THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case 8277/2021

In the matter between:

SMEC SOUTH AFRICA (PTY) LTD	**Applicant**

and

THE CITY OF CAPE TOWN	**First Respondent**
THE EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN	**Second Respondent**
THE MEMBER OF THE MAYORAL COMMITTEE FOR TRANSPORT	**Third Respondent**
INNOVATIVE TRANSPORT SOLUTIONS (PTY) LTD	**Fourth Respondent**
JG AFRICA (PTY) LTD	**Fifth Respondent**
TECHSO (PTY) LTD	**Sixth Respondent**
MOWANA ENGINEERS (PTY) LTD	**Seventh Respondent**

And in the matter between Case 14097/2021

SMEC SOUTH AFRICA (PTY) LTD	**Applicant**

and

THE CITY OF CAPE TOWN	**First Respondent**
THE EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN	**Second Respondent**
THE MEMBER OF THE MAYORAL COMMITTEE FOR TRANSPORT	**Third Respondent**

KERNEELS LION-CACHET ENGINEERS (PTY) LTD **Fourth Respondent**

JG AFRICA (PTY) LTD **Fifth Respondent**

Coram: Rogers J

Heard on: 30-31 May and 17 June 2022

Delivered: 23 June 2022 (by email at 09h30)

JUDGMENT

ROGERS J:

Introduction

[1] These two review applications were consolidated because of overlapping issues.[1] The applicant, SMEC South Africa (Pty) Ltd (SMEC), seeks the setting aside of two tender awards by the first respondent, the City of Cape Town (City). The first application concerns Tender No 36C/2020/21, to which I shall refer as T36. The second application concerns Tender No 26C/2020/21, to which I shall refer as T26. T36 was for the provision of transport engineering, planning and management services in four geographic regions. T26 was for the provision of services in respect of the management of the City's railway sidings.

[2] T36 was advertised on 7 August 2020 with a closing date of 3 September 2020. The tender for two regions was awarded to the fourth respondent in the first application, Innovative Transport Solutions (Pty) Ltd (ITS), and the tender for the other two regions was awarded to the JMT Consortium, whose members are the fifth respondent JG Africa (Pty) Ltd (JGA), the sixth respondent Techso (Pty) Ltd, and the seventh respondent Mowana Engineers (Pty) Ltd.

[1] In the footnotes to this judgment, page references to the record are to the pleadings record, not the rule 53 record filed by the City.

[3] T26 was advertised on 31 July 2020 with a closing date of 4 September 2020. The tender was initially awarded to the fifth respondent in the second application, JGA. Following an internal appeal by the fourth respondent, Kerneels Lion-Cachet Engineers (Pty) Ltd (KLE), the latter replaced JGA as the successful tenderer.

[4] In both cases, the review relief is claimed on various grounds listed in section 6(2) of the Promotion of Administrative Justice Act[2] (PAJA).[3] The City opposes both applications. The other respondents have not participated in the proceedings.

[5] The tenders were evaluated by two differently constituted bid evaluation committees (BECs), which made recommendations to the bid adjudication committee (BAC). In each case, the BEC's meetings were attended, in an advisory capacity, by Mr Eben Lewis, a Supply Chain Management (SCM) practitioner.[4] In both cases, the BECs found that SMEC's bid was non-responsive because SMEC had proposed material deviations from the advertised terms. SMEC was thus not further evaluated on price and preference points. The tenders did not involve scoring for functionality, but there were prescribed minimum requirements relating to key personnel, support staff and the like with which bidders had to comply in order to be found responsive. In both cases, the BAC accepted the BEC's recommendation to find SMEC non-responsive.

[6] The grounds of review that are common to both tenders are (a) that the proposing of deviations, even if material, was not a permissible basis for treating SMEC's bids as non-responsive, and that the materiality of the deviations was not a matter for assessment by the BECs and BAC, which should have fully evaluated

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[2] 3 of 2000.

[3] In the consolidated notice of motion, the decisions at which the review are directed are: the decisions to declare SMEC's bids non-responsive (declaratory orders are also sought that the bids were responsive); the decisions to award the tenders to the successful bidders; the decisions of the appeal authority rejecting SMEC's internal appeals; the decision of the appeal authority in T26 to uphold KLE's internal appeal; and the decision in T26 to apply the Railway Sector Code for purposes of awarding preference points.

[4] Clause 231 of the City's SCM Policy requires the attendance of such a practitioner.

SMEC's bids; and (b) that that it was impermissible for functionality to have been excluded as a matter for evaluation.

[7] Three further grounds are pressed in respect of T26: (a) that the wrong sector code was specified in the tender documents, and applied by the BEC, in determining bidders' preference points; (b) that JGA was declared responsive despite failing to submit proof, timeously or at all, of the Track Inspector training of its relevant key personnel nominee; (c) that KLE, in its internal appeal, was declared responsive despite failing to submit proof, timeously or at all, of the Track Inspector training of its relevant key personnel nominee, alternatively that the substance-over-form approach which the appeal authority applied to KLE should also have been applied to SMEC.

[8] The answer to the two common grounds of review turns on a proper interpretation of the tender terms. It is convenient, however, to start with the constitutional, legislative and policy instruments in which the tender terms are sourced and which provide the framework within which they must be understood.

Section 217 of the Constitution

[9] The starting point in section 217 of the Constitution, which states:

> "(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–
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> (a) categories of preference in the allocation of contracts; and
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> (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.

Preferential procurement legislation

[10] The Preferential Procurement Policy Framework Act[5] (PP Act) requires an organ of state to determine a preferential procurement policy contemplated in section 217(2) of the Constitution within the framework of section 2 of the PP Act. Section 2(1) deals with the allocation of points. Points are only awarded to an "acceptable tender", defined to mean "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document". (This definition is repeated in the definition of "acceptable bid" in the City's SCM policy discussed below.) Paragraph (f) of section 2(1) provides that 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. Regulation 11 of the Preferential Procurement Regulations, 2017[6] (PP Regulations), promulgated in terms of the PP Act, provides that, if an organ of state intends to apply objective criteria in terms of section 2(1)(f), these must be stipulated in the tender documents.

[11] Regulation 5(1) provides that an organ of state must state in the tender documents if the tender will be evaluated on functionality. Regulation 5(2) states that the evaluation criteria for measuring functionality must be objective, and regulation 5(3) sets out what must be specified in the tender documents in that regard, including the minimum qualifying score for functionality. In terms of regulation 5(6), a bid that fails to obtain the minimum score "is not an acceptable tender". Regulation 5(7) provides that each bid that obtains the minimum score must be further evaluated in terms of price, the preference points system and the objective criteria envisaged in regulation 11.

[12] Regulations 6 and 7 set out the 80/20 and 90/10 "preference point systems". The two scored components of the formulas are price (with a weighting of 80% or 90% depending on the specified system) and preference points for broad-based

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[5] 5 of 2000.

[6] Preferential Procurement Regulations 2017, GNR 32 of 20 January 2017, published in *Government Gazette* No 40553. The operation of the PP Regulations in relation to the tenders now under consideration is unaffected by the declaration of invalidity made in *Afribusiness NPC v Minister of Finance* [2020] ZASCA 140; 2021 (1) SA 325 (SCA); [2021] 1 All SA 1 (SCA), upheld in *Minister of Finance v Afribusiness NPC* [2022] ZACC 4, a declaration which remains suspended, as explained in *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC)* [2022] ZACC 17.

black economic empowerment (BEE) (with a weighting of 20% or 10% depending on the specified system). Functionality is not a component of the formulas in regulations 6 and 7. Where functionality is part of the evaluation process, it is scored only to determine whether the bidder meets the prescribed minimum functionality score in accordance with regulation 5. If the prescribed minimum functionality score is achieved, the bidder goes forward to be assessed in terms of the applicable preference points system, where only price and preference points feature.

[13] If the highest bidders have equal scores, regulation 10(1) states that the contract must be awarded to the bidder who scores the highest number of preference points (that is, points for BEE). If the bidders are still equal, regulation 10(2) states that, if functionality is part of the evaluation process, the contract must be awarded to the bidder who scores the highest points for functionality. The effect of regulation 10(3) is that if the bidders are still equal, or if functionality is not part of the evaluation process, the winner must be decided by the drawing of lots.

Municipal Finance Management Act and SCM Regulations

[14] Section 111 of the Local Government: Municipal Finance Management Act[7] (MFMA) requires every municipality to have and implement an SCM policy which gives effect to the provisions of Chapter 11 of the Act. Section 112(1), echoing section 217(1) of the Constitution, states that the SCM policy must be fair, equitable, transparent, competitive and cost-effective, and must cover the matters listed in the subsection. These include "open and transparent pre-qualification processes for tenders and other bids".

[15] Regulation 21(1) of the Municipal Supply Chain Management Regulations[8] (SCM Regulations), promulgated in terms of the MFMA, requires a municipality's SCM policy to determine the criteria with which the documentation for a competitive bidding process must comply, and to state, among other things, that bid documentation must take into account the general conditions of contract and must include evaluation and adjudication criteria.

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[7] 56 of 2003.

[8] Municipal Supply Chain Management Regulations, GN 868 of 30 May 2005, published in *Government Gazette* No 27636.

[16] Regulation 26(1)(a) requires an SCM policy to provide for a committee system for competitive bids consisting of at least a bid specification committee, BEC and BAC. In terms of regulation 28, a BEC must (a) evaluate bids in accordance with the specifications for a specific procurement and the points system set out in the SCM policy; (b) evaluate each bidder's ability to execute the contract; (c) check, in respect of the recommended bidder, whether municipal rates and taxes and municipal service charges are not in arrears; and (d) submit to the BAC a report and recommendations regarding the award of the bid "or any other related matter".

[17] Regulation 29(1) provides that the BAC must (a) consider the report and recommendations of the BEC; and (b) either (depending on its delegations) make a final award or a recommendation to the accounting officer to make a final award, or "make another recommendation to the accounting officer how to proceed with the relevant procurement".

[18] Regulation 24 provides that an SCM policy may allow the accounting officer to negotiate the final terms of the contract with a bidder identified through a competitive bidding process, provided that such negotiation (a) does not allow any preferred bidder "a second or unfair opportunity"; (b) is not "to the detriment of any other bidder"; and (c) does not lead to a higher price than the bid as submitted.

[19] Regulation 41 states that an SCM policy must provide for an effective system of risk management for the identification, consideration and avoidance of potential risks in the SCM system, including the identification of risks on a case-by-case basis.

City's SCM Policy

[20] The City adopted its SCM Policy to give effect to its obligations under Chapter 11 of the MFMA. Clause 125 of the City's SCM Policy requires bid documentation to "clearly indicate the terms and conditions of contract, specifications, criteria for evaluation and adjudication procedures to be followed where applicable". In terms of clause 129, bid documentation and evaluation criteria "shall not be aimed at hampering competition, but rather to ensure fair, equitable, transparent, competitive and cost-effective bidding".

[21] In terms of clause 229, an ad hoc BEC must be constituted for each tender to evaluate bids. Clause 233 specifies how the BEC must go about scoring functionality "[w]here the scoring of functionality forms part of a bid process". Its terms accord with regulation 5 of the PP Regulations. In terms of clause 237, the BEC must consider the bids received "and shall note for inclusion in the evaluation report" bidders who are disqualified for various listed reasons, including a bidder "whose bid does not meet the minimum score for functionality, if applicable" and a bidder "whose bid is not in compliance with the terms and conditions of the bid documentation".

