it throughout the life of the plant would be beneficial to safe reliable operations;
- Areva was the main engineering organisation and therefore has the in depth information on the design and safety assumptions. These factors are relevant considerations for keeping the plant safe through technical problems and plant upgrade

- over the last 15 or so years, Areva generally demonstrated better control over sub- suppliers and had a stronger overall "branding control". In other words , sub-suppliers generally acted in the Areva image and/or the Areva overall quality control process ensured quality of supply ;
- Areva has, or has contracts , for approximately 36 SGR projects between 2005 and 2018, including 9 SGR projects planned between 2015 and 2018, while Westinghouse in the same period (2005 to 2018) has had 2 as prime contractor;
- Areva has offered to grant Eskom its intellectual property rights in respect of the nuclear power station equipment; and
- In addition to the Supplier Development and Localisation (SD&L) offer that both bidders made to Eskom, Areva offered during the negotiations to exchange some training activities with a study on the feasibility to manufacture nuclear valves in South Africa. This represents potential major benefit in terms of localization and job creation in the short to medium term. Valves have been designated by the Department of Trade and Industry ("DTI") as a commodity for localization.

After consideration of the submissions received from the bidders, and upon applying its mind to the competing bids, the BTC took the decision to appoint the preferred bidder using a secret ballot. All five voting members of the BTC were present and all cast their vote. This was done in order to ensure that BTC members were present and all cast their votes. This was done in order to ensure that BTC members were able to exercise their selection independently and to safeguard the integrity of the process...

> Having regard to the above, the BTC resolved that Areva be appointed as the preferred bidder in the replacement of Steam Generators for Unit 1 and Unit 2 Koeberg Nuclear Power Station..." [5]

[15] On 15 August 2014 Areva was told that its bid had been accepted. On 5 September 2014 following a failed interdict application Westinghouse brought this review application. The application was launched on an urgent basis without seeking the record or reasons in terms of Rule 53 of the Uniform Rules of Court.

[16] Before I deal with the merits of this review I need to decide two issues raised by Areva. They are; an application in terms of R6 (11) of the Uniform Rules of Court and a challenge by Areva to the *locus standi* of Westinghouse. Both applications are opposed by Westinghouse. Eskom abides the decision of this court. At the hearing of this application it was agreed that these issues would be dealt with in the course of Westinghouse's and Areva's main argument and not as points *in limine.*

THE APPLICATION IN TERMS OF RULE 6 (11) OF THE UNIFORM RULES OF COURT

Background Facts

[5] LVH 31 record page 485.

[17] In its founding affidavit in this application Westinghouse reserved the right to file a supplementary affidavit dealing with confidential documents. Areva informed Westinghouse that it would not file its answering affidavit until Westinghouse had fully supplemented its founding affidavit.

[18] On 24 October 2014 Westinghouse advised Areva that it would not file a supplementary affidavit. In its answering affidavit Areva stated that if any new matter was included in Westinghouse's replying affidavit, it reserved the right to reply. The replying affidavit contains new matter that is dealt with in the further affidavit. When I read the record I saw that Areva had not filed a further affidavit. Because I wanted to avoid the possibility of a delay in the hearing of this application I caused a letter to be written to Areva in which it was asked whether it intended to file a further affidavit. On 29 January 2015 and in response to my letter, Areva served an unsigned further affidavit. On 3 February 2015 the signed affidavit was served.

[19] Westinghouse's main ground of objection was the delay in filing the affidavit. Areva's explanation for the delay was to blame its attorney, who forgot to file the affidavit timeously. This is not a case in which the sins of the legal advisor should be visited on the client[6]. Similarly this is not a case in which the delay has caused inherent prejudice to the administration of justice. Westinghouse's counsel could not show any prejudice to Westinghouse if I admitted the affidavit. In the exercise of my discretion leave to file the further affidavit is granted.

