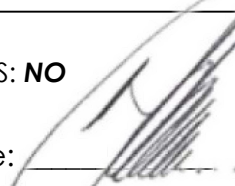


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

| | |
|--|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |
| Date: <u>2nd September 2022</u> Signature:  | |

DATE: 2ND SEPTEMBER 2022

(1) CASE NO: 5798/2021

In the matter between:

WACO AFRICA (PTY) LIMITED t/a SGB-CAPE

Applicant

and

ESKOM SOC LIMITED

First Respondent

**KAEFER THERMAL CONTRACTING
SERVICES (PTY) LIMITED**

Second Respondent

ELECTROHEAT ENERGY (PTY) LIMITED

Third Respondent

ORAM INDUSTRIALS (PTY) LIMITED

Fourth Respondent

RSC INDUSTRIAL SERVICES (PTY) LIMITED

Fifth Respondent

(2) CASE NO: 290/2022

In the matter between:

TMS GROUP INDUSTRIAL SERVICE (PTY) LIMITED

Applicant

and

**ESKOM SOC LIMITED & THE SECOND TO FIFTH
RESPONDENTS AS PER CASE (1) HEADING ABOVE**

Respondents

(3) **CASE NO:** 3047/2022

In the matter between:

SOUTHEY CONTRACTING (PTY) LIMITED

Applicant

and

**ESKOM SOC LIMITED & THE SECOND TO FIFTH
RESPONDENTS AS PER CASE (1) HEADING ABOVE**

Respondents

Coram: Adams J

Heard: 26 and 28 April 2022 – The ‘virtual hearing’ of this opposed Special Motion was conducted as a series of videoconferences on *Microsoft Teams*.

Delivered: 02 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 02 September 2022.

Summary: Administrative law – review – review application based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and on the principle of legality – public tender – administrative action constituted by *inter alia* the award of a tender by a Public Body – the applicants were unsuccessful bidders – they contended that the tender process and the award of the tender were invalid and unlawful – applications dismissed.

ORDER

(1) Under Case number: 5798/2021: -

- (a) Applicant's application is dismissed;
- (b) The applicant shall pay the first respondent's costs, including such costs consequent upon the employment of two Counsel, one being a Senior Counsel.

- (2) Under Case number: 0290/2022: -
- (a) Applicant's application is dismissed;
 - (b) The applicant shall pay the first respondent's costs, including such costs consequent upon the employment of two Counsel, one being a Senior Counsel.
- (3) Under Case number: 3047/2022: -
- (a) Applicant's application is dismissed;
 - (b) The applicant shall pay the first respondent's costs, including such costs consequent upon the employment of two Counsel, one being a Senior Counsel.

JUDGMENT

Adams J:

[1] Before me are three parallel applications for orders declaring invalid and setting aside the decision by the first respondent in the applications, Eskom SOC Limited ('Eskom'), to award a public tender for 'the supply, transportation, erection and dismantling of scaffolding and insulation material for 15 (fifteen) fossil fired power stations' to the second to fourth respondents. This decision was taken by Eskom on 17 December 2021. The three applicants in the applications, namely Waco Africa (Pty) Limited t/a SGB-Cape ('SGB-Cape'), TMS Group Industrial Service (Pty) Limited ('TMS Group') and Southey Contracting (Pty) Limited ('Southey') also tendered for the contracts, but were unsuccessful. And aggrieved at not being awarded the bid or a portion of the bid, they launched these judicial review applications. Relief ancillary to the main relief is also applied for by the applicants. The three applications largely raise common grounds of review, barring two or three deviations.

[2] All three of the applicants previously provided such goods and services to Eskom at some of its coal-fired power stations and, until the contracts were put out on tender, they have been providing such services for more than a decade.

[3] The applicants contend that Eskom's decision to award the Tender was invalid, should be reviewed and set aside for the following reasons: First, Eskom awarded the Tender to bidders with a Construction Industry Development Board ('CIDB') grading of 8 when, in terms of the statutes regulating such grading, in circumstances where the extremely valuable tender may only be performed by contractors who hold the highest CIDB grading of 9. Second, in its adoption of a 'Cluster Allocation Strategy' – which is explained later on in this judgment – and decisions pursuant thereto, Eskom failed to award the tender to the bidder that scored the highest amount of points, as is required in terms of section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPFA'). Third, in making its decision, Eskom evaluated and awarded the Tender in terms of invalid and unlawful PPPFA Regulations. Fourth, Eskom failed to take adequate measures to ensure that the successful bidders had the necessary technical and financial capacity to execute the Tender, notwithstanding Eskom's statutory duty to take those measures. And lastly, Eskom failed to comply with the Invitation to Tender ('ITT') prescripts in a number of respects.

