



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 14708/15

In the matter between:

21/6/2016

NEXUS FORENSIC SERVICES (PTY) LTD

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/ NO
(3)	REVISED <input checked="" type="checkbox"/>
21/06/2016	
DATE	SIGNATURE

THE CHIEF EXECUTIVE OFFICER OF SOUTH SOCIAL

SECURITY AGENCY

First Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY (SASSA)

Second Respondent

SAB&T CHARTERED ACCOUNTANTS INC. t/a NEXIA SAB&T

Third Respondent

JUDGMENT

- [1] In the Notice of Motion the Applicant seeks an order that the award of tender no. SASSA 03/131A to the Third Respondent (referred to as NEXIA SAB&T) dated 25 October 2013 in terms of which NEXIA

SAB&T have been appointed as a service provider to conduct forensic investigations for a period of 3 years be reviewed and set aside, *alternatively* that the decision of the First Respondent to award such tender be declared void *ab initio* and of no legal effect *further alternatively* in the event of the Court not declaring the award of the tender to be set aside or void, that the First Respondent be directed to award such tender to the Applicant for the duration of the remainder of the tender period pursuant to the provisions of Section 8(1)(c)(ii)(aa) of PAJA. The Applicant is a private company that conducts forensic services and whose tender bid was unsuccessful as will be set out more fully herein later.

- [2] The First and Second Respondents are respectively the Chief Executive Officer of the South African Social Security Agency and the South African Social Security Agency (referred to herein later as SASSA) which is a statutory body established in terms of Section 2 of the South African Social Security Agency Act 9 of 2004 and which was established with the purpose of providing for the prospective administration and payment of social security and the provision of services related thereto. The Third Respondent is a company that conducts similar business as the Applicant, to which the tender which is the subject of the review in this application was awarded. Third Respondent did not oppose the application
- [3] During or about July 2013, the Second Respondent invited bids from interested parties under contract no. SASSA:03/131A for the

appointment of a forensic investigation services provider to assist the Second Respondent with the investigation of fraudulent social grants for a period of 3 years. The Applicant and the Third Respondent duly submitted tenders and having complied with the procedural requirements for the submission of the tender, the Applicant received no further notification from the Second Respondent. In the Founding Affidavit deposed to on behalf of the Applicant, it is alleged that the Applicant received a phone call from a "*whistle blower*" who disclosed that the Bid Adjudication Committee ("*BAC*") recommended the Applicant as the successful candidate for the tender, but that a decision had been taken not to award the tender to the Applicant but in fact to the Third Respondent. The Applicant then obtained internal documents of the Second Respondent being memoranda that were directed to the First Respondent by its Supply Chain Management and its BAC. Copies of these documents were annexed to the Applicant's Founding Affidavit and disclosed *inter alia* the following:

- [3.1] On 10 October 2013 the BAC expressed concern regarding the fact that the Bid Evaluation Committee ("*BEC*") recommended that the second highest scoring bidder (Third Respondent) should be awarded the tender;
- [3.2] The BAC deemed the reasons and motivation provided by the BEC report as not justifiable to warrant the Third Respondent being recommended for the award of the bid as this would be

discretionary and does not take into account the evaluation criteria;

[3.3] The BAC further expressed the view that the appointment of the second highest scoring bidder (Third Respondent) would not be defensible in a court of law;

[3.4] The BAC recommended to First Respondent that the Applicant should be appointed as the successful bidder being the highest points scoring bidder in terms of the preferential procurement regulations;

[3.5] Subsequent to and notwithstanding these recommendations to the First Respondent, the First Respondent decided that the Third Respondent should be awarded the tender.