[6] See Saloojee & ANO v Minister of Community Development 1965 (2) SA 135 A at page 141(C-E)

[20] As part of its rule 6(11) application, Areva sought to rely on YMP17 a document attached to its Heads of Argument. In Minister of Land Affairs and Agriculture and Others v D& F Wevell Trust and Others[7] the Court held:

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts."

[21] YMP17 is not incorporated into any affidavit. The application to admit it in argument is refused.

Westinghouse's *Locus Standi*

[22] An unsuccessful tenderer clearly has *locus standi* to challenge a tender award. The issue I am required to determine is whether Westinghouse is indeed the unsuccessful bidder. Areva's case is that Westinghouse USA and not Westinghouse itself is the true tendering party and accordingly Westinghouse lacks the necessary *locus standi* to pursue the review.

[7] 2008 (2) SA 184 (SCA) at page 199 para 43

The relevant legal principles

[23] It is common cause that consideration of a tender constitutes administrative action both in terms of Section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") .

[24] It is settled law that when considering administrative actions in this context a more generous approach to standing must be applied. [8] In Ferreira v Levin [9] the Constitutional Court held that in constitutional cases, there was "no good reason for adopting a narrow approach to the issue of standing". In Giant Concerts CC v Rinaldo Investments Pty Ltd and others[10], the Constitutional Court said that in the Ferreira case it had been:

> "held that own- interest standing does not require that a litigant must be the person whose constitutional right has been infringed or threatened: 'What the section requires is that the person concerned should make the challenge in his or her own interest.'" (my underlining)

[25] In Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others, the Constitutional Court [11] identified the following principles :

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[8] Kruger v President of the Republic of South Africa 2009 (1) SA 417 (CC) at para 21-23.
[9] NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1
[10] [2012] ZACC 28; 2013 (3) BCLR 251 (CC)
[11] Giant Concerts CC (*supra*) page 264 para 41

"(a) To establish own- interest standing under the constitution a litigant need not show the same "sufficient , personal and direct interest' that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, be real and not hypothetical or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed."

[26] Areva's main attack on Westinghouse's *locus standi* was based on the letter YMP17 that I have found to be inadmissible in these proceedings. In argument

Areva's counsel referred to other passages in the record that suggest that Westinghouse may not have *locus standi*. I do not intend to deal with these passages as they do not affect the conclusion to which I have come to.

[27] The following facts are not disputed by Areva:

a) Westinghouse submitted a bid pursuant to the abortive 2010 process. In June 2012 Westinghouse responded to an invitation for expressions of interest in a fresh process. Westinghouse submitted a tender pursuant to the new process which commenced in 2012.

b) Only Westinghouse and Areva were invited to submit bids for the consolidated work in December 2013. The combined bid was sent from Westinghouse on Westinghouse's letterhead.

c) Eskom resolved to negotiate with Westinghouse between 24 June and 2 July 2014. After the negotiations clarifications were sent to Eskom by Westinghouse.

d) Eskom has not disputed Westinghouse's standing, or suggested that it believed that it was dealing with Westinghouse USA. This is demonstrated by the report of Eskom's EXCOPS of 7 August 2014, which noted that its "recommendation would be for Westinghouse Electric Belgium SA" (i.e the applicant) to be awarded the tendered work.

e) Eskom's letter to the Minister of Public Enterprises, dated 12 August 2014, makes it clear that Eskom was dealing with Westinghouse.

f) On 15 August 2014, Eskom sent a letter of regret to Westinghouse, advising it that it had been unsuccessful. On 16 August 2014,

Westinghouse sought access to documents justifying the decision rejecting its bid.

g) The interim proceedings were brought based on evidence presented by Mr. Frederick Wolvaardt, an employee of Westinghouse and the managing director of a locally registered entity; and Prof. Itumeleng Mosala, who is employed by Westinghouse as a consultant.

h) In the current proceedings the affidavits were deposed to by Mr.Van Hulle, who is based in Belgium and employed by Westinghouse (and has been employed by it since 1980). He has been very involved throughout the tender process.

