

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 005599/2022

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
	
...	8/9/2023
SIGNATURE	DATE

In the matter between:

WBHO-LUBOCON JV

Applicant

and

ESKOM HOLDINGS SOC LIMITED
(REGISTRATION NUMBER: 2002/015527/30)

First Respondent

GRINAKER LTA-ENZA CONSTRUCTION
JONIT VENTURE

Second Respondent

JUDGMENT

Manoim J

- [1] This case concerns whether the court should review and set aside a tender awarded by the first respondent Eskom Holdings Soc Ltd (“Eskom”) because of a disqualification criteria to which bidders for the tender were subject. The applicant, a joint venture known as the WBHO-Lubocon joint venture (“WBHO”), was amongst other bidders, disqualified for not meeting this criteria. The tender was awarded to the only bidder that qualified; the second respondent, a joint venture known as Grinaker LTA- Ezra Construction Joint Venture (“Grinaker”). (Grinaker did not oppose and filed no papers in these proceedings.)
- [2] WBHO’s case is that there are two independent reasons for reviewing and setting aside the award to Grinaker, based on Promotion of Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). The first challenges the legality of its disqualification. Eskom says it disqualified WBHO because it had not provided mandatory information. But says WBHO that obligation was not made clear in the tender, and it would be unfair for that reason to impose it on bidders. Second, WBHO says the scope of the tender was changed after the award to Grinaker but only the latter was given an opportunity to re-quote on the revised tender. Rather, says WBHO what should have happened was that the tender should have been re-opened to all, including those initially disqualified.
- [3] WBHO has reformulated its relief several times but essentially it seeks to set aside its disqualification, and the award to Grinaker. In consequence of this relief, it further seeks to be awarded the tender. In the alternative it seeks to have Grinaker’s, and its respective tenders re-evaluated, once WBHO is given an

opportunity to submit the crucial document known as the Appendix to Tender, the omission of which was the basis for Eskom disqualifying it, and then for the best scoring tender (as they were on the date of the opening of the tenders) to be accepted by Eskom.

- [4] Eskom opposes both grounds of review. I will approach the decision by examining each ground in turn but first some background is needed.

Background

- [5] On 5 November 2020 Eskom put out a tender to eight construction firms to bid on a tender to build a combustion waste terrace at the Kusile power station in Mpumalanga.¹ In layperson's terms this is a structure to house the ash that is a byproduct of the coal that is burnt at the power station. Kusile already has an existing waste terrace which was built at the power station by WBHO and is known as Phase 1. However, this structure will soon be filled up, so a new structure is required. This is described in the tender as Phase 2.
- [6] Of the eight firms that were invited to tender for Phase 2 only five submitted bids, but for various reasons only that of Grinaker made its way out of the disqualification stage. None of other firms that bid has challenged the award so in this decision I am only concerned with the challenge brought by WBHO.

¹ *Eskom Holdings SOC Ltd (hereinafter "Eskom") invites you to submit a tender for the complete supply and setting to work of the Combustion Waste Terrace. - Phase 2 ("the Works") for the Kusile Power Station at Emalahleni, Mpumalanga In the Republic of South Africa ("Kusile Power Station"). Case Lines page 01-46 a document described as the invitation to tender.*

- [7] WBHO submitted its bid on 17 February 2021 which was in time for the deadline. It claims it heard nothing from Eskom about the outcome of the tender but then heard rumours that another firm had won.² Its estimator Joe Carter wrote to Eskom and asked for a debriefing meeting with them. This is the type of meeting where the employer, as the bid offeror is sometimes referred to in the tender literature, explains to the jilted bidder what its shortcomings were. Presumably because if it bids again in the future, it will rectify these.
- [8] On WBHO's version, the Eskom officials met with its staff who explained that WBHO had failed to submit what is referred to as the "*FIDIC contract data*". This was later confirmed in a letter to WBHO's attorneys where Eskom wrote that the tenderer had "*been deemed non-compliant*" with the basic compliance requirements due to the contractor's failure to submit the "*required FIDIC contract data*".³ More about this term later as the first ground of review turns on its interpretation. WBHO's people say they were non-plussed. They did not know what this meant and what they should have supplied that they didn't. This then led WBHO to decide on litigation.
- [9] On 8 July 2022, WBHO brought Part A of this notice of motion by way of an urgent application in which it sought an interim interdict to restrain the respondents from further implementing the tender pending the finalisation of the review. Eskom filed its answer on 14 July 2022. The application was never heard as an urgent matter.

