/

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 13055/2019

In the matter between

PUBLIC DISCIPLINE AND INTEGRATION OF TECHNOLOGY CAPE TOWN CC t/a PDIT	**APPLICANT**

and

THE CITY OF CAPE TOWN MUNICIPALITY	**FIRST RESPONDENT**
CADDIC SECURITY SYSTEM & INTEGRATION (PTY) LTD t/a CSS & I	**SECOND RESPONDENT**

Coram: Rogers J

Heard: 9 September 2019

Delivered: 20 September 2019

JUDGMENT

Rogers J

[1] The applicant, Public Discipline and Integration of Technology Cape Town CC t/a PDIT ('PDIT'), seeks the review and setting aside of the award of a tender by the first respondent, the City of Cape Town Municipality ('CCT'), to the second respondent, Caddic Security System & Integration (Pty) Ltd t/a CCS & I ('Caddic'). The tender was for the maintenance of the CCT's Urban CCTV Surveillance System.

[2] Reduced to bare essence, PDIT's grounds of review are (a) that, in violation of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), the CCT failed to give PDIT adequate notice of its right of appeal; (b) that in one narrow respect the bid document was ambiguous, that this caused PDIT to tick a box which it would not have ticked if the document had been clear, and that by ticking the box it was deprived of preference points for broad-based black economic empowerment ('BEE') which it would have been awarded had it not ticked the box.

[3] The previous three-year contract for the supply of the services expired in October 2018. PDIT held that contract by virtue of a successful 2015 tender. At an earlier time Caddic rendered the services.

[4] The tender now in issue was advertised on 7 July 2018 with a closing date of 6 August 2018. The bids were assessed by a bid evaluation committee ('BEC') which made a recommendation to a bid adjudication committee ('BAC'). The BAC finalised its decision on 18 March 2019. The bidders were notified of the outcome on 25 March 2019.

[5] Although the previous contract expired in October 2018, PDIT continued to render the services until the end of April 2019 by way of contract extensions. Thereafter, and for slightly more than three months, no maintenance services were rendered. Caddic was due to start rendering services under the new contract as from 10 August 2019. On 8 August, and to obviate the need to determine an application for interim relief, the parties agreed to an order that the review be heard on an expedited basis and that, without prejudice to PDIT's rights, Caddic would in the meantime render the services on the basis that any cost and inconvenience incurred by it as from the date of the agreed order would not be relied on or taken into account in determining the outcome of the review or the appropriateness of any particular relief.

[6] In terms of the Preferential Procurement Policy Framework Act 5 of 2000 ('Procurement Act'), the tender was evaluated on the basis of scores of 80 and 20 respectively for price and BEE contribution. PDIT, Caddic and two other bidders, IntelliSEC Access Control (Pty) Ltd ('IntelliSEC') and Bona Electronic Solutions ('Bona'), submitted responsive bids. PDIT and Caddic were placed first and second for price, with scores of 80 and 75,65 respectively. In regard to preference points, PDIT scored zero and Caddic 18. Caddic's overall score of 93,65 was the highest, hence the award of the tender. Despite receiving no preference points, PDIT's overall score placed it second out of the four bidders.

[7] It is common cause that if PDIT had qualified for preference points, it would have scored 20 for BEE status and 100/100 overall. The review is concerned with the CCT's failure to award PDIT any preference points.

Schedule 3 – the Preference Schedule

[8] Schedule 3, headed Preference Schedule, is the critical part of the bid document. Table 1 in section 4 made provision for a bidder to indicate its level of

BEE contribution. The details of that clause are not relevant. Whether a bidder was actually awarded the points indicated in the table was affected by the extent of sub-contracting in which it intended to engage and by the BEE status of such sub-contractors.

[9] More particularly, section 2, which set out the conditions associated with the granting of preferences, specified in 2(2) that a bidder granted preference undertook not to sub-contract more than 25 percent of the value of the contract to sub-contractors whose BEE status was not at least equal to its own. Section 2(9) stated that a bidder would not be awarded preference points if it indicated in its tender that it intended sub-contracting more than 25 percent to sub-contractors whose BEE status was not at least equal to its own.

[10] Section 5 of the schedule contained the following declaration (bold print and capitals in the original). To the right of declaration 5(1) was a box which a bidder could tick or leave blank (I shall refer to it as the 'section 5 box'):

'**5 Declarations**

1) With reference to Condition 9[1] in Section 2 above, the supplier declares that:

I/we hereby forfeit my preference points because I/we DO intend sub-contracting more than 25% of the value of the contract to sub-contractors that do not qualify for at least the points that I/we as supplier qualify for . . .

Note:

Suppliers who do not tick this box will be allocated preference points but the sanctions relating to breaches of preference conditions in Section 3 will be applicable if the supplier contravenes the conditions in Section 2.

2) The undersigned, who warrants that he/she is duly authorised to do so on behalf of the supplier, hereby certifies that the preference claim based on the [BEE] status level of

[1] The document actually referred to 'Condition 8' but it is common cause that the intended condition was 9.

contribution indicated in Table 1, qualifies the supplier, subject to condition 9[2] in Section 2 above, for such preference claimed, and acknowledges that:

(i) the information furnished is true and correct;

(ii) the preference claimed is in accordance with the conditions of the schedule;

(iii) the supplier may be required to furnish documentary proof to the satisfaction of the CCT that the [BEE] level of contributor as at the closing date is correct; and

(iv) he/she understands the conditions under which preferences are granted, and confirms that the supplier will satisfy the conditions pertaining to the granting of preferences.'

[11] PDIT and IntelliSEC ticked the section 5 box while Caddic and Bona did not. PDIT and IntelliSEC were thus granted no preference points.