[22] Clause 244 provides that the "responsive bid" that scores the highest number of adjudication points must be recommended for acceptance, unless objective criteria, in addition to the specific goals contemplated in section 2 of the PP Act, justify the acceptance of another bid. Such other objective criteria include whether the recommended bidder "has not demonstrated that it has the necessary resources and skills required to fulfil its obligations in terms of the bid document" or "poses any material risk to the City".

[23] In terms of clause 249, the BEC must submit a report to the BAC, including recommendations regarding the award of the bid, the nomination of an alternative bidder, "or any other related matter". Clause 254 provides that the BAC may accept non-compliance with mandatory procedures or conditions, "but only if such non-compliance is not material". In terms of clause 258, the BAC must, after considering the BEC's report, make a final award "or make another recommendation to the City Manager on how to proceed with the relevant procurement including not making an award". In terms of clause 247, the City Manager may authorise the negotiation of the final terms of the contract. This is subject to the same qualifications stated in regulation 24 of the SCM Regulations.

[24] Clause 378 states that risks pertaining to SCM should at all times comply with the criteria laid down in the City's risk management policies. In terms of clause 382, the risk management process must be applied to all stages of SCM. Clause 385, in setting out the key principles to be included in SCM risk management, is modelled on regulation 41(2) of the SCM Regulations.

[25] The City's preferential procurement system is dealt with as from clause 430 of the SCM Policy. Clause 430.4.5 echoes regulation 5 of the PP Regulations by acknowledging that bids may be declared non-responsive if they "fail to achieve a minimum qualifying score for functionality (quality) if indicated in the bid documents". Clause 438 states that "[f]unctionality (otherwise known as quality) may be included in the bid evaluation process as a qualifying (eligibility) criterion". Clause 439 provides that "[i]f a bid is to be evaluated on functionality, this must be clearly stated in the invitation to submit a bid, and in the bid documentation". Clauses 440 and 441 are modelled on regulations 5(2) and (3) of the PP Regulations in regard to evaluation criteria for functionality. Clause 443 provides that if a bid fails to achieve the minimum qualifying score for functionality as indicated in the bid document, "it must be regarded as non-responsive, and be rejected (not considered any further in the evaluation process)".

The tender documents

[26] The tender terms relevant to the two common grounds of review are identical. The tender documents are made up of five volumes, of which the first four are relevant. Volume 1 is headed "Part T1: Tendering procedures". Volume 2 is headed "Part T2: Returnable documents". Volume 3 is headed "Draft Contract", and consists of several parts: "Part C1: Agreements and Contract Data", "Part C2: Pricing data", Part C3: Scope of Work" and "Part C4: Site information". Volume 4 contains the Standard Professional Services Contract (July 2009) published by the Construction Industry Development Board (CIDB Contract).

[27] Volume 1 sets out the terms governing the lodging, opening, evaluation and awarding of the tenders, in other words the rules of the tender process. Volume 2 contains the documents which a bidder had to return with its tender. The greater part of this volume comprises "Returnable Schedules", being 20 schedules which the bidder had to complete by inserting required details. Volume 3 contains the contract-specific data relevant to the contract to be concluded with the successful bidder. The CIDB Contract in Volume 4 contains the standard general conditions of contract which were to form part of the contract concluded with the successful bidder. These were subject to modifications brought about by the Contract Data in Volume 3.

[28] Volume 1 has an annex headed “Standard Conditions of Tender” (Standard Conditions). Each clause number in the Standard Conditions is preceded by the letter C. The terms of the tender process are the Standard Conditions as modified by the Tender Data set out in T1.2 of Volume 1. The introductory paragraphs of T1.2 state that the Tender Data have precedence over the Standard Conditions in the interpretation of any ambiguity or inconsistency between them. I shall refer to the Standard Conditions as modified by the Tender Data as the Tender Terms, and I quote the relevant provisions as modified.

[29] In T36, clause C.1.1.1 defined the “Employer” as the “City of Cape Town, represented by the Director: Network Management: Transport Directorate”. In T26, the same clause defined the “Employer” as the “City of Cape Town, represented by the Director: Transport Planning: Transport”.

[30] Section C.2 of the Tender Terms deals with the tenderer’s obligations, that is, the tenderer’s obligations during the tender process, as distinct from its contractual obligations if awarded the tender. Clause C.2.1 is headed “Eligibility”. Clause C.2.1.1 stipulates that tenderers must submit a tender offer “that complies in all aspects to the conditions as detailed in this document” and that “[o]nly those tenders that comply in all aspects with the tender conditions, specifications, pricing instructions and contract conditions will be declared responsive”. Clause C.2.1.3 provides that only those bids “from which it can be established that a clear and unambiguous offer has been made to the Employer, by whom the offer has been made and what the offer constitutes, will be declared responsive”.

[31] The introductory sentence of clause C.2.1.4 states that “[o]nly those tenders that satisfy the following criteria will be declared responsive”. These criteria are set out in eight subclauses, C.2.1.4.1 to C.2.1.4.8. Clause C.2.1.4.1 requires compliance with various listed aspects of the City’s SCM Policy and procedures. The headings of the other seven subclauses are “Key personnel”, “Support resources”, “Professional indemnity insurance”, “Track record of tenderer”, “Minimum score for quality” (stated to be “not applicable”), “Pre-qualification criteria for preferential procurement” (stated to be “not applicable”) and “Compulsory clarification meeting”.

[32] The fact that there were no pre-qualification criteria for preferential procurement did not mean that preferential procurement points would not be awarded, only that no minimum score was required in order to be found responsive. The same is not true of the inapplicability of pre-qualification criteria for quality (a synonym for functionality), because, as I have explained, the scoring of functionality only ever occurs when it features as a pre-qualification requirement. Since there was no minimum functionality qualification, functionality was not scored at all. Consistently with this state of affairs, Schedule 14 recorded that there were no functionality criteria for the tenders. Such criteria would have been required if functionality was to be scored.

[33] Clause C.2.17 requires a tenderer to provide clarification in response to a request from the employer during the evaluation phase, subject to the proviso that "[n]o change in the competitive position of tenderers or substance of the tender offer is sought, offered, or permitted". A tender is regarded as non-responsive if a tenderer fails to give such clarification. A note records that the subclause does not preclude "the negotiation of the final terms of the contract with a preferred tenderer following a competitive selection process, should the Employer elect to do so".

[34] Clause C.2.24 is of particular importance. It is headed "Proposed Deviations and Qualifications", and reads (emphasis in the original):

> "Where the tenderer cannot tender in all respects in accordance with the provisions contained in the tender documents, all deviations therefrom shall be clearly and separately listed in the schedule titled **Proposed Deviations and Qualifications by Tenderer** in T2.2 Returnable Schedules, or in a tenderer's covering letter expressly referenced in this schedule.
> The tenderer accepts that the Employer will examine such deviations in terms of clause C.3.8.2 and shall not be bound to accept any such deviations or qualifications.
> It must be clearly stated by the tenderer whether the sum tendered in the Tender Offer includes for *[sic]* all such deviations or qualifications listed or

referred to in the schedule titled **Proposed Deviations and Qualifications by Tenderer** or not."

[35] Section C.3 deals with the "employer's undertakings" in the tender process. It is cast in the form of a series of injunctions to the employer. Clause C.3.8, which is referenced in the above-quoted clause C.2.24, is again important. It is headed "Test for responsiveness", and reads:

"**C.3.8.1** Determine, after opening and before detailed evaluation, whether each tender offer properly received:

a) complies with the requirements of these Conditions of Tender,

b) has been properly and fully completed and signed, and

c) is responsive to the other requirements of the tender documents.

C.3.8.2 A responsive tender is one that conforms to all the terms, conditions, and specifications of the tender documents without material deviation or qualification. A material deviation or qualification is one which, in the Employer's opinion would:

a) detrimentally affect the scope, quality, or performance of the works, services or supply identified in the Scope of Work,

b) significantly change the Employer's or the tenderer's risks and responsibilities under the contract, or

c) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.

Reject a non-responsive tender offer, and not allow it to be subsequently made responsive by correction or withdrawal of the material deviation.

C.3.8.3 The Employer reserves the right to accept a tender offer which does not, in the Employer's opinion, materially and/or substantially deviate from the terms, conditions, and specifications of the tender documents."

[36] Clause C.3.11 deals with the evaluation of tender offers. The introductory paragraphs of this clause state that the Standard Conditions standardise the procurement process, methods and procedures. They are generic in nature, and are made project-specific through choices made in the Tender Data. The Tender Terms

"establish the rules from the time a tender is advertised to the time that a contract is awarded and require employers to conduct the process of offer and acceptance in terms of a standard set of procedures". The opening paragraphs list the activities associated with evaluating tenders as follows: open and record tender offers received; determine whether or not the tender offers are complete; determine whether or not tender offers are responsive; evaluate tender offers; determine if there are any grounds for disqualification; determine acceptability of preferred tenderer; prepare a tender evaluation report; confirm the recommendation contained in the tender evaluation report.

[37] Clause C.3.11.1 states that the employer must appoint an evaluation panel (that is, a BEC) of not fewer than three persons conversant with the proposed scope of works "to evaluate each responsive tender offer using the tender evaluation methods and associated evaluation criteria and weightings that are specified in the Tender Data".

[38] Clause C.3.11.2 sets out how the BEC must go about scoring functionality "[w]here the scoring of functionality forms part of the bid process". Clause C.3.11.3 provides that the tender will be evaluated in terms of the requirements of the PP Regulations. The clause states, among other things, that the preference points system is the 80/20 system, and that "[p]rice, preference and functionality will be scored, as relevant, to two decimal places". The rest of the clause deals with preference points.

[39] Clause C.3.11.4 is headed "Risk Analysis" and reads:

> "Notwithstanding compliance [with] the requirements of the tender, the employer will perform a risk analysis in respect of the following:
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> a) reasonableness of the financial offer
>
> b) reasonableness of unit rates and prices
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> c) the tenderer's ability to fulfil its obligations in terms of the tender document, that is, that the tenderer can demonstrate that he/she possesses the necessary professional and technical qualifications, professional and technical competence, financial resources,

equipment and other physical facilities, managerial capability, reliability, capacity, experience, reputation, personnel to perform the contract, etc; the Employer reserves the right to consider a tenderer's existing contracts with the Employer in this regard

d) any other matter relating to the submitted bid, the tendering entity, matters of compliance, verification of all submitted information and documents, etc.

The conclusions drawn from this risk analysis will be used by the Employer in determining the acceptability of the tender offer in terms of C.3.13."

[40] Clause C.3.13 is headed "Acceptance of tender offer", and is introduced thus: "Accept the tender offer, if in the opinion of the employer, it does not present any material risk and only if the tenderer …", and then follow six sub-items which need not be quoted. The clause ends with a recordal that "[i]f an award cannot be made in terms of anything contained herein", the employer reserves the right to consider the next ranked tenderer.

[41] After making provision for the notification of successful and unsuccessful bidders, clause C.3.20, which is headed "Negotiations with preferred tenderers", states:

"The Employer may negotiate the final terms of the contract with tenderers identified through a competitive tendering process as preferred tenderers provided that such negotiation:

a) does not allow any preferred tenderer a second or unfair opportunity;

b) is not to the detriment of any other tenderers; and

c) does not lead to a higher price than the tender as submitted.

