

REPORTABLE

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 21158/2012

In the matter between:

RAINBOW CIVILS CC

Applicant

and

MINISTER OF TRANSPORT AND PUBLIC WORKS,

WESTERN CAPE

First Respondent

THE HEAD, DEPARTMENT OF TRANSPORT AND

PUBLIC WORKS, WESTERN CAPE

Second Respondent

SAFAZ SIGNS AND ELECTRICAL CC

Third Respondent

Date of hearing: 24 January 2013

JUDGMENT DELIVERED ON 6 FEBRUARY 2012

DAVIS AJ:

- [1] This is an application for the review and setting aside of the award of a tender. The applicant seeks an order that the award by first and second respondent of Tender No. S012/12: Building Facilities Maintenance Project 2012: Cape Town Metropole No. 2 – South ('the Tender') to the third respondent be reviewed and set aside pursuant to the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').
- [2] The Tender forms part of the Building Facilities Maintenance Program ('the BMP Program') initiated by the Department of Transport and Public Works, Western Cape ('the Department'). The object of the BMP Program is to alleviate poverty by creating work opportunities through maintenance of current provincial government infrastructure. Various projects are undertaken as part of the BMP Program, which seek to hire the unemployed poor as BMP workers to clean and maintain public facilities, such as schools and clinics, in designated areas. The BMP Program is managed at regional level by a Regional BMP Management Contractor ('Management Contractor') whose task is essentially to manage the BMP workers who do the physical work; it includes procuring the BMP workers, providing them with uniforms and equipment, supervising their work and paying their wages.
- [3] The Tender was for the appointment of a Management Contractor for Cape Town Metropole No 2 – South. The tender price covered the implementation of a program of daily cleaning of some 133 schools and 13 clinics, and the clearing of vacant provincial land of vegetation and refuse. The tender scope also provided for the optional extras – as required and budget permitting - of cutting of seasonal grass, deep cleaning of toilets at schools and clinics, and repairs and maintenance at schools.

- [4] Ten tenderers submitted tenders, including the applicant and the third respondent ("Safaz"). Eight of the ten tenders were eliminated at the first round for scoring less than the required minimum threshold for functionality, and only the tenders of the applicant and Safaz proceeded to the final stage of tender evaluation. The Tender was awarded to Safaz on 27 September 2012.
- [5] Dissatisfied with this outcome, the applicant undertook certain investigations and took legal advice during October 2012. On 2 November 2012 the applicant launched an urgent application to interdict the first and second respondents ('the respondents') from concluding a service level agreement with Safaz and / or implementing or further implementing the Tender, pending the final resolution of proceedings to be instituted by the applicant for the reviewing and setting aside of the award of the Tender to Safaz.
- [6] The application was opposed by the respondents, but not by Safaz who abided the decision of the Court. On 9 November 2012 an agreement was reached that the applicant's founding papers in the application for the interim interdict would serve as its founding papers in an application to review and set aside the award of the Tender. It was also agreed between the applicant and the respondents that the implementation of the Tender would be delayed pending the determination of the review proceedings.
- [7] Various complaints were raised in the applicant's founding affidavit. It was alleged that: there were discrepancies in the tender documents; Safaz did not qualify for the preference points awarded to it for Broad-Based Black Economic Empowerment Status Level of Contribution ('B-BBEE Status') as it had not submitted the correct verification certificate; Safaz's functionality score was unjustified; the criterion of functionality, and the reservations expressed by the Department's consultant regarding Safaz's ability to implement the tender, were ignored in the final evaluation of the tenders. During the oral argument advanced by Mr Rosenberg,

who appeared for the applicant together with Ms Van Zyl, the applicant's case crystallized into the following discrete challenges:

- (a) there were material discrepancies and inconsistencies in the tender documents;
- (b) Safaz should not have been awarded any points for B-BBEE Status as it failed to submit the prescribed verification certificate to substantiate its claim for B-BBEE preference points;
- (c) the decision to award the Tender to Safaz had been impermissibly influenced by considerations of racial and gender preference outside the parameters of the 90/10 preference points system laid down in the Preferential Procurement Regulations, 2011 ('the Procurement Regulations');
- (d) functionality, or capacity, is a relevant consideration and an objective criterion for the purposes of section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 ('the Procurement Act'), which should have been considered but was disregarded in the final adjudication of the tenders.

[8] As a prelude to dealing with these arguments, it is necessary to set out details of the tender documentation, the process followed in evaluating the tenders and the applicable legislative framework.

The Tender Document

[9] Given the complaint regarding inconsistencies in the tender documents, it is necessary to deal in some detail with the structure and contents of the document

governing the Tender ('the Tender Document'), which was made available to prospective tenderers on 30 March 2012.

- [10] The Tender Document is a ninety-eight page document consisting of a number of different components. It comprises of two main sections, entitled 'The Tender' and 'The Contract', both of which were divided into various parts. The tender section contains information regarding the tender procedures and documents required to be submitted. The contract section contains details regarding the contract, including form of offer and acceptance, pricing data and scope of work.
- [11] Particularly relevant, for present purposes, is the tender section of the Tender Document, which consists of Part T1: Tendering Procedures and Part T2: Returnable Documents. Parts T1 and T2 are, in turn, divided into sub-parts. Part T1 comprises T1.1 Tender Notice and Invitation to Tender ('Invitation to Tender') and T1.2 Tender Data, and Part T2 comprises T2.1 List of Returnable Documents and T2.2 Returnable Documents.
- [12] Prospective tenderers were informed in the opening paragraphs of the Invitation to Tender, firstly that the bid would be evaluated in terms of functionality with bidders required to score a minimum of 60 out of 100 points for functionality, and secondly that preferences would be allocated to bidders for B-BBEE Status.
- [13] The first paragraph of the Tender Data stated that the conditions of tender were the Standard Conditions of Tender as contained in Annexure F of the CIDB Standard for Uniformity in Construction Procurement issued in terms of Government Notice No 12 published in Government Gazette No 31823 dated 30 January 2009, as amended from time to time ('the Standard Conditions'). Thus the Standard Conditions were incorporated by reference into the Tender Data section of the Tender Document. It was stated in the Tender Data that the Tender Data would have precedence in the interpretation of any ambiguity or inconsistency between the Standard Conditions and the Tender Data.

[14] Functionality was defined in the following terms in the Standard Conditions:

'quality (functionality) means the totality of features and characteristics of a product or service that bear on its ability to satisfy stated or implied needs'.

[15] Clause F.3.11 of the Tender Data stipulated that the procedure to be followed for the evaluation of responsive tenders was Method 4 (functionality, financial offer and preference), which was a reference to clause F.3.11.5 in the Standard Conditions. Clause F.3.11.5 of the Standard Conditions read as follows:

'F.3.11.5 Method 4: Financial offer, quality and preferences

In the case of a financial offer, quality and preferences:

- a) Score each tender in respect of the financial offer made, preference claimed, if any, and the quality offered in accordance with the provisions of F.3.11.7 to F.3.11.9, rejecting all tender offers that fail to score the minimum number of points for quality stated in the tender data, if any.*
- b) Calculate the total number of tender evaluation points (TEV) in accordance with the following formula, unless otherwise stated in the Tender Data:*

$$TEV = NFO + NP + NQ$$

where:

NFO is the number of tender evaluation points awarded for the financial offer made in terms of F.3.11.7;

NP is the number of tender evaluation points awarded for preference points claimed in accordance with F.3.11.8;

NQ is the number of tender evaluation points awarded for quality offered in accordance with F.3.11.9.

b) Rank tender offers from the highest number of tender evaluation points to the lowest.

c) Recommend the tenderer with the highest number of tender evaluation points for the award of the contract, unless there are compelling and justifiable reasons not to do so.

d) ...'

- [16] Clauses F.3.11.7 to F.3.11.9 of the Standard Conditions contain methods for scoring financial offers, preferences and quality respectively. Clause F.3.11 of the Tender Data contains a different formula for scoring financial offers from that contained in clause F.3.11.7 of the Standard Conditions. The formula provided in the Tender Data for scoring financial offers therefore took precedence over the one contained in the Standard Conditions. It was set out as follows:

$N_{Fo} = P_m / (P \times W_1)$ where:

1. N_{Fo} is the number of tender evaluation points awarded for the financial offer.
2. W_1 is the maximum possible number of tender evaluation points awarded for the financial offer as stated in the Tender Data.
 - 2.1 90 where the financial value inclusive of VAT of all responsive bids received have a value in excess of R 1 million; or
3. P_m is the comparative offer of the most favourable tender offer
4. P is the comparative offer of tender offer under consideration

Up to 100 minus W_1 tender evaluation points will be awarded to bidders who complete the referencing schedule and who are found to be eligible for the preference claimed'

- [17] Clauses F.3.11.8 and F.3.11.9 of the Standard Conditions provide that preference and quality (i.e. functionality) is to be scored 'in accordance with the provisions of the tender data'. Strangely, the Tender Data do not deal with the criteria for scoring of preference and quality, as one might expect. Instead, these matters are dealt with in two documents located in part T2.2, i.e., the Returnable Documents section,

headed 'Functionality' and 'WCBD 6.1(b): Preference Certificate (90:10)'. I shall refer to these documents as 'the Functionality Document' and 'the Preference Document' respectively.