² Eskom disputes this and says a letter was sent to WBHO informing it of the outcome. It is not clear why WBHO never received this or if it did, why it was not read.

³ Letter dated 30 June 2022, Caselines 01-40.

That much is common cause but not why it was not heard. WBHO claims this was by agreement as it was not going to be able to file its reply on time. Eskom claims the withdrawal was unilateral and that the urgency was self-created and misconceived.

[10] Whether or not the application justified urgency is not for me to consider now. What is relevant from this early exchange of papers is that for the first time in the answering affidavit, Eskom gave greater detail for why the WBHO bid had been disqualified. Eskom explained that the requirement to provide “FIDIC contract data” meant filling in a form called the Appendix to the Tender (“Appendix”). This document required the bidder to fill in certain information in conjunction with the rest of the bid documents submitted. It is now common cause that WBHO never submitted the Appendix with its other bid documents hence this was the basis for its disqualification.

[11] Later, when urgency was no longer pressing it, WBHO filed its replying affidavit. Here the person responsible for submitting its tender, its estimator Joe Carter alleged that Eskom only downloaded the Appendix on 25 January 2021. Recall, the tender was announced on 5 November 2020. Nevertheless, WBHO submitted its tender only on 17 February 2021. Thus, even on Carter’s version it would have been available to it prior to submission. In explanation, WBHO alleges that Eskom had downloaded new documents at several times since the tender was announced and Eskom never alerted WBHO to the fact that the Appendix had only been

downloaded on 25 January 2021. But Conradt Meyer, WBHO's managing director of the relevant division, and its deponent to the replying affidavit, states:

"If the applicant knew Eskom added the Appendix to Tender to the tender documentation it would have been a very simple exercise to complete the document and to include it in applicants bid submission."

[12] But relying on the version of Carter, WBHO at this stage in its replying affidavit, confidently asserted that Carter was correct. He went as far as to put up screen shots from his computer which he said shows all the documents he downloaded from the Eskom tender website to complete WBHO's tender. None he said showed the Appendix was on the website at the time.

[13] Since the filing of the replying affidavit, several supplementary affidavits needed to be exchanged before the facts on when the Appendix was downloaded by Eskom to the website became common cause. Carter, it turns out was wrong. Although he alleged that the Appendix to tender had only been downloaded to the website, in his estimate, on 25 January 2021, the Appendix had been downloaded to the Eskom website on 5 November 2020, and thus was available before to WBHO to access well before its tender was submitted on 17 February 2021. In fact, Carter downloaded all his documents the day after, on 6 November, but appears to have missed the Appendix. Significantly WBHO's own IT personnel have now verified that Eskom's version on when the Appendix was downloaded is correct thus contradicting Carters' initial assertion.

- [14] Thus, the initial version of WBHO in its founding and replying affidavits has been proved incorrect in two respects. First its allegation that there was no document that existed which corresponded to the request for FIDIC contract data; there was, it was the Appendix. Second, that it had not been downloaded to the website timeously; it was, on 5 November 2020 along with several other documents thus was available to WBHO to find on 6th November when Carter says he performed the first download.
- [15] During the course of the exchange of papers, WBHO requested and was provided with, Eskom's record of how the tender was decided. From these papers WBHO has made two further points. First, it emerged that Grinaker had, after being appointed as the approved bidder, been asked to requote for the project based on a new specification for the lining of the waste facility. WBHO argues is that this amounted to a re-designing of the project which meant that Eskom should have re-tendered the entire project so that each invited bidder could have requoted based on the new lower cost design specification for the lining.
- [16] The failure to re-tender constitutes WBHO second point of review. I go on to discuss this later.
- [17] The second fact of significance emerging from the record was how Grinaker had completed the Appendix. Since the absence of this document from the WBHO tender submission was Eskom's justification for disqualifying it, it is relevant to whether bidders were treated equally to see how Grinaker responded. WBHO requested the document from Eskom. Eskom in turn asked Grinaker's attorney to

provide it so that the latter could redact any confidential information from it. But the version provided by the attorney contained several blanks where Grinaker had apparently not provided the requested information. If this was the prerequisite for valid tender, WBHO contended, then Grinaker too should have been disqualified.

