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

CASE NO.: 20559/14

In the matter between:

PROFESSIONAL SECURITY CC t/a PROSEC	Applicant
And	
ROBBEN ISLAND MUSEUM	First Respondent
MINISTER OF ARTS AND CULTURE	Second Respondent
KHUSELANI SECURITY AND RISK MANAGEMENT (PTY) LTD	Third Respondent
ENFORCE SECURITY SERVICES (PTY) LTD	Fourth Respondent
MJAYELI SECURITY (PTY) LTD	Fifth Respondent
MVULA QUALITY PROTECTION (AFRICA)(PTY)(LTD)	Sixth Respondent

JUDGMENT DELIVERED THIS 19th DAY OF- AUGUST 2016

ERASMUS, J

Introduction:

[1] This is an application for the reviewing and setting aside of the first respondent's decision to award a tender in respect of the provision of security

services ("the tender") to the third respondent, declaring invalid any contract concluded pursuant to that decision, and an order awarding the tender to the applicant, alternatively that the matter be remitted to the Bid Adjudication Committee of first respondent ("the BAC") for a decision on the awarding of the tender, on the basis that the third respondent is excluded.

[2] Third respondent contends that the applicant's grounds for review are flawed and oppose the application, the first respondent in turn took the stance that they did not want to be seen as partisan and abides to the decision of the court, but made valuable contributions to the resolution of the matter..

Background:

[3] During 2011, the applicant successfully tendered for the contract to provide private security services for the first respondent on Robben Island as well as at Quay 501, Jetty 1 and the Nelson Mandela Gateway, V&A Waterfront, Cape Town, and was appointed on a three year contract which terminated on 28 February 2014. The contract was thereafter extended by agreement on a month-to month basis until a new contract could be awarded.

[4] Along with approximately thirty other bidders, the applicant tendered for the new contract, a three year contract to run from 1 December 2014 to 30 November 2017(the subject of this application). The new tender specifications are almost identical to the previous contract.

[4] The closing date for the tenders was on 24 April 2014, and the third respondent was announced as the winning tenderer on 27 October 2014, having submitted the lowest bid price which gave it the highest score in the evaluation. The applicant's bid price was the second lowest, and it's score the second highest.

[5] This application was launched by applicant on 17 November 2014 in the form of an urgent application interdicting first respondent from implementing its decision and for reinstating a month-to-month security contract for the provision of security services by itself to first respondent, which had been cancelled with effect from 30 November 2014, together with a prayer that the relief prayed for above be heard on an semi-urgent basis.

[6] On 28 November 2014, applicant was successful in it's application to interdict first respondent from implementing the impugned decision pending the expedited hearing of this application. However, it was not successful in obtaining an order reinstating the month-to-month contract that had been cancelled by first respondent.

[7] The applicant at that stage relied on two irregularities in the tender process, namely, that the bid process had not been read out aloud at the bid opening ceremony; and further that the third respondent's bid price with reference to the Private Security Regulation Authority ("PRISA") Illustrative Contractive Prising Scheme was below the minimum prescribed in the Bid Specifications. The vagueness argument was not an issue but rather that bias on the part of the first respondent was alleged in the affidavits before the court.

[8] Justice Baartman granted the interdict on the basis of a finding related to the irregularity above, namely that the relevant Bid Specification was ambiguous to the extent that the entire process was compromised. As also appears from the judgment, it was submitted on behalf of the first respondent during argument, that the appropriate remedy to follow upon such a finding would be that the tender process would have to be conducted afresh. No order as to costs was made.

[9] The Rule 53 record of the decision was filed by the first respondent on 19 December 2014, which was followed by supplementary founding, answering and replying papers filed by the parties.

[10] The parties have also tendered further affidavits, which processes have been regulated in an order made by the Judge President on 29 October 2015. There were different versions of the order and the Judge President inadvertently signed the incorrect one, but the parties are *ad idem* about the order intended to be made by the Judge President. Applicant consented to the further affidavits that were filed in an answering affidavit thereto, to which the first and third respondent have filed replying affidavits.

[11] The first and third respondents have not consented to a further affidavits which the applicants seeks to file, but have filed provisional answering affidavits thereto and the applicant's application for leave to file its affidavit was to be heard as a point *in limine*. .

[12] A demand for security for costs that the third respondent had filed on 21 November 2014 led to an interlocutory application to compel the applicant to furnish such security, which was finally argued and dismissed on 29 July 2015.