[12] The sanctions potentially applicable to a successful bidder who did not tick the section 5 box, but who sub-contracted more than 25 percent of the value of the contract in breach of the conditions and declarations, were listed in section 3 of the schedule: disqualification from the tender process; payment of costs, losses or damages to the CCT; cancellation of the contract; restriction from obtaining business from the CCT for a period not exceeding ten years; criminal prosecution; and/or a financial penalty calculated in accordance with a specified formula.

[13] The 25 percent threshold has its source in regulations 6(5), 7(5) and 12 (3) of the Preferential Procurement Regulations promulgated in terms of the Procurement Act (R32 in *Government Gazette* 40553, 20 January 2017).

Background to the ambiguity point

[14] PDIT asserts that the bid document was ambiguous as to the sub-contractors to be counted for purposes of the relevant conditions and declarations in the Preference Schedule. Had PDIT understood the schedule in the way the

[2] See previous footnote.

BEC applied it, PDIT would not have ticked the section 5 box. In its founding papers PDIT went further, stating that if Caddic had understood the schedule in the way PDIT understood it, Caddic would also have had to tick the section 5 box. In either of these events, PDIT would have had the highest overall score.

[15] To understand the ambiguity complaint I must refer to other parts of the bid document. Part 4 was the Price Schedule. That schedule comprised a table, in which the bidder was to insert its prices, and a set of 'Pricing Instructions'. The table was divided into two parts. These two parts were later described by the BEC as Category A and Category B and I shall do likewise.

[16] Category A comprised tendered monthly rates per technician for four types of technicians (items 1.1 to 1.4) and fixed monthly rates for two service providers specified by the CCT (items 2.1 and 2.2). Clause 4.1 of Part 5 (headed 'Specifications') stated how many technicians of each type formed part of the tendered services. The effect of clause 4.1 was that two technicians were required for each of items 1.1 and 1.2 while seven technicians were required for each of items 1.3 and 1.4.

[17] In regard to item 2 of Category A, clause 2.2 of Part 5 (headed 'Specifications') stated that the CCT had service level agreements ('SLAs') with various service providers to support the system. The successful bidder would have to do work with these service providers and pay them the fixed amounts pre-printed in items 2.1 and 2.2. The two specified service providers were Fibre Based Integration ('FBI') and Transnet Freight Rail ('Transnet').

[18] Category B comprised rates for call-outs, overtime and ad hoc services, with the units of measure being per call-out and per hour as the case might be (items 3.1 to 3.4), and mark-up percentages on outsourced work and on equipment/spares (items 4.1 and 4.2).

[19] Clause 3.10 of the Pricing Instructions recorded that the annual tender sum for the Category A work would be used ‘for evaluation purposes’.

[20] Clause 2.4 of the Specifications required a bidder to list, on a schedule headed ‘Returnable Schedule 16-C Specialised Contractors’, the ‘recognised and accredited specialised sub-contractors that will be utilised in respect of the equipment listed on’ Schedule 16-C. The schedule listed ten categories of equipment, with space for the bidder to insert its sub-contractor per category. These provisions must be read with clause 6.1 of the Specifications, which stated that due to the complexity of the CCTV System the successful bidder ‘will have in his employ specialists or sub-contract to companies specialising in the following fields’. The clause listed the same ten categories contained in Schedule 16-C.

[21] PDIT alleges that the bid document reasonably conveyed to it that the 25 percent threshold was to be computed with reference to the Category A contract value and that for this purpose FBI and Transnet were ‘sub-contractors’. It was on this basis that PDIT ticked the section 5 box.

Background to the inadequate notice point

[22] The complaint regarding inadequate notice of the right of appeal arises in this way. Clause 6.1.6 of Part 6 of the Bid Document (headed ‘Conditions of Tender’) deals with objections, complaints, queries, disputes, appeals and access to court. Three broad remedies in respect of disputes were described:

(a) A party aggrieved by a decision or action taken by the CCT in the implementation of its supply chain management system was entitled, within 14 days of the decision or action, to lodge a written objection, complaint, query or dispute against the decision or action. This remedy was said to be sourced in regulations 49 and 50 of the Municipal Supply Chain Management Regulations

('the SCM Regulations') promulgated under the Local Government: Municipal Finance Management Act 56 of 2003.

(b) A person whose rights were affected by a decision taken by the CCT could appeal against that decision by giving written notice of the appeal and reasons to the City Manager within 21 days of notification of the decision. This remedy was said to be sourced in s 62 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act').

(c) Finally, there was the right to approach the courts in terms of PAJA and the Promotion of Access to Information Act 2 of 2000 ('PAIA').

[23] On 25 March 2019 the CCT notified PDIT that its bid had been unsuccessful and that the tender had been awarded to Caddic. From the notification, PDIT could see that Caddic's prices were higher than its own. Since PDIT also knew that it would ordinarily be entitled to 20 preference points, it asked the CCT to explain why its tender had been rejected. On 28 March the CCT replied, stating that PDIT had been the second-ranked tenderer and that in the Preference Schedule it had indicated an intention to sub-contract more than 25 percent of the contract value. In a response of 2 April PDIT explained that, 'due to the sub-contractors enforced by' the CCT (ie FBI an Transnet), and due to PDIT's lowering of the rates for its own work, the total value of sub-contractors exceeded 25 percent. A calculation was attached. PDIT's letter concluded by saying that if the CCT required further information it should not hesitate to ask.

[24] On 3 April the CCT replied that it did not need further information and that PDIT could exercise its rights in terms of clause 6.1.6 (which was copied and pasted into the email) if it so wished. This clause set out the three remedies mentioned above.

[25] On 8 April PDIT addressed a letter to the City Manager stating, with reference to clause 6.1.6, that it thereby lodged an official objection. After summarising the grounds, PDIT said that because its pricing had been considerably lower than Caddic's, the award of the tender should be revised. The writer concluded: 'We trust that you will adjudicate our objection in a positive manner and looking forward to a positive outcome.'