[4] In issue in these applications is whether valid grounds exist for the review and the setting aside of the decision by Eskom to award the tender in favour of the second respondent, Kaefer Thermal Contracting Services (Pty) Limited ('Kaefer'), the third respondent, ElectroHeat Energy (Pty) Limited ('ElectroHeat'), the fourth respondent, Oram Industrials (Pty) Limited ('Oram') and the fifth respondent, RSC Industrial Services (Pty) Limited ('RSC'). And, if so, what just and equitable remedy should be granted.

[5] It is the case of the applicants that Eskom's tender process and its decision to award the tender to the second to fifth respondents should be reviewed, declared invalid and set aside in terms of sections 6(2)(a), (b), (c), (e), (f)(i) and (ii), (h), and (i) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), alternatively, on the basis of the principle of legality enshrined in section 1(c) of the Constitution of the Republic of South Africa, 1996.

[6] The issues in these matters are to be decided with reference to the laws relating to public procurement and the notion that public procurement is not a

mere showering of public largesse on commercial enterprises. It is the acquisition of goods and services for the benefit of the public.

[7] The procurement of goods and services by the state and other public entities is subject to various legal constraints. Section 217(1) of the Constitution requires all organs of state, when they contract for goods or services, to do so 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective'. That is taken up in the Public Finance Management Act, Act 1 of 1999 ('the PFMA'), which provides in s 51(1)(a)(iii) that the accounting authority of a public entity (which includes Eskom) 'must ensure that the public entity ... has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective'. It has also been held that public procurement constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act, Act 3 of 2000 ('PAJA') and must comply with the provisions of that Act.

[8] Section 217 of the Constitution, the Preferential Procurement Policy Framework Act, Act 5 of 2000 ('the Procurement Act') and the Public Finance Management Act, Act 1 of 1999] provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA.

[9] Section 217, the PPPFA, Eskom's procurement policies and the ITT all constitute the framework for Eskom's procurement process in issue. Eskom's procurement policies and the ITT are not just Eskom's internal prescripts. They have legal effect and must be complied with unless set aside in proceedings for judicial review. As was held by the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South*

*African Social Security Agency and others (Corruption Watch and another as amici curiae)*¹, at para 40:

‘Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into 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.’

[10] Eskom as a public entity listed in Schedule 2 of the Public Finance Management Act is subject to the provisions of the PFMA, the National Treasury Regulations, Guidelines, Circulars and Instruction Notes that regulate the procurement and contracting of goods and services. These instruments are issued under statute. They have legal effect unless and until set aside in proceedings for judicial review. They have not been set aside. These are not proceedings to set them aside. This is the inevitable consequence of the rule of law.

[11] With this legislative framework in mind, I now turn to deal with the grounds of review raised by the applicants, but before I do that it may be apposite at this point to set out the facts in the matter in very broad strokes.

[12] During August 2020, Eskom started the procurement process. And ‘the Procurement Strategy for the Supply, Transportation, Erection and Dismantling of Scaffolding and Insulation for 15 Fossil Powered Station including Eskom Rotek Industries (Turbo Gen Services) and Group Capital’ (the ‘Procurement Strategy’) was approved by Eskom’s Investment Finance Committee (‘IFC’) with a mandate to negotiate but not to conclude contracts. The approved budget value

¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC);

for the CORP 5171 Tender was approximately R4.5 billion and the approved budget per cluster was recorded in the Procurement Strategy. The reduction of costs and realisation of savings through the payment of market related rates was the rationale adopted by the Procurement Strategy.

[13] The Procurement Strategy embodied the following features and considerations: To issue an open competitive tender to the market for a contract period of four years commencing 1 July 2021 to 30 June 2025; the works were to be divided into eight clusters; the awarding of contracts would be to a maximum of eight suppliers in possession of the technical capability and capacity to provide scaffolding and insulation material and those who met Eskom parameters; to negotiate market related rates with the recommended suppliers; to impose the requirement that all tenderers be in possession of a CIDB Grade 8 SL or higher; to mirror the contract terms and conditions present in the historical term service contracts; and highlighting that the works would be repetitive and routine in nature for the purposes of providing access to the plant and equipment to perform maintenance and repair work and to provide access to areas that require the removal and reinstatement of insulation.