[13] The applicant, in its supplementary founding papers, included two further irregularities on which reliance was placed, namely that the third respondent's bid contained misrepresentations relating to the interests of its sole director, Mr Mohamed Yacoob in another company, as well as it's past dealing with the State.

[14] Before dealing with the specific grounds of review on which the applicant relies, certain basic legal principles relevant to adjudication are considered.

Legal principles

[15] The legal principles pertaining to the judicial review of public procurement processes were set out by the Constitutional Court in the judgment in the case of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) ("Allpay 2014(1))".

The fairness and lawfulness of administrative action must be evaluated independent of the result. This means, *inter alia,* that

> *"If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed"*[1]

and that

> *"Once a ground of review under PAJA has been established there is no room for shying away from it"*[2]

the result being that the decision/action must then be declared unlawful as required by s 172(1)(a) of the Constitution.

[16] It is trite that fairness in the procurement process is a value in itself. In *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) at para 9 the SCA stated as follows:

'[F]airness is inherent in the tender procedure. Its very essence is to ensure that before government, national or provincial, purchases goods or services, or enters into contracts for the procurement hereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in s 217 [of the Constitution] permeate the procedure for awarding or refusing tenders.'

[17] For the process to be lawful, proper compliance with the procurement process

---

[1] *Allpay 2014 (1) supra* at para 24
[2] Ibid at para 25

is necessary. In *Premier, Free State & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 30, Schutz JA said:

'One of the requirements . . . is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of the tender. . . . that would deprive the public of the benefit of an open and competitive process.' (My emphasis.)

[18] Procedure and outcome must not be conflated, the proper approach being *"to establish, factually, whether an irregularity occurred"*[3] which must then *"be legally evaluated to determine whether it amounts to a ground of review under PAJA".*[4]

[19] Where appropriate, this legal evaluation must take into account the materiality of any deviance from legal requirements, which is done "*by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established".*[5]

---

[3] Ibid para 28
[4] Ibid para 28
[5] Ibid para 28 – See also *Steenkamp NO v Provicial Tender Board, Eastern Cape* 2007 (3) SA 121 CC at Paragraph 60

[20] In the case of *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121; [2006] ZACC 16 (CC) at para 60, the Constitutional Court stated that strict compliance with tender procedures by both bidders and adjudicators is of central importance in public procurement tenders. In *Allpay* the court also said (at para 92) that '*the purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive'*.

[21] The strict mechanical approach to assessing the materiality of compliance with legal requirements has been discarded, the *"central element"*[6] being to *"link the question of compliance to the purpose of the provision"*[7].

[22] Any deviation must be assessed in terms of the norms of procedural fairness codified in PAJA. The basis for any deviations would have to be reasonable and justifiable, and the process of change in departing from the prescribed proceedings must itself be procedurally fair.

[23] The court in *Westinghouse Electric Belgium Sociėtė Anonyme v Eskom Holdings (Soc) Ltd and Another* [2015] JOL 34915 (SCA) at para 37 held that in assessing the lawfulness of the tender process a court must consider only whether the bids have been properly evaluated against the tender criteria, other considerations are not relevant.

---

[6] Ibid para 30
[7] Ibid para 30

[24] Once a finding of invalidity under PAJA review grounds are made, the decision or conduct must be declared unlawful/invalid and a just and equitable order must then be made in terms of s 8. The possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered at this stage. The interests of those most closely associated with the benefits of the contract must be given due weight and the rights or expectations of an unsuccessful bidder will have to be assessed in that context.

[25] The question of remedy was dealt with in more detail by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (4) SA 179 (CC) ("Allpay 2014 (4)) and included the following among the judicial pronouncements regarding the "proper approach to remedy"[8].

[26] The emphasis is on "correction and reversal" of invalid administrative action, with reference to s 172(1)(b) of the Constitution which provides for an order of suspension or declaration of invalidity to be made to allow the competent authority to correct the defect.[9]

[27] Logic, general legal principle, the Constitution, binding authorities of the court, the rule of law and the principle of legality all point to a default position that

---

[8] *Allpay 2014(4) supra* para 29-35
[9] Ibid para 29

requires the consequences of invalidity to be corrected or reversed where they can no long be prevented.[10]

[28] In the context of public-procurement matters generally, priority should be given to the public good which means that he public interest must be assessed not only in relation to the effect of the order on future procurement.[11]