If negotiations fail to result in acceptable contract terms, the City Manager (or his delegated authority) may terminate the negotiations and cancel the tender, or invite the next ranked tenderer for negotiations …

…

> In terms of the [PP Regulations], tenders must be cancelled in the event that negotiations fail to achieve a market related price with any of the three highest scoring tenderers."

[42] Schedule 20 of the Returnable Schedules is headed "Proposed Deviations and Qualifications by Tenderer". An introductory paragraph states that the tenderer should record any proposed deviations or qualifications in this schedule or by way of a covering letter referenced in the schedule. The next paragraph states the following in bold print: **"The Tenderer's attention is drawn to clause C.3.8 of the Standard Conditions of Tender referenced in the Tender Data regarding the Employer's handling of material deviations and qualifications."**

The CIDB Contract and SMEC's deviations

[43] In both of its tenders, SMEC in Schedule 20 made reference to a covering letter. This letter set out SMEC's "qualifications to the tender" (I shall refer to them as deviations, which seems more accurate). There were three deviations, all relating to the CIDB Contract in Volume 4.

[44] The first deviation concerned clause 3.12.1 of the CIDB Contract, although the covering letters erroneously referred to clause 13.12.1 (there is no such clause). Clause C3.12 is a penalty clause. Clause 3.12.1, as modified by the Contract Data, reads thus:[9]

> "If due to his negligence, or for reasons within his control, the Service Provider does not deliver the relevant project by the required Delivery Date, the Employer shall without prejudice to his other remedies under the Contract or in law, be entitled to levy a penalty for every Day or part thereof, which shall elapse between the Delivery Date and the actual date of completion, at the rate equal to 25% of the daily rate(s) applicable to the relevant part of the Service, and up to the maximum of 25% of the total price

[9] Although the Contract Data states that the clause I have quoted must be "added", it seems to me to be in substitution for clause 3.12.1 of the CIDB Contract. In its standard form, clause 3.12.1 of the CIDB Contract provides for a daily penalty "at the rate and up to the maximum amount stated in the Contract Data".

applicable to the contract. Note that this clause 3.12.1 deals with a penalty for late delivery only, and does not permit payment for work not actually performed to the satisfaction of the Project Manager."

SMEC's first deviation was to reduce the maximum penalty of 25% to 10%.

[45] SMEC's second deviation related to clause 8.3 of the CIDB Contract, a clause headed "Force Majeure". SMEC's deviation was to add a provision relating to the Covid-19 pandemic. Since this did not feature in the BEC and BAC decisions, it is unnecessary to elaborate.

[46] SMEC's third deviation related to clause 13.5.1 of the CIDB Contract. Clause 13.5 is headed "Limit of Compensation". It reads:

> "Unless otherwise indicated in the Contract Data, the maximum amount of compensation payable by either Party to the other in respect of liability under the Contract is limited to:
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> a) the sum insured in terms of 5.4 in respect of insurable events; and
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> b) the sum stated in the Contract Data or, where no such amount is stated, to an amount equal to twice the amount of fees payable to the Service Provider under the Contract, excluding reimbursement and expenses for items other than salaries of Personnel, in respect of non-insurable events."

[47] Regarding clause 13.5.1(a), clause 5.4.1 of the Contract Data required professional indemnity insurance of not less than R 16 million (T36) and R5 million (T26) in respect of each and every claim during the period of insurance; public liability insurance of not less than R20 million (both T36 and T26) for any single claim, the number of claims to be unlimited during the contract period; and insurance in terms of the provisions of the Compensation of Occupational Injuries and Diseases Act.[10] Regarding clause 13.5.1(b), no sum was stated in the Contract Data.

[10] 130 of 1993.

[48] SMEC's third deviation was to delete clause 13.5.1 in its entirety and replace it with the following:

> "The Consultant's aggregate liability to the Employer arising out of or in connection with the performance or non-performance or repeat or delayed performance of the Services, or any act or omission in the performance of the Service Provider's professional duties in relation to the Services, whether by way of indemnity in terms hereof, statute, under the law of contract, in delict or any other basis in law or equity, shall (to the extent permitted by law) be limited to the total amount of the Price stated herein or agreed to between the parties. The Employer releases the Consultant with respect to any liability:
>
> a) to the extent that, in respect of any event which causes loss or damage to the Employer, the amount of such liability may exceed the amount equal to the Contract Price as stated above; and
>
> b) to the extent that the aggregate amount of such liability in respect of all such events may exceed the amount equal to the Contract Price stated above where there is more than one event which causes the Employer to suffer loss or damage.
>
> The Consultant shall furthermore not be liable to the Employer for loss of use of any works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the Employer in connection with the Agreement or the Services."

The T36 decision

[49] Thirteen bids were received, of which nine, including SMEC's, were found by the BEC to be non-responsive. Only the responsive bids were further evaluated and allocated points.

[50] The record of the BEC's meetings shows that the decision to declare SMEC's bid non-responsive was based on its third deviation. As to the first deviation, the BEC felt unable to make a determination of materiality, because there was no clause 13.12.1 in the CIDB Contract. The BEC considered whether this was a mistaken

reference to clause 3.12.1, but noted that the latter clause did not refer to a percentage. The BEC seems to have overlooked the fact that clause 3.12.1 had been amended by the Contract Data.

[51] As to the second deviation, the BEC again felt unable to make a determination, because they could not find a clause 8.3.4 in the CIDB Contract. The BEC seems not to have appreciated that SMEC was proposing to add a further subclause to clause 8.3.

[52] As to the third deviation, the BEC considered that the proposal limited SMEC's liability for non-performance. This shifted greater risk from SMEC to the City. This was considered to be a material deviation, because it "significantly" changed the City's and SMEC's risks and responsibilities, and would also affect the competitive position of other bidders if SMEC were allowed to rectify the deviation.

[53] In its report to the BAC, the BEC stated that SMEC had proposed deviations and qualifications which were material, since they would have significantly changed the employer's or the tenderer's risks and responsibilities under the contract. The bid was thus non-responsive in terms of clauses C.2.24 and C.3.8.2 of the Tender Terms. The BAC accepted the BEC's report and resolved that the tender be awarded to JGA (two regions) and ITS (the other two regions).

[54] SMEC pursued an internal appeals against its disqualification. This appeal were made in terms of section 62 of the Local Government: Municipal Systems Act[11] (Systems Act). The appeal failed.

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[11] 32 of 2000. Section 62(1) reads:

> "A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or subdelegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision."

Since the BAC is made up of "staff members", the appeal in terms of section 62(4)(a) lay to the City Manager.

The T26 decision

[55] Eight bids were received, of which six, including those of SMEC and KLE, were found by the BEC to be non-responsive. Only the two responsive bids were further evaluated and allocated points.

[56] The record of the BEC's meetings indicates that SMEC's non-responsiveness was based on the first and third deviations.[12] The T26 BEC, unlike the T36 BEC, correctly identified the purport of the first and second deviations clause. The second deviation was not regarded as material.

[57] In its report to the BAC, the BEC stated that SMEC had proposed deviations and qualifications which were material, since they would have significantly changed the employer's or the tenderer's risks and responsibilities under the contract. The bid was thus non-responsive in terms of clauses C.2.24 and C.3.8.2 of the Tender Terms. KLE was declared non-responsive for non-compliance with an aspect of clause C.2.1.4.2 ("Key personnel"), in that it had failed to provide proof of Track Inspector training of its relevant key personnel nominee, even after a request for clarification. The BEC recommended that the tender be awarded to JGA. The BAC accepted the BEC's report and resolved that the tender be awarded to JGA.

[58] Both SMEC and KLE pursued internal appeals against their disqualification. SMEC's appeal failed. KLE's appeal succeeded, and it displaced JGA as the successful bidder. I shall deal at a later stage with the reliance which SMEC placed on the approach of the appeal authority to KLE's appeal.

The responsiveness challenge

The challenge in outline

[59] Although SMEC does not concede that its proposed deviations were material, it is not a ground of review that the BEC, BAC and appeal authority could not properly have concluded, on the merits, that the deviations were material. SMEC's contention is that material deviation was not a matter for assessment by the body, or

[12] The minutes of the third meeting at record 1110 refer only to the change of percentage in the first deviation, but the transcript of the meeting at record 1004-1013 indicates that the BEC regarded both the first and third deviations as material.

at the time, it was done. The BEC and BAC, so it is contended, were not entitled on this ground to find that SMEC's bids were non-responsive. Only the "Employer" as defined could do so, and this should have happened in the context of the risk assessment contemplated in clause C.3.11.4. The BEC and BAC should have evaluated SMEC's bids as responsive, whereas no such evaluation took place in view of the premature decision on non-responsiveness.

[60] Even at the time of the risk assessment contemplated in clause C.3.11.4, so SMEC contends, a finding that SMEC's deviations were material would not necessarily exclude SMEC from further consideration, assuming it was the preferred bidder. SMEC had merely responded to an invitation to propose deviations. If the "Employer" as defined thought the deviations were material, SMEC could have ameliorated or withdrawn them in the final-contract negotiations permitted by clause C.3.20.

Interpretation of the Tender Terms

[61] Clause C.2.24 of the Tender Terms is stated to apply where the bidder "cannot" tender in all respects in accordance with the provisions of the tender documents. In that event, the deviations must be clearly and separately identified by way of Schedule 20. On the face of it, the word "cannot" does not permit a bidder who is able and willing to comply in all respects with the tender documents to propose terms which are more advantageous to it than those specified in the tender documents. Arguably, therefore, the proposing of deviations in Schedule 20 conveys that the bidder is not prepared to bid on terms which do not incorporate the deviations. I shall, however, assume in SMEC's favour that its proposed deviations were not non-negotiable.

[62] Clause C.2.24 does not use the word "material". It simply states that all deviations must be clearly identified by way of Schedule 20. The Tender Terms must be read as a whole. Clause C.3.8.2, read with the second introductory paragraph of Schedule 20, could not be clearer in laying down that a bid which incorporates material deviations by way of Schedule 20 will be rejected as non-responsive. Reading the two clauses and Schedule 20 together, the position is the following:

(a) If deviations are identified by way of Schedule 20, the employer must assess them for materiality as contemplated in clause C.3.8.2.

(b) If the deviations are assessed to be material, the bid must be rejected as non-responsive, and the bidder must not be allowed to rectify the matter by ameliorating or withdrawing the deviations.

(c) If the deviations are assessed not to be material, the bid cannot on that ground be rejected as non-responsive, but clause C.2.24 nevertheless warns the bidder that the employer is not bound to accept the deviations.

(d) Since a bid with non-material deviations cannot be rejected as non-responsive, it must be further evaluated. If the bid scores the highest, the non-material deviations can be the subject of final-contract negotiations in terms of clause C.3.20. In that process, the non-material deviations might be accepted by the City or they might be rejected or modified, provided that the limitations in clause C.3.20 are observed. If agreement on the non-material deviations cannot be reached, the Tender Terms allow the City to begin negotiations with the next ranked bidder.