[4] The recommendation by the Bid Adjudication Committee dated 10 October 2013 contained the following comment:

"The Bid Adjudication Committee at its meeting held on Thursday 10 October 2013, noted with great concern the following:

- The Chairperson of the Bid Evaluation Committee supported the first recommendation to the Bid Adjudication Committee that was tabled at the meeting held on 01 October 2013. The Chairperson however did not support the revised recommendation of the Bid Evaluation Committee to award the bid to the second highest scoring bidder (SAB&T Chartered Accountants*

Inc. t/a NEXIA SAB&T) based on National Treasury Implementation Guide : Preferential Procurement Regulations 2011, paragraph 16 : Award of contracts, which states the following: "A contract must be awarded to the bidder who scored the highest total number of points of the preference point systems" and "in exceptional circumstances a contract may, on reasonable and justifiable grounds, be awarded to a bidder that did not score the highest number of points. The reasons for such a decision must be approved and recorded for audit purposes and must be defensible in a court of law."

- The Bid Adjudication Committee deemed the reasons and motivation provided on paragraph 5.5 of the Bid Evaluation Committee's report as not justifiable to warrant SAB&T Chartered Accountants Inc. t/a NEXIA SAB&T being recommended for the work of this bid as this would be discretionary and does not take into account the evaluation criteria.*
- The motivation provided for the appointment of the second highest scoring bidder (SAB&T Chartered Accountants Inc. t/a NEXIA SAB&T) would not be defensible in a court of law.*

Based on the report presented at its disposal, the Bid Adjudication Committee recommended to the Chief Executive Officer to appoint Nexus Forensic Services (Pty) Ltd as the successful and highest scoring point bidder (99 points) in terms of preferential procurement regulations to the amount of R71 876 094.13 VAT inclusive. The services prices for year two (2) and year three (3) will be adjusted in line with the consumer price index as determined by Statistics South Africa (STATSSA)."

- [5] At the bottom of this recommendation the First Respondent, in her own handwriting, made the following comment:

"After discussions with the office of the Auditor-General. (sic) It was decided that SAB&T Chartered Accountants Inc. t/a NEXIA SAB&T be awarded this tender. This company was functionally the highest and recommended by the BEC."

This note by the First Respondent was affixed to the recommendation of the BEC in her handwriting on the 25 October 2013. A letter of award was delivered to the Third Respondent on 25 October 2013, the effect of which was that the Third Respondent was the successful bidder and was awarded the contract.

- [6] The Applicant thereafter, during September 2014, assisted by attorneys, attempted to utilise the provisions of the Promotion of Access to Information Act, 2 of 2000 to request information from the Second Respondent and in particular all records of the decision in respect of the

said tender without any success. This prompted the Applicant to launch these proceedings. First Respondent thereafter deposed to an affidavit setting out the course of events which prompted her to award the tender to the Third Respondent, and a substantial record of documents was filed relating to the tender process.

- [7] It is trite law that the procurement process by State Organs is effected through a process of tender and acceptance, creating a contract. The tender process, for obvious reasons, is strictly regulated by the Constitution, legislation envisaged by the Constitution, Regulations and National Treasury Guides. The present legal framework, within which the tender process operates, is summarised as follows:

[7.1] Section 217 of the Constitution, which deals with "*procurement*", provides for the award of tenders in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Section 217(3) of the Constitution provides for the prescription by National Legislation of a framework within which a policy must be implemented, referred to in section 217(2) of the Constitution, which reads:

"217(2) *Sub-section (1) does not prevent the Organs of State or Institutions referred to in that sub-section from implementing a procurement policy providing for –*

(a) Categories of preferences in the allocation of contracts; and

(b) The protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination."

[7.2] The National Legislation envisaged by Section 217(3) of the Constitution is the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA") which allows for a preferential procurement policy based on a points system. Section 2(1) of the PPPFA reads:

"2(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference points system must be followed:

(b)(i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (3) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that

the lowest acceptable tender scores 80 points for price;

- (c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;*
- (d) the specific goals may include-*
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;*
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette no. 16085 dated 23 November 1994;*
- (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;*
- (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer, and*

(g) *any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have."*

[7.3] The PPPFA therefore mandates that an Organ of State must determine its preferential procurement policy and implement it within the framework of *inter alia* a preference point system, that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender, that a contract must be awarded to the tender who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tender, and that the goals contemplated in sub-section 1(1)(e) must be measurable, quantifiable and monitored for compliance.