- [18] But here another controversy emerged. When Eskom had this omission pointed out, it filed another affidavit, referred to as the explanatory affidavit. In this affidavit Antonio Mammes, a senior procurement manager at Eskom, claims that the version sent that emanated from Grinaker's attorney, was not the final version that Eskom had received with the tender and considered. He attached another version of the Appendix from Grinaker which he asserted was the one Eskom considered. This one differs from the first one supplied by Grinaker's attorney, in that all the questions are now answered, except in one respect.

Was Grinaker's tender properly completed

- [19] Although this was not advanced as an independent self-standing ground of review in the papers, I will deal with it as if it is. Like the re-tender objection, it is based on the assumption that completion of the Appendix was a mandatory returnable and hence must be considered as a third ground for review – that Eskom has acted inconsistently in the application of its own rules.
- [20] The first issue is whether Eskom has provided an authentic version the Appendix attached to the Grinaker tender. This version was supplied by Eskom in the so-

called explanatory affidavit, which, despite its name, was a further supplementary answering affidavit.

[21] WBHO whilst not contesting the filing of this affidavit urges me not to accept this version. Relying on the well-known *Wightman* decision counsel for WBHO urged me to reject this version on the basis that this mere assertion was insufficient.⁴ It required, he argued, for Mammes to have given more facts; why he was the person with personal knowledge, where he had extracted this version, was it the one supplied at the time and where had it been retained.

[22] I do not accept this approach. Mammes has personal knowledge of the tender and has done all he needed to do for the purpose of motion proceedings. He relied on Grinaker's attorney to supply the Appendix because he says she needed to redact confidential information from it. She had got the wrong document he contends and now he was providing the correct version. There was no reason for him to elaborate on this any further. He is not to quote *Wightman* resting his case on a "...bare and ambiguous denial." For the purpose of these proceedings, I must apply *Plascon Evans* and accept Eskom's version.⁵

[23] But WBHO further argues that even if the version now supplied by Mammes is the correct version of the Appendix, it is still deficient. Although Eskom did not require that all the questions in the Appendix be answered – only those indicated - one of those it needed to fill in was the bidder's bank account details. In answer to this

⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C.

question Grinaker had filled in: “*TBA if the tender is approved*”. Grinaker, WBHO argued, had thus failed to answer the question. Hence, it was on Eskom’s own version, non-compliant and should have been disqualified. But Eskom’s counsel argued that the question had been answered; the only issue was whether the answer should be considered sufficient. I agree with this, although Eskom has not put up any explanation to justify sufficiency.

- [24] The question then is what legal conclusion to draw from the allegedly insufficient answer. Put differently, is the undertaking to defer providing the consortium’s banking details, an insufficient response to the question, so much so as to justify a conclusion that Grinaker has submitted a non-responsive Appendix, and hence, not conformed to a mandatory requirement to provide the FIDIC contract data. In my view in the context of this tender one could not conclude that deferring the provision of bank account details, was so material as to render the Appendix submitted non-responsive. The purpose of the Appendix as was explained by Eskom, was to enable those tasked with determining the award to compare information from bidders in a succinct format. This was one of the objectives of the Appendix despite the fact that some of this information had already been supplied elsewhere by bidders. But not all the information supplied serves this comparative objective. It is unlikely that the supply of banking information would be relevant to the comparison. Thus, the fact that Grinaker elected to supply this information only later if it won the tender would not have been a comparative fact relevant to the assessments of the bids and hence despite the insufficient response would not have been a rational basis for disqualifying its bid.