[26] As appeared from the objection and preceding correspondence, PDIT understood that the 'contract value' for purposes of the Preference Schedule was the value of the Category A work and that the two service providers dictated by the CCT in items 2.1 and 2.2 of Category A were 'sub-contractors' for purposes of calculating whether the 25 percent threshold was breached.

[27] Mr Ernest Sass was appointed to deal with the objection as the 'Independent and Impartial Person' ('IIP') contemplated in regulation 50 of the SCM Regulations. He issued his report on 10 June. It was upon receipt of this report that PDIT learnt that the BEC had not regarded FBI and Transnet as being sub-contractors for purposes of the Preference Schedule.

[28] Mr Sass distilled three grounds from PDIT's objection. The first focused on PDIT's understanding of the meaning of 'sub-contractors'. According to information supplied by the BEC to Mr Sass, the BEC had not regarded FBI and Transnet as sub-contractors for purposes of the 25 percent threshold. Mr Sass found that PDIT's contrary understanding 'was not misplaced' as the exclusion 'could not be elicited from the tender document'. As a result of the ambiguity, the evaluation process fell foul of s 217 of the Constitution. It is unnecessary to refer to the second ground (which Mr Sass also upheld) and the third ground (which he did not).

[29] In his penultimate paragraph, Mr Sass summarised his conclusions. The ambiguity in the bid document had created confusion in PDIT's understanding of what constituted a sub-contractor for purposes of awarding preference points. Furthermore, the BEC's conduct in evaluating the tender had not complied with the standards set out in s 217 of the Constitution. His final paragraph, under the heading 'Resolution', was: 'It is hereby resolved that there is merit to this objection.'

[30] Mr Sass's report was sent to PDIT on 11 June. On the next day PDIT wrote to ask what the next step would be. It took the CCT until 23 July 2019 to deliver itself of the following Delphic utterance: 'The objection has been finalized therefore you may exercise your right in terms of clause 6.1.6.3 of the tender document'. The writer copied and pasted that sub-clause, which dealt with the right to approach the court in terms of PAJA and PAIA.

[31] Understandably puzzled, PDIT sought clarity. It wanted to know what the official outcome was, given that Mr Sass had found in PDIT's favour. The CCT's reply was, regrettably, no more intelligible than the earlier one. PDIT was told that the letter (presumably the report) of Mr Sass 'was the outcome' and that it contained contact numbers for any queries.

[32] PDIT perhaps hoped that its attorneys would have better luck. They wrote to the CCT on 26 July 2019 stating that PDIT had grave difficulty in understanding why, when its appeal had been finalised favourably, it now needed to exercise rights under PAJA. Surely it was incumbent on the CCT, they asked, to give effect to the outcome by setting aside the award to Caddic? They intended to bring urgent proceedings and asked for specified information by noon on Monday 29 July (inter alia the names and contact details of the bidders and whether the CCT had already concluded a contract with Caddic).

[33] The CCT crowned its inglorious letter-writing campaign on 29 July 2019 by advising that a request for information had to be made in terms of PAIA and attaching the relevant form. It does not seem to have occurred to the CCT that, in the urgent circumstances that prevailed, the leisurely time limits laid down in PAIA would render the whole exercise pointless.

[34] I note here that the CCT's position, at least after the event, was that the entire objection process, which occupied the period from 8 April 2019 to 10 June 2019, was an exercise in futility, since the CCT was not entitled, on the basis of an outcome favourable to PDIT, to vary its decision to award the tender to Caddic.

[35] The urgent application was launched on 30 July. In regard to the ground of review based on inadequate notice of its appeal right, PDIT made two points in its founding papers. First, in terms of s 3(2)(*b*)(iv) of PAJA it was a mandatory requirement that the letter of 25 March 2019, notifying PDIT of the CCT's adverse decision, should have informed PDIT of its right of appeal. Second, even if regard were had to subsequent correspondence, the CCT's letter of 3 April had conveyed that an objection was one of the ways in which PDIT could challenge the CCT's decision. PDIT had sought, by way of its objection, a revision of the award. If PDIT had been told that a challenge had to be 'dressed up in the form of an appeal rather than at objection', it would have done so.

The 25 percent calculations

[36] As I have said, PDIT and IntelliSEC ticked the section 5 box while Caddic and Bona did not. PDIT calculated that FBI and Transnet made up 29 percent of its Category A bid. But PDIT made two arithmetical errors. First, although its calculation set out the monthly amount for the technicians covered by item 1.4, it failed actually to include the amount when summing the totals. Second, PDIT based its calculation on six technicians for each of items 1.3 and 1.4, whereas the

correct number was seven. Corrected for the first error, FBI and Transnet made up 24 percent, not 29 percent of the Category A work. Corrected for both errors, FBI and Transnet made up 20 percent of the Category A Work. These mistakes were not appreciated by anyone until Caddic pointed them out in its opposing papers.

[37] PDIT's calculation for Caddic was infected by the same two errors. Since Caddic's Category A prices for item 1 were higher than PDIT's prices, the portion of Caddic's Category A bid contributed by FBI and Transnet was slightly lower than PDIT's corrected figure of 20 percent. So even if Caddic had understood the Preference Schedule as PDIT did, it would not have ticked the section 5 box.

[38] It is clear from correspondence disclosed in the rule 53 record that IntelliSEC only ticked the section 5 box because it regarded FBI and Transnet as relevant sub-contractors. Since IntelliSEC's item 1 prices were higher than PDIT and Caddic's, IntelliSEC must also have made a calculation error; properly calculated, FBI and Transnet comprised less than 25 percent of its Category A bid.

[39] We do not know whether Bona thought that FBI and Transnet were 'sub-contractors' for purposes of the Preference Schedule. Since its item 1 prices were the highest of all, the fact that it did not tick the section 5 box could be explained by the fact that it correctly calculated that FBI and Transnet comprised less than 25 percent of the Category A value.