- [18] The Functionality Document contains two definitions of functionality, namely *'the measurement according to predetermined norms of a service or commodity designed to be practical and useful, working or operating, taking into account quality, reliability, viability and durability of a service or commodity'* and *'the special expertise, technical ability and experience [of] the tenderer for a specific project type.'* It states that the evaluation of the bids will be conducted in the following two stages:

'A. Firstly, the assessment of functionality will be done in terms of item 4 below. A bid will be disqualified if it fails to meet the minimum threshold for functionality as per the bid invitation. (The minimum threshold will be 60% of the 100 points awarded for functionality.)

B. Thereafter, only the qualifying bids are evaluated in terms of the 80/20 or 90/10 preference points system where the 80 or 90 points must be used for price only and the 20 or 10 points are used for Broad-Based Black Economic Empowerment (B-BBEE) status level of contribution.'

- [19] Item 4 of the Functionality Document sets out a scoring system for the award of points based on experience and standing (20 points), capability (20 points), resources (50 points) and general compliance (10 points). Various details and documents are to be submitted in substantiation of these criteria.

- [20] The Preference Document informs tenderers that it contains general information and serves as a claim form for preference points for B-BBEE Status. It contains a cautionary notice advising bidders to study the general conditions, definitions and directives applicable in respect of Broad-Based Black Economic Empowerment, as prescribed in the Procurement Regulations. Under the heading 'general conditions' it stipulates that the 90/10 preference point system (provided for in the Procurement

Regulations) is applicable to the bid, and that a maximum of 10 points will be awarded for B-BBEE Status and a maximum of 90 points for price.

- [21] Paragraph 5.4 of the Preference Document defines B-BBEE Status Level of Contributor as *'the B-BBEE status received by a measured entity based on its overall performance using the relevant scorecard contained in the Codes of Good Practice on Black Economic Empowerment, issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act'*. Paragraph 5.4 of the Preference Document was amended by an Addendum to the Tender Document, the relevant portion whereof read as follows:

'WCB6.1(b) Preference Certificate (90:10), page 31 of 101, Clause 5.4 – It is hereby confirmed that the bidder's B-BBEE status submitted and to be used in the adjudication of the bid, had been assessed and compiled in terms of the Construction Charter.'

- [21] Paragraph 7.1 of the Preference Document contains a formula for scoring price of financial offer. It states that a maximum of 90 is allocated for price on the following basis:

$$P_s = 90 \left[1 - \frac{P_t - P_{min}}{P_{min}} \right]$$

Where: P_s = Points scored for comparative price of bid under consideration.

P_{min} = Comparative price of lowest acceptable bid.

P_t = Comparative price of bid under consideration.'

- [22] Paragraph 7.2 of the Preference Document states that preference points for B-BBEE status will be awarded in accordance a given table of scores. For present purposes it is relevant to note that tenderers who qualified for level one B-BBEE Status were eligible for 10 points whereas those who qualified for level three were eligible for 8 points.

[23] Paragraph 7.4 of the Preference Document states that bidders *'must submit their original and valid B-BBEE status level verification certificate or a certified copy thereof substantiating their B-BBEE rating issued by a Registered Auditor approved by IRBA or a Verification Agency accredited by SANAS.'*

[24] Paragraph 13 of the Preference Document contained various declarations with regard to the B-BBEE Status and preference points claimed, which had to be signed by the tenderer. It stipulates that B-BBEE preference points claimed had to be substantiated by means of a B-BBEE verification certificate issued by an approved body.

[25] Paragraph 4 of the Preference Document warned tenderers that,

'Failure on the part of a bidder to fill in, sign this and submit a B-BBEE Verification Certificate from (one of the authorised bodies listed) will be interpreted to mean that preference points for B-BBEE status level of contribution are not claimed.'

The Tender Evaluation Process

[26] The closing date for the submission of tenders was 2 May 2012, later extended to 9 May 2012. In the respondents' answering affidavit, deposed to by Mr. Mguli, the Assistant Executive Manager of the Department who made the decision to award the Tender to Safaz ('the Decision Maker'), it is stated the evaluation of the bids was conducted in the following two stages:

'15.1 First, functionality was assessed in terms of item 4 of the Functionality Assessment comprising the following criteria: experience and standing; capability; resources; and general compliance. The total points for functionality were 100 and tenderers had to score a minimum of 60% of the 100 points.'

15.2 *Thereafter, only the qualifying bids were evaluated in terms of the 90/10 preference points system where 90 points were used for price only and 10 for Broad-Based Black Economic Empowerment (B-BBEE) status level of contribution.'*

[27] The tenders were first scrutinised by Mr. D. J. Kotze of Laatoe Key Kotze CC, a firm of Quantity Surveyors and Project Managers employed by the Department as a consultant to consider the bids submitted and to make a recommendation to the Department on the award of the Tender ('the Consultant').

[28] During May 2012 the Consultant prepared an unsigned document entitled 'Tender Report' and dated 25 May 2012. I shall refer to this document as the 'First Draft Tender Report'. It appears from the First Draft Tender Report that:

28.1 both the applicant and Safaz passed the functionality threshold of 60%;

28.2 the applicant scored 95% for functionality whereas Safaz scored 61%;

28.3 the applicant tendered the lowest price in an amount of R 10 549 039.02, whereas Safaz tendered a price of R 10 577 855.94;

28.4 Safaz had a level 1 B-BBEE status, whereas the applicant's B-BBEE status was level 3;

28.5 Safaz had the highest overall score with 98.08 tender evaluation ('TEV') points, whereas the applicant scored 98 TEV points.

[29] The Consultant recorded, *inter alia*, the following observations regarding the applicant's tender:

'3.1.14 *Their bid is the best for the following reasons:*

3.1.14.1 *They provided the best bid presentation.*

3.1.14.2 *Their price is the lower of the two functional tenders.*

3.1.14.3 *They are experienced in terms of the knowledge of the people to be employed and in implementing, training and administering the program.*

3.1.14.4

3.1.14.5

3.1.14.6 *They have a low risk of failing in their obligations to [sic] the tender.'*

[30] The Consultant recorded, *inter alia*, the following observations regarding Safaz's tender:

'3.2.9 ***investigation of experience, capability and human resources to provide the services to the project:*** *The tenderer complies with the capability and human resources, but lacks the experience to implement and administer the program. They do not have a recognised cleaning expert in their team.*

3.2.10 ***infrastructure and transport:*** *The Tenderer owns her own premises and has the necessary vehicles to provide the service.*

3.2.11 ***Most recent relevant projects completed:*** *The tenderer successfully completed a number of building contracts for the Department and others.*

3.2.12 *Of the responsive tenderers, Safaz Signs and Electrical has the second lowest price and the highest points.*

3.12.13 *Due to the tenderer's inexperience with this kind of work, they may pose the risk of implementing the program too slowly and failing to meet the Department's delivery objectives for 2012/2013.*

3.12.14 *The tenderer's bank rating (D=Fair trade risk).*

3.12.15 *During a telephonic interview, the tenderer admitted that they did not realise that they have to pay the workers' wages in advance to being paid by the Employer. This oversight from the tenderer may pose the risk of not being able to finance the wages to be paid in advance to the workers.'*

[31] Notwithstanding the fact that Safaz scored the highest TEV points, the Consultant in the First Draft Tender Report recommended that Safaz be eliminated and that the Tender be awarded to the applicant. He gave the following reasons in this regard:

4. REASONS FOR THE ELIMINATION OF TENDERERS

...

Safaz Signs & Electrical

1. *The tenderer is a building contractor and do [sic] not have the necessary experience to implement the program without assistance from the Department and its agents.*
2. *The tenderer may not be able to pay the workers' wages in advance.*

5. RECOMMENDATIONS FOR THE AWARD OF THE TENDER

...

Rainbow Civils can be recommended for the following reasons:

- a. *The tenderer satisfactorily completed several projects of similar size and nature.*
- b. *They are the second highest points scorer.*
- c. *Their price is a realistic price under current market conditions.*
- d. *Their price is the lowest of the functional tenders submitted.*
- e. *Their financiers are willing to fund the tender submitted.*
- f. *They pose the least risk to the Department.'*

[32] The First Draft Tender Report was given to Ms Estelle Bosman, the Department's Assistant Manager: Technical Services on about 25 July 2012, but its consideration was delayed from July to September 2012 on account of her absence due to illness.