[7.4] The 2011 Procurement Regulations prescribes *inter alia* what should be contained in the invitation to submit a tender, that the evaluation criteria in respect of functionality be clearly specified in the invitation to submit a tender, (Regulation 4), and further prescribes a formula that must be used to calculate the points for a price in respect of tenders with a determined Rand value, known as the "90/10 preference point system for acquisition of services" (Regulation 6).

[7.5] In terms of Regulation 7 of the 2011 Procurement Regulations, a contract may only be awarded to a tender that did not score the highest total number of points, *"only in accordance with section 2(1)(f) of the Act"*, which is the PPPFA referred to in par. [7.2] *supra*.

[7.6] The National Treasury Implementation Guide: Preferential Procurement Regulation 2011, paragraph 16 reads:

"A contract must be awarded to the bidder who scored the highest total number of points of the preference point system and in exceptional circumstances a contract may, on reasonable and justifiable grounds, be awarded to a bidder that did not score the highest number of points. The reasons for such a decision must be approved and recorded for audit purposes and must be defensible in a court of law."

[8] It is clear from the applicable legislation, regulations and implementation guides by the National Treasury that the highest scoring bidder in terms of a preferential points system should be awarded the tender. Only in exceptional circumstances may a lower scoring bidder be appointed and then only in accordance with the provisions of Section 2(1)(f) of PPPFA which requires that objective criteria must justify the award to another tender.

[9] It is further important to note that the applicable legislative framework results in the following process:

[9.1] The invitation to submit a tender, also known as "*the terms of reference*", must contain all the evaluation criteria for measuring functionality, the weight of each criteria, the applicable values and the minimum qualifying score for functionality (Regulation 4(3) of the 2011 Procurement Regulations).

[9.2] All competing bidders must be evaluated on functionality and the criteria for measuring functionality must be objective (Regulations 4(2), 4(5) and (6) of the 2011 Procurement Regulations). This is often referred to as the "first phase" or "qualification phase".

[9.3] A bidder must pass the threshold score for functionality before it becomes eligible for evaluation during the second phase of the process, also known as "*the award phase*". During this second phase points get awarded to tenderers in accordance with the preference point system prescribed in terms of Regulation 7 of the 2011 Procurement Regulations (Regulation 4(5) of the 2011 Procurement Regulations).

[9.4] The "*award*" of the tender is made to the highest scoring bidder in the second (award) phase (PPPFA Section 2(1)(f) unless objective criteria in addition to those contemplated in section 2(1)(d) and (e) justify the award to another tenderer, and this can only be in exceptional circumstances in which instances the reasons must be approved and recorded for audit purposes.

Vide: ***par [7.5] and [7.6] supra***

- [10] The aforesaid legislative framework clearly designed a process in terms whereof competing bidders should be evaluated by utilising objective criteria in a fair, reasonable, applicable and transparent manner and in terms whereof the personal discretion of the functionary awarding the tender be restricted as far as possible, and to provide a means of measuring the rationale behind the award of a tender. In this regard see:

RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape & Others (769/02) [2003] ZAECHC23 (18 March 2003) para [25]

Westing House Electric Belgium Societee Anonyme v Eskom Holdings (SOC) Ltd & Another (476/2015) [2015] ZASC 208 (9 December 2015) par [8]

- [11] The issue of the award of tenders has been the subject of numerous decisions and it is now established law that considerations extraneous to the tender evaluation criteria set out in the invitation to bid (terms of reference) utilised by an administrative body in awarding the tender renders the tender unlawful and procedurally unfair and that the arbitrary use of measure to determine the success or failure of a bid is contrary to the functions required of a Bid Evaluation Committee.