[28] Considered together these facts read with the principles set out in the Giant Concerts decision, sufficiently establishes Westinghouse's *locus standi.* Areva's attack on Westinghouse's *locus standi* is dismissed.

THE REVIEW

The Law

[29] Before dealing with the merits of the review I will set out the legislative framework and the case law that has guided my decision.

[30] Procurement policy falls squarely within the Constitutional framework of section 217 of the Constitution of South Africa 1996. The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is founded upon the constitutional right to administrative action, which is lawful, reasonable and procedurally fair as contemplated in section 33 of the Constitution. [12]

[31] Section 6 of PAJA sets out the framework in which the review of administrative act takes place. The grounds of review relied on by Westinghouse are:

'(1) . . .

(2) A court or tribunal has the power to judicially review an administrative action if -

(a) . . .

(i) . . .

(ii) . . .

(iii) . . .

(b) . . .

(c) the action was procedurally unfair;

(d) . . .

(e) the action was taken-

(i) . . .

[12] AllPay Consolidated Investment Holdings Pty Ltd v Chief Executive Officier, South African Social Security Agency 2014 (1) SA 604 (CC)at page 617 para 33 ("AllPay 1")

(ii) . . .

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates dictates of another person or body;

(v) . . .

(i) arbitrarily or capricious;

(f) the action itself –

(i) . . .

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator;

(dd) the reasons given for it by the administrator;

(g) . . .

(ii) . . .

(h) . . .

(i) . . . "

[32] In this matter the binding statutes are the Public Finance Management Act ("PFMA") and the Preferential Procurement Policy Framework Act 5 of 2000 ("the

Procurement Act"). In reaching its decision Eskom had to follow the process set out in its Procurement and Supply Management Procedure herein below:

"2.1.1 Purpose

"The purpose of the Procedure is to set out the defined procedures that will enable a Procurement Practitioner to deliver the required outputs of his/her scope with clarity, effectiveness and accountability, and to furthermore enable standard application of the Approved Procurement Framework thereby resulting in accuracy and consistency in decision- making and the achievement of the strategic objectives of the Group Commercial Division, and Eskom as a whole. This Procedure may be subject to amendments from time to time (either in the form of signed and approved Practise Notes issued by the Risk and Governance Department within the Group Commercial Division, or in the form of a formal revision to this Procedure) in order to align with changes in business strategy, legislation, policy industry trends , recognised good practise as well as other considerations which are necessary to maintain the efficiency and integrity of Eskom's procurement and supply chain operations.

While one cannot act outside of the Approved Procurement Framework, the overall intention is to ensure that application thereof results in an outcome / solution that is commercially, financially and technically sound, and which in addition does not contravene the constitutional principles of fairness, equitability transparency competiveness and cost effectiveness on this basis the Procedure must, in the event of a lack of clarity or in the event of ambiguity or inconsistency be interpreted in favour of complying with aforementioned constitutional principles to ensure an outcome that is legally sound and which does not compromise the integrity and reputation of Eskom.

> Relaxation of this Procedure is only permissible with the Approval of Delegated Approval Authority at a level of Excops or higher, and only where deviations are required or purposes of the acquisition of loans /funding to support the procurement , and/or the achievement of substantial monetary and /or technical benefits to Eskom, which is supported by a Board approved strategy deviations from this criteria are still required to comply with the constitutional principles of fairness, equitability , transparency , competiveness and cost effectiveness"[13]

[33] At paragraph 3.10 of the SCM policy under the heading **OBTAINING APPROVAL FOR PROCUREMENT** the following is recorded:[14]

> "Having considered all relevant issues, the Delegated Approval Authority decides whether the recommendation is in the best interests of Eskom."