The first respondent *"primacy of the public interest in procurement and social security matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. The enquiry cannot be one-dimensional and must have a broader range."*[12]

Grounds of review:

[29] The applicant relies on four grounds of review, namely:

29.1 The first respondent's failure to read out the tender prices at the opening of the bid;

25.2 The first respondent's failure to disqualify the third respondent on the basis that the third respondent's bid did not comply with clause 19.1.2 of the Bid Specification regarding pricing in accordance with the PSIRA recommended pricing schedule. (underpricing)

---

[10] Ibid para 30
[11] Ibid para 32
[12] Ibid para 33

29.3 The first respondent's bid contained material misrepresentations relating to the interests of its sole director, Mr Mohamed Yacoob in a related company, Khuselani SA.

2.4 The third respondent also misrepresented it's past business dealing with the State.

[30] I propose to first deal with the issue of the third respondent's "underpricing", since if the court's finding in this regard, namely that the relevant bid specification is ambiguous, is confirmed, the appropriate remedy would be that the entire tender would have to be run afresh, starting with a re-advertising thereof. The remaining grounds of review raised would in such event have little, if any, further significance.

[31] In this regard, the applicant a Notice of Intention to Amend its Amended Notice of Motion on 4 November 2015, The amendment provides for a re-run of the tender as one of the possible remedies to follow upon an order setting aside the award of the tender to the third respondent.

[32] The applicant in this regard made an open proposal to the respondents that the matter be settled on the basis that:

32.1 the awarding of the tender to the third respondent is declared invalid, such declaration to be suspended pending a re-run of the entire process, which is to be completed within four months, third respondent to pay the

applicant's costs (on the basis that the applicant was successful or at least substantially successful);

32.2 alternatively, that costs be argued.

Third respondent's bid price below the prescribed minimum pricing: (underpricing)

[33] Paragraph 19.1.2 of the Bid Specification contains, *inter alia,* the following mandatory prescript:

"All bidders are required to submit their costing in line and as regulated by PSIRA. Any bidder who submitted a quote below the PSIRA recommended pricing Schedule Plus overheads (1 September 2013 until 31 August 2014) as determined by the First respondent, will not be considered for participation in the following phases."

[34] The PRISA schedule is a printed form divided into columns and tabulated the different components of the total direct cost of the bid. It has a separate line item following the direct cost component that reads:

"Share of overheads/40% of direct costs (economy of scale rule applies)"

This amount will then be added to the direct costs to determine total costs per month over a period.

The applicant determined its bid price on a pure methodical completion of the PSIRA schedule with regard to the live items on the schedule and applied the 40% "rule" for overheads

[35] It is common cause between the parties that the recommended pricing schedule referred to is the PSIRA schedule that is issued to its members periodically, but there is some dispute as to the correct interpretation of certain provisions thereof.

[36] The applicant contends that the third respondent's quote fell foul of the aforesaid prescript and that it's bid ought, accordingly, to not have been considered for further participation at all.

[37] Applicant argues that in not disqualifying the third respondent on that basis, the first respondent committed an irregularity which amounts to grounds of review in terms of ss 6(2)(b); (d); (e)(iii); (f)(i) and (i) of the PAJA.

[38] With regard to the irregularity (namely, the failure to apply the provisions of clause 19.1.12 of the Bid Specifications), applicant contends that to be material, the materiality is to be determined with reference to the purpose thereof for at least the following reasons:

38.1 The purpose of prescribing a minimum bid price, which includes provisions of overhead costs (i.e. all expenses over and above the security guards' wages and including profit), is to avoid the awarding of a contract to a tenderer that is not able to sustain the service.

38.2 The third respondent has effectively conceded that by quoting a price that exceeds the direct costs of the guards' salaries by a mere R9700.00 per month, it makes a net loss on this contract. It, however, explains that it is prepared to make the loss since it regards this specific contract as a marketing strategy, and covers the overhead costs out of its "business development fund". In effect, the third respondent's explanation is that it can afford a quote a price which will result in losses on this specific contract because being a large, nation-wide company, it is able to do so.

38.3 Applicant contends that to allow the first respondent to effectively shout out companies who are not in a position to carry such losses, would offend ss 33 and 217 of the Constitution, which *inter alia* require reasonable and procedurally fair administrative action in the case of the first-mentioned, and a fair, equitable, transparent, competitive and cost-effective public procurement system in the case of the last-mentioned.