[25] I go on now to consider the two other grounds of review. As a point of departure, the legal standard for which the lawfulness of a tender process by a state actor such as Eskom must be judged by is common cause. Statutory wise, the governing provisions are section 217(1) of the Constitution, section 51(1)(a)(iii) of the Public Finance Management Act (“PFMA”) and section 2(1)(f) of the Preferential Procurement Policy Framework Act (“PPPFA”), among others. The values the Constitution requires of state contractors is that their processes are fair, equitable, competitive, and cost effective.⁶

[26] WBHO relies on PAJA and that is central as well to this assessment. But it has adopted a shotgun approach to PAJA, contending almost all of that statute’s review grounds apply, when the case turns on more narrowly on questions of fairness, transparency, and equal treatment, and to the extent that Eskom has given explanations for its decision making, whether they are rational.

Mandatory requirement.

[27] WBHO commenced this case on the premise that Eskom had made mandatory a requirement that was so cryptic and unclear that it was impossible to comply with. The mandatory requirements were set out in the document sent out to the bidders.⁷ The bid document stipulated that certain requirements had to be provided with the

⁶Section 217(1) lists these.

⁷In the document the following is stated under the heading “*TENDER RETURNABLES, The tenderer must submit the returnables set out hereunder as part of its tender. Returnables that are mandatory for evaluation will result in disqualification if not submitted at tender closing.*”

tender and others could be provided for later. It was made clear in the tender document that a bidder would be disqualified if what were termed as the “*mandatory returnables*” were not completed. WBHO does not dispute this. What is at issue is what was meant by one of the returnables which were described as the “*completed FIDIC schedule and contract data*”. (My underlining) The first part of the phrase, the reference to the “FIDIC completed schedule” was understood and WBHO supplied it. Both sides agree on this. Both also understood the reference to “contract data” to be qualified by the adjective “FIDIC” i.e., what was meant was not any contract data but *FIDIC contract data*. The reference to FIDIC is also clearly understood and is a well-accepted term used internationally in the building industry which references a standard form contract which is then cut and pasted for specific contracts.⁸

[28] WBHO’s complaint is that the term *FIDIC contract data* had no generally accepted meaning. There was no reference to such a term in the 1999 FIDIC red book, the bible of the industry, although it has come to have a meaning in the latest version of the book, the second edition of 2017. Nevertheless, WBHO contends, the bid documents refer specifically to the first edition, not the second edition of the red book.

[29] WBHO raises a series of questions – if Eskom was referring to the Appendix as the mandatory returnable document, why did not just say so in express terms?

⁸ FIDIC is the French version of the acronym for the *Federation Internationale des Ingenieurs-Conseils*. In English this is translated as the *International Federation of Consulting Engineers*. The acronym is defined in the Eskom Procurement and Supply Chain Management Procedure document.

Why use obtuse language to make a simple point? Why did Eskom in its first response not again make this clear? Why did this explanation only come about in its answering affidavit? Why did it, in the answering affidavit, continue the opaqueness of the term “contract data” by saying it “included the Appendix”? This suggests, by the use of the word “inclusion”, WBHO argues, that the Appendix was a subset of the remaining requirement for *contact data*, but if this was the case, what was the remaining data?

[30] All these criticisms are valid. Eskom never explains why it chose to refer to the FIDIC contract data when it could have more easily referred to the Appendix if this was the information it was requesting. The courts have made clear in a number of cases that it is a requirement of fairness that tender documents must make bid requirements clear.

[31] Thus, in *GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works & Others* the court held:

“(…), tender documents which do not provide sufficiently clear information about bid requirements create confusion and thus fall short of the requirements of fairness.”⁹

[32] In *Babcock Ntuthuko Engineering (Pty) Ltd v Eskom Holdings SOC Limited and Others* Millar J held:

⁹ 2007 JOL 20439 (D).

“(…), a tender must be framed in a manner that is not ambiguous and affords all tenderers an equal opportunity to understand what the requirements of the tender are and to meet those requirements. It is inevitable that a poorly drafted and ambiguous ... tender, such as the one in the present case, would be impeachable”.¹⁰

[33] In *AllPay* the Constitutional Court put it most succinctly, explaining 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.”¹¹

[34] Eskom does not dispute that these cases set out the law on what is required of a fair tender specification. But it argues that reliance on the linguistic aspect of the case is a red herring. The real issue is how WBHO approached the completion of its tender documents and why it did not follow the instructions it was meant to.