[34] In application proceedings where disputes of fact arise the proper approach is to rely upon the facts set forth by the respondent, together with the undisputed facts of the applicant. Only if the respondent's version is so far-fetched or clearly untenable can the applicant's version be accepted.[15]

[35] In this matter the decision to award the tender was made not only after a tender process but after a negotiation process. In a tender process a tenderer is

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[13] Record page 203
[14] Record page 263
[15] See Plascon-Evans Paints (tvl) Ltd v Van Riebeck Paints 1984 (3) 620; NDPP v Zuma [2009] 2 All SA 243 (SCA)

given a single opportunity to make a comparable and competitive bid[16]. In a negotiated process the parties are able to ask questions, respond to issues raised and within reasonable limits adjust their tenders.

[36] The test for evaluating tender processes and the principles to be applied have been recently laid down in All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, SA Social Security Agency and Others[17] ("AllPay1") They are:

36.1 The fairness and lawfulness of the procurement process must be assessed in terms of PAJA. [18]

36.2 The constitutional and legislative procurement framework entails that supply chain management prescripts are legally binding. In AllPay 1 the Constitutional Court pronounced: "Hence insistence on compliance with process formalities has a threefold 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. [19]

36.3 The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is achieved. The Constitutional court ruled: "Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually,

[16] Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) 413 (SCA) at para 30
[17] 2014 (1) SA 604 CC
[18] Para 22
[19] para 27

whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must , where appropriate take into account the materiality of any deviance from legal requirements , by linking the question of compliance to the purpose of the provision , before concluding that a review ground under PAJA has been established… [20] (my underlining)

36.4 The requirements of fairness do not dictate that tender rules must be applied inflexibly or by rote. AllPay establishes that non material irregularities will not result in a tender being set aside.[21]

[37] Administrative processes prescribed by law are subject to the norms of procedural fairness set out in the Constitution. Deviations from the tender process will be assessed in terms of the norms of procedural fairness.[22] In AllPay 1 Froneman J stated:[23]

"… That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair".

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[20] Para 28
[21] AllPay 1 (supra) para 57-58
[22] See MEC for Education ,Gauteng Province , and Others v Governing Body, Rivonia Primary School and Others 2013(6) SA 582 (CC) para 49
[23] AllPay1 (supra) page 620 para 40

[38] More importantly deviations that do not materially impact on fairness, lawfulness or reasonableness of the process do not justify a review under PAJA. In AllPay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Other the court held:[24]

> "21... There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised so intensely with the objective of doing so. But, as a fair process does not demand perfection and not every flaw is fatal..."

[39] In Baxter, Administrative Law at 446 and 548 respectively the following is said:

> "Administrative action based on formal or procedural defects is not always invalid. Technicality in the law is not an end in itself. Legal validity is concerned not with technical but also with substantial correctness.[25] Substance should not always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects...
>
> Flexibility and informality are important too and, as Lord Denning MR put it, agencies 'need not quote chapter and verse. An outline... will suffice.' The decision-maker need not go to the trouble of informing the individual of information which the latter obviously has at his disposal or at least ought to have."[26]

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[24] AllPay (SCA) 557 at page 562 para 21
[25] Van Heerden J in Marais v Mc Intosch 1978 (3) SA (414 (N) 421.
[26] Baxter, Administrative Law 1984 (Juta & Co Ltd) Kenwyn

[40] At the outset of the hearing Westinghouse conceded that it does not challenge Eskom's SCM policy, or Eskom's tender requirements expressed in the published tender data. It does not challenge the BTC's decision to appoint external advisors AFC, or the BTC's decision to call for a composite bid, or its decision to hold parallel negotiations with both bidders. Its case is focused on the alleged unlawfulness and demonstrable procedural unfairness which has caused it prejudice.

The irregularities alleged by Westinghouse

[41] Westinghouse's review is based on what it has extracted from Eskom's letter to the Minister. Based thereon it asserts that there were six (6) additional criteria introduced during the negotiations that were procedurally unauthorised and extraneous. It is submitted that reliance on these criteria was irrational, unreasonable and procedurally unfair. There is also a complaint that it was not informed as to how these considerations would be included in the matrix of factors that would be taken into account and was not afforded the opportunity to address any negative inferences that may be drawn.