The matter was then handed over to Mr Mark Carstens, Manager: Quantity Surveying Profession Services, Public Works Education Facilities ('Carstens'), who was also a member of the Department's Bid Evaluation Committee ('the BEC'). The remaining members of the BEC were Mr Robin Erfort (Manager: Technical and Maintenance Services,)(('Erfort'), Mr Anthony van Niekerk (Manager: Technical and Maintenance Services, Public Works Health Facilities)(('Van Niekerk') and Mr Frederick Bartman (Manager: Technical and Maintenance Services, Public Works General Building Facilities)(('Bartman').

- [33] Carstens prepared a draft report on the Tender in the form of an internal memorandum, dated 18 September 2012 and addressed to the Decision Maker, which was to be considered and discussed by the members of the BEC when it made its recommendation to the Decision Maker. I shall refer to this document as 'the First Internal Memorandum'.
- [34] The First Internal Memorandum reflects that the tenders of the applicant and Safaz were both functional, and that the applicant was scored 95% and Safaz 64% for functionality. (It does not appear why Safaz's functionality score differed from the score of 61% awarded to it by the Consultant in terms of the First Draft Tender Report.) The First Internal Memorandum reflects that Safaz scored the highest number of TEV points – 98.08 as compared with the applicant's second highest score of 98 points. The applicant had tendered the lowest price of R 12 617 966.88 as against Safaz's price of R 12 887 280.48, calculated on the adjusted comparative offer method. The reason for the use of the comparative offer method of evaluation was explained by virtue of the inclusion in the Tender of a large number of optional items to be priced by "rate only", which could distort the final tender offer.
- [35] Notwithstanding the fact that Safaz scored the highest TEV points, the First Internal Memorandum recommended that the Tender be awarded to the applicant. The following observations were made regarding Safaz:

‘4. The highest points scoring tender (98.08 points), Safaz Signs and Electrical, achieved an acceptable score of 64 out of a possible 100 (64%) for the predetermined functionality requirements and we note the following in respect of the supporting documentation provided in fulfilment of these criteria:

- The tenderer provided details of previously completed projects of greater value but not of similar scope.
- The tenderer did not provide references of previous employers for validation of the successful completion of works of a similar scope or value.
- The tenderer provided details of relevant staff but did not include the necessary particulars in respect of a proposed operations manager and wage administrator.

5. Based on, but not limited to, the above, the inexperience of the Safaz Signs and Electrical on a project of this nature represents a substantial risk to the Department, associated Public Works Directorates and Client Departments for the most successful implementation and completion of this project within the required programme dates.’

[36] By contrast, the First Internal Memorandum contained the following ringing endorsement of the applicant’s tender:

‘6. The second highest points scoring tenderer (98.00 points), Rainbow Civils achieved an acceptable score of 95 out of a possible 100 (95%) for the predetermined functionality requirements and we note the following in respect of supporting documentation provided in fulfilment of these criteria:

- The tenderer provided details of previously completed projects of similar scope and of greater value.
- The tenderer provided sufficient references of previous employers for validation of the successful completion of works of a similar scope or value.

- *The tenderer provided sufficient details and particulars of all staff proposed to ensure the successful and timeous completion of this project.*
 - *The tenderer further noted that the staff proposed for this project were immediately available and not currently involved in the tenderers current projects.*
 - *The presentation of all required information fully demonstrates the tenderers understanding of the scope of the works as well as achievement of the programme dates.*
7. *Rainbow Civils achieved a functionality score of 95%, significantly higher than the second responsive tenderer by 48%.*
 8. *Rainbow Civils are considerably experienced in the employment, training and compensation of labour to be employed on a project of this nature.*
 9. *Rainbow Civils demonstrates an understanding of the implementation and administration process necessary to achieve the successful completion of this project within the required programme dates and does not pose a financial or programme risk to the Department associated Public Works Directorates and Client Departments.*
 10. *Based on, but not limited to, the above, we support the consultant Quantity Surveyors recommendation to award the project to Rainbow Civils in the amount of R 10 549 039.02 including VAT.*

[37] Curiously, and for reasons which are nowhere explained, the Consultant on 18 September 2012 prepared and sent to Carstens an altered version of the First Draft Tender Report, also dated 25 May 2012, which I shall refer to as 'the Second Draft Tender Report'. This document reflected that Safaz had been awarded a score of 58% for functionality. The Safaz tender was therefore non-functional as a result of its failure to meet the 60% minimum threshold, and was excluded from the next stage of the tender evaluation process. The Second Draft Tender Report recommended that the Tender be awarded to the applicant, the only functional tenderer, for

essentially the same reasons as set out in the First Draft Tender Report. No reasons are given for the different scores awarded by the Consultant to Safaz for functionality.

- [38] Based on the contents of the Second Draft Tender Report, Carstens prepared a second internal memorandum addressed to the Decision Maker, which he dated and signed on 18 September 2012 ('the Second Internal Memorandum'). In the Second Internal Memorandum, it is recorded that the applicant had scored 95% for functionality and 98 TEV points, and that the applicant's tender was the only functional tender received. It records further that the applicant's tender offer was for an amount of R 10 549 039.02, which translated to R 12 617 966.88 on the comparative offer method of evaluation. As in the First Internal Memorandum, motivation is provided for using the comparative offer method. It was recommended is that the Tender be awarded to the applicant, for the same reasons as given in the First Internal Memorandum. This recommendation was supported by all three remaining members of the BEC, who signed the Second Internal Memorandum on 19 and 20 September 2012.
- [39] The BEC did not, at the stage when the Second Internal Memorandum was signed, perform an independent scoring assessment in respect of functionality; it relied on the functionality scores awarded by the Consultant.
- [40] The Decision Maker had sight of both the First and Second Internal Memoranda. He states in the answering affidavit that it was '*a major concern*' that the First Internal Memorandum recorded that the tender of Safaz was responsive and functional, whereas the Second Internal Memorandum excluded Safaz's tender as non-functional. He states that he was also concerned about the way in which the tenders of the applicant and Safaz had been reduced to comparative offers. Accordingly he requested Supply Chain Management ('SCM') in the person of Mr. Leonard Thomas, Assistant Manager: Supply Chain Management: Provincial Public Works ('Thomas')

to consider the Consultant's evaluation of these two tenders and the BEC's recommendation that the tender be awarded to the applicant.

- [41] Thomas discussed and debated the matter with Adv. Chantal Smith, the Director: Supply Chain Management. After discussing and debating the matter, Thomas and Smith concluded that the Consultant's recommendation (supported by the BEC) that the Tender be awarded to the applicant, was flawed in material respects. Consequently Thomas prepared a memorandum dated 25 September 2012 ('the SCM memorandum') in which he commented on the evaluation method used in two tenders (S011/12 and the Tender) and recorded that:

41.1 the Consultant had erred in reducing the tenders to comparative offers instead of evaluating the tenders in accordance with the bill of quantities and the offer form, in other words in terms of the price tendered;

41.2 in respect of the Tender *'two sets of evaluation committee outcomes were tabled, rendering two different sets of results. This compromises the integrity of that process'*;

41.3 he therefore recommended that the Department should, in both instances, revert to the original evaluation criteria of highest points and to specification based on the tender offers submitted or alternatively cancel both tenders.

- [42] On 25 September 2012 a meeting was held to discuss the SCM Memorandum, at which Thomas, Adv. Smith, and Messrs Carstens and Erfort from the BEC were present. At the end of this meeting, the members of the BEC were asked to reconsider the Second Internal Memorandum recommending the award of the Tender to the applicant and the two Consultant's reports. Accordingly on 26 September 2012 the BEC (comprising Messrs Carstens, Erfort, Van Niekerk and Bartman) met to consider the SCM Memorandum and to reconsider the

recommendation regarding the award of the Tender. Thomas attended the meeting as an 'observer'.

[43] The minutes of the meeting of the BEC on 26 September 2012 ('the BEC Minutes') reveal that the BEC, having taken cognisance of the SCM Memorandum, disagreed with the Consultant's recommendation in that it was considered that the bid price should be used for evaluation and not the comparative price used by the Consultant, and that the Consultant's functionality assessment had been 'inconsistent'.