[39] Applicant argues, in addition that by satisfying the bid specifications, the third respondent's tender was not an "acceptable tender" as defined in the Preferred Policy Framework Act, 5 of 2000 ("the PPFA").

[40] Applicants argue that at best for the respondents, paragraph 19.1.2 of the Bid Specifications read with the PSIRA Schedule, is ambiguous.

[41] The ground of review, in the event of such a finding, would be that contemplated in ss 6(2)(c) and (i) of the PAJA, and applicant contends that

the only "just and equitable remedy" as contemplated in s8(1) of the PAJA, that would cure the defective process, would be for the entire process to be re-run, commencing with a new, clear and unambiguous bid specification.

[42] The Applicant contends that the application ought to succeed on this ground alone, with costs. The first respondent's counsel in argument before me by implication concede that:

42.1 The first respondent made it clear that they do not wish to oppose the rieview application on the "pricing" issue and do not take issue with an order being granted in the following terms:

"that Tender RIM EST – 04/2013/14 be advertised and conducted afresh, the minimum bid price be stated clearly and unambiguously in the Bid specification document(s)"

42.2 They conceded that it was at least arguable that the bid specification was vague because the PSIRA pricing schedule might reasonably be understood in different ways to different readers. This was because the schedule did not make it clear whether PSIRA members were obliged to charge overheads of 40% and to what degree a lesser percentage might be charged because of the economy of scale. The precise meaning of this not being addressed in the schedule and if this renders it vague a grant of review would then be established.

[43] Mr Edmunds on behalf of the first respondent, in my view, correctly points out that the wording and contention of 19.1.2 leaves it open for interpretation in the following respects:

> *"1. Are the plus "plus overheads" referred to directly related to the overheads mentioned in the PSIRA schedule or are they additional thereto*
>
> *2. What is left to be determined by RIM?*
>
> *3. When one looks at the sectoral determination insofar as it relates to the bid for wages this might lead to speculation;*
>
> *4. How are economy of scale applied, and exactly what does it mean?"*

[44] In the explanation of the process RIM took the salutary precaution by consulting with PSIRA as to the meaning of the 40% rule and took their guidance from the comparative schedule as referred to in paragraph 42. Whilst this might be salutary it does not help the parties that have to read the bid specifications and tender accordingly.

[45] Accordingly the bid specifications were vague and does not comply with the principles as set out above and stand to be set aside with its consequences.

Failure to read out the tender prices at the opening of the tender meeting:

Having found the bid specifications was vague, I shall deal with the other aspects as they remain.

[46] The third respondent did not apply the 40% rule but included a note in it's bid, qualifying why only a limited amount per month had been provided for in respect of overheads (over and above the wages of security officers). That note read as follows:

"*Set up costs, including accommodation, diesel, transport of vehicle to island, CCTV maintenance will be expensed from the KSA Capital Budget provisions for business development falls within this budget.*"

[47] The applicant contends that on a correct interpretation of the Bid Specification read together with the PSIRA schedule, the bid prices had to include the provisions for "share of overheads" which is prescribed as "40% of direct costs (economy of scale rule applies)" in the schedule. The first and third respondents contend that it was not compulsory for bidders to include a 40% provision for overheads.

[48] First respondent interprets paragraph 19.1.2 and the reference to the PSIRA guidelines as follows:

48.1 It is apparent from paragraph 19.1.2 that first respondent is afforded a discretion in determining compliance with it.

48.2 The PSIRA's recommended pricing schedule is a non-binding guideline issued by the PSIRA to assist security companies in formulating their contract pricing, taking into account the requirements of national labour legislation and sectoral determination.

48.3 It sets out the minimum wages and mandatory benefits and allowances to be paid to security guards of different grades. The sum of all these components is equal to the total direct cost of labour. One of the self-evident purposes of the schedule is to provide a guideline to ensure that security officers are fairly paid. This was a key factor motivating first respondent's inclusion of the requirement that costing should be in line with the schedule.

48.4 The illustrative overhead cost referred to in the schedule is qualified by the statement that the "*economy of scale rule applies*".

48.5 Economies of scale are the cost advantages that enterprises obtain due to size, output, or scale of operation, with cost per unit of output generally decreasing with increasing scale as fixed costs are spread out over more units of output. This provides a clear indication that the overhead costs are variable and will differ from case to case depending on the nature of the bidder and the nature of the work it is bidding for. In other words, the pricing for the overheads component is flexible; the 40% of direct cost illustration is not intended to be prescriptive.