[42] I will deal with the complaints in the context of what was said by Baxter in para 39 *supra* and what is said in para 38 hereof and the following paras of the Toll Collect case

> "[17] .... In order for the tender process to be fair to all tenderers, SANRAL needed to disclose in advance , in the tender documents , full details of every element of the

tender evaluation process that would be undertaken once tenders were submitted, including details of the breakdown in the allocation of the points for quality under the three heads set out in the tender documents. The submission was that this was necessary in order for the process to be transparent and for the evaluation of the competing tenders to be objective. Neither contention can be sustained. [27]

[18] Transparency in a tender process requires that the tender take place in an environment where it is subject to public scrutiny ...But once a tender is issued and evaluated and a contract awarded in an open and public fashion, that discharges the constitutional requirement of transparency. it is not there to be used by a disappointed tenderer to find some ground for reversing the outcome or commencing the process anew, by claiming that there should have been greater disclosure of the methodology to be adopted in evaluating the tenders.[28]

[43] That these six strategic considerations were taken into account is not in issue. There is no suggestion that they were not also applied to the evaluation of Areva's bid.

[44] On 13 June 2014 Eskom invited the parties to attend negotiations that would be performed in parallel over a two week period. The written invitation states that :

"The negotiation parameters will be mainly limited to:

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[27] South African National Road Agency Limited v Toll Collect Consortium 2013 (6) SA 356 (SCA)
[27] Toll Collect (Supra) para 17
[28] Toll Collect (supra) par 18

- Technical deviations identified during the tender evaluation process that could impact the tender price;
- Commercial deviations identified during the tender evaluation process that could impact the contract price;
- Inter- lot interface option where the supplier takes full responsibility for the project schedule, quality and cost;
- Project schedule to ensure implementation during the X23 outages without compromising Eskom or Regulator requirements;
- Terms and conditions as defined in the draft composite contract that Eskom drafted and which will be used during execution of the Lots;
- Safety and quality(RD-0034) aspects; and
- Supplier Development and Localisation (SD&L).

It is Eskom's requirement that the SGR project be successfully performed in Outage 23"[29]

The parties were also told that the negotiations would be a "continuation of Eskom's evaluation, final ranking and approval process by the BTC.[30]

[45] Westinghouse does not dispute that it was informed at least 10 days (13 June 2014) prior to the negotiations (23 June 2014) what the parameters of the negotiations would be. Furthermore, in its answering affidavit Eskom states [31]that:

> "On the last day of negotiations the criteria for evaluation was communicated to both tenderers. "

[29] Record LVH 23 page 418
[30] Record page 421/3
[31] Record page 601 para 89

[46] In its reply Westinghouse does not deny that the evaluation criteria including the strategic considerations were communicated to it. It then goes on to assert that it was not told what these considerations were. However in reply it claims somewhat strangely that it was never informed what the strategic considerations were. [32]

[47] There is no suggestion by Westinghouse prior to the parallel negotiations i.e. after receiving the invitation letter of 13 June 2014 or even during the negotiations that the strategic considerations were extraneous or that it did not understand them. Neither did Westinghouse seek clarity on what the strategic considerations were. Instead Westinghouse took part in the negotiations without even whispering a complaint.

[48] I turn to deal with each of the strategic considerations.

Original Equipment Manufacturer (OEM)

[49] This criterion has to do with a tenderers' past experiences in the manufacture and installation of generators and would obviously be a factor to be taken into account in awarding a contract. When Eskom issued an invitation for parties to express an interest in the tender and when separate tenders for Lots 1, 2 and 3 were invited tenderers previous experience was a mandatory requirement. In considering

[32] Record page 1462 replying affidavit para 193

to whom it might award the single contract, Eskom would obviously have to have regard to previous experience in particular who had originally installed the equipment. Areva states that it is the OEM i.e that it manufactured the original generators that are to be replaced. Its version is substantially supported by Eskom. At best for Westinghouse it can be said that it had a role in the manufacture which was far from a dominant role. In reaching a decision on this issue, the competing claims were obviously evaluated. A decision to find that Areva was in fact the OEM and its tender superior to Westinghouse is rational and cannot be a ground for review. I accordingly dismiss this ground of review.