[63] SMEC's argument that the materiality of deviations, and the risk they pose for the employer, should await the risk analysis contemplated in clause C.3.11.4 is misconceived. There is no reason why aspects bearing on risk should not feature in different ways at different stages of the tender process. For example, it would be risky for the City to appoint a contractor whose key personnel are not sufficiently qualified and experienced. This does not mean that this risk cannot be addressed by way of prescribed minimum requirements for responsiveness, as was done here in clause C.2.1.4.2. In the same way, risk in the form of material deviation from the tender documents (this expressly includes material deviations from the contract conditions) can be addressed by way of a responsiveness criterion. In the case of responsive bids, risk also features indirectly, since the bidder with the highest score might ordinarily be expected to pose the least risk of bad performance.

[64] The risk analysis in clause C.3.11.4 is directed at identifying any residual risks to which the City might be exposed if it were to contract with the best-scoring responsive bidder. In the scheme of the Tender Terms, the risk analysis need only be done in respect of the bidder who has come out on top in the evaluation process.

The risk analysis is the last step before acceptance of the tender offer. When clause C.3.13 requires the City to accept the tender offer if, in the City's opinion, it does not present any material risk, it is referring to any material risk revealed in the risk analysis contemplated in clause C.11.4. Material deviation from the tender documents would have been addressed at an earlier stage, as a criterion for responsiveness.

[65] In the present matters, the City engaged Moore CT Forensic Services (Pty) Ltd (MCT) to do "due diligence audits" on the preferred bidders. In the case of T36, the audits were done on ITS and the JMT Consortium, while in T26 the audit was done on JGA. These audits were done after the last BEC meetings but before the BECs finalised their reports to the BAC. It seems that the MCT audits were the primary means by which the City undertook the risk analysis required by clause C.3.11.4. In each case, the audit report set out MCT's findings about the bidder's legal status,[13] financial ability and creditworthiness[14], ability to perform the work,[15] and verification of declarations made in the bid.

[66] It will be recalled that clause C.2.1.4 begins, "Only those tenders that satisfy the following criteria will be declared responsive". SMEC argues that material deviation from the tender documents is not listed anywhere in the eight subclauses of C.2.1.4, and is thus not a criterion for responsiveness. Clause C.2.1.4 must, however, be read in the context of the Tender Terms as a whole. Clause C.2.1 is headed "Eligibility". Clause C.2.1.4, with its eight subclauses, is only one aspect of eligibility. The very first requirement, in C.2.1.1, is compliance "in all aspects to the conditions as detailed in this document", and it is expressly stated that only tenders that comply "in all aspects with the tender conditions, specifications, pricing instructions and contract conditions will be declared responsive". In the light of clauses C.2.24 and C.3.8.2, material deviations from contract conditions cannot be regarded as compliance with the conditions detailed in the tender documents. Put differently, clause C.2.1.1, read with clause C.3.8.2 and the second introductory

[13] CIPC registration, directors, shareholders, tax compliance, black economic empowerment verification etc.

[14] Litigation, banking details, solvency, submission of financial statements etc.

[15] Physical inspection of the bidder's premises, interviewing management, obtaining references etc.

paragraph of Schedule 20, makes it clear that an absence of material deviations is a criterion for responsiveness.[16]

[67] In the context of the Tender Terms as a whole, therefore, the introductory words of clause C.2.1.4 cannot be read as containing the only requirements for responsiveness. The introductory words mean that, in the absence of compliance with the eight subclauses, a bid will not be declared responsive. It does not follow that a bid which complies with the eight subclauses will inevitably be declared responsive, because there are other requirements for responsiveness as well. Apart from clause C.2.1.1 read with clause C.3.8.2, there is C.2.1.3, which expressly makes a clear and unambiguous offer a criterion for responsiveness.

The Aurecon case

[68] Counsel for SMEC placed considerable reliance on the judgment of the Supreme Court of Appeal in *Aurecon*.[17] In that case, the appellant, Aurecon, was one of six bidders. The BEC recommended, and the BAC accepted, that five of the bids were non-responsive, that Aurecon's bid was responsive, and that the tender should be awarded to Aurecon.[18] After a considerable delay, the respondent in the appeal, the City, applied to set aside the award of the tender to Aurecon. One of the review grounds was that Aurecon had been permitted to withdraw a qualification recorded in the equivalent of Schedule 20 in the present case. The qualification was the addition of a clause in terms of which the City would indemnify Aurecon against liability resulting from exposure to hazardous substances such as asbestos. The

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[16] In *WBHO v Nelson Mandela University* [2019] ZAECPEHC 68, where the tender invitation contained a provision practically identical to our C.3.8.2, and a returnable schedule practically identical to our Schedule 20, a bidder had proposed a deviation to the standard contract terms specified in the tender invitation. The Court found that the BEC had committed no reviewable irregularity in assessing the deviation to be material (because it significantly changed the employer's risk) and in finding the bid for this reason to be non-responsive. Once the employer formed the opinion that the deviation was material, it had no power to condone the non-responsiveness (at paras 21-31 and 44-47).

[17] *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) (*Aurecon*). In the respects relevant to this case, the Supreme Court of Appeal's judgment is unaffected by the further appeal to the Constitutional Court in *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC).

[18] Id at paras 5-6.

BEC rejected the qualification and asked Aurecon to withdraw it, which the latter did.[19]

[69] The relevant clauses of the Tender Terms are not fully quoted in the judgment, but it seems that in that matter clauses F.3.8.2 and F.4.2, and the heading of Schedule 15, were the same as clauses C.3.8.2 and C.3.20, and the heading of Schedule 20, in the present case. In rejecting this ground of review, Maya ADP said that the only valid criticism that might possibly have been levelled against the BEC was that it had not rejected Aurecon's bid as non-responsive, as it had done with the other five bidders. Maya ADP then referred to the equivalent of clause C.3.8.2, emphasising that a responsive tender was one that conformed with all the terms, conditions and specifications of the tender "without *material* deviation" (emphasis added by the learned Acting Deputy President). She continued:

> " Whether or not a deviation or qualification is material is obviously a question to be determined by the BEC in its discretion taking into account the eligibility criteria set out in the Standard Terms of Contract and the Tender Data. It would appear from the BEC's conduct that it did not consider the proposed qualification to be of a disqualifying nature."[20]

[70] Maya ADP went on to consider clause F.4.2, which made provision for negotiations with the preferred bidder in the same terms as our clause C.3.20. She also referred to the corresponding power conferred on the City Manager by what was then clause 231 of the SCM Policy (now clause 274). She continued:

> "These provisions make clear that the mere proposal of qualifications cannot in itself render a bid non-responsive. It was common cause that when Aurecon was asked to withdraw its qualifications it had become the City's preferred tenderer. In that case the City was entitled to negotiate the final terms of the contract with it. Needless to say, the other tenderers had already been eliminated from the process in the initial evaluation for failing to

[19] Id at para 25.

[20] Id at para 26.

meet the relevant eligibility criteria. There would, therefore, have been no room to negotiate anything with them. In any event, it is not known what amendments they should have been allowed to make so it is not possible to determine if the BEC could have exercised its discretion in their favour."[21]

[71] In my opinion, *Aurecon* is distinguishable and does not assist SMEC. *Aurecon* was decided on the factual basis that the BEC had not regarded Aurecon's proposed qualification as material. The paragraphs I have quoted from *Aurecon* make the point that, once Aurecon was found to be responsive (because its proposed qualification was not a material deviation), the subsequent withdrawal of the qualification was not improper, because this was a permissible part of the process of negotiation between the City and Aurecon as the preferred bidder. If, in that case, the BEC in its discretion had found (as it did in SMEC's case) that the qualification was material, it would have been bound to declare Aurecon non-responsive in the same way as the other bidders had been declared non-responsive, and in that event there could have been no scope for final negotiations with a preferred bidder. In short, the Tender Terms cannot be construed as inviting bidders to propose material deviations.

Regulation 4 of the PP Regulations

[72] Counsel for SMEC submitted that, in terms of regulation 4 of the PP Regulations, the only pre-qualification criteria that can be stipulated in a tender are those set out in regulation 4. That contention is without merit. Regulation 4 is expressly limited to those pre-qualifying criteria whose purpose is "to advance certain designated groups". It does not purport to regulate or exclude other pre-qualifying criteria. The PP Regulations were promulgated in terms of the PP Act, the stated purpose of which is to provide a framework for the implementation of preferential procurement policies pursuant to subsections 217(2) and (3) of the Constitution. The Act and its regulations are not directed at other purposes.

[73] Just as the PP Regulations regulate aspects of eligibility bearing on the preference points systems, so do the SCM Regulations regulate aspects of eligibility

[21] Id at para 27.

falling within the purview of the concerns of the MFMA.[22] In general, though, it is for the public authority (the employer) to determine the eligibility criteria for the tender.[23]

Who decides materiality of deviations?

[74] Once it is found that the absence of material deviation is, in terms of clause C.3.8.2, a criterion of responsiveness, there can be no doubt in my view that it is a matter which can and must be assessed by the BEC. Counsel for SMEC accepted that compliance with the criteria for responsiveness set out in clause C.2.1.4 is properly a matter for assessment by the BEC. There is no reason to treat the absence of material deviation, as required by clause C.2.1.1 read with clause C.3.8.2, any differently. SMEC's argument that the BEC did not have the power to undertake this assessment was based largely on a contention that the materiality of a deviation was a matter for the "Employer" to assess in the risk analysis contemplated in clause C.3.11.4. I have already explained why I reject that interpretation of the Tender Terms.

[75] Regulation 26(1) of the SCM Regulations requires a competitive bidding process to involve a BEC. In terms of regulation 28(1)(a), the first function of the BEC is to evaluate bids in accordance with "the specifications for a specific procurement" and with the applicable points system. Assessing responsiveness is the first stage of evaluation. I am not aware of its having ever previously been suggested that assessing responsiveness, either in general or in any particular respect, is not a proper function of a BEC. In *Aurecon*, the Court seems to have been in no doubt that the BEC's function included an assessment of bids for responsiveness, including responsiveness in the form of an absence of material deviation.

[76] The fact that the BEC makes an assessment of responsiveness does not mean that it is the final arbiter on that question. In all cases, the BEC makes a

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[22] For example, regulation 21 of the SCM Regulations states that, if the value of the transaction is expected to exceed R10 million (VAT included), the bid documentation must require bidders to furnish the documents and particulars specified in regulation 21(d).

[23] *WDR Earthmoving Enterprises v Joe Gqabi District Municipality* [2018] ZASCA 72 (*WDR Earthmoving*) at para 30.

recommendation to the BAC. Depending on the BAC's delegated power, the BAC will either make a final decision or make a recommendation to the City Manager. The final decision-maker might disagree with the BEC's responsiveness assessment. If this results in a finding that a particular bidder should not have been declared non-responsive, the final-decision-maker would need to refer the matter back to the BEC for further evaluation.

Full evaluation of non-responsive bids?

[77] I did not understand counsel for SMEC to argue that, if absence of material deviation was a criterion for responsiveness, the BEC should nevertheless have fully evaluated SMEC with reference to price and preference points. It would be a waste of resources for BECs to evaluate non-responsive bids, and none of the cases cited in argument are authority for the proposition that this has to be done. Regulation 28(1) of the SCM Regulations should not be interpreted as requiring such a futile exercise. Clause C.3.8.1 provides that responsiveness must be determined before "detailed evaluation". If a bid is found to be non-responsive, it must be "rejected" at that point in the process. As I said earlier, section 2 of the PP Act envisages that only "acceptable" (that is, responsive) bids are allocated price and preference points. Where functionality is an eligibility requirement, clause 443 of the SCM Policy explicitly states that, if a bid fails to achieve the minimum qualifying score for functionality, "it must be regarded as non-responsive, and be rejected (not considered any further in the evaluation process)".