[14] An ITT was subsequently issued, incorporating key features of Eskom's Standard Conditions of Tender and Invitation to Tender, which included that: the tender validity period was fifty-two weeks from the date and time of the tender; the evaluation criteria were divided into five different stages, namely (i) basic compliance, (ii) mandatory and pre-qualification criteria including compliance with the CIDB Level 8SL or higher grading, (iii) functionality criteria including site inspection and tender evaluation, (iv) evaluation of price and B-BBEE preference points with prices to be scored out of 90 points and B-BBEE out of 10 points in accordance with the PPPFA, and (v) contractual requirements, which included the Safety and Quality requirements, financial statement and SD&L that were to be assessed after the evaluation and the ranking of the tenderers; the allocation strategy inter alia reflected that (i) the contracts would be divided into eight different clusters, (ii) the allocation of contracts would be based on the 90/10 Price Preference Scoring methodology, (iii) tenderers could submit offers for all the clusters or select the clusters they preferred, even though a supplier would only

be awarded a contract for one cluster, (iv) in the event that a tenderer scored the highest in more than one cluster, the said tenderer would be given an option to choose one cluster they preferred and the remaining clusters would be allocated to the next ranked tenderer as per the 90/10 Price Preference Scoring methodology, which methodology would be applied to the remaining clusters, (v) Eskom reserved its right to allocate more than one cluster per supplier (limited to two clusters) should the tenderers refuse to accept mandated negotiation parameters, (vi) no supplier would be allocated more than two clusters, and (vii) the allocation of the second cluster would be on the 90/10 Price Preference Scoring methodology meaning the highest ranked supplier would be allocated a second cluster.

[15] The ITT also provided for Eskom's reservation of its right to negotiate with preferred bidders after the competitive bidding process or price quotations, should the tendered prices not have been deemed to be market related. The conditions of contract would be those of the NEC 3 Term Service Contract. And a non-mandatory clarification meeting was to take place on 4 November 2020.

[16] On 4 February 2021, Eskom received the bid submissions of the various bidders, including the applicants, and the evaluations commenced during February 2021 and were concluded during May 2021. The analysis conducted took into account the cheapest Eskom rates and the cheapest rates found in the bid submissions from all the suppliers, for the purposes of arriving at a revised Eskom estimate (the new Eskom estimate). Twenty-three tenderers responded to the tender and were evaluated in the four stages recorded in both the Proposed Allocation Strategy in the Procurement Strategy and the ITT. The shortlisted bidders were ranked per cluster according to price as follows: (1) Kaefer scored the highest points on cluster 1 to 7. Kaefer did not tender on cluster 8; (2) RSC scored the third highest points on cluster 8 and the second highest on clusters 1 to 7; (3) Oram scored the third highest points on clusters 1 to 7 and the second highest on cluster 8; (4) Electro-Heat scored the fourth highest points on clusters 1 to 7 and the third highest on cluster 8; (5) SGB-Cape scored the fifth highest points on clusters 1 to 7 and the fourth highest on cluster 8; (6) Southey scored the sixth highest points on clusters 1 to 7 and the fifth highest points on cluster 8;

and (7) TMS scored the seventh highest points on clusters 1 to 7 and the sixth highest on cluster 8.

[17] Eskom followed the 90/10 Preference Scoring Methodology by first allocating to the highest ranked tenderer and thereafter to the tender ranked second, third, fourth, fifth, sixth and seventh in that particular cluster. In effect each of the successful tenderers scored the highest points in the clusters allocated, in light of the two contract limitation per tenderer and excluding tenderers already allocated contracts.

[18] Eskom thereafter commenced negotiations, as per the reservation of their rights in terms of the ITT, with all seven shortlisted bidders using the price ranking methodology as per the ITT and the approved Procurement Strategy. The negotiations with the shortlisted tenderers took place in three rounds between 23 to 26 April 2021.

[19] Based on the revised rates offered by the preferred bidders during the negotiation process, the fourth highest scoring bidders were Kaefer, RSC, Oram and Electro-Heat (who were ranked first to fourth respectively), having offered competitive prices in line with Eskom's cost saving initiative. On the other hand, SGB-Cape, Southey and TMS were ranked fifth, sixth and seventh respectively as their prices were still between 11% and 28% higher than the first ranked tenderer, resulting in no further negotiation rounds with them. The negotiated prices were evaluated and signed off by Eskom's Chief Advisor Quantity Surveyor, who confirmed that the prices offered were financially acceptable offers in relation to the agreed Tender price and the CPA and confirmed the recommendation to award the contracts to the four highest ranked tenderers.