[50] Westinghouse asserts that the technical committee had already factored Areva's OEM status into the assessment of Areva's experience and that the BTC'S reliance on this was improper to the extent that it was "double –counted or re-weighted". There is no evidence that the BTC in fact double-counted. In its letter to the Minister the BTC makes no reference to any of the evaluation teams' assessment or weightings. It therefore could not have added to anything.

Control over subcontractors and 'branding control'

[51] In the original tender the tenderers subcontractors had to be dealt with in its tender. Areva's subcontractor was known as SENPEC. Westinghouse's subcontractor was Bechtel. When Eskom's technical committee was considering the award of 3 separate contracts, it evaluated and rejected SENPEC as a

subcontractor. In AFC'S report [33] it stated that the technical committee's exclusion of SENPEC as a subcontractor should be re-valuated . When Eskom opted for a composite price for a single contract what was clearly included and discussed in the parallel negotiations was the subcontractor to be employed by Westinghouse and Areva i.e Bechtel and SENPEC respectively. What emerged during the parallel negotiations was that during the period 2000 – 2010 Areva as lead contractor was responsible for more than half of Steam Generator Replacements ("SGR") worldwide (excluding Japan) whereas Westinghouse as lead contractor was only responsible for 4 projects. In the period 2011 – 2014 Areva's market share increased to 75%. Westinghouse was not the lead contractor in any project during this period. For the period 2015- 2018, Westinghouse is not scheduled to be the lead contractor for a single SGR , while Areva will be the lead contractor for all but one. [34]Even if Bechtel's experience is added to Westinghouse's, Areva is still the market leader. Westinghouse's attack on Areva's use of SENPEC is extraordinary when it is borne in mind that SENPEC is currently Westinghouse's subcontractor in China.

[52] Here again it is clear that the merits of using SENPEC or Bechtel were weighed in the course of the parallel negotiations. That the BTC was satisfied with the credentials of SENPEC as a subcontractor to Areva and preferred it to Westinghouse and Bechtel cannot be said to be irrational or a reviewable decision. It was faced with a choice and made it.

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[33] Para 8 supra

[34]YMP9,10&11 ; Areva's answering affidavit page 1193 para 77.2

Experience

[53] This issue is closely related to the issue of OEM. I have dealt with this issue in part. Westinghouse asserts that Eskom failed to take into account the experience of Westinghouse's subcontractor, Bechtel and that the bidder's experience was a factor that had already been taken into account. This, Westinghouse asserts is another example of double- counting. Areva during the period 2005 – 2018 will be directly responsible for 36 SGR projects .Westinghouse on the other hand will be directly responsible for only two such projects. Again, even if Bechtel's experience is added to Westinghouse's, Areva still enjoys an advantage.[35] This ground of review must fail.

[54] In argument it was submitted that in the evaluation of the factors referred to above, there was "double-counting" that favoured Areva. There is no evidence to support this submission.

Intellectual Property Rights

[55] The failure to state in the letter to the Minister that Eskom also considered Westinghouse's Intellectual Property Rights on this issue does not mean that their submissions were ignored during the parallel negotiations or by Eskom. The agenda

[35] see record 1366- 1377 YMP9

handed to the parties prior to the parallel negotiations indicated matters that would be dealt with at such negotiations. It is not disputed that that the issue of Intellectual Property Rights was discussed with Areva and Westinghouse during the parallel negotiations. The uncontroverted evidence of Mr Koenig, the lead negotiator is that whatever was discussed with the one party was discussed with the other. That the BTC opted for Areva's proposal rather than Westinghouse's cannot be characterised as a reviewable ground. I accordingly find that the question of Intellectual Property Rights was raised with Westinghouse in the course of the parallel negotiations and both its and Areva's approach was placed before the BTC. In my view it was reasonable and justifiable for the BTC to take into account Intellectual Property Rights in the field of nuclear energy.