Vide: ***Westing House (supra), para. [34] – [37]***

- [12] Against the aforesaid background, the tender process *in casu* and the reasoning of the First Respondent in awarding the tender to the Third

Respondent should be considered. The First Respondent deposed to an Answering Affidavit, the first part of which is not a *seriatim* answer to the allegations as set out by the Applicant in the Founding Affidavit, but a comprehensive factual background dealing with the tender process. It is not necessary for purposes of this judgment to repeat those facts as set out by the First Respondent, but I refer to the following relevant allegations namely:

[12.1] In paragraph 18 of the First Respondent's Opposing Affidavit she states as follows:

"I need to make it quite clear that in line with the above provisions I and not the BAC was the final decision maker in regard to whom the final award of the tender should go to. The BAC only had the power to submit a recommendation to me to make a final award. As the provisions of the SCM policy quoted above, clearly state, I am not bound by the recommendations made by the BAC and I am entitled to reject the BAC's recommendation."

Although this stance of the First Respondent may technically be correct, it should be borne in mind that the BAC consists of a number of persons, who individually and collectively apply their objective minds to the process, and then make a recommendation to the First Respondent. Common sense dictates that it will be only in the most exceptional circumstances, and in terms of applicable legislation and

regulations, that the First Respondent would lawfully exercise her power to award a tender contrary to a recommendation of the BAC.

[12.2] A total number of 26 bids were received, in respect of which eventually only 3 bids were found to meet the technical evaluation criteria. These bids were then in fact the bids which were evaluated on functionality as described in paragraph 9.1 *supra*.

[12.3] During this qualifying phase the bid submitted by the Applicant scored 75.8 (the second highest score) and the Third Respondent scored 76 (the highest score) therefore point 0.2 higher. The First Respondent annexed to the Opposing Affidavit the BEC scoring sheet which indicated that the functional criteria utilised for purposes of the "*functionality score*" consisted of the following items:

- [i] Company track record;
- [ii] Project methodology;
- [iii] Project plan;
- [iv] Team leader experience;
- [v] Qualifications of the team leader.

[12.4] The terms of reference (invitation to bid) defined each of these functional criteria and for purposes of this judgement it is not necessary to repeat each of those definitions suffice to say that the functional criteria was clearly utilised in order to determine

the experience of the service provider, whether the service provider had a so-called "*national footprint in conducting investigations*" (i.e. being able to conduct such investigations throughout the company) and generally whether or not the bidder would proverbially "*be able to do the job*".

[12.5] It is significant to note that on the criteria of "*company track record*" Applicant and Third Respondent scored equally (40 points) on project methodology the Applicant scored 18 whilst the Third Respondent scored 20, on project plan the Applicant scored 8 whilst the Third Respondent scored 7.2, on team leader experience the Applicant scored 8 whilst the Third Respondent scored 6.4, and on qualification of the team leader the Applicant scored 0 whilst the Third Respondent scored 2.4.

[12.6] During the "*award*" phase (Vide: ***para. [9.3] and [9.4] supra***) the Applicant scored 99 whilst the Third Respondent scored 93.87. In terms of the provisions of Section 2(1)(f) of PPPFA the tender should therefore have been awarded to the Applicant, unless the First Respondent could justify the award to another tenderer on objective criteria in addition to those contemplated in paragraphs (d) and (e) of Section 2(1) of PPPFA.

[13] The First Respondent further ventilated the issues referred to in paragraph [3.2] to paragraph [5] ***supra***, and then provided the

reasoning for her decision to award the tender to the Third Respondent which reasons can be summarised as follows:

- [13.1] The "*main reason*" for her support (of the BEC recommendation i.e. that the tender should be awarded to the Third Respondent) centred around the importance of finding a service provider that was technically capable of dealing with the increasing volume of fraud cases and organised syndicates operating within SSA and which demonstrated a national footprint capacity.
- [13.2] The volume of fraud investigated cases increased drastically and statistics in this regard was supplied by the First Respondent.
- [13.3] There was urgency in dealing with the volume of work with an experienced and technically capable service provider that would be able to handle the work.
- [14] In general, the First Respondent by repetition stressed the importance of the urgency of the task, the technical ability of the service provider, the service provider's so-called "*national footprint*", and the ability of the service provider to operate within the present system of the Second Respondent. First Respondent further explains at length that the Third Respondent was previously contracted to the Second Respondent, and on the advice of a certain Mrs R Oggle, the Manager of Fraud Management and Compliance, who previously cooperated with the Third Respondent, it was decided to award the tender to the Third

Respondent. This, according to the First Respondent, constituted objective criteria which entitled her to award the tender to the Third Respondent.