[40] I should mention here that the 2015 tender contained the same distinction between Category A and Category B work, with FBI and Transnet constituting item 2 of Category A. I think one may infer from PDIT's email to the CCT of 2 April 2019 that it did not tick the section 5 box in 2015. PDIT explained in its email that, because in its 2018 bid it had lowered its rates for the technicians in

item 1 of Category A, FBI and Transnet now exceeded 25 percent of the Category A value.

Interpretation of the bid document

[41] PDIT's premise was and is that the contract value contemplated in section 5(1) of the Preference Schedule is a value assessed with reference to Category A. On that premise, PDIT's complaint is that it reasonably thought that FBI and Transnet were 'sub-contractors' for purposes of the declaration. IntelliSEC also so believed. Caddic took the same view as the BEC, namely that FBI and Transnet were not 'sub-contractors'. We do not know how Bona understood the Preference Schedule.

[42] Caddic denies that the bid document is ambiguous in this respect. The bid, it says, draws a distinction between 'sub-contractors' on the one hand and the third party 'service providers' with whom the CCT has concluded SLAs on the other. Caddic points to the definition of 'sub-contract' in the Preference Schedule as 'the primary contractor's assigning, leasing, making out work to, or employing, another person to support such primary contractor in the execution of part of a project in terms of the contract'. This language, Caddic argues, cannot sensibly be applied to FBI and Transnet. It would also not have made sense for service providers which the CCT itself had foisted on bidders to be counted for purposes of assessing the extent of a bidder's BEE contribution.

[43] There is some force in these points, and simply as a matter of interpretation I think Caddic's construction is the right one. There was nevertheless enough ambiguity to mislead at least two of the four responsive bidders. Mr Sass also considered the bid ambiguous. In terms of clause 2.2.1 of the Specifications, the specified service providers had to be paid by the successful bidder. This suggests a contractual relationship between the bidder and the

specified service providers. It is not unusual for an employer to require the primary contractor to use specified sub-contractors. They are usually called nominated sub-contractors (cf *Minister of Public Works and Land Affairs v Group Five Building Ltd* [1999] 3 All SA 467 (A)). In the case of a nominated sub-contractor, however, it is usual for the primary contractor to enter into a sub-contract with the nominated sub-contractor. The fact that the CCT already had SLAs with FBI and Transnet points against an intention that the successful bidder had to conclude sub-contracts with those parties.

[44] Before considering the effect of the ambiguity, I must address another potential ambiguity which came to the fore during argument. Caddic's counsel submitted that although the pricing evaluation was confined to the Category A work, the contract value for purposes of the Preference Schedule included Category B work. Although none of the bidders, so it seems, intended to use sub-contractors for Category A work (leaving aside FBI and Transnet), PDIT and Caddic intended to use specialist sub-contractors to some extent for Category B work.

[45] I accept that clause 3.10 of the Pricing Instructions is not dispositive since the 'evaluation' contemplated therein may have been confined to pricing evaluation. Still, the clause is not without significance. Self-evidently the reason why pricing evaluation was confined to Category A work is that the extent to which Category B work would be needed was uncertain.

[46] The Category A work represented services which the successful bidder had to supply and for which it was entitled to charge at the monthly rates indicated. By contrast, the extent to which overtime and after-hours call-outs were needed from the bidder's own staff and from specialist sub-contractors depended on how often problems occurred after hours; and the extent to which the services

of specialist sub-contractors were needed would depend on how often specialised equipment malfunctioned. Similarly, the amounts payable by the CCT as mark-ups on equipment and spares would depend on the extent to which equipment had to be replaced.

[47] PDIT explained that the *modus operandi* under the previous contract, in regard to specialist supplies in terms of Category B, is that if the CCT wanted a specialist supply of that kind, the primary contractor (PDIT until April 2019) would need to get a quotation from the specialist sub-contractor. If the CCT approved the quotation, the primary contractor's tendered mark-up would be added.

[48] In any one year the successful bidder was only entitled to charge for after-hours call-outs after the first 100 calls. The BAC minutes of 18 March 2019 record that, based on historical experience, an average of 76 call-outs per year could be expected. The level of free call-outs was set at 100 in the expectation that it would comfortably cover all likely call-outs.

[49] If Category B work were to be included in the pricing evaluation, standard assumptions about the extent of ad hoc services and supplies would have been needed in order to compare prices sensibly. No such assumptions appear from the bid document. PDIT, as the incumbent supplier, may have been able to make informed guesses on such matters. Other bidders would have been in the dark.

[50] These reasons for excluding Category B work from pricing evaluation apply with at least equal force to preference evaluation. There is an important public policy in ensuring that BEE contribution is properly rewarded (cf *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency, & others* 2014 (1) SA 604 (CC) paras 46-55, 72). The 25 percent threshold was a blunt instrument. If a bidder intended sub-

contracting more than 25 percent to parties with a lesser BEE status than its own, it would receive no preference points whatsoever, even though its own BEE status was at the highest level. Since the 25 percent threshold was set with reference to the value of the contract, such value would need to be capable of reasonably accurate ascertainment to avoid potentially unfair results and inconsistent estimates among the bidders.

[51] Nothing in the bid document would have enabled a bidder to know what assumptions to make in putting a value to the Category B work. Depending on events, the Category B work in a year might be small or large. If the CCT had intended the contract value for purposes of the Preference Schedule to be assessed differently from clause 3.10 of the Pricing Instructions, I would have expected to find the necessary assumptions contained in the bid document.