[20] The effect of the above recommendation was that Eskom would be awarding a maximum of two clusters to the four successful bidders, instead of one cluster to seven bidders with the exception of one extra cluster to one successful supplier, as initially envisioned in the Procurement Strategy and Invitation to Tender. The total savings achieved on the CORP 5171 contract, so Eskom alleges, is approximately 29% in comparison to what Eskom was then paying for the same scope of work in terms of the expired ENK contracts.

[21] On 30 November 2021, Eskom's Board resolved that the contracts be awarded to Kaefer, RSC, Oram and ElectroHeat for a period of four years and correspondence together with the NEC 3 Contracts were sent to the successful bidders on or about 7 December 2021, notifying them of their award.

[22] On 3 December 2021, Eskom informed the applicants that (a) their ENK Contracts would terminate in terms of its full scope of the works on 31 December 2021, (b) the demobilisation and handover would occur in January 2022, (c) the applicants would be permitted to complete outage works that had not been completed by 31 December 2021, and (d) they should provide Eskom with their demobilisation plans.

[23] Between 13 December and 17 December 2021 Eskom entered into contracts with the successful tenderers in the following terms: (1) The contract was a rate based contract; (2) The starting date of the contract was 1 January 2022 to 31 December 2025; (3) The plan identified in the Contract Data is stated in each Task Order; (4) The use of plant equipment and materials is per Task Order; (5) The Contractor supplies, erects and dismantles scaffolding in accordance with each detailed Task Order; (6) The Employer instructs the Contractor when a scaffold is required and by when it must be dismantled; and (7) The Contractor makes the provision for the supply of labour for the erection, alteration and dismantling of scaffolding during outages, maintenance and project activities.

[24] On 17 December 2021, Eskom published a Regret Letter to the unsuccessful suppliers on its Tender Bulletin and on the CIDB website, informing all bidders that it had decided to award the CORP 5171 Tender to the respective successful bidders and that they had been unsuccessful in their bids. On 22 December 2021, Eskom wrote letters to the applicants informing them that they were not successful in their bids for the CORP 5171 Tender for the reasons, namely, that they had tendered exorbitant prices when compared to the lowest accepted rates and prices, and their prices were thus not market-related and could not be awarded the Tender in terms of the 90/10 preference point system.

[25] Against that factual backdrop, I now proceed to deal with the review grounds raised by the applicants.

[26] The first ground of review relates to the division by Eskom of the tender, as per the ITT, into eight clusters. The ITT plainly authorises the allocation strategy that was implemented.

[27] In *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals*², the High Court confirmed that it is acceptable for an organ of state to award more than one bid to separate bidders and thus conclude separate contracts in respect of one call of tenders in instances where the tender documents allow:

[74] It is unclear to me why the proposed distribution of volumes among several stevedoring companies, in terms of the Notes, should have come as a surprise to the applicant at the post-tender negotiations. It was not unlawful or improper for the first respondent to divide the volumes amongst the several tenderers. The PPM, which was the first respondent procurement policy framework document, compiled in compliance with the PPPFA, stipulated as follows:

"When it is considered in Transnet's best interest to divide the total requirement of a tender between two or more tenderers (e.g. in order to draw from the most convenient or nearest source, or to ensure continued competition or to optimise available resources or to support a BEE Company) a supply or service may be divided amongst several tenderers, and contracts can be placed accordingly, provided that this was a tender condition. The total value of the business to be awarded, and not the individual contracts, will however determine whether such tender falls within the (Acquisition Council's) AC's jurisdiction or not. Once approval for the award of the business has been obtained from the AC, the individual contracts may be signed by the person with necessary contractual powers for the individual contracts".

[75] Therefore, clause 6.12 of the PPM was the empowering provision in terms of which the first respondent announced more than once in the RFP about its intention to allocate the volumes to more than one preferred stevedore at each port. I can refer to a few further examples in this regard:

² *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals* 2011 JDR 0357 (KZD);

"TPT intends to sub-contract the stevedoring services to more than one (1) stevedore per port to perform the stevedore services for a period of two (2) years, with an option to extend for a further one (1) year (in favour of TPT) which may be exercised by TPT within its sole and unfettered discretion)"

And

"Without limitation to TPT's rights elsewhere contained herein, and in addition thereto, TPT may accordingly in its sole and unfettered discretion, split the award of the business to more than one stevedore in the proportions that TPT deems fit, In its sole discretion and unfettered discretion."

[28] Thereafter, the learned Judge concludes this point at para 77 as follows:

'[77] To my mind, the fact that section 2(1)(f) of the PPPFA refers to "the tenderer" (in singular) does not in any way imply a legislative intention that all times the award of contract, under PPPFA, should be restricted only to a single tenderer even where the tender document clearly reflected the contrary intention.'