[44] The BEC accordingly recalculated the functionality points of Safaz as follows:

'Item 4.1.2 – previous projects of similar or greater than scope of work

Safaz Signs was allocated 0 points. This bidder provided details of work of greater value but not similar scope. The committee therefore granted the bidder 3 of the 6 points available for this criteria [sic]

Item 4.3.4 CV's of Key personnel (under Assessment remarks)

Safas Signs was allocated 2 out of 6 points for the supervisor's criteria. The bidder provided details of 5 supervisors for this bid. The committee therefore granted the bidder 4 of the 6 points available for this criteria. [sic]

[45] With the additional points allocated Safaz scored a total of 64% for functionality and therefore qualified to progress to the next stage of the evaluation process. The ultimate result was that the BEC recommended that the '*highest points scorer (89.55), Safaz Signs and Electrical, with an amount of R 10 577 855.94, which is .2% below the estimate, is recommended to execute the work.*'

[46] It appears from a document entitled 'Bid Evaluation Scoresheet (Price Only)', dated 27 September 2012 and signed by Thomas, that:

46.1 the applicant's price was the lowest at R 10 549 039.02 whereas Safaz's price was second highest at R 10 577 855.94;

46.2 the applicant was scored 90 for price, whereas Safaz received a score of 89.75 for price;

46.3 the applicant was scored 8 for B-BBEE status, whereas Safaz received a score of 10 for B-BBEE status;

46.4 Safaz scored the highest TEV score at 99.75, whereas the applicant scored 98 TEV points.

[47] On 27 September 2012 a Bid Evaluation Form was prepared and signed by the Decision Maker. Relevant for present purposes is Section D of the form, headed '*Contractor Recommendation*' which was signed by Erfort. This section contained three questions requiring a 'yes' or 'no' answer. The three questions and the answers given in response were as follows:

D1	<i>Recommendation from consultants?</i>	Yes
D2	<i>Financial ability to execute services successfully?</i>	Yes
D3	<i>Do you consider the contractor is capable of executing this work successfully?</i>	Yes'

[48] It is common cause that no financial risk assessment was undertaken by the Consultant in respect of the tenderers.

The Decision Maker's Reasons for the Award of the Tender

[49] In arriving at his decision regarding the award of the Tender, the Decision Maker had regard '*inter alia*' to the First Draft Tender Report, the Second Draft Tender Report, the First and Second Internal Memoranda, the SCM Memorandum, the BEC Minutes and the Bid Evaluation Form. He does not say in terms that he had regard to the

tender documents submitted by the applicant and Safaz – as one might expect if he had done so – and one is left guessing as to whether or not he did so.

[50] The Decision Maker states that he is aware of the provisions of the PPPF Act and its definition of an acceptable tender as one *'which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'*. He points out that clause F.3.13 of the Standard Conditions provides that a tender offer may be accepted *'if in the opinion of the employer, it does not present any unacceptable commercial risk and only if the tenderer ... can, as necessary and in relation to the proposed contract, demonstrate that he or she possesses the professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and the personnel to perform the contract.'*

[51] The Decision Maker gives the following main reasons for deciding to award the Tender to Safaz:

'45. I formed the view that awarding the tender to the third respondent would not present any unacceptable commercial risk to the Department; and that the third respondent had the necessary qualifications and competence, financial resources, equipment and managerial capability and reliability, related experience and personnel, to carry out the tender – the management of cleaning of schools and clinics.

46. I also had regard to the objectives of the Broad-Based Black Economic Empowerment Act 53 of 2003, which include increasing access of black women to economic activities. For some five years before the services were put out to tender in March 2012, i.e. between 2006 and 2010, the applicant was the only entity which was awarded the tender for cleaning schools and clinics. In 2011 the Department issued small contracts to new entrants such as Distinctive Choice (who is also owned by a woman) and divided the works into smaller contracts. This is how it came about that the third respondent submitted a bid for the tender. Therefore, I considered that awarding the tender to the third respondent would promote the

objective of increasing access of black women to an economic activity. This activity – the management of a contract to clean schools and clinics in the Cape Town Metropolitan Area – was formerly dominated exclusively by the applicant, the upper management of which is largely male.'

[52] Regarding the recommendations of the Consultant, the Decision Maker states that he considered the reservations expressed by the Consultant in the First Draft Tender Reports, namely that Safaz was a building contractor and lacked the necessary experience to implement the program without assistance from the Department, and that Safaz might not be able to pay the workers' wages in advance. However he disagreed with the Consultant in these regards, for the following reasons:

52.1 First, Safaz had been managing personnel for a considerable period of time. It had been carrying out construction contracts since 2005. The Tender contemplated management of the BMP program and monitoring its various facets – work of a far lesser scope than construction.

52.2 Second, the Consultant was specifically employed by the Department to assist in the implementation of the Tender and could therefore assist if needs be. In any event, the BMP workers hired to do the cleaning would be supervised by the management of the relevant school or clinic. In addition, the Department would send out inspectors to inspect the work done.

52.3 Third, the fact that Safaz did not know that it would have to pay the workers' wages in advance of it receiving payment from the Department did not mean that it did not have the money to pay the workers' wages or that it posed a financial risk. Furthermore, Safaz had a CIDB grading of 6 GB, which meant that it was eligible to undertake projects up to a value of R 13 million.

[53] The Decision Maker states further that he was not persuaded that the Consultant's reasons for recommending the award of the tender to the applicant justified the

elimination of the Safaz tender, and that *'the two recommendations by the Consultant (were) inconsistent'* in that the First Draft Tender Report treated the Safaz tender as functional, whereas the Second Draft Tender Report excluded it as non-functional. He states in this regard that:

'This was of particular concern as there was no new information which the Consultant had obtained or considered between the two reports, given the fact that the conflicting recommendations were dated 25 May 2012. For these reasons, I referred the matter to Supply Chain Management.'

- [54] Finally, the Decision Maker stated that he was satisfied that the Consultant had erred in his assessment of the functionality of the Safaz tender and that the revised functionality score awarded by the BEC on 26 September 2012, was fair and reasonable, and he concluded that, *'(f)or the above reasons I was of the opinion that the award of the tender to the third respondent did not present an unacceptable commercial risk to the Department.'*

The Legislative Framework

- [55] It is common cause that the award of the Tender was governed by section 217(1) of the Constitution, as read with section 2 of the Procurement Act and the Procurement Regulations.

- [56] Section 217, which of the Constitution provides the foundation for all public procurement, reads as follows:

'217 Procurement

- (1) *When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*

- (2) *Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*
- (a) *categories of preference in the allocation of contracts; and*
 - (b) *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
- (3) *National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'*

[57] The national legislation envisaged in section 217(3) of the Constitution is the Procurement Act, which was enacted to provide the framework for the implementation of a preferential procurement policy as envisaged in section 217(2). The relevant section of the Procurement Act is section 2, which reads as follows:

- '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 (d) 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.*

2(2) *Any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance.'*

[58] The relevant portions of the Procurement Regulations are Regulations 4, 6, 7 and 10. Regulation 4 reads as follows:

‘4 Evaluation of tenders on functionality

- (1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.*
- (2) The evaluation criteria for measuring functionality must be objective.*
- (3) When evaluating tenders on functionality, the –*
 - (a) evaluation criteria for measuring functionality;*
 - (b) weight of each criterion;*
 - (c) applicable values; and*
 - (d) minimum qualifying score for functionality;**must be clearly specified in the invitation to submit a tender.*
- (4) No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.*
- (5) Tenders that have achieved the minimum qualifying score for functionality must be evaluated further in terms of the preference point systems prescribed in regulations 5 and 6.*

[59] Regulation 6 reads as follows:

‘6 The 90/10 preference point system for acquisition of services, works or goods with a Rand value above R 1 million

- (1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R 1 000 000 (all applicable taxes included):*

$$P_s = 90 \left[1 - \frac{P_t - P_{min}}{P_{min}} \right]$$

Where

P_s = Points scored for comparative price of tender or offer under consideration

P_t = Comparative price of tender or offer under consideration; and

P_{min} = Comparative price of lowest acceptable tender or offer.

- (2) Subject to subregulation (3), points must be awarded to a tenderer for attaining their B-BBEE status level of contributor in accordance with the table below:

B-BBEE Status Level of Contributor	Number of Points
1	10
2	9
3	8
4	5
5	4
6	3
7	2
8	1
Non-compliant contributor	0

- (3) A maximum of 10 points may be allocated in accordance with subregulation (2).
- (4) The points scored by a tenderer in respect of the level of B-BBEE contribution contemplated in subregulation (2) must be added to the points scored for price as calculated in accordance with subregulation (1).
- (5) Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

[60] Regulation 7 reads as follows:

'7 Award of contracts to tenderers not scoring the highest number of points

- (1) A contract may be awarded to a tenderer that did not score the highest total number of points, only in accordance with section 2(1)(f) of the Act.'