[52] Grave sanctions could be invoked against a tenderer who failed to tick the box when it should have done. I cannot accept Caddic's counsel's argument that each bidder had to make its best estimate on the footing that it could face these sanctions if things turned out differently to its expectations. Furthermore, there was not a level playing field when it came to making educated guesses. PDIT as the incumbent supplier was perhaps best placed to assess these matters. Caddic, which held the contract for some years until 2013, might also have had some inkling, though its information would have been out of date. Other bidders were, as I have said, been completely in the dark. An interpretation of the bid document giving rise to this disparity should be avoided.

[53] The minutes of the BEC and BAC do not state, or contain any calculation of, an assumed value for Category B work. What is also significant is that the BEC told Mr Sass that the specialist sub-contractors contemplated in clause 2.4.1 of the Specifications were not taken into account for purposes of the Preference

Schedule. Clause 2.4.1 refers to the sub-contractors listed by a bidder in Schedule 16-C to provide the specialist services in respect of the ten categories of equipment contemplated in that schedule as read with clause 6.1 of the Specifications.

[54] In my view, the specialist sub-contractors contemplated in Category B are the specialists a bidder would need (if it did not have the expertise in-house) to maintain, and if necessary replace, specialist equipment of the kind listed in clause 6.1 and Schedule 16-C to the extent that such equipment formed part of the Urban CCTV System. If this be so, the BEC could not have taken Category B work into account for purposes of the Preference Schedule: to the extent that ad hoc work was performed by a bidder's own staff, there would be no sub-contracting; and to the extent that ad hoc work was performed by specialist sub-contractors, the BEC itself took the view that such work was to be left out of account.

[55] I thus conclude that the value of the contract for purposes of the Preference Schedule was to be computed only with reference to the Category A work, and that this was the basis on which the BEC evaluated preference. The only relevant ambiguity was whether FBI and Transnet were to be treated as sub-contractors.

[56] As shall presently appear, the bid document does not seem to leave plausible scope for the use of sub-contractors for Category A work (except to the extent that FBI and Transnet might be so regarded). Put differently, the technicians in item 1 of Category A were either required to be, or were at very least most likely to be, employees of the bidder. If FBI and Transnet were not 'sub-contractors' for purposes of the Preference Schedule, there was no realistic likelihood that any bidder would be sub-contracting any, let alone 25 percent, of the Category A work. Why then ask the 25 percent question? The short answer is

that the Preference Schedule was in all likelihood a standard document used by the CCT. It was not specifically formulated with reference to the present tender. Many contracts put out to tender would involve a realistic prospect of substantial sub-contracting even though this particular contract did not. As I have previously mentioned, the 25 percent threshold has its source in the Preferential Procurement Regulations.

Legal consequences of the ambiguity

[57] Caddic argued that if the bid document was ambiguous, this vitiated the entire tender process. PDIT could not, so Caddic submitted, ask that the tender be awarded in its favour, since the irregularity lay not in the evaluation process but in the document itself.

[58] It seems to me that each case must turn on its own facts. The ambiguity here was very narrow. Only two of the four bidders were misled to their prejudice. If they had not been misled, we know that they would have left the section 5 box unticked. That is the only respect in which their bids would have differed from the ones they actually submitted. And if PDIT had left the section 5 box unticked, we know what preference points it would have been awarded. (This is probably true for IntelliSEC as well but it does not matter since even 20 preference points would not have made IntelliSEC the highest bidder.)

[59] The ambiguity is not only very confined; its primary effect was in the way the tenders were evaluated rather than in the prices and information the bidders supplied in their bid documents. We are concerned solely with a tick in the section 5 box. Was the BEC misled by this tick to believe that PDIT and IntelliSEC were going to sub-contract any work in item 1 of Category A? For several reasons one can be confident that the BEC was not misled, and knew that they would not be sub-contracting any such work:

(a) First there is the nature of the item 1 work. The bidder had to provide the monthly rate at which it would charge for each of four types of technicians. Their details had to be set out in Returnable Schedule 16-B headed 'Details of Key Staff'. Beneath the heading was an instruction to the bidder to insert, in the spaces provided, 'details of the key personnel required to be in the employment of the tenderer'. This must be read with clause 4 of the Specifications headed 'Staff Requirements'.

(b) Even if Schedule 16-B would have permitted a bidder to make a technician available by way of sub-contract, it was most unlikely that anybody without technicians in its employ would bid for the contract.

(c) Then there is the clarificatory correspondence between the BEC and PDIT. On 18 September 2018 the BEC wrote to PDIT. With reference to clause 4.2.1, PDIT was asked to provide matric certificates or equivalent qualifications for the four control room technicians listed in its bid. On the next day PDIT responded by supplying full CVs and supporting documentation. This exchange of correspondence seems to take for granted that the four technicians were in PDIT's employ.

(d) On 3 October 2018 the BEC sought clarification regarding PDIT's ticking of the section 5 box. The BEC asked PDIT to provide the sub-contractors it intended using 'as you have not completed Annexure 3'. The BEC's reference to annexure 3 was regarded by both sides as erroneous, the intended reference being to annexure 4. Either way, the BEC's question made no sense. Annexures 3 and 4 were not documents to be completed as part of the bid; they were monthly schedules which the successful bidder would have to complete during the life of the contract. That is why none of the bidders completed them.

(e) PDIT was thus justifiably puzzled by the question: 'You have indicated that PDIT will need to provide you with subcontract list however the sub-contractors are assigned to tasks by City of Cape Town'. This conveyed clearly enough that

the ‘sub-contractors’ which PDIT had in mind in ticking the section 5 box were the sub-contractors specified by the CCT, ie FBI and Transnet.

(f) This was followed by telephonic communication between a CCT official and PDIT representative about what the BEC was looking for. The upshot was an email from PDIT seeking confirmation that the BEC simply wanted BEE certificates for the sub-contractors listed by PDIT in its Schedule 16-C. These were then provided but this is neither here nor there because the BEC told Mr Sass that the Schedule 16-C sub-contractors did not form part of the contract value for purposes of the Preference Schedule.