- [15] The First Respondent further states that she relied on the provisions of Section 2(1)(f) of the PPPFA as well as Clause 17.4 of the terms of reference (bid invitation) of the Second Respondent which reads:

"The agency reserve the right not to accept the lowest price quotation, as other criteria, including the functionality and preferences will be taken into consideration, when bids are evaluated."

- [16] In my opinion, the First Respondent's reliance on Clause 17.4 of the terms of reference is ill founded and can be disposed of summarily. A "catch all" clause such as 17.4 of the terms of reference cannot vitiate the applicable legislative framework within which the procurement process operates, and an Organ of State is not entitled to enter into a contract of procurement contrary to the legislative framework referred to *supra*.

- [17] The next issue is whether or not the First Respondent is entitled to rely on the provisions of Section 2(1)(f) of PPPFA on the facts as alleged. It is clear from the facts that the first Respondent utilised the functionality criteria (hereafter referred to as "*functionality*") which were utilised during the qualification phase again during the award phase stage of the process. This was conceded by Counsel acting on behalf of First and Second Respondents during argument. The pertinent question to

be addressed therefore is whether or not functionality may be taken into consideration (having already been taken into consideration during the qualification phase) again during the award phase. Counsel for the First and Second Respondents submitted that the First Respondent was entitled to again consider functionality during the award stage, and relied upon judgments of the Eastern Cape High Court as well as the Western Cape High Court in support of the aforesaid submission.

Vide: ***TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd*** 2009 ZAECHC 7 (17 March 2009)

Rainbow Civils CC v Minister of Transport and Public Works, Western Cape 2013 ZAWCHC 23 (6 February 2013)

- [18] The issue whether or not functionality has a dual application in the procurement process of state organs, is a contentious issue and the law in this respect is not settled. In this regard, see the informative article of Professor Q. Quinot "The Role of Quality In the Adjudication of Public Tenders" PELJ 2014 (17) 3. In ***RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape and Others*** (769/02) [2003] ZAECHC 23 (18 March 2003) in para [32] the learned Judge held that the provisions of section 2(1)(f) of PPPFA are clear namely that the objective criteria referred to therein must be additional criteria, in other words these must be criteria over and above those which have already received consideration as specific goals in terms of section 2(1)(d) and

(e) of PPPFA. However, the reasoning for that interpretation does not appear from the judgment.

[19] I disagree with the submission that the ***TBP Building & Civils (Pty) Ltd*** decision relied upon by Counsel for First and Second Respondents supports the argument in favour of the dual application of functionality for the following reasons:

[19.1] The Respondent company in that judgment who invited tenders, was not an Organ of State under the provisions of PPPFA as a result of which it had a general duty to treat a tenderer fairly (paragraphs [15] and [16] of the judgment).

[19.2] For the aforesaid reason, the Court found that functionality could be used as an initial threshold requirement and again during the second part of an assessment as the repetition is not unfair.

Vide: ***para. 25, 26 and 27 of the judgment***

[19.3] In any event was the aforesaid judgment delivered prior to the amendment of the relevant regulations which caused an inconsistency as set out in par [19] of the judgment, as was pointed out by Prof. Quinot in the article referred to ***supra***.

[19.4] In paragraph [23] of the judgment reference is made to the argument of Mr. Gauntlett, who argued that PPPFA makes no allowance for functionality to be recognised in the award phase (referred to in the judgment as “.... the determination

of the score out of 90 points for price"). It is clear from the judgment that this argument of Mr. Gauntlett was not dismissed by the learned Judge, but the matter was distinguished on the grounds as set out in par. [19.1] *supra*. In my opinion, if anything, this part of the judgment support the reasoning as set out in par [21] to [25] *infra*.