48.6 The intention was that bidders were to ensure that they provided for all the relevant components of the total direct cost of labour. This protected security officers by obliging all bidders, at the very least, to meet the minimum wage and benefit requirements provided for in national labour legislation and relevant sectoral determinations.

48.7 The calculation of overheads was a distinct and discretionary component. The intention was that companies should determine and make provision for appropriate overheads to cover the overhead costs associated with the bid specification so that first respondent had a clear breakdown of all relevant cost components.

48.8 By referring to this recommended pricing schedule, first respondent did not seek to impose a requirement that companies provide for overheads of 40% of the direct labour cost. To have done so would have been unduly prescriptive and irrational.

48.9 First respondent recognises that overhead costs are highly variable and dependent on the nature of the bidder and the bid specification. By obliging companies to make provision for overheads at 40% of the direct labour cost, first respondent would be needlessly increasing costs to the public purse by obliging companies to build in disproportional overhead costs that would ultimately be likely to result in a significant profit for a successful bidder.

48.10 If first respondent was to have prescribed the overhead cost, it would have undermined the competitiveness of the tender process, this being the only component in which bidders could innovate to bring down their costs and differentiate themselves from other bidders. Had the overhead provision been prescriptive, the setting of the tender price would merely have been an arithmetical exercise for bidders, and price would not have been a differentiating factor.

48.11 In exercising the discretion that first respondent reserved for itself to determine the minimum price that would be accepted as "in line" with the schedule plus overheads, first respondent took into account that the schedule was calculated on the basis that the security officer would work 12 hour night shifts, every night in an average month, and such would need to be revised for first respondent's bid specification which required security officers during the day and night, not all of whom would work 7 days a week. As part of the valuation process, first respondent adapted this generic framework to fit its bid specification.

48.12 First respondent, however, decided not to provide for a specific amount in respect of overheads since it was difficult to gauge what would be an appropriate amount given the variability of overhead costs and first respondent was loathe to include an inappropriate amount which could result in the exclusion of bidders with innovative proposals that would ultimately reduce first respondent's costs.

48.13 First respondent consulted with PSIRA who confirmed that overheads are extremely variable from project to project and company to company, that there should be flexibility in the calculation of overheads and that it was correct for first respondent not to include a fixed cost for overheads in its calculation.

[49] It is common cause that the minimum cost of paying the lawful compensation to the guards as determined by first respondent (with reference to the PSIRA schedule) is R 280 420.71 per month and that the third respondent's tender price is R 290 179.32.

[50] The third respondent determined it's pricing for the guards for the purpose of the tender in a similar manner to first respondent, but it submitted a bid price in respect of the Grade A security guard which is higher than the minimum price as determined by first respondent (R 8200 per month versus R 7611.00).

[51] First respondent motivated it's preference for the tender of the third respondent as follows:

51.1 First respondent had regard to the third respondent's note in its bid, qualifying why the monthly overhead costs would be limited.

51.2 It was apparent to first respondent from the third respondent's bid documentation that it was a large and experienced security services firm, employing over 1000 security officers and having carried out work for a

number of government departments, including the Department of Public Works and the Department of Education in the past.

51.3 The third respondent's annual financial statements demonstrated that the company was able to adequately make provision for operational costs and would be in a position to cover the various overheads in accordance with it's bid.

51.4 Accordingly, in the considered view of first respondent's bid evaluation committee, the third respondent's bid was compliant with the bid specification. Given this fact and the fact that it was the highest scoring bidder, it was awarded the tender.

[52] The applicant initially argued that the third respondent's pricing rendered its tender unacceptable because it did not submit its pricing in respect of the individual guards in line with the PSIRA schedule and further that it did not include a 40% mark up on its direct costs for overhead costs, which it submitted was peremptory if paragraph 19.1.2 is read together with the PSIRA schedule, and that the tender condition leaves no room for discretion on the part of first respondent to accept the third respondent's bid for tender.

[53] The applicant eventually conceded that it's own determination of the guard pricing was incorrect as it did not apply the schedule to the bid specification.

[54] It is clear from the wording of paragraph 19.1.2 of the bid specification that first respondent had a discretion to determine overheads. That is evident from

the words "*as determined by*" first respondent, following the word "*overheads*" in paragraph 19.1.2.