[29] Therefore, in my view, *South African Container Stevedores* is authority for the proposition that as long as it is clearly stipulated in the ITT, the award to more than one bidder is not in conflict with the procurement framework and regulations. That then, in my view, is the end of this ground of review.

[30] Secondly, the applicants contend that Eskom, in adjudicating the bids, failed to take into consideration the capacity, or not, of the successful bidders to deliver on the services. In that regard, Mr Maenetje SC, who appeared on behalf of Eskom with Ms Rajah, submitted that the Preferential Procurement Policy Framework Act, Act 5 of 2000 ('PPPFA') Regulations define functionality as 'the ability of a tenderer to provide goods or services in accordance with specifications as set out in tender documents'. Regulation 5 stipulates the role of functionality in the procurement process and states that an organ of states must make it clear in its ITT whether the bids will be evaluated in terms of functionality. It provides as follows:

- '5. Tenders to be evaluated on functionality – (1) An organ of state must state in the tender documents if the tender will be evaluated on functionality.
- (2) The evaluation criteria for measuring functionality must be objective.
- (3) The tender documents must specify—
 - (a) the evaluation criteria for measuring functionality;

- (b) the points for each criteria and, if any, each sub-criterion; and
 - (c) the minimum qualifying score for functionality.
- (4) The minimum qualifying score for functionality for a tender to be considered further –
- (a) must be determined separately for each tender; and
 - (b) may not be so—
 - (i) low that it may jeopardise the quality of the required goods or services; or
 - (ii) high that it is unreasonably restrictive.
- (5) Points scored for functionality must be rounded off to the nearest two decimal places.
- (6) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is not an acceptable tender.
- (7) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point system and any objective criteria envisaged in regulation 11.”

[31] As was held by the Court in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape*³, ‘the point is simply that functionality should not be ignored in the final adjudication between competing tenders, and should be taken into account within the parameters of the Procurement Act.’ Functionality or capacity is a relevant consideration and falls to be taken into account in deciding whether or not a tender should be awarded to a tenderer other than the one with the highest score for price and preference.

[32] I agree with the submission on behalf of Eskom that *in casu* it applied the criteria as set out in the ITT in compliance with Regulation 5 of the 2017 Regulations in terms of functionality. All bidders were aware of that criteria and were evaluated in terms of that criteria at the first stage of evaluation of functionality and that functionality was also assessed in the final award of the contract. It also involved a site assessment. The site assessment ensured that successful bidders had the capacity to deliver on the Tender specifications. A site assessment considers the resource capacity and capability of the tender to deliver on the tender specifications.

³ *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCH 3 (WCC);

[33] As correctly argued by Mr Maenetje, to the extent that the CIDB Regulations required an assessment of the bidders' resource capacity and capability to deliver on the Tender specifications, they duplicate the functionality requirement and, potentially, the financial capacity (which is a contract requirement). They do not by such a requirement mean that the assessment under functionality and financial requirement is not sufficient for purposes of the CIDB Regulations. That is the case here.

[34] As regards the alleged non-compliance with the Construction Industry Development Board Act 38 of 2000 ('the CIDB Act') and the Regulations promulgated thereunder, Eskom contends that such non-compliance does not of necessity invalidate a tender process.

[35] In terms of the CIDB Act, contractors working in the construction industry must register on the CIDB's national register of contractors. CIDB Regulation 17 determines the maximum value of contracts that a contractor is considered capable of undertaking. CIDB Regulation 25 (1) provides as follows:

'25 Invitation of tender or expression of interest for construction works contracts –

(1) Subject to subregulation (1A), in soliciting a tender offer or an expression of interest for a construction works contract, a client or employer must stipulate that only submissions of tender offers or expressions of interest by contractors who are registered in the category of registration required in terms of subregulation (3) or higher, may be evaluated in relation to that contract.

(1A) ...

(1B) Where a contract involves construction works over an agreed number of years –

(a) on an "as and when required" basis;

(b) of a routine nature; or

(c) grouped into identifiable and similar components where an instruction to proceed to the construction of the next component is conditional on the successful completion of the previous component, the value of that contract may for the purpose of subregulation (1), be taken at its annual value.'

[36] CIDB Regulation 25(7A) serves as a further exception to the general rule set out in Regulation 25(1) and provides that:

'(7A) An organ of state may subject to its procurement policy and notwithstanding anything to the contrary contained in this regulation, evaluate and award a tender offer

from a tenderer who is registered but who tendered outside of his or her tender value range as contemplated in regulation 17, provided that –

- (a) the margin with which the tenderer exceeded his or her tender value range contemplated in regulation 17, is reasonable;
- (b) the award of the contract does not pose a risk to the organ of state;
- (c) the tender offer in all other aspects comply with these Regulations; and
- (d) the report referred to in regulation 21 or 38(5) and (6), indicates whether this subregulation was applied in the award of the tender.'