- [20] The rationale for the ***Rainbow Civils*** judgment relied upon by Counsel for the First and Second Respondents is found in paragraph [110] of such judgment which reads:

"I consider that the Constitutional imperative that the procurement system be cost effective, means that functionality must necessarily be taken into account in the adjudication of competing tenders and should not be relegated to a mere qualifying criterion. I should make it clear that I do not intend hereby to make any pronouncements on the method of tender evaluation contemplated in the procurement regulations where functionality is scored at a threshold stage, and final TEV points are scored on the basis of price and preference only. 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. I therefore agree with Mr Rosenberg's submission that functionality or capacity is a relevant consideration and an objective criterion for the purposes of section (2)(1)(f) of the Procurement Act."

I respectfully disagree with the learned Judge's reasoning for the reasons as set out *infra*. It is, in my opinion, clear from the aforesaid judgment that the learned Judge did not attempt to interpret and analyse the applicable legislative framework and in any event it is clearly stated that the learned Judge did not intend to make any pronouncements on the method of tender evaluation contemplated in the procurement regulations where functionality is scored at qualification stage and final TEV points are scored on the basis of price and preference only. These *dictae* in the judgement can therefore not elevate the principle of the dual application of functionality as part of our law.

- [21] In my opinion, the answer as to whether or not functionality may be applied during the qualification as well as the award phase lies in a proper interpretation of the applicable legislation and regulations. In terms of Regulation 8(5) made in terms of Section 5 of the PPPFA, the conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further evaluation. Regulation 8(6) mandates that points for price in respect of a tender which has scored the specified number of points in Regulation 8.5 referred to *supra*, must be established separately and calculated in accordance with the provisions of Regulations 3 and 4. This clearly envisage two distinct different phases, using different scoring methodology, resulting in a qualification phase and an award phase as referred to in par.[9] *supra*.

- [22] Section 2(1)(f) of PPPFA empowers a decision maker to consider objective criteria *in addition to* those contemplated in paragraphs (d) and (e) to justify the award to another tenderer. In *casu*, section 2(1)(d) is irrelevant. Section 2(1)(e) mandates the inclusion of specific goals for which a point may be awarded and functionality criteria is a mandatory inclusion in any invitation to submit a tender (or terms of reference) in terms of Regulation 8 of the Regulations promulgated in terms of section 5 of PPPFA. It therefore follows that section 2(1)(e) of PPPFA refers to all criteria stipulated in the terms of reference, including functionality.
- [23] By referring to objective criteria, in addition to those contemplated in paragraph (e), the decision maker is therefore enjoined not to reconsider those criteria which had already been considered, but additional objective factors, other than those already included in the terms of reference.
- [24] In my opinion the words "in addition to" in the context of section 2(1)(f) of PPPFA means "extra" or "over and above" as held in the RHI decision referred to *supra*. The complete framework of the procurement process envisage an investigation to determine firstly "who can do the job" utilising functionality criteria and then awarding "the job" to the lowest bidder. To empower the decision maker to utilise functionality again during the award stage, would be contrary to the provisions of regulations 8(5) and 8(6) read in conjunction with section 2(1)(f).

[25] To hold otherwise would in my opinion vitiate the provisions of section 217 of the Constitution, creating a system which is not fair, unequitable, not transparent, not competitive and not cost effective, for the following reasons:

[25.1] The procurement process is designed to eliminate possible

bidders who are not able to "do the job", and to award the tender to the lowest bidder. To refer back to initial functionality criteria used for the qualification phase, is irrelevant for the issue of price.