[55] Even if it is found that the inclusion of 40% overheads in the contract price was required, the following principle stated in *Millennium Waste Management v Chairperson Tender Board* 2008 (2) SA 481 (SCA) at para [17] is apposite:

'Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (SA Eagle Co Ltd v Bavuma). In this case condonation of the appellant's failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217. The appellant had tendered to provide the needed service at a cost of R444 244,43 per month whereas the consortium had quoted and was awarded the tender at the amount of R3 642 257,28 per month.'

[56] If it is found that first respondent deviated from its own requirement as specified in the bid specification, it is submitted that it did not constitute a material irregularity because it served the purpose of inserting paragraph 19.1.2 in the bid specification document.

[57] The first respondent provided a schedule which shows the application of the Bid Specifications relating to the security guards required, to the PSIRA schedule.

[58] From the first respondent's schedule it can be seen that:

58.1 the minimum bid price, excluding any provision for overheads, amounted to R280,240.71;

58.2 the minimum bid price, including provision for 40% in respect of overheads, amounted to R394,215.51.

[59] The prices bid by the five tenderers that managed to pass the functionality evaluation process were as follows:

59.1	Khuselani Security and Risk Management	R290,179.32
59.2	Prosec	R411,946.58
59.3	Enforce Security	R455,324.00
59.4	Mjayeli Security	R482,416.32
59.5	Imvula Quality Protection (Africa)	R838,180.00

[60] It is clear from the aforegoing that the third respondent's bid was far below the minimum price, if a 40% provision for overheads is to be included, and indeed on R9758.62 above the minimum price if overheads are to be excluded.

[61] As regards to the competing contentions of the parties regarding the correct interpretation of clause 19.1.1.2 of the Bid Specification read with the PSIRA schedule, the following facts and circumstances are pointed out in respect thereof:

61.1 The key to this question lies not in the PSIRA schedule itself, but in the wording of clause 19.1.2 which expressly and unambiguously requires that a quote may not be below the PSIRA recommended pricing

61.2 Clause 19.1.2 is clear and unambiguous in that it expressly states that the overheads must be included;

61.3 The respondents appear to place stock in the fact that the PSIRA schedule, in prescribing the 40% also contemplates that the "economy of scale rule applies", which as the respondents' contentions are understood, allegedly makes it clear that some latitude is contemplated.

61.4 The difficulty with this line of argument is that it has not been shown that any considerations of economies of scale actually come into play in this tender. It is by no means a large tender, involving only twenty five security guards.

61.5 The respondents also appear to contend that the fact that the PSIRA schedule is *ex facie* the document an "illustrative pricing structure", which is expressly repeated in paragraph 3 of the notes thereon, supports their interpretation.

.

61.6 Lastly, in this regard, the respondents are understood to contend that the words in clause 19.1.2 *" . . as determined by the Robben-Island Museum"* means that the first respondent has a discretion to determine the percentage of overheads that ought to be included.

61.7 Applicant argues that the words referred to mean nothing more than it is the first respondent who must determine whether a quote is indeed below the PSIRA recommended pricing, by simply applying the Bid Specifications to the PSIRA schedule.

[62] Mr Edmunds on behalf of the first respondent, in my view, correctly points out that the wording and contention of 19.1.2 leaves it open for interpretation in the following respects:

"1. Are the plus "plus overheads" referred to directly related to the overheads mentioned in the PSIRA schedule or are they additional thereto

2. What is left to be determined by RIM?

3. *When one looks at the sectoral determination insofar as it relates to the bid for wages this might lead to speculation;*

4. *How are economy of scale applied, and exactly what does it mean?"*

[63] In the explanation of the process RIM took the salutary precaution by consulting with PSIRA as to the meaning of the 40% rule and took their guidance from the comparative schedule as referred to in paragraph 42. Whilst this might be salutary it does not help the parties that have to read the bid specifications and tender accordingly.

[64] Accordingly the bid specifications were vague and does not comply with the principles as set out above and stand to be set aside with its consequences.

Failure to read out the tender prices at the opening of the tender meeting:

Having found the bid specifications was vague, I shall deal with the other aspects as they remain.

[65] Transparency is a key component of procurement law principles. The underlying rationale of transparency has been described by Professor Phoebe Bolton in "*The Law of Government Procurement in South Africa*" as follows:

"The underlying aim or rationale for a transparent procurement system is to ensure that interested or affected parties, like the media, the legislature, potential contractors and the public, as taxpayers, are free to scrutinise the procedures followed. This, to a large extent, ensures public confidence in government procurement procedures and promotes openness and accountability on the part of state organs. Transparent procurement procedures encourage good decision making and, to a large extent, serve to combat corrupt procurement practices. It is a well-known phenomenon that corruption thrives in the dark. Transparency also fosters competition because it allows interested parties to participate in the procurement process…"

[66] The first respondent is bound by legislation that prescribes the application of fair and transparent procurement procedures for national and provincial government is the Public Finance Management Act 1 of 1999 ("PFMA").