[37] The essence of the complaints by the applicants arises from CIBD Regulation 25(9)(c) and is to the effect that the functionality assessment that formed part of the tender evaluation process was not sufficient to meet the obligation of Regulation 25(9)(c). The basis of this conclusion is the Financial Analysis Reports conducted by Eskom's Financial Management Reporting Unit and the failure by Eskom to satisfy itself that the bidders have the requisite capacity and expertise to do the work as evidenced by the findings in the reports and the lack of convincing mitigating factors and failure to obtain mitigating factors from Kaefer and Oram.

[38] Eskom's case in that regard is that functionality was assessed firstly as a qualification criterion at stage 3 in two phases in terms of the tender criteria as set out in the ITT, which details what will be assessed during Phase 1 and 2 and the points to be allocated at each phase. The criteria as set out in the ITT comply, so Eskom avers, with the requirements of Regulation 5 of the 2017 Regulations in that it set sets out the objective measurable criteria of experience and standing, capability and resources. This was the mode of testing the functionality of all tenderers and all of them were evaluated in the same manner at this stage and none of them ever complained that this was an inappropriate manner of evaluating functionality.

[39] The winning bidders, as well as the applicants, were all evaluated in terms of the two phases of the evaluation and qualified at stage 3 of the functionality evaluation stage. The site inspection report, which the applicants have, shows that in respect of each bidder, the evaluation team assessed the necessary

workshop facilities, scaffolding material and insulation material. These are facilities that are required to deliver the services in terms of the Tender.

[40] In the final analysis, and on the evidence, Eskom was satisfied that the risks were sufficiently mitigated and that the bidders had the capacity to perform a contract to the value of R200 million. Regulation 25(9)(c) does not prescribe any criteria to assess capacity at all other than that it should be assessed. In my view, Eskom has complied with CIDB Regulation 25(9)(c) as well as the PPPFA and its Regulations read together with its SCM policies and conditions of tender. There is thus no justification to review and set aside the award of the tender and the contracts on this ground.

[41] Another one of the complaints by the applicants is in relation to CIDB Regulation 25(1)(B) is that Eskom never intended to apply it to the tender and that its reliance on Regulation 25(1)(B) is *ex post facto* and opportunistic and not reflected in the ITT. Eskom's riposte is that, on a proper interpretation, the ITT did make regulation 25(1B) applicable.

[42] In that regard, the ITT expressly provided that the CIDB requirements are applicable and intentionally invited contractors with a CIDB grading of 8 SL or higher to submit their proposals. The inclusion of Grade 8 SL tenderers in the ITT was indicative of Eskom's intention and clear understanding that the nature of the work falls within the ambit of CIDB Regulation 25(1B) and that it would be able to apply it. Eskom clearly was aware of the statutory requirement that tenders exceeding R200 million could only be performed by bidders with a grading of 9SL.

[43] Having regard to these considerations, Eskom submits that the terms of the ITT were clear to every reasonable tenderer that Eskom intended to evaluate and award the contracts to contractors with CIDB contractor grading of 8 SL or higher or apply Regulations 25(1B). It would be wholly unreasonable to read Regulation 25(1) in isolation.

[44] I find myself in agreement with this submission. Moreover, it was all along part of Eskom's procurement strategy, approved by its Investment Finance Committee, that Eskom intentionally included contractors with CIDB grade 8 SL in the tender scope in an effort to achieve cost-effectiveness. There is accordingly

no basis upon which to conclude that Eskom failed to comply with the provisions of Regulation 25(1B).

[45] I therefore conclude that Eskom was entitled to rely on regulation 25(1B). It did not act *ultra vires* its powers, and did not commit a material irregularity. It is in the first instance for Eskom to determine whether the services it requires are routine in nature and rendered on an as and when required basis. When it acts rationally in that determination, its decision cannot be set aside on review.

[46] The third ground on which the review application is based is that the ITT was invalid. Eskom contends that TMS and SGB-Cape are precluded from challenging the criteria set out in the ITT, which they failed to challenge before they submitted themselves to the Tender which on their own version they were aware was irregular.