[78] Clause 237 of the SCM Policy states that the BEC "shall note for inclusion in the evaluation report" bidders who are disqualified for various reasons. This means, in my opinion, that the BEC's report to the BAC should identify bidders who have been rejected as non-responsive. The BEC reports in the present case accord with this understanding of the SCM Policy. This enables the BAC or final decision-maker to form a view on responsiveness. If the BAC or final decision-maker concludes that a bidder should not have been rejected as non-responsive, the matter can be referred back to the BEC for further evaluation.

Risk analysis

[79] In view of my analysis, it is not necessary to decide whether the risk analysis contemplated in clause C.3.11.4 is a proper matter for the BEC to concern itself with. In principle, however, and once it is appreciated that the BEC merely makes a recommendation, it is unobjectionable for the BEC to comment on the risk analysis in its recommendation to the BAC. The risk analysis is ultimately concerned with the acceptability of the preferred bidder, and the final decision in that regard must be that of the functionary with final power to award the tender. I do not think the definition of "Employer" in Clause C.1.1.1 is intended to identify the person with evaluation and adjudication powers in the tender process. The definition merely identifies the City's representative for purposes of the proposed contract, that is, the senior representative of the directorate within whose functional area the contractual services are to be rendered.

[80] I thus reject SMEC's ground of review concerning the decision to reject its bids as non-responsive. The Tender Terms do not suffer from vitiating ambiguity or uncertainty; on the contrary, their meaning is clear. The BEC, BAC and appeal authority understood and applied them correctly.

The functionality challenge

[81] SMEC alleged that the City was obliged to assess all bids on functionality. This argument was based on section 2(1))(f) of the PP Act and clause C.3.11.3 of the Tender Terms. The City's failure to undertake this assessment was said to be a reviewable irregularity. For several reasons, I disagree.

Challenge irrelevant in case of non-responsive bid

[82] First, and specifically in relation to SMEC, the City was not required to further evaluate its bids once they were rejected as non-responsive for reasons unrelated to functionality. The same is true of other non-responsive bids. This would be so, even if functionality was something which had to be assessed in relation to bids which were otherwise responsive.

Functionality permissibly excluded

[83] Second, functionality was not something which these particular tenders required to be evaluated (that is, scored). Regulation 5(1) of the PP Regulations

states that an organ of state "must state in the tender documents if the tender will be evaluated on functionality". This provision recognises that a particular tender might be one which will not be evaluated on functionality, and that this is so is recognised in regulation 10(2). Regulations 5(2) to 5(7) apply only if the tender is one which is to be evaluated on functionality. Clause 233 of the SCM Policy accords with regulation 5(1) in recognising that functionality may in particular tenders not be a matter for evaluation.

[84] The same is true of clause C.3.11.2 of the Tender Terms, which lays down the procedure to be followed "[w]here the scoring of functionality forms part of a bid process". Similarly, clause C.3.11.3.2 provides that price, preference and functionality will be scored, "as relevant", to two decimal places. Counsel for SMEC argued that since clauses C.3.11.2 and C.3.11.3 were incorporated into the Tender Terms by way of the Tender Data, they must have been regarded as tailored to these particular tenders, meaning that functionality had to be scored. I disagree. The fact that unique provisions tailored to a particular tender would need to be accommodated in the Tender Data does not mean that the Tender Data does not also contain some generally applicable changes which the City has made to the Standard Conditions. A number of additions in the Tender Data seem to be of this kind.[24]

[85] In relation more particularly to clauses C.3.11.2 and C.3.11.3, their very formulation shows that they might be applicable to some tenders but not to others. If functionality was intended to be scored in these two particular tenders, clause C.3.11.2 would not have started with the subordinate clause "Where …", and the qualification "as relevant" would not have been inserted in clause C.3.11.3.2. Counsel for SMEC argued that "as relevant" did not mean "if applicable", but he was unable to give any other meaning.

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[24] For example, clauses C.2.1.1, C.2.1.3, C.2.1.4.1, C.2.8, C.2.11, C.12.1, C.2.13.1, C.2.13.5 and C.2.13.11, to mention just a few, strike one as generally applicable modifications and additions; there is nothing project-specific about them. Another clear example is clause C.2.7, which deals with the clarification meeting. This provision in the Standard Conditions states that the clarification meeting must be attended "where required". In the present case, clause C.2.1.4.8 of the Tender Data stated that there was no compulsory clarification meeting, yet clause C.2.7 was nevertheless supplemented in the Tender Data, the additional provision being stated to operative "if applicable".

[86] Clause C.2.1.4.6 stated that there was no minimum score for quality (functionality). I have already explained that, in terms of the PP Regulations, functionality is only scored if the tender specifies a minimum score for functionality. Since there was no such minimum score in these two tenders, functionality was not part of the evaluation process. This accords with Schedule 14, which stated that there were no functionality criteria for these tenders; in terms of regulation 5 of the PP Regulations, such criteria were only have been needed if the bids were to be evaluated on functionality.

Section 2(1)(f) of PP Act

[87] SMEC's reliance on section 2(1)(f) of the PP Act is misplaced. That section does not mean that, wherever objective criteria in addition to those contemplated in sections 2(1)(d) and (e) could notionally be devised, they have to feature in the tender process. Section 2(1)(f) merely permits the organ of state to award a tender to a bidder who did not score the most points, but only if there are other objective criteria to justify the award. Regulation 11(1) of the PP Regulations states that a contract "may" be awarded to a bidder that did not score the highest points, but only in accordance with section 2(1)(f). Regulation 11(2) states that "[i]f" an organ of state intends to apply objective criteria in terms of section 2(1)(f), these objective criteria must be stipulated in the tender documents. This shows that an organ of state does not have to specify objective criteria merely because such these could notionally be specified.

[88] In any event, functionality as a potentially objective criterion is expressly dealt with in regulation 5 of the PP Regulations. Regulation 5 is clear that an organ of state is not required to include functionality as a matter for evaluation. Even where functionality is a matter for evaluation, it is only as an eligibility requirement (a minimum functionality score). If the minimum score is achieved, the further evaluation is based on price and preference points. The only residual role that functionality then plays is as a tie-break between equal highest bids if the tie cannot be broken with reference to BEE (preference points).

Functionality as non-evaluative factor

[89] The fact that functionality was not to be evaluated does not mean that functionality in a more general sense was irrelevant. In order to ensure that competent services would be supplied, the Tender Terms incorporated detailed eligibility requirements for key personnel, support resources and track record. If a particular bidder met these requirements, and scored the most points for price and preferential procurement, residual functionality concerns could be addressed in the risk analysis contemplated by clause C.3.11.4, a component of which was the tenderer's ability to fulfil its obligations.

[90] The regulatory regime thus permitted the City to issue these tenders on the basis that scoring for functionality would not be part of the evaluation. Counsel for SMEC did not refer me to any authority to the effect that all tenders must invariably require functionality to be scored.[25] SMEC did not advance the case that the City committed a reviewable irregularity by issuing the tenders on that basis, but even if such a case was advanced, it was not established.

Attack should have been directed at tender invitation

[91] Furthermore, such an attack is concerned with the decision to issue the tender invitations on these terms, rather than with decisions made by the BECs and BACs. The function of the BECs and BACs was to evaluate the tenders in accordance with the tender documents. If SMEC considered that the decision to go out to tender on terms which did not require functionality to be scored was unlawful, it should have launched a timeous challenge once the tenders were issued on 31 July 2020 (T26) and 7 August 2020 (T36) respectively. That a decision to issue a tender on terms which violate procurement legislation is in principle susceptible to judicial review is apparent from the judgment of the Supreme Court of Appeal in

[25] The cases to which counsel for SMEC referred in their heads of argument were cases where the tenders required functionality to be evaluated: see *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (*Rainbow Civils*) at para 12; *Quality Plant Hire CC v Greater Tzaneen Municipality* [2016] ZAGPPHC 619 at paras 48 and 53 (and see also, in the interim proceedings*, Quality Plant Hire CC v The Greater Tzaneen Municipality* [2015] ZAGPPHC 805 at para 14); *Infinite Blue Trading 29 CC t/a Motau Projects v City Power Johannesburg (SOC) Ltd* [2019] ZAGPJHC 169 at paras 1-2; *Down Touch Investments (Pty) Ltd v South African National Road Agency SOC Limited* [2020] ZAECGHC 120 at para 6*;* and *Maximum Profit Recovery (Pty) Ltd v Inxubu Yethemba Local Municipality* [2021] ZAECGHC 11 at para 35;

Airports Company South Africa.[26] But instead of challenging the decision to issue the tenders on supposedly objectionable terms, SMEC participated in the tenders, allowed the tender evaluation processes to run their course, internally appealed against the decisions to reject its bids as non-responsive, and only launched review proceedings on 17 May 2021 (T36) and 18 August 2021 (T26), after it had failed in its quest to be the successful bidder.

[92] There are cases in which vagueness, ambiguity or inconsistency in tender documents has led to the award of tenders being set aside at the suit of disappointed bidders.[27] While there is no reason to doubt that a disappointed bidder may seek to impeach an award on this basis, the argument in those cases did not focus attention on whether the reviewable decision is simply the award of the tender or whether such a review necessarily encompasses an attack on the decision to issue the tender on terms suffering from vitiating vagueness, ambiguity or inconsistency. This question is important, having regard to the time-limit for review proceedings laid down section 7(1) of PAJA. *ACSA* is an example of a case where the decision to issue the tender was explicitly challenged.[28] In principle, it seems undesirable that a bidder should be at liberty to "take a chance" in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid. However, in view of the conclusion I have reached on other aspects, I need not finally decide this point.

[93] The functionality challenge thus also fails. This disposes of the grounds which are common to both tenders. There are three further grounds of review in respect of T26.

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[26] *Airports Company South Africa SOC Ltd v Imperial Group Ltd* [2020] ZASCA 2; 2020 (4) SA 17 (SCA); [2020] 2 All SA 1 (SCA) (*ACSA*).

[27] See *Rainbow Civils*, note 25 above, at paras 74-7. See also *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC (*Allpay*) at paras 73-93, although in that case the ambiguity and confusion seem not to have infected the original tender terms but came about when the public authority later issued a notice to bidders which moved the goalposts on functionality.

[28] *ACSA*, note 26 above.

The first T26 challenge – BEE sector codes

[94] Clause C.2.23.2 of the Tender Terms in T26 dealt with BEE. This clause stated that, in order to qualify for preference points, the bidder had to submit documentary proof of its BEE status level of contribution in accordance with the applicable Codes of Good Practice as issued by the Department of Trade and Industry. The clause stated that the applicable code for T26 was the "Amended Codes for Measuring [BEE] in the Railway Sector" (Rail Code).[29]

[95] Eight bids were received. Five of the bidders, including SMEC, provided evidence of their BEE status level of contribution with reference to the Amended Construction Sector Code (Construction Code). It is unclear what the other three bidders did, but according to the City they, too, did not provide evidence with reference to the Rail Code. The result was that none of the eight bidders qualified for preference points. Since the BEC declared six of the eight bids non-responsive, this was – on the BEC's approach – only of practical significance for the two responsive bidders, KLE and JGA.