[67] In accordance with s 76(4)(c) of the PFMA, the National Treasury has issued instructions concerning, *inter alia, "the determination of a framework for an appropriate procurement and provisioning system which is fair [and] transparent."*

[68] It is stated in paragraph 4.10 of the National Treasury document entitled *"Supply Chain Management: A Guide for Accounting Authorities (the "SCM guide"), which relates to 'opening of bids"*, that:

"…Bids should be opened in public, that is, bidders or their representatives should be allowed to be present. If requested by any bidder, the name of the

bidders and if practical the total amount of each bid and of any alternative bids, should be read aloud. The names of the bidders and their individual total prices should be recorded when bids are opened."

[69] The *"minutes of the compulsory briefing session for the private security held at First respondent…dated 10 April 2014…"* record that:

"One of the bidders asked if only the names of the companies was going to be read and not the prices and in BL: responded to say only the name were going to be read (sic)."

[70] The person having raised the question was the deponent to the applicant's affidavits, Mr Sitole.

[71] Applicant argues that by raising the question, the first proviso of a request in paragraph 4.10 was satisfied.

[72] With regard to the second proviso in paragraph 4.10, namely whether it was "practical" to read the prices out aloud, the first respondent has stated that it has taken a blanket policy decision to not read out prices aloud at tender opening sessions.

[73] First respondent explained, in it's answering affidavit, that it has a policy that as a general principle bid prices are not read out because the lowest price is not the only criterion. In the experience of first respondent, reading out bid prices tends to be misleading and creates unfounded expectations on the part

of the bidders who have submitted bids at the lowest price. Furthermore, if for whatever reason the tender needs to be re-advertised, the bidders who are able to attend the bid opening session would be advantaged in that they will be aware of the pricing strategies of all their competitors. This impairs the competiveness of the new tender process.

[74] Mr Sitole, the deponent to the applicant founding and replying affidavits, alleges that at the opening of tenders on 24 April 2014 he:

'(S)pecifically raised the question as to why the tender prices of the bid was not announced, and was told by one of the officials…that they had been instructed not to read out the prices.'

[75] This in itself did not amount to a request to read out the prices.

[76] It is clear that, at the briefing session which was attended by a representative of the applicant, it was explained that the tender prices would not be read out and the applicant had two weeks before the opening of the bids within which to request, in writing or otherwise, that the prices be read out, which it did not do. Consequently, there was no request that the tender prices be read out and first respondent's policy (which is not impugned) applied.

[77] The decision not to read out the prices had no bearing on the decision to accept the tender of the third respondent.

[78] An unsuccessful bidder could request the tender prices. That is exactly what the applicant did when it requested reasons from first respondent and the latter divulged the tender prices thereof and points scored by the recommended bidder and the applicant.

[79] According the principles enunciated in *All Pay*, the purpose of the provision must be considered to determine whether the deviation was material and amounts to a ground of review in terms of the PAJA.

[80] The applicant contends that the purpose of the provision is to promote transparency and accountability. This proposition is forfeited by s 217 of the Constitution which specifically refers to "transparency" and the SCM guide which has been issued pursuant to s 76(4)(c) of the PFMA, which also refers to transparency.

[81] In these circumstances, the decision not to read out the tender prices did not constitute an irregularity. Even if it can be said that there was an irregularity in this regard, it was not material as it had no bearing on the award of the tender and, in any event, an unsuccessful bidder could obtain the information in the way that the applicant did.

<u>The remaining issues:</u>

[82] Shortly before the hearing of the mater the applicant filed a Notice of Intention to Amend the relief sought by adding a paragraph 7A:

The relief sought therefore at the time of the hearing was

"7. Reviewing and setting aside the First Respondent's decision to award Tender RIM EST-04/2013/14 to the Third Respondent, in terms of the Promotion of Administrative Justice Act No 3 of 2000 and declaring invalid any contract concluded pursuant thereto.