[25.2] In terms of the applicable regulations as set out *supra* the terms of reference must contain functionality criteria which is measurable, the points awarded to each item, and on these points a bidder qualifies. The award of the tender is made thereafter, utilising a different points for price scoring system (paragraph [7] *supra*). A bidder therefore does not expect to be scored on functionality at the qualification stage, and again during the award stage. This would result in a system where the decision maker arbitrarily may use individual functionality criteria during the award stage, without the bidder knowing what value will be placed on such criteria during this "second round" of consideration of functionality. This clearly results in a process which is not provided for in the relevant regulations and/or the terms of reference, and is unfair.

Vide: ***All pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*** [2013] ZACC 42 para [34]-[43].

[26] Functionality criteria is therefore excluded as a "*objective criteria to justify the award to another tenderer*" as envisaged in section 2(1)(f) of PPPFA.

[27] In any event, the First Respondent's reasoning justifying her reliance on Section 2(1)(f) is flawed, based on the applicable facts, for the following reasons:

[27.1] Where the decision of the First Respondent to award the tender not to the highest score bidder in terms of Section 2(1)(f) of PPPFA is challenged, the onus is on the First Respondent to convince the Court that such criteria as utilised by the First Respondent is objective, justifiable (in a legal sense) and in exceptional circumstances. (In terms of National Treasury Directives).

[27.2] The facts relied upon by the First Respondent is neither objective, nor justifiable, nor exceptional for the reasons as set out hereunder.

[28] The lack of objectivity lies therein that the First Respondent relied on the advice of Mrs Ogall referred to supra. Her advice, having a managerial relationship with the Third Respondent, is not objective, and is certainly not a measurable or quantifiable criteria. Having regard to the difference in scores obtained by the Applicant and the Third

Respondent respectively as set out *supra*, and an analysis of the scoring on the respective functionality criteria, the Applicant and the Third Respondent placed virtually on an equal footing and the difference of 0.2 points in my opinion does not render the circumstances either justifiable or exceptional.

[29] In the premises, I find that the award of the tender to the Third Respondent by the First Respondent was unlawful.

[30] It is common cause that the tender *in casu* expires on 25 October 2016, approximately four and a half months after the hearing of this application. In the light thereof, Counsel for First and Second Respondents urged me to dismiss the application with costs, on the basis that the matter has become moot.

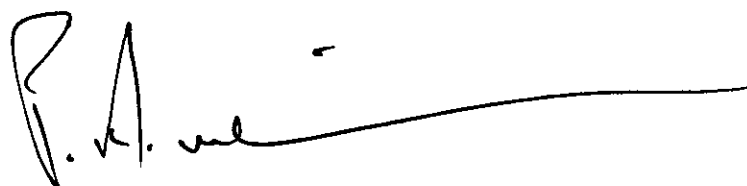
[31] In terms of Section 172(1) of the Constitution this Court is enjoined to declare that any law or conduct that is inconsistent with the Constitution is either invalid or unlawful. On the strength of the judgment in ***Chairperson, Standing Tender Committee v JFE Sapela Electronics 2008 (2) SA 638 (SCA)*** I was invited by Counsel acting on behalf of the Applicant to declare that the tender *in casu* is declared inconsistent with the applicable legislation, that the award of the tender not be set aside, and that the First and Second Respondents be ordered to pay the costs. In my opinion, this is the correct order to make.

[32] I therefore make an order in the following terms:

[1] The First Respondent's award of tender no. SASSA03/131A to the Third Respondent is declared inconsistent with the provisions

of Section 217(1) of the Constitution and is hereby declared invalid in terms of Section 172(1) of the Constitution;

- [2] The award of the tender is not set aside;
- [3] The First and Second Respondents are ordered, jointly and severally, to pay the Applicant's costs of the application, including costs of two counsel.



**P A VAN NIEKERK
ACTING JUDGE OF THE HIGH COURT**

Date heard:	9 June 2016
Counsel for Applicant:	Adv. A Liversage
Attorney for Applicant:	Van Zyl le Roux Inc.
Counsel for Respondent:	Adv. N Cassim SC
Attorney for Respondent:	State Attorney, Pretoria
Judgement Delivered:	21 June 2016