[96] At its first meeting the BEC discussed the question of the applicable code. The line department was asked to investigate this question. The department's report was prepared by the chairperson of the BEC, Mr Jonathan Louw. He noted that the management of the City's railway sidings involved some specialist railway inputs, so "logic might dictate" the use of the Rail Code. On the other hand, the project also required some general construction-sector skills. As a result, the choice of sector scorecard "was not obvious" and that "[t]wo possible Codes of Practice would appear applicable for this project". Mr Louw concluded his report thus:

> "Due to limited amount of specialist work for private companies (both contractors and consultants) in the rail sector in the past few years, many contractors and built environment professionals are likely to carry out the majority of their core business in the construction field. As a result, these companies would possess [Construction Code] scorecards. Therefore, it is

[29] I use the expression "Rail Code" because it appears, from the regulatory material handed up during argument, that the correct name for this subsector code is "Rail", not "Railway". The Rail Code is a subsector of the Transport Sector.

conceivable that contractors and built environment professionals carrying out work on the Railway Sidings project could possess [Construction Code] scorecards.

As a result of the Scope of Work for this tender, the correct sector code should have been the [Construction Code] and line department is requesting a minor breach in the BBBEE Sector Code applicable to [T26] from [Railway code] (as advertised) to [Construction Code] due to reasons stipulated above."

[97] Mr Lewis, the SCM practitioner, advised the BEC that the evaluation criteria could not be changed retrospectively. The adoption of the Construction Code could affect the ranking of bidders, and could create fertile grounds for appeals and objections, even if an "administrative error" was made in specifying the Rail Code rather than the Construction Code. The BEC, including Mr Louw, accepted Mr Lewis' view. Indeed, the version in the City's answering papers goes somewhat further, indicating that upon reflection the members of the BEC were satisfied that the City had acted correctly in specifying the Rail Code.[30] As a result none of the bidders qualified for preference points.

[98] SMEC argued that the use of the wrong sector code vitiated the entire tender. Even if there were only two responsive tenders, it was impossible to know whether potential bidders with Construction Code scorecards refrained from bidding because they would not receive preference points.

[99] The first answer to this review ground is that it is not a matter which concerns SMEC. In other words, it does not have standing to challenge the tender award on this basis. The two responsive bidders, KLE and JGA, have not complained that they were not awarded preference points, nor is there evidence that their ranking would have been affected if they had been evaluated with reference to the Construction

[30] Lewis para 76 at record 1087 and para 96 at record 1099. Each member of the BEC made a confirmatory affidavit.

Code. As to unknown potential bidders, they have not come forward to complain that they were prejudiced by the terms of the tender invitation.[31]

[100] The second answer is that SMEC has not demonstrated that the City committed a reviewable irregularity by specifying the Rail Code rather than the Construction Code. Clause 1 of the Rail Code states that it "extends to the entire rail industry value chain", the "key players being the state-owned operators and infrastructure companies". The challenge for these entities, so the code notes, is to use their purchasing power "to drive the transformation of the entire rail industry value chain, including manufacturers, suppliers, consultants and maintenance companies". The Rail Code "will also have an impact on other sectors of the economy that are not rail specific, for example, general services".

[101] As it turned out, the eight firms that submitted bids did not have Rail Code scorecards, but the evidence does not establish that the City must have known that no firms with Rail Code scorecards would submit bids. The evidence does not show that the Rail Code was inapposite. At most, the evidence indicates that both the Rail Code and the Construction Code could have been apposite. If the City had specified only the Construction Code, potential bidders with Rail Code scorecards might have complained.

[102] The complaint would thus have to be that the clause should have specified both the Rail Code and the Construction Code. However, and apart from the fact that this complaint was not explicitly made, the feasibility of doing so was not explored in the evidence or argument. If there were potential bidders from both sectors, it was not necessarily irrational to favour those with Rail Code scorecards, since they might have fewer opportunities for empowerment than firms with Construction Code scorecards. Furthermore, one does not know whether it is feasible, in a single tender, to make use of multiple sector codes. The very fact that different codes exist

[31] This situation must be distinguished from a complaint by a non-responsive bidder that the tender was awarded to a bidder who should also have been declared non-responsive. If, in the latter situation, a successful review would leave no responsive bidder, the unsuccessful bidder's interests are directly affected, because the public authority would have to recommence the tender process, and the unsuccessful bidder could compete afresh. *WDR Earthmoving*, note 23 above, was a case of this kind (see at paras 15-17).

for different sectors suggests that multiple codes might result, to use a trite metaphor, in "comparing apples with pears".[32]

[103] Another answer might be that this complaint is not in truth concerned with the actions of the BEC and BAC but with the City's decision to issue a tender which adopted the Rail Code rather than the Construction Code as the relevant code for preference points. The BEC and BAC were bound to evaluate the tender in accordance with its published terms. The invitation was issued on 31 July 2020. SMEC did not institute timeous review proceedings directed at the decision embodied in the published invitation. Arguably, however, if the code complaint was sound the BEC could have recommended to the BAC, and the BAC could have recommended to the City Manager, that no award be made. Again, I need not express a final view on this point, since the other answers to this review ground are sufficient.

The second T26 challenge – JGA and proof of Track Inspector training

[104] SMEC complains that the BEC acted irregularly by allowing JGA to supplement its bid, after the closing date, by supplying proof of the Track Inspector training of Mr Leon Mtsi. In terms of clause C.2.1.4.2 (key personnel), one the key positions was a Civil Engineering Technologist/Technician. JGA nominated Mr Mtsi for this position. He had the qualification and professional registration required by

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[32] According to the regulatory material handed up during argument, ordinary firms with Rail Code scorecards can score a maximum of 109 points (100 ordinary points plus 9 bonus points), unless they are "qualifying small enterprises" (QSEs), in which case they can score a maximum of 182 points (175 ordinary points plus 7 bonus points). Ordinary firms with Construction Code scorecards, on the other hand, can score a maximum of 123 points (105 ordinary points plus 18 bonus points), unless they are QSEs, in which case they can score 110 points (105 ordinary points plus 5 bonus points). The way in which points are distributed across the measured features (ownership; management control; skills development, preferential procurement; and supplier/enterprise development) differ between the codes.

Unlike the Construction Code, the Rail Code does not contain a table of "recognition levels", i.e. a table defining BEE recognition levels according to the number of points scored. In the Construction Code, which is the same as the Generic Codes in this respect, the positive recognition levels range from "Level One Contributor" (the best) through to "Level Eight Contributor" (the lowest), with status as "Non-Compliant Contributor" receiving zero recognition. On the assumption that the recognition levels in the Rail Code are the same as in the Generic Codes (and thus the same as in the Construction Code), ordinary firms with Construction Code scorecards might more easily obtain higher contributor level recognition than their counterparts in the Rail Code, but conversely QSEs with Rail Code scorecards might more easily obtain higher recognition levels than QSEs with Construction Code scorecards.

clause C.2.1.4.2. The clause additionally required that this person should have the following experience:

> "Railway Engineering: 8 years' verifiable experience within rail engineering sector, performed inspections work on railway tracks. Trained to recognise track defects and failures. Proof of Track Inspector training to be attached to the applicable schedule."

[105] JGA included, in its bid, Mr Mtsi's CV and professional qualifications. One of the projects in which he was involved ("2019 to date") was said to be a "Condition Assessment and Evaluation" of seven railway sidings in various provinces, with the outcome of the study being a written report on the condition of the railway infrastructure with recommendations for compliance with the National Railway Safety Regulations Act.[33] A list of "selected courses" which Mr Mtsi had attended included a course on "Basic Track Engineering" and another titled "Introduction to Multi-Disciplinary Concepts in Railway Engineering".

[106] At its second meeting, held on 30 November 2020, the BEC found that none of the eight bidders had submitted proof of Track Inspector training. Two of the eight bidders were found non-responsive in other respects. It was resolved that the remaining six bidders would be invited to amplify the information supplied on Track Inspector training. This included SMEC, which had not yet been found non-responsive (its proposed deviations were only assessed at the next BEC meeting).

[107] The minutes of the third BEC meeting, held on 11 December 2020, indicate that requests for clarification were sent to the six bidders who were still, at the time of the second meeting, regarded as responsive. SMEC's clarification satisfied the BEC on Track Inspector training, but at the same meeting SMEC's deviations were found to be material and it was thus declared non-responsive. The minutes reflect that the request for clarification from JGA had been sent to a wrong email address, so a further letter was to be sent to JGA.

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[33] 16 of 2002.

[108] The further request to JGA was contained in a letter dated 11 December 2020. The City's letter said that although the required training was mentioned in Mr Mtsi's CV, "no proof of Track Inspector training was submitted". JGA was asked to submit such proof "to conform with the tender requirements".

[109] In its reply, JGA referred to the project concerning the seven railway sidings, stating that as part of this project Mr Mtsi "personally undertook the site investigations, condition assessments and report writing, including budgets to reinstate the sidings where found to be sub-standard". JGA highlighted the course on "Basic Track Engineering", stating that Mr Mtsi had attended this course in 2009 and that it had been run by the South African Institution of Civil Engineering. With regard to the course, "Introduction to Multi-Disciplinary Concepts in Railway Engineering", JGA said that this was a five-day training course which Mr Mtsi had attended in 2012 at the University of Pretoria. JGA attached Mr Mtsi's certificate for this course, as well as the course brochure, with reference to which JGI emphasised aspects bearing on track inspection.[34]

[110] At its fourth meeting, held on 8 February 2021, the BEC found JGA's clarification to be satisfactory, and its bid was thus held to be responsive. Although SMEC alleged that there was no indication, in the minutes or transcript of its proceedings, that the BEC had given attention to the content of the University of Pretoria course, the City denied that the course content was not discussed, and the City's version cannot be rejected on the papers.[35]

[111] Although SMEC was found non-responsive for reasons unrelated to Track Inspector training, it has a residual interest in the BEC's decision to allow JGA to provide supplementary information on this issue, because if all the bidders should

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[34] For example, track geometry and rail profile roughness; rail defects; sleeper integrity; fastener strength and integrity; functional condition measurements; life-cycle of track structure; track functional deterioration; the three stages of track deterioration; track maintenance strategy, tactics, levels and management systems; basic metallurgy and rail welding; manufacturing defects; and service inspections and rail repairs.

[35] The audio recordings of the BEC's meetings were incomplete, because only the voice of Mr Lewis, the SCM practitioner, could be heard. The City said that one could thus not assume that something was not discussed just because it did not appear in the transcripts.

have been declared non-responsive, the City might need to issue a fresh tender, in which SMEC could again compete.[36]

[112] However, I do not consider that this ground of review should succeed. In the light of the fact that none of the eight bidders provided information which accorded with the BEC's understanding of "proof of Track Inspector training", it was not unreasonable for the BEC to conclude that they should be allowed to clarify this aspect. All bidders were treated equally. JGA was not specially advantaged.

[113] Clause C.2.17 of the Tender Terms made provision for clarification to be sought from bidders after the closing date. In circumstances where all responsive bidders were invited to clarify their bids in respect of Track Inspector training, it cannot be said that the supply of such clarification would bring about a "change in the competitive position of tenderers or substance of the tender offer" as contemplated in clause C.2.17. JGA's clarification elaborated on material already forming part of its bid; it did not place reliance on projects or training courses which had not been mentioned in its bid.