[35] This place the current case in a different category to those of *GVK Siyazuma*, *Allpay* and *Babcock*. Eskom has made two arguments in relation to the question of sufficient clarity, and I consider both to be correct.

¹⁰ (64288/2021) [2022] ZAGPPHC 865 (17 November 2022) paragraph 33.

¹¹ *AllPay Consolidated investments Holdings (Pty) Ltd and others v CEO, SASSA, and others* 2014 (1) SA 604 (CC) paragraph 92.

- [36] First, WBHO knew that the provision of certain information was compulsory for a bid to qualify. The bid document states:

“Mandatory Tender Returnables

a) Should the supplier fail to provide any mandatory tender returnables as clearly specified in the tender enquiry, the tender submission will be deemed non-responsive;”

- [37] Second, the phrase “*FIDIC contract data*” was clearly something in addition to the “*FIDIC schedule*” because it was prefaced by the word “*and*”. Once this additional category of information was required, the bidder would have been on notice to provide it. If WBHO was still uncertain what it was it should have asked. It never did. But because Carter was unaware that the Appendix had been downloaded, WBHO is in no position to argue that it still would not have been aware that this was the FIDIC contract data. But even if one speculates that it might still not have joined the dots, the real question is was there anything about the Appendix which suggested it was not a mandatory returnable?

- [38] There is a footnote on the first page of the Appendix which states that:

“Tenderers are required to insert information, if and as applicable, where items are referenced []”. The use of the term required is not ambiguous. It must be completed. If it must be completed it follows it must be submitted.”*

[39] Then the body of the Appendix document contains three columns. The first describes the item, the second references it to a clause number in the FIDIC Red Book's particular conditions, whilst the third indicates the information required. There can be little doubt that the reader of the Appendix would have appreciated from reading its contents that this was a document that had to be submitted with the tender, with the referenced items inserted.¹² Amongst the items referenced for completion were:

- a. The stipulated profit percentage
- b. The termination profit percentage
- c. The percentage for adjustment of provisional sums.

[40] Eskom says without this information it is impossible to properly assess a bid. Carter would have known this if he had seen the Appendix. Nor would it require straining the language to conclude that these three items constitute data even though the Appendix is not described as the FIDC contract data. Thus, any reasonable reader of the Appendix would have understood that its completion where indicated and submission, was part of the mandatory tender requirements even if they did not appreciate at the time that this constituted the FIDIC contract data. But Eskom goes further to assert this should have been appreciated by those in the industry. According to Eskom:

¹²Even the description as an 'Appendix to the Tender' would have made its status obvious. Why would one submit a tender and leave out an appendix to it?

“it is a common understanding for those working with FIDIC in the industry that the Appendix to Tender contains the contract data under the FIDIC suite of contracts.”

[41] Granted WBHO says the language is used in a later FIDIC Red Book formulation and not the one referenced in the tender.¹³ But the later formulation was in use in the industry at the time WBHO tendered and should have been familiar to bidders. It is not a case of where the FIDIC references were contradictory and WBHO had mistakenly relied on an earlier version of the same terminology that had been given a different meaning. But in any event, as I have stated, the content of the Appendix was such as to alert the reader to its significance and the need for its submission as part of the bid documents. Indeed, this point was conceded by WBHO in the replying affidavit (that was at the time it denied awareness of the existence of the Appendix having been downloaded at the relevant time).¹⁴ It stated that it would have completed and submitted the Appendix if it knew of its existence then.

[42] But the existence of this document was not hidden from the bidders. According to Eskom, and this is not disputed, the tender advertisement contained a link. A bidder clicking on the link would be directed to a page headed *“Drop off summary”* which listed thirty separate documents that had been downloaded. One of these documents was headed *‘Appendix to tender’*. It is now common cause that the

¹³ WBHO says that Eskom refers to the first edition of FIDIC in the tender documents (1999) whilst the reference to the Appendix is language used in the second edition (2017).