[47] As contended on behalf of Eskom, upon its publication, the ITT was ripe for challenge under PAJA. The Invitation to Tender was published in October 2020. Not only did TMS submit its tender in terms of the Invitation to Tender without demur, it would have kept the results of that tender had it been successful. Now that it was unsuccessful it wishes to challenge the ITT. It is precluded from doing so. In any event, its challenge to the ITT is out of time under section 7(1) of PAJA and no application is brought under section 9(1) of PAJA for the extension of the 180-day time period. The law is clear that a formal application is required for the extension. And absent an extension, the lawfulness of the ITT no longer matters.

[48] I find myself in agreement with these submissions. The review must be decided on the basis of the ITT as it stands. TMS was entitled to challenge the ITT under the principle of legality. The issuing of the ITT involved the exercise of public powers by Eskom. It was procuring goods and services as an organ of state under its procurement policies that are in place pursuant to section 217 of the Constitution and section 51(1)(iii) of the PFMA. These are public powers. It could have challenged the Invitation to Tender as *ultra vires* the powers of Eskom under these sections and the PPPFA or as irrational. The irrationality ground is precisely what it raises in this application.

[49] Accordingly, I am of the view that the purported challenge to the ITT is without merit and should be refused. It is impermissible.

[50] The fourth ground of review relates to Eskom's Cluster allocations and, in that regard, the applicants contend that this approach falls foul of the provisions of section 2(1)(f) of the PPPFA, in that it awarded the tender to more than one bidder and in that it awarded clusters 1 and 7 to Kaefer, which was the highest scoring bidder, and awarded the remaining clusters to bidders who did not score the highest points in the remaining clusters. Thus, so the applicants contend, Eskom's cluster allocation contravenes section 2(1)(f) and there is no objective criteria to justify it.

[51] Eskom's cluster model was in line with its SCM policy which also envisages instances where a single project may result in multiple contracts. As Eskom has explained, the rational was to achieve a result that would be cost effective to Eskom.

[52] As was held in *South African Container*, it is totally acceptable for Eskom to award the tender to more than one bidder and conclude multiple contracts in line with its allocation strategy and its SCM policies. This method of awarding tenders does not contravene section 2(1)(f) of the PPPFA. The point is simply that the cluster allocation ensured that at every stage, following the elimination of the highest scoring bidder, the next highest scoring bidder in a cluster would be allocated.

[53] I am therefore of the view that the cluster allocation does not contravene section 2(1)(f) of the PPPFA and meets the objective of cost-effectiveness in section 217(1) of the Constitution. The objective of cost-effectiveness is what informs the default position in section 2(1)(f) of the PPPFA.

[54] For the same reasons, the cluster allocation strategy does not contravene section 217 of the Constitution. In any event, the lawfulness of the cluster allocation strategy, set out in the ITT, is irrelevant at this stage.

[55] The fifth ground of review relates to the validity of the PPPFA Regulations and the fact that Eskom's Procurement Strategy and ITT expressly provided that bidders would be evaluated for compliance with prequalification criteria set out in

Regulation 4(1) and (2) of the 2017 Public Procurement Regulations, which regulations the SCA on 2 November 2020 declared to be unlawful. In fact, due to the interconnectedness of the regulations, the SCA declared that the entire Regulations were inconsistent with the PPPFA and thus invalid, and ordered that the declaration of invalidity be suspended for a period of twelve months from the date of the order. On appeal from the SCA, the Constitutional Court upheld the declaration of invalidity. It handed down its order on 16 February 2022.

[56] In my view, at the time relevant to this matter, the declaration of invalidity was subject to a suspension order. As correctly submitted by Mr Maenetje, it would be nonsensical to read the declaration of invalidity by the SCA to operate retrospectively in the face of the order suspending same. (See *Rodpaul Construction (Pty) Ltd t/a Rod's Construction v Breede Valley Municipality and Others*⁴).

[57] I therefore conclude that, at the time of issuing the ITT, evaluating and awarding the Tender, the Regulations were applicable and valid, there is no merit in this ground of review.

[58] The sixth ground of review, as raised mainly by SGB-Cape, relates to 52-week period of CORP5171 Tender, which is the subject of these applications.

[59] SGB-Cape contends that the Tender validity period in the Invitation to Tender was for a period of 52 weeks, in contravention of CIDB SFU, which provides that a tender validity period in respect of construction and engineering works shall not exceed twelve weeks, in the absence of approval by an accounting officer, and therefore the Tender process is unlawful.

[60] Eskom submitted that it is not open to SGB-Cape to challenge the validity period of the Tender *ex post* its tender submission. It also delayed unreasonably in doing so and without any reasonable explanation whatsoever. The lawfulness or otherwise of the tender validity period, so Eskom contends, no longer matters.