(g) Finally there is the BEC’s report to the BAC of 21 January 2019. It is clear from that report that the BEC knew that both IntelliSEC and PDIT only intended to use sub-contractors (apart from FBI and Transnet) for the specialised services contemplated in Schedule 16-C. Despite this knowledge, because IntelliSEC and PDIT had ticked the section 5 box, they would, so the BEC thought, be unfairly advantaged if they were awarded preference points.

[60] I find the BEC’s conclusion, and the BAC’s acceptance of it, incomprehensible. By the time it made its final allocation of points, the BEC knew that none of the bidders would be using sub-contractors in Category A. It was obvious to the BEC that IntelliSEC and PDIT had ticked the section 5 box in the mistaken belief that FBI and Transnet were sub-contractors for purposes of the Preference Schedule. In its response to the BEC on 3 October 2018, IntelliSEC’s Ms Makepeace said:

‘[T]he only sub-contractors that we will be using are the contractors listed within the actual tender document. I was not sure if I should tick the box relating to sub-contractors, so rather than be in breach I ticked it.’

She quoted items 2.1 and 2.2 of Category A, asking: ‘As these contractors are mandated by the City I trust this is correct?’ I have already quoted from PDIT’s

response of the same date which, while not as explicit, could not have left the BEC in any doubt. Even if there were doubt, the fact that IntelliSEC had understood FBI and Transnet to be relevant sub-contractors must have alerted the BEC to the fact that PDIT had made the same mistake yet the BEC did not probe the matter further.

[61] The requirement that a bid document be reasonably clear serves important requirements of policy. A bidder must know what information is expected of it so that the merits of its bid may be fairly assessed. The public authority needs to be able to compare like with like so as to ensure it gets the best value for money, uniformly adjusted for important preference considerations designed to address historical disadvantage. An unclear document has the potential to deprive the public authority of a bid which would have been the most favourable had the document not misled the bidders.

[62] Where a bid document is unclear, it might often be difficult for the public authority to know what the bids would have contained if all the bidders had understood the document in the way intended by the public authority. *Allpay* was such a case – an important technical requirement (the nature of verification required for the payment of grants to beneficiaries) was vague and uncertain, which meant that some bidders had not presented a technical solution of the kind which the tender authority had in mind (see cf *Premier, Free State, & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30).

[63] This is not such a case. On a very narrow point of ambiguity, the way in which the two bidders who were misled would have dealt with the section 5 box if they had understood the Preference Schedule in the way the BEC did is beyond doubt, and the BEC knew what the true position was. To say that IntelliSEC and PDIT would have been unfairly advantaged by awarding them preference points is

perverse. The unfairness, both to the bidders and to the CCT (since the latter was deprived of the cheapest bid), was in ignoring the true position as it appeared from the bids submitted by IntelliSEC and PDIT read as a whole and together with the permissible clarificatory correspondence which preceded final adjudication. As the Constitutional Court said in *Allpay* (para 92), the purpose of a tender 'is not to reward bidders who are clever enough to decipher unclear directions' but 'to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive'.

[64] Where a bidder has not complied with a mandatory condition of the tender, a tender adjudicator may not disregard the bid without more. The 'strict mechanical approach' has, the Constitutional Court said in *Allpay*, been discarded. The 'central element is to link the question of compliance to the purpose of the provision'. Immaterial deviations should not non-suit a bidder. The materiality of irregularities is 'determined primarily by assessing whether the purposes the tender requirements serve have been substantially achieved' (paras 30, 58).

[65] In *Allpay* it was a mandatory requirement that a bidder who wished to tender to provide the relevant services in more than one province should submit a separate tender for each province. The successful tenderer, Cash Paymaster, tendered for all nine provinces but did not submit nine separate sets of documents. The Constitutional Court held that the purpose of separate bids had, despite this deviation, been attained (para 62).

[66] The present matter is an *a fortiori* case. PDIT's bid was a valid one suffering from no irregularity. Its mistake was to tick a box which it should not have ticked. In determining whether PDIT should effectively have been put out of the running for this mistake, it is proper to ask whether the purpose of the relevant question in the Preference Schedule was, having regard to the information

supplied by PDIT as a whole, substantially achieved. The purpose was for the CCT to know whether PDIT would be sub-contracting more than 25 percent of the Category A value. That purpose was met, because the BEC knew, despite the tick, that PDIT would not be doing so. A public tender process

'should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price'.

(*Minister of Social Development & others v Phoenix Cash and Carry – Pmb CC* [2007] 3 All SA 115 (SCA) para 2, cited with approval in *Allpay* para 92 fn 105.)

[67] Caddic's counsel referred me to *Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality* [2014] ZAKZDHC 18, para 63, where it was held that it would violate ss 33 and 217 of the Constitution to allow a bidder to submit its BEE certificate late. Without needing to consider the correctness of that decision, I find it distinguishable. We are not here concerned with a failure to submit mandatory documents by the closing date of an unambiguous tender invitation. We are dealing with a timeous and complete bid which contained one incorrect answer induced by ambiguity. The tender process allowed for a period of clarification. By the time the final adjudication was made, the BEC knew the true facts.

[68] In my view, the decision of the BEC to hold PDIT to its tick in the section 5 box was arbitrary and capricious, not rationally connected to the information before the BEC, and one which no reasonable person could have made. It is thus unlawful and liable to be set aside in terms of s 6(2) of PAJA.

[69] That PDIT made the two arithmetical mistakes previously mentioned does not affect my conclusion. The fact remains that PDIT would not have ticked the box if it had known that FBI and Transnet were to be left out of account; and the

fact also remains that the BEC knew that PDIT was not sub-contracting any relevant part of the Category A work.