[114] Furthermore, the fact that the BEC sought clarification from all the responsive bidders warrants the same inference as in *Aurecon*,[37] namely that the BEC did not regard the non-compliance by the bidders as being material. I do not consider there to be grounds for vitiating the BEC's value judgment in this respect. The BEC's subsequent conclusion – that JGA had supplied satisfactory proof of Track Inspector training – has likewise not been shown to suffer from reviewable irregularity.

The third T26 challenge – KLE and proof of Track Inspector training

[115] The background to this issue has been set out above. In its bid, KLE identified Mr D H Prinsloo as its Civil Engineering Technologist/Technician. His CV, forming part of KLE's bid, stated that he had obtained his civil engineering degree from the University of Pretoria in 1979 and had attended and successfully completed "all available postgraduate courses in Railway Engineering" at that university. His "key

[36] See *WDR Earthmoving*, note 23 above, at paras 15-17.

[37] *Aurecon*, note 17 above, at para 26.

qualifications" covered track condition assessment. His post-training work experience with Transnet started as a Track Maintenance Engineer, and he rose to more senior engineering positions in the railway sphere over the period 1987 to 2020.

[116] In Schedule 18, in which tenderers were invited to indicate the human resources, other than those already identified as key personnel, which they had at their disposal for the project, KLE listed a Mr J J Nel, whose title, job description and qualifications were all specified as being "Track Inspector". His attached CV indicated extensive experience in railway construction, inspection and maintenance, and the completion of a variety of professional development courses over the period 1989 to 2009.

[117] On 2 December 2020, the City wrote to KLE requesting proof of the Track Inspector training of its nominated Civil Engineering Technologist/Technician in order for the bid to conform with the tender requirements. In its reply dated 4 December 2020, KLE attached various certificates of service and training as a Track Inspector in respect of Mr Nel. On 14 December 2020, the City again wrote to KLE, stating that its clarification did not bring about compliance with the tender requirements, and that only proof of Track Inspector training in respect of Mr Prinsloo would be acceptable.

[118] KLE replied on the same day, complaining that the tender document had been unclear. There were, KLE said, two distinct occupations: Track Inspector and Civil Engineer. Nevertheless, KLE elaborated on Mr Prinsloo's experience and training. The information supplied in its bid showed, so KLE contended, that Mr Prinsloo's experience included inspection work on railway tracks as well as training to recognise track defects and failures. KLE listed the postgraduate courses in Railway Engineering alluded to in the bid. These included "Introduction to Multi-Disciplinary Concepts in Railway Engineering" (presumably the same course mentioned in Mr Mtsi's CV) and other courses germane to track inspection.[38]

[38] The courses included Railway Safety Audits, Investigation and Reporting; Management of Continuously Welded Rails; Railway Infrastructure Maintenance Management; Track Geotechnology; Railway Asset Management; and Wheel-Rail Interaction.

[119] At its meeting on 8 February 2021, the BEC decided that the further information supplied by KLE still did not constitute proof of Mr Prinsloo's Track Inspector training, and KLE's bid was declared non-responsive. This decision was accepted by the BAC. KLE pursued an internal appeal, contending that its bid had been fully compliant and responsive. Its bid, so it asserted, had been more than R1 million cheaper than the next best responsive bid, and it would (submitted KLE) be a disgraceful waste of ratepayers money if KLE were not appointed. KLE attached the information previously supplied in respect of Mr Prinsloo. KLE contended that Track Inspector training for engineers by definition included the civil engineering degree, on-the-job training, relevant postgraduate training courses (Mr Prinsloo had completed every available course) and professional registration.

[120] The appeal authority, Mr Lungelo Mbandazayo (the City Manager), upheld KLE's appeal on the same date he dismissed SMEC's appeal. The appeal authority confined his attention to Mr Prinsloo's qualifications. With reference to case law, Mr Mbandazayo said that, in assessing the materiality of non-compliance, substance should prevail over form. It was unclear from the Tender Terms what constituted or sufficed as proof of Track Inspector training. During the hearing of the internal appeal, Mr Mbandazayo posed the question to the BEC representatives whether Mr Prinsloo's CV would constitute experience as a Track Inspector, or on-the-job training, for purposes of the tender. The BEC replied that although the information supplied would justify the conclusion that Mr Prinsloo was an experienced Track Inspector, KLE had not provided proof of his training as such, and that all bidders were expected to comply with this eligibility criterion.

[121] Mr Mbandazayo considered that the BEC had applied form over substance. The BEC had acknowledged that, from the information supplied, it could be concluded that Mr Prinsloo was an experienced Track Inspector. By focusing on the strict requirement of proof of training, the BEC had frustrated rather than promoted the objects of section 217(1) of the Constitution. Since the BEC confirmed that KLE would have been the preferred bidder but for having been declared non-responsive, the appeal authority decided that KLE should replace JGA as the successful bidder.

[122] Most of the information on which KLE relied to substantiate Mr Prinsloo's compliance was contained in its original bid. Its response to the request for clarification simply elaborated on the postgraduate courses which Mr Prinsloo had completed. As with JGA, there is no basis to conclude that it was irregular for this information to be taken into account.

[123] The question which then remains is whether the information supplied in respect of Mr Prinsloo complied materially with the Tender Terms. That is a merits-based assessment. Where there is a right of internal appeal, the ultimate value judgment is that of the appeal authority. The question is not whether the appeal authority was right on the merits, but whether his decision was vitiated by a review irregularity. I do not think it was. On the face of it, the BEC's position in the appeal hearing was remarkable, since proof that Mr Prinsloo was an experienced Track Inspector (something the BEC acknowledged) does not seem compatible with a supposed absence of proof of training as such, even if it is on-the-job training. Coupled with the other information supplied by KLE in respect of Mr Prinsloo's qualifications, the appeal authority was entitled to reach the conclusion he did.

[124] SMEC's stance in the present proceedings was ambivalent on this part of the case. On the one hand, SMEC argued that KLE should have been declared non-responsive because of its failure to provide proof of Mr Prinsloo's Track Inspector training. On the other hand, SMEC submitted that the appeal authority had rightly emphasised substance over form in KLE's appeal, and should have done likewise in SMEC's appeal. On the latter point, I do not think there is any substance in the criticism of the supposed differential approach adopted by the appeal authority to the appeals of SMEC and KLE respectively. The nature of the issues in the two appeals was quite different:

> (a) In KLE's case, the question was whether, in substance, KLE had supplied information proving that Mr Prinsloo had been trained as a Track Inspector. The appeal authority answered this question affirmatively, holding that in substance the City would be getting someone with exactly the training and experience which the Tender Terms prescribed for the Civil Engineering Technologist/Technician.

(b) In SMEC's case, by contrast, it could not sensibly be contended that the substituted terms which SMEC had proposed in Schedule 20 were substantially the same as the terms of the CIDB Contract as amended by the Contract Data. The issues in SMEC's appeal were how material the undoubted deviations were and whether SMEC should have been afforded an opportunity to make its bid responsive by withdrawing the proposed deviations.

Regulation 5(2)(a) of SCM Regulations

[125] A few days after the main hearing, I sent an enquiry to the parties arising from my study of the regulatory material handed up during argument. A reading of regulation 5(2)(a) of the SCM Regulations[39] appeared to suggest that, because the values of the T36 and T26 contracts each exceeded R10 million, the final decision to make the awards would have been taken by the City Manager, albeit on the recommendation of the BAC. The heading of the BAC's resolution in T36 tended to point in this direction. I thus sought clarity as whether the final awards had been made by the BAC or City Manager. As I later explained to the parties, my intention was not to introduce a new ground of review but simply to obtain clarity so that my judgment would be factually accurate.

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[39] Regulation 5 is headed "Subdelegations". Its first two subparagraphs state:

> "(1) An accounting officer may in terms of section 79 or 106 of the Act subdelegate any supply chain management powers and duties, including those delegated to the accounting officer in terms of regulation 4(1), but any such subdelegation must be consistent with subregulation (2) and regulation 4.
>
> (2) The power to make a final award—
>
> (a) above R10 million (VAT included) may not be subdelegated by an accounting officer;
>
> (b) above R2 million (VAT included), but not exceeding R10 million (VAT included), may be subdelegated but only to—
> (i) the chief financial officer;
> (ii) a senior manager; or
> (iii) a bid adjudication committee of which the chief financial officer or a senior manager is a member of; or
>
> (c) not exceeding R2 million (VAT included) may subdelegated but only to —
> (i) the chief financial officer;
> (ii) a senior manager;
> (iii) a manager directly accountable to the chief financial officer or a senior manager; or
> (iv) a bid adjudication committee."

[126] The parties, in response, were in agreement that the final awards were made by the BAC. However, this spawned a contention by SMEC's legal team that the awards were beyond the power of the BAC, having regard to regulation 5(2)(a). The City disputed this. As a result, and at my direction, there was a further hearing (conducted virtually) on two questions: (a) whether the Court should entertain the new review ground; and (b) if so, whether the effect of regulation 5(2)(c) was that the BAC had indeed acted beyond its powers. I have concluded that the new ground should not be entertained. For this reason, I do not reach any conclusion on its merits. However, in case the case goes further, I record, in only the briefest terms, the competing contentions.

[127] According to the City, regulation 5(2) is only concerned with the subdelegation by the accounting authority (here, the City Manager) of the latter's delegated powers. The SCM Regulations do not limit the power of a municipal council to delegate its powers directly to the BAC. The City's council has adopted a System of Delegations (SoD) in accordance with section 59 of the Systems Act.[40] In terms of the SoD, the council has delegated (a) to the City Manager, the power to make procurement decisions up the value of R200,000; (b) to the BAC, the power to make a final award on procurement where the value exceeds R200,000. These parts of the SoD had not hitherto featured in the case or been attached to the City's affidavits, because they were not relevant to the issues raised by the parties.

[128] According to SMEC, a municipal council does not have any original power to make procurement awards, and is therefore unable to delegate such power to the accounting authority or BAC. The accounting authority exercises original powers in that regard, something to be inferred from the totality of the regulatory framework. In terms of regulation 5(2)(c), the accounting authority cannot delegate that power in the case of procurement with value exceeding R10 million. The City's SoD cannot be relied on to avoid this conclusion. The reference in regulation 5(2) to subdelegation (rather than delegation) is merely sloppy drafting.

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[40] Section 59(1) provides that "[a] municipal council must develop a system of delegation that will maximise
administrative and operational efficiency and provide for adequate checks and balances, … "

[129] I decline to allow this new review ground to be raised. It comes too late. SMEC is not relying on recently disclosed facts. If the new review ground were legally sound, its factual foundation was known to SMEC when it launched proceedings. Furthermore, it is a ground which makes a nonsense of the internal appeals which SMEC and KLE pursued, since if the BAC had no power to make the awards, and if only the City Manager had the power to do so, there could have been no appeal in terms of section 62 of the Systems Act to the City Manager. None of the respondents were forewarned of this ground of review. It is notionally possible that they might have entered the lists had the point been taken.

[130] The new ground is not unique to the facts of these two tenders. It strikes at the heart of the City's SoD insofar as the latter deals with procurement. The new ground would require SMEC to impeach the relevant parts of the SoD as *ultra vires*. If the SoD were successfully impugned, this might imperil many past, pending and imminent tenders. It is undesirable that so far-reaching a point, the answer to which is by no means self-evident, should be hurriedly tagged on to the end of a case which has already been fully argued on unrelated grounds.