Supplier Development and Localisation (SD &L)

[56] This complaint must be considered in the context of the uncontested evidence of Mr Koenig which is that, whatever was discussed with Areva was discussed with Westinghgouse. In the course of negotiations over a two week period and when it came to SD&L, this issue was discussed with both Westinghouse and Areva. In the course of such discussions Areva stated that if it got the contract it offered to exchange certain trainee activities for a study on the feasibility of manufacturing nuclear valves in South Africa. Westinghouse's complaint appears to be that in the parallel negotiations this offer by Areva was not put to Westinghouse, thus it is submitted by Westinghouse that this amounts to an amendment of Areva's bid, to its prejudice. Westinghouse's complaint is that what resulted was an amendment to

Areva's bid and that it was not given an opportunity to match it. Even if it could be found to be that this was a flaw in the parallel negotiations. I find that it is not material and that any such flaw is not fatal. Here I have regard to the following:

> "...There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised so intensely with the objective of doing so. But, as a fair process does not demand perfection and not every flaw is fatal..."[36]

[57] Considering the totality of the tender procedure, I do not find that this flaw affects the validity of the award or that it affords grounds for setting aside the award to Areva.

The Float

[58] In its letter to the Minister the BTC emphasized that the management of Eskom's risk was the primary driver of decisions to be made. It is clear from the letter to the Minister that the word 'float' is not used as a reason for awarding the tender to Areva. However, what was clear to all the parties from the outset was that it was vital for a tenderer to be able to comply with the project schedule i.e. X23 outage referred to earlier on in this judgment. This issue formed part of the original tender and was debated at length during the parallel negotiations. At the end of the day, the BTC was satisfied with Areva's offer of a three month float. Westinghouse, as submitted

[36] AllPay (supra) SCA para 21

by Areva adopted a somewhat 'cavalier' approach by stating that it was only prepared to discuss its float once it was awarded the contract. I find substance in Areva's submissions. Having regard to the aforegoing the need for a schedule float is overwhelming and it is surprising that Westinghouse did not think so. In my view a bidder should always furnish as much information as possible. This is a competitive process and the bidders must be as competitive as possible, Westinghouse's statement that it wanted to deal with its float after it was awarded the contract and that this is acceptable conduct should be contrasted with its objection to Areva making a similar offer in relation to SD&L [37]I find that this ground of review must also fail.

[59] Considering the tender process as a whole and assuming that there was a flaw in the evaluation of SD&L this flaw would not in my judgment create a ground for setting aside the award of the tender to Areva.

Price

[60] In argument Westinghouse seemed to rely on the fact that its price was lower than Areva's as a ground for review. What was clear in the original tender was that price was not going to be the determinative factor in accepting or rejecting the tender. There is no merit in the suggestion that price can be the determinative factor. In reaching its decision Eskom was aware of this fact. Notwithstanding the fact that

[37] see Eskom's Answering Affidavit page 705

Westinghouse's price was cheaper than Areva's, Eskom was entitled to award the contract to Areva.

Conclusion

[61] On my view of the facts, the strategic considerations were relevant considerations for the selection of the successful bidder. None of the six criteria applied can be said to be irrelevant considerations. There is accordingly nothing to support the submission that the BTC's final decision was arbitrary or capricious. There are also no facts to support a suggestion that the action was taken because of the unauthorised or unwarranted dictates of another person or body. The BTC's decision was rationally connected to its reasons, the purpose for which it was taken and the information before it. The decision of the BTC was reasonable and lawful. I accordingly find that the tender process was procedurally fair. It follows that the application to review and set aside the award of the contract to Areva falls to be dismissed.

Costs

[62] I granted Areva's application to file its further affidavit. Very little court time was spent dealing with Westinghouse's opposition to this application.