[70] Caddic criticised PDIT for failing to seek clarification before finalising its bid. The bid document entitled a tenderer to seek clarification. There was also a meeting where clarification could have been sought. This criticism may have force in relation to IntelliSEC which seemingly appreciated the ambiguity at the time it completed its bid. In PDIT's case, however, there is nothing to show that it was alive to ambiguity when it submitted its bid. Indeed, it was still labouring under a misapprehension when it lodged its objection on 8 April 2019. It was the information supplied to Mr Sass by the BEC, as recorded in his report of 10 June, that caused the scales to fall from PDIT's eyes.

[71] Caddic's counsel referred me to *South African National Roads Agency Limited v Toll Collect Consortium* 2013 (6) SA 356 (SCA), particularly para 27, where Wallis JA said that a court will be reluctant to intervene and substitute its own judgment for that of the evaluator where the complaints 'merely go to the result of the evaluation'. The court is not entitled to interfere 'merely because the tender could have been clearer or more explicit'. These statements must be understood in their context. The alleged absence of clarity in that case had no influence on the information which the tender invitation solicited. The complaint was that the tender invitation had not adequately explained how the process of evaluation would take place (it was a considerably more complex process than the present one). The aggrieved tenderer could not demonstrate that the content of its bid would have been any different had more information about the evaluation methodology been supplied. The present case is very different. The lack of clarity induced two bidders to tick a box which they would otherwise have left unticked. Despite this mistake on their part, the bid evaluator knew the true facts.

Inadequate notice of appeal right

[72] Where administrative action materially and adversely affects the rights or legitimate expectations of a person, s 3(2)(*b*)(iv) of PAJA requires the administrator to give such person 'adequate notice of any right of review or internal appeal, where applicable'. Regulation 23 of the regulations promulgated in terms of s 10 of PAJA states that this notice must be given 'when informing' the person whose rights are materially and adversely affected by the administrative action.

[73] I am reluctant to hold that notice is inadequate solely because it does not accompany the first notification of the adverse decision. Notification of a right of appeal might be adequate if given a few days later, provided the right of appeal was not – on account of strict time limits – rendered nugatory by the late notification. In the present case the CCT's letter of 3 April 2019 informed PDIT of its rights under clause 6.1.6. If that was an adequate notification of the appeal right, the purpose of s 3(2)(*b*)(iv) was substantially achieved. PDIT had 21 days to note an internal appeal. The objection it filed shows that it could comfortably have met this time limit.

[74] In my view, an appeal in terms of s 62 of the Systems Act would have been an effective appeal remedy. The decision to award the tender was made not by the City Manager but by the BAC so s 62 could in principle apply. The terms of the tender (clause 6.3.14.1 of the Conditions of Tender) read with the notification of the award made it clear that no rights would vest in the successful bidder until appeals, if any, were finalised, reference being made to the 21-day appeal period in terms of the Systems Act.

[75] Whether, by contrast, an objection in terms of the SCM Regulations empowers the IIP to grant an effective remedy is doubtful. In *Total Computer*

Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality & others 2008 (4) SA 346 (T) Murphy J seems to have equated an objection with an internal appeal (see paras 66-72). Later judgments, however, have held that the IIP cannot reverse an administrative decision (*Lohan Civil-Tebogo Joint Venture & others v Mangaung Plaaslike Munisipaliteit & others* [2009] ZAFSHC 21 paras 31-33; *ESDA Properties (Pty) Ltd v Amathole District Municipality & others* [2014] ZAECGHC 76 paras 9-11; *Q Civils (Pty)Ltd v Mangaung Metropolitan Municipality & others* [2016] ZAFSHC 159 paras 23-24). In her article on internal remedies in the context of tenders, Professor Bolton expresses doubt about the efficacy of an objection in terms of the SCM Regulations (Bolton P, 'Municipal Tender Awards and Internal Appeals by Unsuccessful Bidders' 2010(13) *Potchefstroom Electronic Law Journal* 3 at 24-25, accessible on SAFLII at [2010] PER 18).

[76] PDIT's counsel did not seek to persuade me that an objection in terms of the SCM Regulations was a means by which a tender award could be reversed. Caddic's counsel submitted that it was not. For purposes of the present proceedings I must accept this to be so.

[77] Although such may be the true position, an aggrieved bidder cannot be expected to be aware of the legal intricacies. Adequate notice of a right of appeal should not require the recipient to seek legal advice as to the legal efficacy of the remedies held out to him. PDIT's grievance, as the CCT knew, was that the tender had been awarded to Caddic rather than PDIT. In that context, it was not unreasonable for PDIT to assume that the first remedy mentioned in the CCT's letter of 3 April 2019 – a remedy on its face available to a person 'aggrieved' by a 'decision' taken by the CCT 'in the implementation of its supply chain management system' – was an effective means of attacking the award to Caddic.

[78] If the CCT had referred solely to the right of appeal contained in clause 6.1.6.2 of the Conditions of Tender, the notice would have been adequate. However, the CCT's reference to the right of objection conferred by clause 6.1.6.1 was positively misleading and did in fact mislead PDIT. In my opinion, this rendered the notice of PDIT's right of appeal 'inadequate' for purposes of s 3(2)(*b*) of PAJA. The CCT might have remedied the inadequacy if, upon receipt of the objection, it had agreed to treat it as an appeal in terms of s 62 of the Systems Act or had notified PDIT that it was pursuing a futile procedure. Instead the CCT allowed more than three months to pass before telling PDIT that its apparent success before Mr Sass was a pyrrhic victory.

[79] In view, however, of my conclusion on the ambiguity point and of the remedy I consider appropriate in respect of that ground (more on this below), it is unnecessary to say more than that if the inadequate notice point had stood alone it might well have justified a setting aside of the contract concluded between the CCT and Caddic and a direction that the CCT give PDIT proper notice of its appeal right. This would ensure that PDIT's right of appeal was not rendered nugatory by the intervening lapse of time and the vesting of rights in Caddic. Whether the award of the tender itself fell to be set aside would be a matter for the appellate authority to determine.