7A. Granting an order that Tender RIM EST-04/2013/14 be awarded to the Applicant, alternatively that the matter be remitted to the Bid Adjudication Committee of the First Respondent for a decision on the awarding of the tender, on the basis that the Third Respondent is excluded."

[83] The amendment was opposed by both the first and third respondent on the following grounds:

(a) It required the court to substitute its decision for that of the Bid Adjudication Committee (BAC)

(b) The basis for the exclusion of the third respondent was in issue, as a volume of new evidence was to be introduced that was in any event challenged on factual and legal grounds.

(c) <u>SUBSTITUTION</u>

(d) Section 8(1) of the PAJA provides that a reviewing court may grant any order that is just and equitable. Section 8(1)*(c)*(i) allows for the matter to be remitted for reconsideration by the administrator, and 8(1)*(c)*(ii) provides that in exceptional circumstances a court may substitute or vary the administrative action. In *Gauteng Gambling Board v Silverstar Development & others* 2005 (4) SA 67 (SCA) at para 29, Heher JA said:

(e) *'An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. . . . That is why remittal is almost always the prudent and proper course.'*

(f) Heher JA relied in this regard on, inter alia, the Constitutional Court decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) at paras 46-49. The court in *Gauteng Gambling,* however, considered that there were exceptional circumstances in that matter and accepted that remittal was not necessary and substitution was appropriate. In my view, this case does not contain exceptional circumstances and therefore remittal is the prudent and proper course.

(g)

(h)

(i) In *Commissioner,Competition Commission v General Council of the Bar of South Africa & others* 2002 (6) SA 606 (SCA) at para 14 Hefer AP said:

(j) *'[T]he remark in Johannesburg City Council v Administrator, Transvaal & another [1969 (2) SA 72 (T) at 76D-E] that "the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will be no remittal to the administrative authority where such a step will*

operate procedurally unfairly to both parties.'

(k) Fairness is, therefore, essentially the question.

(l)

(m)

(n) The Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa & another* 2015 (5) SA 245 (CC) held that substitution was the appropriate remedy. Khampepe J said, at para 47:

(o) *'To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of the administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-bycase basis that accounts for all relevant facts and circumstances.'* (Footnote omitted.)

In order for the applicant to succeed they first had to overcome the hurdle of third respondent's application to strike out newly introduced evidence.

I am of the view that the application to amend must fail for the following reasons:

(a) It would amount to a substitution by the court of the role and task of the Bid Adjudication Committee;

(b) In the event that prayer 7 be granted on the basis that the specifications were vague, the appropriate order is a rerun of the process;

(c) The evidence on which the new relief is sought is objectionable, and

(d) Any evaluation and finding on the new evidence might influence the determination the (BAC) in later evaluations.

These issues relate to the two additional grounds for review that it is not necessary to deal with the merits or demerits thereof at this stage.

Costs:

[84] The first respondent's lack of clarity has been the cause of the litigation and the applicant was successful. The general rule is that costs follow the result.

[85] First respondent only opposed a portion of the relief sought in the application for an interim interdict and they were successful in their opposition. The vagueness argument was not an issue but rather that bias on the part of the first respondent was alleged in the affidavits before the court. There is therefore good reason that the applicant be liable for the first respondent's cost insofar as it relates to the interim interdict.

[86] The first respondent's, vagueness of its bid specifications led to the litigation; however they conceded this point early on. There would therefore be no reason why they should be mulcted in costs beyond that concession. I found

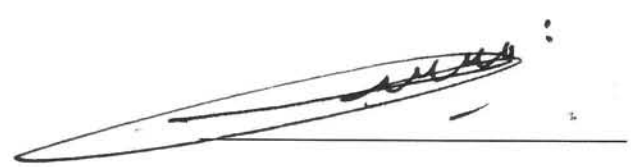
on the facts that there was no merit in the applicant's argument relating to the non-disclosure of the bid prices at the opening of the tenders. The applicant and third respondent should and could have accepted this and thereby avoid a lengthy and drawn out litigation. They chose to rather become involved in issues that were not initially alleged that led to unnecessary costs.

Order:

1) The first respondent's decision to award Tender RIM EST-04/2013/14 to the third respondent is declared invalid and any contract concluded thereto is set aside

2) Applicant is ordered to pay the costs of the first respondent for the application before Baartman, J. The third respondent to pay its own costs.

3) In respect of the main application first respondent is liable for the costs of the applicant and third respondent up to the date of their concession on the vagueness point. Thereafter the parties each must pay their own costs.



ERASMUS, J