[61] The relevant portions of regulation 10 read as follows:

'10 Broad-Based Black Economic Empowerment Status Level Certificates

- (1) ...
- (2) *Tenderers other than Exempted Micro-Enterprises (EMEs) must submit their original and valid B-BBEE status level verification certificate or a certified copy thereof, substantiating their B-BBEE rating;*
- (3) *The submission of such certificates must comply with the requirements of instructions and guidelines issued by the National Treasury and be in accordance with notices published by the Department of Trade and Industry in the Government Gazette.*
- (4) *The B-BBEE status level attained by the tenderer must be used to determine the number of points contemplated in regulations 5(2) and 6(2).'*

Inconsistencies in the Tender Document

[62] Mr Rosenberg argued that there were fundamental inconsistencies and contradictions in the Tender Document which went to the very heart of the tender evaluation process and rendered the subsequent award reviewable.

[63] It is plain for all to see that the Tender Data (incorporating the Standard Conditions) and the Functionality and Preference Documents (in the Returnable Documents section of the Tender Document) contain different methods for evaluating the tenders.

[64] The method of evaluation set out in clause F.3.11.5 of the Standard Conditions states that tenders will be scored for quality (functionality) in addition to financial

offer (price) and preference for the purposes of calculating total TEV points.¹ By contrast, the method of evaluation referred to in the Functionality and Preference Documents contemplates scoring for functionality only at an initial threshold stage, after which those tenders qualifying as functional are scored for TEV points on the basis of price and preference only, where up to 90 points may be awarded for price and up to 10 points for B-BBEE Status.

- [65] As a result of this inconsistency, prospective tenderers are not clearly informed as to the nature of the role to be played by functionality in the adjudication of the tenders. On one method, scores are to be awarded for functionality in the overall scoring of the tenders. On the other method, functionality is relegated to a qualifying role and ignored in the crucial final scoring of the tenders. The former method favours experienced tenderers, the latter new entrants.
- [66] Furthermore, the Tender Data and the Preference Document contain different formulae for calculating the scores for financial offer or price. The following simple arithmetic exercise – the sort likely to be undertaken by prospective tenderers – shows that these formulae yield different results:

¹ The method of evaluation laid down in the Standard Conditions conflict with the requirements of the Procurement Regulations, which expressly provide for the evaluation of tenders based on price and preference only after an initial scoring for functionality and would therefore appear to be *ultra vires*. The point was not raised, however, and nothing turns on it in this case.

Formula in the Preference Document

Assuming that:

Pmin (the lowest tender price) is R 1 200 000.00

Pt (the price of the tender under consideration) is R 1 300 000.00

$$\begin{aligned}
 Ps &= 90 \left[1 - \frac{Pt - Pmin}{Pmin} \right] \\
 &= 90 \left[1 - \frac{1\,300\,000 - 1\,200\,000}{1\,200\,000} \right] \\
 &= \frac{165}{2} \\
 &= 82.5
 \end{aligned}$$

Formula in the Tender Data

Assuming that:

Pmin (the lowest tender price) is R 1 200 000.00

P (the price of the tender under consideration) is R 1 300 000.00

W₁ is 90

$$\begin{aligned}
 NFO &= Pm / (P \times W_1) \\
 &= \frac{1\,200\,000}{1\,300\,000 \times 90} \\
 &= \frac{1\,200\,000}{117\,000\,000} \\
 &= \frac{2}{195} \\
 &= 0.0102
 \end{aligned}$$

- [67] Mr Rosenberg went further and argued that the formula for scoring price in the Tender Data, or its explanation, was erroneous. This was disputed on the papers. The respondents allege that the formula works and that the applicant is not qualified to pronounce on the workings of the formula. It seems to me that this misses the point. A prospective tenderer should be placed in a position to make sense of the formula and apply it on the basis of the explanation given. But be that as it may, it is not necessary to make any finding in this particular regard. What is important, for present purposes, is that the Tender Document contains two different methods for calculating the scores to be awarded for price, which yield different results. Needless to say, the situation is not conducive to clarity.
- [68] Mr Rosenberg argued that the inconsistency between various sections of the Tender Document created confusion and rendered the resultant decision reviewable in terms of sections 6 (2)(c) and 6 (2)(e)(iii) of PAJA.
- [69] The respondents denied that there was any confusion created by the Tender Document because, so it is said, tenderers were informed in the tender documents that the tender would be evaluated for functionality and thereafter in terms of the 90/10 preference points system. Mr Jaga, who appeared for the respondents, submitted that this particular criticism of the Tender Document did not constitute a ground for review. He contended, further, that the applicant could not point to any prejudice as a result of the alleged confusion.
- [70] The fact that the tenderers were informed in the Functionality and Preference Documents how their tenders would be evaluated does not, in my view, assist the respondents. It does not address the fact that there were multiple, and in some instances contradictory, scoring methods contained in different sections of the Tender Document. In the absence of provision stating which section of the Tender Document would be afforded precedence in the event of inconsistency between the various sections, tenderers would be at a loss to know which of the conflicting methods would be applied in the adjudication of the bids.

[71] In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* ('New Clicks')², Chaskalson CJ stated the following regarding the doctrine of vagueness:³

'It seems to have been assumed by the parties, and in my view correctly so, that vagueness is a ground for review under PAJA. Although vagueness is not specifically mentioned in PAJA as a ground for review, it is within the purview of s 6(2)(i) which includes, as a ground for review, administrative action that is otherwise "unconstitutional or unlawful". This Court has held that the doctrine of vagueness is based on the rule of law, which is a foundational value of our Constitution. In Affordable Medicines [Trust and Others v Minister of Health of RSA and Another ('Affordable Medicines')]⁴ this Court explained the doctrine in the following terms:

"(L)aws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives."...

Related to this is a requirement implicit in all empowering legislation that regulations must be consistent with, and not contradict, one another. Regulations which fail to comply with these requirements would therefore contravene s 6 (2)(i) of PAJA.

(Emphasis added.)

[72] The decisions in *New Clicks* and *Affordable Medicines* dealt with the validity of regulations, but I consider that the principles referred to therein are equally applicable in the context of procurement. In my view the imperatives of fairness and

² 2006 (2) SA 311 (CC).

³ At para [246].

⁴ 2005 (6) BCLR 529 (CC) at para [108].

transparency, laid down in section 217(1) of the Constitution, dictate that prospective tenderers should be properly informed of the tender evaluation criteria to be applied. This information is obviously necessary to enable would-be bidders to decide whether or not to spend time and money on preparing a tender.⁵

- [73] Furthermore, I consider that it offends against the notion of transparency where a tender adjudicator is left to choose from a smorgasbord of tender evaluation methods. To my mind transparency and fairness requires that tender evaluation methods should be clearly defined, certain and published in advance in the tender documentation.
- [74] There can be no doubt, in my view, that the contradictions in the Tender Document regarding the method of tender evaluation are material as they relate to a fundamental part of the tender process. They have the effect that prospective tenderers are not informed with reasonable certainty of the manner in which the tenders will be adjudicated. I am therefore of the view that the Tender Document is vague and non-compliant with the principle of legality.
- [75] As regards the question of prejudice, I cannot accept the submission that the award of the Tender should not be aside because the applicant has not shown any prejudice as a result of the contradictions in the Tender Document. An applicant for review is not required to show actual prejudice; potential prejudice is sufficient. As Friedman J put it in *Roberts v Chairman, Local Road Transportation Board and Another (1)*⁶,

*'The question is not whether anyone has actually been prejudiced, but whether the failure by the Board to afford interested persons the prescribed 10 day period within which to lodge representations was calculated to prejudice potential objectors. (See *Mostert v Munro en 'n Ander* 1965 (1) SA 193 (A) at 205 E – F)' (Emphasis added.)*

⁵ See *RHI Joint Venture v The Minister of Roads and Public Works, Eastern Cape and Others* 2003 (5) BCLR 544 (Ck) at para [37] –[38].

⁶ 1980 (2) SA 472 (C) at 477 D.

- [76] To my mind the uncertainty created by the contradictions in the Tender Document was calculated to prejudice prospective tenderers by virtue of the failure to properly inform them of matters which had significant bearing on their decision whether or not to submit a tender. Where an irregularity is calculated to cause prejudice to a party, it is for the other party to show that the irregularity in fact caused no prejudice.⁷ The respondents have not shown that the applicant was not prejudiced by this irregularity.
- [77] The consequence of the finding that the Tender Document is vague is that the resultant award of the Tender is reviewable for being “otherwise unconstitutional or unlawful” in terms of section 6 (2)(i) of PAJA.