[63] I dismissed Areva's *locus standi* application. Areva has however, been predominantly successful in the main application. It did not act unreasonably in raising an objection to Westinghouse's *locus standi.* In these circumstances I do not make a separate costs order on the *locus standi* application in favour of Westinghouse.[38] The costs thereof will form part of the costs in the main application.

[64] With reference to the main application Areva and Westinghouse submitted that any costs order in their favour should include the costs of three counsel. Eskom briefed two counsel in this matter. I have had regard to the importance of this matter, the prolixity of the papers and the complexity of the legal and factual issues and the time spent in preparation. I have also had regard to the seniority and experience of senior counsel briefed by Areva and Westinghouse. Considering all these factors, this is not a case in which parties are entitled to the costs of three counsel. In the exercise of my discretion Westinghouse is to pay the costs of Areva and Eskom in the review application, such costs to include the costs of two counsel.

[65] In the result I make the following order:

1.1 The Application is dismissed with costs. The costs shall include the First Respondent's costs of two counsel and the Second Respondent's costs of two counsel.

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[38] Erasmus Vol 2 E 12-9 para 4

CARELSE J
JUDGE OF THE SOUTH GAUTENG HIGH COURT

Appearances:

Counsel for the Applicant	**: J. Gauntlett SC, B. Borgstrom and L. Kelly**
Instucted by	**: Attorneys Webber Wentzel**
Counsel for the First Respondent	**: V. Maleka SC and H. Rajah.**
Instructed by	**: Attorneys Mnchunu**
Counsel for the Second Respondent	**: P. Hodes SC, D. Goldberg and D. Simonz**
Instructed by	**: Attorneys Dentons**

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:2014/35650

(1) REPORTABLE : YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

19/5/2015
DATE

SIGNATURE

In the matter between:-

WESTINGHOUSE ELECTRIC BELGIUM SOCIETE ANONYME — **Applicant**

and

ESKOM HOLDINGS SOC LIMITED — **1st Respondent**
AREVA NP INCORPORATED IN FRANCE — **2nd Respondent**

JUDGMENT

Carelse J:

[1] The applicant seeks leave to appeal to the Supreme Court of Appeal against my judgment and order delivered on 2 April 2015, in which I dismissed the

applicant's case with costs which costs included the costs of two counsel. The second respondent seeks leave to cross-appeal my cost order.

[2] Section 17(1)(a) of the Superior Courts Act 10 of 2013)('The Act') provides that:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; ..."

[3] Counsel for the first respondent submitted that if I grant leave to appeal, it should be to the Full Bench of this division in terms of section 17(6)(a) of the Act. Section 17(6)(a) of the Act provides that :

"If leave is granted under subsection (2) *(a)* or *(b)* to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

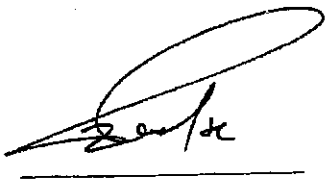
(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

[4] This matter involves a tender of approximately R5 billion. It dealt with issues of national importance. It was a difficult matter involving issues of interpretation. It could set a precedent. In my view these are compelling reasons why the appeal and cross-appeal should be heard.

[5] In my view the administration of justice requires that both the appeal and the cross appeal be heard by the Supreme Court of Appeal.

[6] In the result I make the following order:

1. Leave to appeal and cross-appeal is granted to the Supreme Court of Appeal.
2. Costs are costs in the appeal.



Carelse J
Judge of the High Court of South Africa

Appearances:

Counsel for the Applicant	**: J. Gauntlett SC, B. Borgstrom and L. Kelly**
Instucted by	**: Attorneys Webber Wentzel**

Counsel for the First Respondent	**: V. Maleka SC and H. Rajah.**
Instructed by	**: Attorneys Mchunu**
Counsel for the Second Respondent	**: P. Hodes SC, D. Goldberg and D. Simonz**
Instructed by	**: Attorneys Dentons**
DATE OF HEARING	**: 15th of May 2015**
DATE OF JUDGMENT	**: 19th of May 2015**