⁴ *Rodpaul Construction (Pty) Ltd t/a Rod's Construction v Breede Valley Municipality and Others* Case No 6435/2022, WCCHC (24 March 2022), Unreported;

[61] I agree with this submission. The validity period of the Tender was expressly and unambiguously reflected in the ITT and, in the absence of SGB-Cape having challenged it before its submission of a bid, or at the very least at the clarification meeting, or within a reasonable time thereafter, it cannot be permitted to do so at this stage. SGB-Cape's tender submission must therefore be taken as an acquiescence of the stipulated tender validity period. It also agreed to the extension of the tender validity period. It could have protested and challenged the extension or refused to agree.

[62] In any event, as correctly submitted on behalf of Eskom, it has substantially complied with this requirement in that the ITT and its extension was authorised by the accounting authority, namely the Board of Eskom, in compliance with CIDB SFU. The CIDB itself does not challenge the tender validity period. It was also not unfair to any tenderer or potential tenderer because it afforded sufficient time for bids to be considered. It caused no prejudice to any bidder. There was no material irregularity such as to constitute a ground of review.

[63] Therefore, in my view, the fifty-week validity period does not invalidate the tender.

[64] In all of the circumstances and for the reasons mentioned above, Eskom's impugned decision to award the tender to second to fifth respondents is not invalid and therefore cannot and should not be declared to be constitutionally invalid or set aside. In the final analysis, the procurement process followed by Eskom and the subsequent award of the tender to second to fifth respondents were 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective'. It therefore complied with the letter and the spirit of Section 217(1) of the Constitution.

[65] In the light of these findings, it is not necessary to consider the appropriate relief to be granted, based on what is 'just and equitable'. Neither is it necessary for me to deal with any of the other issues raised by or disputes between the parties. All three applications stand to be dismissed.

Conclusion and Costs of the Applications

[66] For all of the reasons above, the applications stand to be dismissed.

[67] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*⁵. There are no grounds in this case to depart from the ordinary rule that costs should follow the result.

[68] Moreover, the complexity of the matter does, in my view, warrant costs to include the costs of two counsel, with one being a Senior Counsel.

[69] The applicants in each of the three applications should therefore pay Eskom's costs.

Order

[70] In the result, the following order is made: -

- (1) Under Case number: 5798/2021: -
 - (a) Applicant's application is dismissed;
 - (b) The applicant shall pay the first respondent's costs, including such costs consequent upon the employment of two Counsel, one being a Senior Counsel.
- (2) Under Case number: 0290/2022: -
 - (a) Applicant's application is dismissed;
 - (b) The applicant shall pay the first respondent's costs, including such costs consequent upon the employment of two Counsel, one being a Senior Counsel.
- (3) Under Case number: 3047/2022: -
 - (a) Applicant's application is dismissed;
 - (b) The applicant shall pay the first respondent's costs, including such costs consequent upon the employment of two Counsel, one being a Senior Counsel.

⁵ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

**L R ADAMS**

*Judge of the High Court
Gauteng Division, Johannesburg*

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| HEARD ON: | 26 th and 28 th April 2022 – in a ‘virtual hearing’ during a videoconference on the <i>Microsoft Teams</i> . |
| JUDGMENT DATE: | 2 nd September 2022 – judgment handed down electronically |
| FOR THE APPLICANT (SGB-CAPE) IN THE FIRST MATTER: | Adv W Mokhari SC, together with Advocate S Mathiba |
| INSTRUCTED BY: | Werksmans Attorneys, Sandton. |
| FOR THE APPLICANT (TMS GROUP) IN THE SECOND MATTER: | Adv Dennis Fine SC, together with Advocate Nada Kakaza and Advocate Henri-Willem Van Eetveldt |
| INSTRUCTED BY: | Dingiswayo Du Plessis Van der Merwe Incorporated, Sandton |
| FOR THE APPLICANT (SOUTHEY CONTRACTING) IN THE THIRD MATTER: | Adv Andrew Kemack SC, together with Advocate Maryke Nieuwoudt |
| INSTRUCTED BY: | MDA Attorneys, Houghton, Johannesburg |
| FOR THE FIRST RESPONDENT (ESKOM) IN ALL THREE APPLICATIONS: | Adv Ngwako Maenetje SC, with Advocate Hephzibah Rajah |
| INSTRUCTED BY: | Mchunu Attorneys, Rosebank, Johannesburg |
| FOR THE SECOND TO FIFTH RESPONDENTS IN ALL THREE MATTERS: | No Appearance |
| INSTRUCTED BY: | No appearance |