Remedy

[80] PDIT seeks a substituted award in its favour. In terms of s 8(1)(*c*)(ii)(*aa*) of PAJA a substituted decision may be made 'in exceptional circumstances'. This must be read in the context of s 8(1)'s general injunction that a remedy should be directed to that which is 'just and equitable' (*Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) SA 245 (CC) para 35). A court must be mindful of the doctrine of separation of powers and of the need to show appropriate deference to an administrative body

which may have special skills and expertise which the court lacks (*Trencon* paras 43-45). Factors which carry particular weight in determining whether it is appropriate to make a substituted order are whether the court is in as good a position as the administrator to make the decision and whether the decision of the administrator is a foregone conclusion (para 47).

[81] In my view there are exceptional circumstances in the present case which make a substituted order the just and equitable one. First, the way PDIT would have dealt with section 5 of the Preference Schedule, but for the ambiguity, is beyond doubt and was known to the BEC. It would not have ticked the section 5 box.

[82] Second, it is not in doubt that if PDIT had not ticked the section 5 box it would have scored 20 preference points and been awarded 100/100 overall. This is not a matter of expert assessment; the price points have already been determined by the BEC, and the preference points are objectively determined by the terms of the tender and PDIT's admitted BEE status. Had PDIT been awarded 20 preference points, it would have been the highest-scoring bidder by some margin. This is so even if the other tenderer misled, IntelliSEC, were also to have been awarded 20 preference points.

[83] Third, although clause 6.3.12.2 of the Conditions of Tender stated that the CCT was not obliged to accept the lowest tender, s 2(1)(*f*) of the Procurement Act stipulates that an organ of state functioning within its preferential procurement policy (as the CCT was here) must award a contract to the tenderer who scores the highest points unless objective criteria in addition to those contemplated in paras (*d*) and (*e*) of the subsection justify the award to another tenderer. Paras (*d*) and (*e*) are not applicable (at least not adversely to PDIT), and no other 'objective

criteria' for not awarding the tender to it (if it be the highest bidder) have been identified.

[84] The CCT has abided the court's decision. (The CCT caused Ms Mayosi to be briefed to attend court on a watching brief but she said she had no instructions to make any submissions.) In its explanatory affidavit the CCT has not said that it would have refrained from awarding the tender to PDIT if it had been the highest bidder. PDIT was the incumbent supplier. No criticism of its work has been made. Caddic was awarded the tender for no other reason than that the BEC erroneously gave it the most points. For the Category A work, PDIT's bid was significantly cheaper than Caddic's. Despite subsequent downward negotiation, Caddic's rates for items 3.1, 3.2, 3.3 and 4.1 in Category B remain significantly higher than PDIT's. Its re-negotiated rate for item 3.4 (which was previously higher than PDIT's) is now only modestly lower than PDIT's. Its renegotiated mark-up rate in item 4.2 is significantly below PDIT's but the CCT will have the same opportunity to negotiate with PDIT on Category B as it did with Caddic.

[85] In short, the court is in as good a position as the BEC to make the decision and the outcome, if the matter were remitted, is a foregone conclusion. The choice of the successful tenderer does not call for a policy-laden and polycentric assessment. It is common cause that the CCT cannot do without the service. Without prejudice to the parties' rights, Caddic has been performing the service on an interim basis. Its contract is running from 1 August 2019 to 30 June 2021, a period just under two years. If the matter were remitted, a significant part of the contract might have run its course by the time a fresh decision were made. The bidder entitled to the award should start work as soon as possible. Any other result would be unfair.

[86] Caddic argued that a relevant consideration was that, by making arithmetical mistakes and misinterpreting the Preference Schedule, PDIT had been the author of its own predicament. I do not regard this as relevant when assessing the appropriate remedy. I have concluded that, despite such mistakes by PDIT, the BEC acted unlawfully by not awarding PDIT preference points. If that conclusion is right, the award of the tender to Caddic must be set aside. I do not see how PDIT's mistakes can be relevant to the question whether the award of the tender should be remitted to the CCT or determined by the court.

Conclusion

[87] Caddic delivered an application to strike out para 39 of PDIT's supplementary founding affidavit. It has no merit. PDIT was simply explaining that because Caddic had responded to PDIT's rule 35(12) notice, the CCT had found it unnecessary to respond to an identical notice calling for the same document. Although the document supplied by Caddic turned out to be an erroneous version of the contract, the error has been explained and rectified by Caddic and its attorney, and the explanation is not disputed. Nothing turns on the matter. To the extent that para 39 contained an element of hearsay, there is no prejudice.

[88] The matter justified the employment of two counsel. Both sides used two advocates. It has been agreed between PDIT and the CCT that if PDIT succeeds it will not seek costs from the CCT beyond the date on which the latter filed its notice to abide.

[89] I make the following order:

(a) The decision taken by the first respondent to award Tender 2S/2018/19 to the second respondent, on or about 18 March 2019, is reviewed and set aside and substituted with an award of the tender to the applicant.

(b) By virtue of (a) above, the contract concluded between the first and second respondents, pursuant to the award of the tender, is set aside.

(c) The second respondent shall pay the applicant's costs, including the costs of two counsel and including the costs reserved in the order of 8 August 2019.

(d) The first respondent shall be jointly and severally liable with the second respondent for the aforesaid costs up to and including 28 August 2019.

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

For Applicant	R G L Stelzner SC (with him J R Whitaker) Instructed by Terblanche Slabber Pieters Inc, Malmesbury c/o McLoughlin Clark Inc 2nd Floor, Bree Street Studios 17 New Church Street Cape Town
For Second Respondent	F B Pelser (with him M B de Wet) Instructed by R K Hall & Associates 2nd Floor, Bank Chambers 144 Longmarket Street. Cape Town