Safaz was not entitled to the preference points claimed for B-BBEE Status

- [78] It is common cause that the effect of the amendment of clause 5.4 of the Preference Document was that tenderers were required to submit a B-BBEE Status Verification Certificate (‘Verification Certificate’) which had been compiled in terms of the ‘Construction Charter’. This was a reference to the Construction Sector Charter Code published in terms of section 9 of the B-BBEE Act under Government Notice No. 862 of 2009 in Government Gazette No. 32305 of 5 June 2009 (‘the Construction Sector Code’).
- [79] It is also common cause that the Verification Certificate submitted by Safaz had been compiled in terms of the Codes of Good Practice on Black Economic Empowerment published under Government Notice No. 29618 of 2007 in Government Gazette 29617 of 9 February 2007 (‘the DTI Codes’), and not in terms of the Construction Sector Code.

⁷ *Grove Primary School v Minister of Education and Others* 1997 (4) SA 982 (C) at 997 H – I.

- [80] It is clear from the papers that neither the Consultant nor the BEC, nor the Decision Maker, was alive to the fact that the Verification Certificate submitted by Safaz was not compliant with the requirements stipulated in the Preference Document (as amended).
- [81] Mr Rosenberg argued that it was a peremptory requirement that tenderers, in order to qualify for the preference points for B-BBEE Status, submit the correct Verification Certificate, i.e., one compiled in terms of the Construction Sector Code. I agree with this submission.
- [82] To my mind there are several indications in the Preference Document that it was mandatory for bidders to submit a Verification Certificate compiled in terms of the Construction Sector Code in order to be awarded preference points for B-BBEE Status. Clause 4.4 of the Preference Document contains a clear warning to prospective bidders that failure on the part of a bidder to fill in and sign the document and submit a Verification Certificate would be interpreted to mean that preference points for B-BBEE Status were not claimed. Clause 7.4 of the Preference Document stipulates that bidders *'must submit their original and valid B-BBEE status level verification certificate ... substantiating their B-BBEE rating ...'* (Emphasis added.) The amended clause 5.4 of the Preference Document makes it plain that the tenderers were required to confirm that *'the bidder's B-BBEE status submitted and to be used in the adjudication of the bid, had been assessed and compiled in terms of the "Construction Charter"'*.
- [83] To my mind a reading of the Preference Document as a whole leaves no room for any construction other than that the requirement as to submission of a B-BBEE Verification Certificate – in proper form - was peremptory, and that the effect of failure by a bidder to submit such a Verification Certificate was that preference points for B-BBEE Status could not be awarded.⁸

⁸ See *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA) at para [32] – [33]

[84] Mr Jaga contended, with reference to the contents of the answering affidavit filed on behalf of Safaz, that the reference to the DTI Codes instead of the Construction Sector Code in Safaz's Verification Certificate, was merely an error on the part of Kbonga, the verification agency which had issued the certificate, and that the certificate should have referred to the Construction Sector Code instead of the DTI Codes.⁹ It appears that Mrs Jappie, the sole member of Safaz, was unaware of the problem when she submitted the Verification Certificate, and that it had been an innocent mistake on her part.

[85] It was argued, with reference to the case of *Millenium Waste Management v Chairperson, Tender Board: Limpopo Province and Others* ('Millenium Waste')¹⁰ that this was an error which could be condoned. He also referred to *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* ('Metro Projects')¹¹, in which Conradie JA said the following with reference to the duty resting on a provincial tender committee to act fairly:¹²

'Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

[86] The gist of Mr Jaga's argument was that the BEC had the discretion to condone Safaz's non-compliance with the requirements regarding the prescribed Verification Certificate, and also that the BEC could have asked Safaz to correct what was an obvious and innocent mistake in its tender.

⁹ The affidavit filed on behalf of Safaz reveals that Kbonga, when asked to confirm that it had made a mistake in Safaz's verification certificate, refused to do so and maintained that it had issued the certificate in accordance with a discretion which it had to certify Safaz in terms of the DTI Codes as opposed to the Construction Sector Code.

¹⁰ 2008 (2) SA 481 (SCA) at paras [15] – [17].

¹¹ 2004 (1) SA 16 (SCA) at para [13].

¹² *Ibid.*

[87] In my view the argument is misplaced. This was not a situation, like that in Millennium Waste, where the Decision Maker was aware of the particular defect in the tender and applied his mind, rightly or wrongly, to the question of whether he could and should condone the defect or allow the tenderer an opportunity to correct the mistake. As I have indicated, the Consultant, the BEC and the Decision Maker were all oblivious to the defect in the Verification Certificate submitted by Safaz. It does not assist the respondent to suggest that the Decision Maker could and would have condoned the defect if he had been aware of it. The fact of the matter is that he was not, and the question of condonation simply did not arise.¹³

[88] I might add, *en passant*, that I do not consider that the terms of the Preference Document afforded the Decision Maker any discretion to condone non-compliance with the requirements regarding the Verification Certificate. And had the Decision Maker been aware of the defect and afforded Safaz an opportunity to augment its tender by submitting the prescribed Verification Certificate, such conduct might well have founded a complaint that all tenders were not being treated equally.¹⁴ That, however, is not the situation with which we are faced in this case, and in my view the simple answer, for present purposes, is that Safaz did not submit the prescribed Verification Certificate and should not, therefore, have been awarded any preference points for B-BBEE Status.

[89] Mr Jaga also contended that, based on Regulation 6(2) of the Procurement Regulations, Safaz was entitled to receive a score of 10 points by virtue of its level one B-BBEE Status, and that Safaz did in fact qualify for level one B-BBEE Status in terms of both the DTI Codes and the Construction Sector Code. Reference was made to the affidavit of a so-called B-BBEE expert, Mr Brink, in which he confirmed that he had assessed Safaz and that Safaz qualified for certification as a level one B-BBEE Status Contributor in terms of the Construction Sector Code.

¹³ Cf *Tecmed (Pty) Ltd v Eatsern Cape Provincial Tender Board and Others* 2001 (3) SA 735 (SCA) at B – C. In that case the tender board was not aware of the fact that Tecmed's tender had been submitted late and therefore could not apply its mind to the question whether it should exercise a discretion in Tecmed's favour and admit it.

¹⁴ See *Metro Projects supra* n 6, at para [14].

[90] This argument, however, misses the point, namely that the tenderer's B-BBEE status, on which the claim for preference points was based, had to be properly verified in terms of the specific tender requirements. In order to be eligible for the preference points for level one B-BBEE Status, Safaz was required not simply to qualify for certification for level one B-BBEE Status in terms of the Construction Sector Code, but to verify that it had been so certified by submitting the relevant Verification Certificate.

[91] I am accordingly of the view that Safaz was not entitled to the 10 points awarded to it for B-BBEE Status and that these points were awarded to it as a result of ignorance of the defect in Safaz's Verification Certificate. Safaz achieved a final score of 99.75 TEV points and the applicant 98 TEV points. The prejudice to applicant in these circumstances is self-evident: had Safaz not been wrongly awarded 10 points for B-BBEE Status, the applicant would have been the highest scoring tenderer and, as such, entitled to the award of the Tender.

[92] In these circumstances I consider that there was non-compliance with a mandatory and material requirement in the Tender Document, in that points for B-BBEE Status was awarded in the absence of the required Verification Certificate, and that the Decision Maker failed to take into account a relevant consideration, namely the fact that the Verification Certificate submitted by Safaz was non-compliant. For these reasons I am of the view that the award of the Tender to Safaz should be reviewed and set aside in terms of sections 6(b) and 6(e)(iii) of PAJA.

The Decision Maker based his decision on considerations of racial and gender preference falling outside the parameters of the Procurement Act and the Procurement Regulations.

[93] It is clear from paragraph 46 of the respondent's answering affidavit (quoted above at paragraph 51) that the Decision Maker placed much store in the fact that Safaz

was owned by a black woman. He states in terms that he had regard to the objectives of the B-BBEE Act, which include increasing the access of black women to economic activities.¹⁵ The question is whether it was lawful for him to do so, i.e., whether this was a relevant consideration which could properly be taken into account in the decision to award the Tender.

- [94] Mr Rosenberg submitted that it was not. He contended that preference based on gender is already provided for in the 90/10 preference points system which governed the Tender, and that the Decision Maker was effectively 'double counting' by giving additional preference to Safaz based on gender. Mr Jaga countered that the Decision Maker was entitled, in awarding the Tender, to be guided by the objectives in section 2(d) of the B-BBEE Act.
- [95] Mr Rosenberg referred me to the decision in *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and others* ('Grinaker')¹⁶, where the tender had been awarded to someone other than the highest scoring tenderer on the basis of affirmative action and black empowerment considerations, and the question was whether the criteria contemplated in sections 2(d) and (e) of the Procurement Act (which include advancement of persons previously disadvantaged on the basis of race, gender and disability) may be taken into account for purposes of determining, in terms of section 2(f) of the Procurement Act, whether objective criteria exist for the award of the tender to one other than the highest scoring tenderer. De Villiers J held¹⁷ that section 2(f) contemplates objective criteria over and above those contemplated in section 2(d) and (e) of the Procurement Act, and stated the following in this regard:¹⁸

¹⁵ See section 2(d).