[131] It is not the function of a Court to suggest review grounds to a litigant,[41] nor was it my intention to do so. The Court's function is to determine the issues properly raised on the pleadings.[42] There are exceptions to this principle, but they do not find application here. This is not a case where the court must intervene because the parties are approaching an issue on a shared misunderstanding of the law. The proper scope of regulation 5(2), and the original powers of municipal councils and accounting authorities in the procurement sphere, are not matters which are germane to the pleaded review grounds.

Conclusion

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[41] See *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at paras 66-7. See also *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC); 2017 (11) BCLR 1443 (CC) at paras 76-7.

[42] *Fischer v Ramahlele* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) at para 13; *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; [2022] 2 All SA 607 (SCA) at para 9.

[132] SMEC impeached the process followed by the City in several other respects, but these were not pursued in written or oral argument, even though they were not formally abandoned. Suffice to say that none of them struck me as being of such self-evident merit that I should decide them without the benefit of argument.

[133] In regard to costs, the City sought costs against SMEC, including the costs of three counsel where engaged. The justification advanced for the costs of three counsel was this. The two review applications were instituted separately, and in each case there was a Part A for urgent relief and a Part B for final relief. In T36, Part A was resolved by an agreed order. In T26, the question of interim relief was argued, and an interim order was granted in similar terms to the agreed order in T36. At that stage, the City had different junior counsel in the two cases. A silk had not yet been engaged. When the applications for final relief were consolidated, the City brought in senior counsel to lead the two juniors already on brief. Having regard to this background in combination with the complexity of the matter, the costs of three counsel (where engaged) are in my view justified.

[134] However, the question arises whether SMEC should be insulated from an adverse costs order by virtue of the *Biowatch* principle.[43] I asked counsel to address me on this point, with particular reference to the judgment of the Constitutional Court in *Harrielall*.[44] *Harriell* was a PAJA review by a university student who had been refused admission to study for a medical degree. The High Court dismissed her application with costs, and the Supreme Court of Appeal dismissed her appeal with costs. In the Constitutional Court, the applicant again failed on the merits. In regard to costs, however, the Constitutional Court held that the High Court and Supreme Court of Appeal had erred in finding that *Biowatch* was inapplicable.

[135] The Supreme Court of Appeal had stated that the review raised no constitutional issues. The Constitutional Court disagreed, holding that the constitutional issues in the case were twofold. First, explained the Court, a PAJA review is a constitutional matter, because PAJA was enacted to give effect to the

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[43] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[44] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC).

right to administrative justice in section 33 of the Constitution.[45] The Court emphasised that the review of the exercise of public power "is now controlled by the Constitution and legislation enacted to give effect to it", observing that "[i]t is not controversial that a review of administrative action amounts to a constitutional issue".[46] Second, the review application implicated the applicant's rights under section 29(1)(b) of the Constitution; although that section did not guarantee her access to a course of her choice, her right of access to further education was nevertheless engaged.

[136] The fact that a PAJA review is constitutional litigation does not mean that the applicant will always be insulated from costs, because *Biowatch* is subject to exceptions, such as where the litigation is "frivolous or vexatious, or in any other way manifestly inappropriate".[47] *Biowatch* "gives no free pass to cost-free, ill considered, irresponsible constitutional litigation".[48] Counsel for the City did not argue, however, that, if *Biowatch* otherwise applied, there were grounds of this kind to deprive SMEC of its costs protection. The City's submission was that a PAJA review of this kind is not subject to *Biowatch* at all.

[137] With regard to *Harrielall*, counsel for the City submitted that the outcome in that case rested on a combination of the two considerations mentioned in the Court's judgment. That is not how I read it. In my view, the Court was saying that, for two discrete reasons, the case raised constitutional issues bringing the matter within the scope of *Biowatch*. If, as the Court explained, PAJA review is a constitutional matter and implicates the right to administrative justice guaranteed in section 33 of the Constitution, such a review is constitutional litigation. Where litigation involves another fundamental right, such as section 29(1)(b), this will also justify characterising the litigation as constitutional, whether or not that fundamental right arises in the context of a PAJA review (as it did in *Harrielall*) or in some other type of litigation.

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[45] Id at para 17.

[46] Id at para 18.

[47] *Biowatch*, note 43 above, at para 24.

[48] *Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) at para 41.

[138] Counsel for the City referred to several judgments of the Constitutional Court and Supreme Court of Appeal which were said to support the proposition that *Biowatch* did not, without more, apply to review proceedings. These cases, in my view, are distinguishable. Starting with the Constitutional Court judgments, in *Camps Bay Ratepayers' and Residents' Association*,[49] which predated *Harrielall*, the Court declined to apply *Biowatch* in a planning review because in reality the case was a property dispute between two neighbours, the ratepayers' association having chosen to take sides with one of the neighbours.[50] In other words, the Court characterised the litigation as a fight between two private parties.

[139] *Big Five Duty Free*[51] was not a PAJA review. In a previous round of litigation, the High Court had set aside the award of a tender on application by an unsuccessful bidder. The successful bidder appealed to a Full Court, but before delivery of judgment in the appeal, the unsuccessful and successful bidders reached a settlement in terms of which the unsuccessful bidder abandoned the benefit of the High Court's judgment. The Full Court made this settlement an order of court. What was at issue in the subsequent litigation which reached the Constitutional Court was the proper interpretation of the Full Court's order. This did not involve a challenge to the lawfulness of conduct of an organ of state. The Court held that *Biowatch* did not apply because the matter was an interpretative dispute, and the successful bidder (which was unsuccessful in Constitutional Court) had been acting in its commercial interests.[52]

[140] Turning to the Supreme Court of Appeal judgments, *National Homebuilders Registration Council*[53] was not a PAJA review. The main case advanced by the applicant in the High Court (the respondent in the appeal) was that section 14 of the

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[49] *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC).

[50] Id at para 76.

[51] *Airports Company South Africa v Big Five Duty Free (Pty) Limited* [2018] ZACC 33; 2019 (5) SA 1 (CC); 2019 (2) BCLR 165 (CC).

[52] Id at para 63.

[53] *National Home Builders' Registration Council v Xantha Properties 18 (Pty) Ltd* [2019] ZASCA 96; 2019 (5) SA 424 (SCA) (*NHBRC*).

Housing Consumers Protection Measures Act[54] did not apply to homes being built solely for the purpose of being let, and the applicant sought a declaratory order to this effect. If that contention was correct, the applicant would not have to pay the prescribed fee for enrolling the construction. This argument failed in the Supreme Court of Appeal. In the alternative, the applicant sought an order that section 14 was unconstitutional, but the Supreme Court of Appeal noted that the argument "was not advanced with any enthusiasm", which was understandable because the argument was "devoid of merit".[55] It is unsurprising, in the circumstances, that the Supreme Court of Appeal declined to apply *Biowatch*: the applicant's main case was not constitutional litigation, and its alternative constitutional attack was hopeless. It is in this light that one must understand the Court's concluding observation that the litigation was in truth "nothing more than a commercial dispute in which the respondent sought to evade the clear provisions of the Act" and that "[c]onstitutional considerations played no part".[56]

[141] *Motala*[57] was a review case. The appellant lost in the High Court and in the Supreme Court of Appeal. The latter Court said that, although the appellant had sought a review of the Master's decision, "this was no more than a civil challenge to an adverse administrative action which the appellant sought to overturn to the benefit of his own private pocket". The case did not have a "radiating impact on other private parties" and did not raise "constitutional imperatives in considerations such as the interpretation of legislation". There was no discrete legal point of public importance. But other considerations also played a part in the Court's decision not to apply *Biowatch*. The litigation had arisen from the appellant's own conduct in concealing the grounds of his disqualification and in dishonest answers he gave to the Master.[58] It was furthermore important, the Court said,[59] that the appellant's conduct in persisting to litigate issues which had been overtaken by events was frivolous and

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[54] 95 of 1998.

[55] *NHBRC*, note 53 above, at paras 22-3.

[56] Id at para 27.

[57] *Motala v Master of the North Gauteng High Court, Pretoria* [2019] ZASCA 60; 2019 (6) SA 68 (SCA); [2019] 3 All SA 17 (SCA).

[58] Id at para 99.

[59] Id at para 100.

vexatious in the sense explained in the Constitutional Court's judgment in *Lawyers for Human Rights*.[60]

[142] The last case mentioned by counsel for the City was *Bo-Kaap Civic and Ratepayers Association*.[61] This was a planning review. There were three appellants, the first being a ratepayers' association. The other two appellants were property owners in the area and had indemnified the association in respect of costs. The Court considered that the scale on which the litigation had been conducted was excessive, driven perhaps by the funding that was available. Properly distilled, the case was within a narrow compass, and did not require lengthy expert affidavits. The Court emphasised that *Biowatch* does not permit "risk-free asserted constitutional litigation". The Supreme Court of Appeal found no misdirection on the part of the High Court in granting costs against the appellants. No reference was made to *Harrielall*, but the Court's approach may have been based on exceptions to the *Biowatch* principle.

[143] I have not found authority for the proposition that *Biowatch* is inapplicable where the applicant has a strong commercial interest in vindicating a constitutional right. Even in a case like *Harrielall*, a commercial motive (the desire to qualify for a more remunerative profession) might be present. The formulation in *Harrielall* appears to cover the present case. Whether a carve-out should be recognised for commercially inspired review proceedings in general, or for reviews by disappointed tenderers in particular, is a question for a higher court. I regard myself as bound by *Harrielall* to find that SMEC is entitled to *Biowatch* protection. And in addition to the constitutional dimensions inherent in all PAJA reviews, this case (like all tender reviews) concerns section 217(1) of the Constitution and various enactments and municipal policies designed to give effect to it.[62]

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[60] *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC).

[61] *Bo-Kaap Civic and Ratepayers Association v City of Cape Town* [2020] ZASCA 15; [2020] 2 All SA 330 (SCA).

[62] Cf *Allpay*, note 27 above, at para 45:

> "Section 217 of the Constitution, the [PP] Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA …"

[144] Two aspects of reserved costs were argued. The first concerns the costs relating to Part A of the T26 application (the application for an interim interdict was opposed and argued). The second concerns the costs of an application which SMEC brought in the T36 case to compel further and better compliance by the City with its obligation to deliver the record of the impugned decisions. The parties were agreed that the costs relating to Part A in the T26 application should be costs in the cause in the main case. In relation to the application to compel, the City argued that SMEC should pay the costs while SMEC argued that they should again be costs in the cause in the main case.

[145] Since SMEC has failed in both of the main cases but is insulated against an adverse costs order, it follows that there should be no costs order on these reserved matters. In regard to the application to compel, I do not think that SMEC's conduct was such as to deprive it of *Biowatch* protection; the explanation which caused SMEC to abandon the interlocutory application was only fully given and substantiated in the City's opposing papers in the interlocutory proceedings.

Order

[146] The following order is made:

1. In both cases, the application is dismissed.
2. In both cases, the parties shall bear their own costs. This applies also to all questions of reserved costs.

O L ROGERS

Judge of the High Court

In the municipal sphere, the MFMA fulfils the role played, in the national sphere, by the Public Finance Management Act 1 of 1999.

For the Applicant in both applications:	S D Wagenar SC and M van Antwerpen instructed Weavind & Weavind Attorneys
For the First, Second and Third Respondents in both applications:	K Pillay SC, N C de Jager and G Solik instructed by John MacRobert Attorneys