¹⁴ *“If the applicant knew Eskom added the Appendix to Tender to the tender documentation it would have been a very simple exercise to complete the document and to include it in applicants bid submission.”*

Appendix was on the website on 5 November 2020 and was thus available to WBHO by the 6th November 2020, the day Carter says he first downloaded documents from the Eskom website. His failure to download the Appendix, it now accepted, was due to his own error not that of Eskom's.

[43] To summarise the position in respect of the first ground of review. WBHO's review case was initially based on two factual misconceptions. First it alleged that there was no FIDIC contract data document for bidders to complete. But Eskom explained in the answering affidavit that there was such a document – it was the Appendix. This then led to the second error. WBHO relying on Carter contended that even if this was the FIDIC contract data, the Appendix had never been on the website prior to WBHO submitting its bid. But this too proved false – a fact that WBHO now concedes.

[44] This has limited WBHO's review case on the first point to a linguistic one. Had the Appendix not been available on the website this may have been an arguable proposition. But its presence on the website and the requirement for bidders to read downloaded documents, coupled with the content of the Appendix which makes its status as a mandatory returnable obvious to the reader, removes any ambiguity. Thus, each bidder had an equal opportunity to access the mandatory returnable at the same time and in the words of *Allpay* there was “*no burden to decipher unclear directions*” imposed on any bidder. The diligent bidder would have accessed the document from the website as instructed and seen from its contents that it was something that it was required to complete and return.

- [45] The tender was not unfair nor was it irrational for Eskom to have acted in the way it did to disqualify WBHO. Once it had specified that completion was mandatory it was obliged to disqualify a bidder which did not submit the completed Appendix. This review ground fails.

Second basis

- [46] The second basis of complaint is about the change in specification. This was not part of WBHO's original cause of action and only emerged when the record of decision making was produced.
- [47] What emerged from the record in the analysis done by Eskom's staff is that they considered the Grinaker bid was "... *way above the budgeted amount by* [amount was redacted] and that "...*it should be renegotiated to a market related price...*"
- [48] Whether there was any connection between this proposal and what happened next is less clear. However, what happened is that Eskom received regulatory approval from the Department of Forestry, Fisheries and Environment to change the liner on phase 2 from a Class A liner to a Class C liner. In less technical terms it meant that whilst the original tender required bidders to quote on two layers of HDP lining (Class A) the new specification required only a single layer of lining.¹⁵ This would effectively reduce the associated costs since less material would be required.

¹⁵In more technical terms it is described by Eskom in the relevant document in this way: "*The change to a Class C liner resulted in the amount of HDPE liner material required reducing by approximately 50% and the Liner Leakage Detection Layer also being removed. The Leakage Detection Layer consisted of Geocells and River Sand with associated drainage piping, the removal of these items also resulted in a significant cost saving to the project.*"

Eskom got Grinaker, by then the chosen preferred bidder, to submit a new quote based on the reduced specification. No one else was asked to quote. Grinaker's bid which had up until then been above that of WBHO's (quoted on Class A linings) was now below it. WBHO claims that if had been asked to bid on the new specification it would still have been lower than that of Grinaker, and by some margin.

[49] But what WBHO contends is that this amounted to a 'major design change' and even worse, amounted to 'tender manipulation' designed to bring the Grinaker price down so it was affordable to Eskom. These complaints, although not argued in this way, suggests two criticisms about the design change.

[50] First that its scope was such that it should have meant that the whole Phase 2 project should have been put out for a fresh tender. This argument depends on the extent of the change or put differently is an argument about the consequences of substantiality. The second suggests bad faith – Eskom was manipulating the costs so as to bring the favoured bidder, post award, in line with a market related price.

[51] The argument around substantiality required WBHO to establish that the character of the tender had changed so materially from what was originally advertised that fairness required it be put up for a new bid or that all those invited should be permitted to re-tender based on the new specifications. However, it was for WBHO as the applicant to make out its case on this aspect both on the facts and on the law. I was not given any factual basis for doing so. WBHO's factual case here amounted to no more than repeating what Eskom stated about the difference

between the two specifications. The fact that WBHO could so confidently state what its new bid price would have been had it been asked to tender on the new specifications, suggests that they were not that substantial technically. One layer of the materials to be used as opposed to two. This does not on the face of it appear to be a substantial design change that materially could have affected the nature of the original bid. It was not seeking a complete re-design of the waste facility – only a reduction on the protective layer, subject to environmental approval, which it had got. Moreover, it led to a reduction in expense not an increase.