¹⁶ [2002] 3 All SA 336 (T).

¹⁷ *Grinaker supra* n 16 at para [60].

¹⁸ *Ibid.*

'The criteria contemplated in paragraphs (d) and (e) would, if the specific goal is clearly specified in the invitation to submit a tender, be the basis for the award of a maximum of ten points. To my mind, the legislature therefore envisaged that over and above the objective criteria contemplated in paragraphs (d) and (e), there might be objective criteria justifying the award of the tender to another tenderer other than the tenderer who had scored the highest points. To put it differently, the legislature did not intend that criteria contemplated in paragraphs (d) and (e), should be taken into account twice, firstly in determining what score was achieved out of ten in respect of the criteria contemplated in these paragraphs and, secondly, in taking into account those selfsame criteria to determine whether objective criteria justified the award of the contract to another tenderer than the one who had scored the highest points.'¹⁹ (Emphasis added.)

- [96] The situation in this case differs from that in Grinaker in that the Decision Maker was operating under the assumption – erroneous as it turns out – that Safaz was the highest scoring tenderer. He did not undertake an enquiry into whether or not objective criteria existed which justified the award of the tender to the applicant instead of Safaz – a point to which I shall return when I deal with the last ground for review. He appears to have adopted the approach that the award of the Tender to Safaz was justified because, above all else, Safaz was a black, female-owned entity; in other words, this criterion was decisive in the decision to award the Tender.
- [97] It seems to me that the true nature of the Decision Maker's error in this regard was that he failed to appreciate that his power was confined to the four corners of the Procurement Act, the Procurement Regulations and the Tender Document, and that he had no general discretion to take into account considerations of race and gender or affirmative action outside of the specific parameters laid down therein.
- [98] Viewed differently, the Decision Maker erred in thinking that the B-BBEE Act was relevant and applicable to the discharge of his function, because he misinterpreted

¹⁹ Similar conclusions were reached in *RHI Joint Venture v Minister of Roads and Public Works and Others* 2003 (5) BCLR 544 (Ck) *supra* n 5 at para [26] – [28] and *Shearwater Construction v City Tshwane Metropolitan Municipality and others* [2006] JOL 16809 (T).

the nature and sphere of application of the B-BBEE Act. This particular act is clearly aimed at achieving an integrated, co-ordinated and uniform approach to Broad-Based Black Economic Empowerment. It lays down concrete mechanisms for the achievement of its objectives, which are designed to be implemented systemically on a macro level, and not on an *ad hoc* individual basis.

[99] Section 9(1) of the B-BBEE Act provides that the Minister of Trade and Industry may issue codes of good practice on black economic empowerment which may include:

- (a) *the further interpretation and definition of broad-based black economic empowerment ...;*
- (b) *qualification criteria for preferential purposes for procurement and other economic activities;*
- (c) *indicators to measure broad-based black economic empowerment;*
- (d) *the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph (c);*
- (e) *guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector; and*
- (f) *any other matter necessary to achieve the objectives of this Act.'*

[100] It is significant that section 9(4) of the B-BBEE Act specifically caters for preference to be accorded to black women. It provides that:

'In order to promote the achievement of equality of women, as provided for in section 9(2) of the Constitution, a code of good practice issued in terms of subsection (1) and any targets specified in a code of good practice in terms of subsection (3), may distinguish between black men and black women.'

[101] Organs of state and public bodies are enjoined, by section 10 of the B-BBEE Act, to *'take into account and, as far as is reasonably possible, apply'* any relevant code of good practice issued in terms of the B-BBEE Act *'in developing and implementing a preferential procurement policy'*.

- [102] Thus an organ of state is obliged, in determining and implementing its preferential procurement policy, to have regard to both the framework and preference point system laid down in the Procurement Act, and the relevant codes of good practice issued in terms of the B-BBEE Act.
- [103] In this case the Tender was clearly formulated with the provisions of the Procurement Act and the B-BBEE Act in mind. The Tender Document in this case made specific reference to the Procurement Regulations and informed tenderers that a maximum of 10 points would be awarded for B-BBEE Status, as measured and verified by an accredited B-BBEE Verification Agency. It is clear from clause 5.4 of the Preference Document (as amended) that B-BBEE Status was to be measured in accordance with the relevant scorecard contained in the Construction Sector Code issued in terms of section 9(1) of the B-BBEE Act.
- [104] In a nutshell, it is quite clear that the objectives of the B-BBEE Act were taken into account and built into the very matrix of the Tender: Ten preference points were dedicated to B-BBEE Status, which, in turn, took into account racial and gender criteria - as contemplated in section 2 (d) and (e) of the PP Act.
- [105] Nothing in the wording of the Tender Document, the Procurement Act or the Procurement Regulations, afforded the Decision Maker the discretion to attach any weight to race and gender over and above the ten preference points available to be awarded for B-BBEE Status. This is not surprising. To my mind the very purpose of the Procurement Act, and the relevant B-BBEE Codes of Good Practice, is to ensure that preferential procurement policy is formulated and implemented in a defined and consistent manner,²⁰ and not left to the vagaries of individual discretion.

²⁰ See the remarks of Ebrahim J in *RHI Joint Venture v Minister of Roads and Public Works and Others* *supra* n 5 at para [25].

[106] I therefore consider that the Decision Maker's decision was materially influenced by an error of law, as contemplated in section 6(2)(d) of PAJA, in that he wrongly considered himself at liberty to take into account the objectives set out in section 2(d) of the B-BBEE Act, and failed to appreciate the limited ambit of his powers. This error led him to take into account an irrelevant consideration, i.e., the racial and gender status of Safaz, and to award the Tender for a reason not authorised by the empowering provision. I am accordingly of the view that the decision to award the Tender to Safaz is reviewable in terms of sections 6(2)(c), 6(2)(d), 6(2)(e)(i) and 6(2)(e)(iii) of PAJA.

The Decision Maker failed to consider functionality as an objective criterion in terms of section 2(1)(f) of the PP Act.

[107] Mr Rosenberg submitted that functionality is an objective criterion for the purposes of section 2(1)(f) of the Procurement Act, which should be taken into account in considering whether or not the tender should be awarded to someone other than the highest scoring tenderer. He argued that, particularly in the situation where Safaz and the applicant were 'effectively dead heating' in terms of price and B-BBEE points, the Decision Maker had erred by failing to take into account the vast discrepancy between the functionality scores of the applicant and Safaz²¹ in deciding to award the tender to Safaz. It is difficult to fault the logic of this argument - which went unanswered by the respondents.

[108] Section 2(1)(f) of the Procurement Act provides that the tender must be awarded to the highest scoring tenderer unless there are objective criteria which justify the award of the tender to another tenderer. The Procurement Act has its genesis in

²¹ Safaz's functionality had been controversial throughout the tender process. The Consultant had first given Safaz a score of 61 % for functionality, which he had then reduced to 58%. The BEC later recalculated Safaz's functionality score and awarded it a score of 64%. The applicant had consistently scored 95% for functionality.

section 217 of the Constitution. Section 2(1)(f) must therefore be construed in the light of section 217(1), which requires that the procurement system be '*fair, equitable, transparent, competitive and cost-effective*'.

- [109] Functionality as it is variously defined in the Tender Document²² concerns the ability of the tenderer to deliver what is required, to meet the needs of the tender, to deliver a service or commodity which is fit for purpose. It is based on the objectively measurable criteria of experience and standing, capability and resources.²³ As such it has direct bearing on the question of whether a tender is cost-effective, i.e. whether it yields the best possible value for money.²⁴ To my mind it is self-evident that it is not cost effective to award a tender to a party who ticks the right boxes as regards price and preference, but is unable to get the job done properly – whether through lack of experience, adequate personnel or financial resources.
- [110] 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. It therefore falls to be taken into

²² See paragraphs [14] and [18].

²³ Contained in the Functionality Assessment on p 30 of the Tender Document.

²⁴ See P Bolton *The Law of Government Procurement in South Africa* at p.103 where capability is treated as a factor relevant to cost-effectiveness.

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.

[111] As De Villiers J pointed out in *Grinaker*,²⁵ section 2(1)(f) of the Procurement Act, which is cast in peremptory terms, posits a two-stage enquiry: the first step is to determine who scored the highest points in terms of the 90/10 points system; the next stage is to determine whether objective criteria exist, in addition to or over and above those referred to in sections 2(d) and (e), which justify the award of the tender to a lower scoring tenderer.

[112] As I have indicated, the Decision Maker operated under the assumption that Safaz was the highest scoring tenderer. It is evident from his affidavit that he did not expressly ask the question whether objective factors existed which justified the award of the Tender to the applicant instead of to Safaz. He approached the matter from the point of view that he was entitled, by virtue of Clause F.3.13 of the Standard Conditions, to accept the Safaz tender if he was of the opinion that Safaz did not present any unacceptable commercial risk and if Safaz could demonstrate that it had the necessary qualifications, competence, resources *etc.* to perform the contract. What was pertinently absent was any consideration of the question whether the Tender should rather be awarded to the applicant; instead the Decision Maker focussed all his attention on Safaz.

[113] He gave no consideration to the fact that the applicant had vastly outscored Safaz in terms of functionality. It apparently did not occur to him that, given that the applicant had tendered the lowest price, and that the overall TEV scores of applicant and Safaz were only 1.75% apart, it was incumbent upon him to apply his mind to the question whether the applicant's superior functionality did not make the applicant's tender more cost effective.

²⁵ *Supra* n 16 at para [40] – [41].

[114] Thus, in my judgment, the Decision Maker erred by failing to proceed to the second stage of the enquiry prescribed in section 2(f) of the Procurement Act, inasmuch as he failed to consider whether any objective factors existed which justified the award of the tender to the applicant instead of to Safaz. In so doing, he failed to adhere to the mandatory prescripts of an empowering provision and his decision is therefore reviewable in terms of section 6(2)(b) of PAJA. I also consider that, to the extent that he failed to take into account the vast discrepancy between the functionality scores of the applicant and Safaz, he failed to take into account a relevant consideration and therefore erred in the matter contemplated in section 6(2)(e)(iii) of PAJA.

Discretion

[115] Section 8(1) of PAJA confers a discretion upon the Court in judicial review proceedings to grant any order that is just and equitable. In tender cases the exercise of this discretion involves a balancing between the interests of the disappointed tenderer, the interests of the successful tenderer, and the interests of the public at large.²⁶

[116] The public interest factor comprises competing considerations of legality and certainty. Public interest undoubtedly requires that administrative action be lawful; on the other hand, the public interest also requires finality of administrative decisions and the exercise of administrative functions.²⁷ As was pointed out by Scott JA in *Chairperson, Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and Others* ('Sapela')²⁸, considerations of pragmatism and practicality form part of the latter category of public interest.

²⁶ *Millennium Waste supra* n 10 at para [22] – [23].

²⁷ *Chairperson, Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at para [28].

²⁸ *Ibid.*

[117] Cloete JA summed up the position as follows in *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* ('Eskom Holdings').²⁹

'The principle of legality would require that an invalid administrative decision be set aside. The desirability of certainty may – and I emphasise the word “may”, because this is not so in every case – point in the opposite direction: persons who altered their position on the basis that the administrative act was valid would suffer prejudice if it is set aside, because the effect of such an order is retrospective.'

[118] On behalf of the respondents Mr Jaga submitted that the award of the Tender should not be set aside as this would prejudice the public residing in the relevant areas inasmuch as 133 schools and 13 community health centres would not be cleaned, and a fire and health hazard would be created by the failure to clear vacant provincial erven of bush and rubbish. It was also contended that some 1850 poor, unemployed persons, who would otherwise be employed as BMP workers, would suffer as a result of any delay in the implementation of the Tender.

[119] Mr Jaga argued further that Safaz would be prejudiced if the award of the Tender were to be set aside, inasmuch as Safaz had:

119.1 incurred a non-refundable cost in an amount of R 16 834.21 in procuring the requisite guarantee of 5% of the contract sum;

119.2 spent time visiting 111 schools and 3 clinics between 27 September and 8 November 2012 in order to identify persons to be employed as BMP workers;

119.3 upgraded its accounting package at a cost of R 13 649.30;

²⁹ 2009 (4) SA 628 (SCA) at para [10]

- 119.4 did not submit a tender for another contract with the City of Cape Town worth R 11 million because it anticipated that it would be busy implementing the Tender;
- 119.5 bought three motor vehicles at a cost of R 103 000.00 to be used in implementing the Tender;
- 119.6 'in anticipation of being awarded the tender' purchased an immovable property in July 2012 to serve as its business premises.

[120] To my mind the crucial consideration in this case is the fact that, as I have indicated,³⁰ the parties reached agreement after this application was launched, that the Tender would not be implemented. This means that no work has commenced on, and no public expense has been incurred in respect of, the Tender project. The setting aside of the award of the Tender would not, therefore, result in any loss to the public purse through waste or duplication.

[121] It is so that the setting aside of the award of the Tender will have the result that delivery of the contemplated cleaning services might be delayed, and the employment opportunity for the persons intended to be employed as BMP workers will be delayed. As regards the services, it appears that, although the BPM programme has been running for some five years, there have been long periods during which no service was in place, for example during March 2010 to December 2011, during which time the Department itself managed the situation. The Department therefore can and should take responsibility for delivery of these services until such time as a proper tender can be implemented.

[122] As regards the delayed employment prospects for the intended BMP workers, that is indeed unfortunate. However, it hardly lies in the mouth of the respondents to rely on this argument in circumstances where they have apparently been content to let the

³⁰ *Supra* at para [4].

BM Program remain fallow long periods of time. Furthermore, on respondents' own version, the Tender, which closed on 9 May 2012, lay gathering dust between July and September 2012 because the employee in charge of the matter was absent due to illness, and was only handed over to Carstens on 18 September 2012 to avoid the lapse of the Tender. To my mind, the delay in the creation of employment opportunities through the BMP programme is of the Department's making, and cannot be laid at the door of the applicant.

- [123] As regards the interests of Safaz, I am not persuaded that any of the instances of alleged prejudice - with the exception of the non-refundable cost of R 16 834.21 and the failure to submit a tender for another contract – constitute real prejudice for the purposes of the present enquiry in the sense of a detrimental alteration of Safaz's position in anticipation of the validity of the tender award. The upgrading of its accounting software and purchase of vehicles cannot, in my mind, be regarded as prejudice, since there assets can be productively employed in Safaz's business.
- [124] The fact that Safaz purchased an immovable property before being awarded the Tender '*in anticipation*' of getting the contract is a problem entirely of Safaz's own making, and is not a relevant consideration. To my mind this conduct, which would otherwise be incomprehensibly rash, can only be taken as an indication of a measure of confidence in Safaz's prospects and viability, which tends to puts paid to Ms Jappie's suggestion that '*(t)he loss of this contract may destroy (Safaz) and me*'. There is no evidence that, without the Tender contract, Safaz will not be able to continue trading and submitting tenders for other contracts; in fact the contrary appears from the very fact that it complains that it held back on submitting a tender for a lucrative contract with the City of Cape Town because it thought it would have its hands full with the Tender.
- [125] Finally, it should not be forgotten that Safaz was the author of its own misfortunes. However innocently the error may have arisen, the fact of the matter is that the responsibility lay with Ms Jappie to check that the tender submitted on behalf of

Safaz was correct in all respects. More particularly, it was incumbent on her to satisfy herself that Verification Certificate which she submitted - and confirmed as correct by her signature - was indeed in accordance with the requirements set out in the Preference Document.

[126] Having carefully weighed the relevant competing interests, I am of the view that there are no considerations of public policy, pragmatism or prejudice to Safaz which would suffice to outweigh the applicant's interest in a fair, lawful tender process and the general public interest in lawful administrative action. Furthermore, I consider that the effective vindication of constitutional rights requires that relief be afforded to a litigant who has made out a case, unless there are compelling reasons to deny such relief. In my view there are no such reasons in this case, and justice and equity therefore demand that applicant be granted the relief which it seeks.

Conclusion

[127] I was originally asked to make an order reviewing and setting aside the award of the Tender to Safaz and awarding the Tender to the applicant. However Mr Rosenberg wisely did not persist with the latter request. In view of the finding that the Tender Document was unlawful for vagueness, I consider that the entire tender process which followed was fatally flawed. In the event that the Department wishes to issue a fresh tender for the services, it must do so on revised tender documents which do not contain material inconsistencies.

[128] As regards the question of costs, there is no reason, in view of the conclusion which I have reached, why the ordinary rule should not apply.

[129] In the result it is ordered that:

- (a) The award of Tender No. S012/12: Building Facilities Maintenance Project 2012: Cape Town Metropole No. 2 – South ('the Tender') to the third respondent on 27 September 2012 is reviewed and set aside.
- (b) Should the respondents call for fresh tenders in respect of the services contemplated in the Tender, they must do so by means of revised tender documents which do not contain material inconsistencies.
- (c) The first respondent is directed to pay the applicant's costs, such costs to include the costs occasioned by the employment of two counsel.

D M DAVIS


ACTING HIGH COURT JUDGE