- [52] Nor has WBHO referred me to any case law as to when a change in design is so material as to justify on the grounds of fairness, transparency, cost effectiveness or equitability, that a new bid is required. Eskom makes the point that its tender documents stipulated that Eskom reserved the right to engage in post tender negotiations with a preferred bidder. According to the invitation to tender document:

“Please note: Eskom reserves the right to negotiate with preferred bidders after a competitive bidding process or price quotations; should the tendered prices not be deemed market-related”.

- [53] This is precisely what Eskom did. It concluded the price was not market related and it negotiated it to a lower price. Second it makes the point that the regulatory approval from the Department only came in October 2021 – ten months after Grinaker had been awarded the bid. This negates any suggestion of tender manipulation. Eskom needed this consent in order to lower the tender specification downwards and this was not available to it at the time of the original bid.

[54] I find that this second basis for review is also without foundation.

Was WBHO's allegation that its bid was superior to Grinaker's relevant?

[55] Much was made by WBHO in its papers about the fact that its bid was substantially lower than that of Grinaker's, before the specification to Class C was made, and that even thereafter, its bid, if re-tendered, would have remained lower.¹⁶ It also suggested that as the firm that had undertaken Phase 1 it was the obvious candidate for Phase 2. Further remarks about Grinaker's financial status were also made arising from concerns that emerged by Eskom itself in the record. However, this case does not concern whether Eskom chose the best candidate. It is about whether WBHO was incorrectly disqualified from further consideration. I found that it was not. Second, whether given the scope change a new tender was required and I found that it did not.

Costs

[56] This case started as an urgent application with Part A being urgent and Part B, or the present application, being brought in the ordinary course. The urgent application was never heard but the pleadings got as far as the filing of the founding and answering affidavits. WBHO never filed its replying affidavit in time for the

¹⁶Eskom denies in its papers that WBHO's was the lowest bid, It suggests that it was fifth ranked out of the bidders, although it does not put up any figures to substantiate this claim whilst WBHO does.

matter to be heard on the urgent roll. There is some dispute about why this happened. But I see no reason to re-enter this dispute.

[57] Then it is suggested that punitive costs are appropriate as a measure of censure of the conduct of Mr Carter who had initially denied receiving the Appendix only to have his IT person point out his error. It was suggested that he had perjured himself. I am reluctant to come to that conclusion. Mr Carter may have got it wrong, but I am unable to come to the conclusion that he was in bad faith. The tender comprised voluminous documents and it is entirely reasonable that in downloading them all from the website a good faith error could have occurred. Eskom should not be too quick to come to harsh conclusions about WBHO's sloppiness - it also wasted much time in this litigation by putting up the wrong version of Grinaker's Appendix that required further filings to explain.

[58] Given the volume of paper that the tender and this litigation entailed, it is not surprising that both parties made mistakes. Carelessness and lack of attention to detail does not, without more, amount to bad faith.

[59] The only relevance of delving into this history of the litigation is whether the costs should have been based on an attorney-client or party and party scale. Given that the application is unsuccessful, and I cannot conclude that a punitive award is justified, Eskom can have its costs for both the urgent application (Part A) and this one (Part B) but on a party and party scale.

ORDER: -

[60] In the result the following order is made:

1. The application is dismissed.
2. WBHO is liable for Eskom's costs for both Part A and Part B of the application, including the costs of two counsel, on a party and party scale.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 11 August 2023

Date of judgment: 08 September 2023

Appearances:

Counsel for the Applicants: Adv C Acker
Adv MO Mudimeli

Instructed by. Pagel Schulenburg Inc

Counsel for First Respondent: Adv G.I Hulley SC
Adv V.J Heideman

Instructed by: **Ledwaba Mazwai**