

**THE REPUBLIC OF SOUTH AFRICA**



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

Case No: 9697 / 2023

In the matter between:

**SS SALUTIONS (PTY) LTD t/a SEAL SECURITY**

Applicant

and

**WESTERN CAPE PROVINCIAL GOVERNMENT**

First Respondent

**THE MEC FOR THE DEPARTMENT OF**

Second Respondent

**INFRASTRUCTURE**

**WESTERN CAPE PROVINCIAL GOVERNMENT**

**THE DIRECTOR OF ACQUISITIONS &**

Third Respondent

**CONTRACT MANAGEMENT OF THE**

**DEPARTMENT OF INFRASTRUCTURE**

**WESTERN CAPE PROVINCIAL GOVERNMENT**

**THE CHIEF DIRECTOR OF SUPPLY CHAIN**

Fourth Respondent

**MANAGEMENT OF THE DEPARTMENT OF**

**INFRASTRUCTURE**

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| <b>WESTERN CAPE PROVINCIAL GOVERNMENT</b>      |                        |
| <b>THE MEC FOR PROVINCIAL TREASURY</b>         | Fifth Respondent       |
| <b>WESTERN CAPE PROVINCIAL GOVERNMENT</b>      |                        |
| <b>THE DEPARTMENT OF</b>                       | Sixth Respondent       |
| <b>INFRASTRUCTURE</b>                          |                        |
| <b>WESTERN CAPE PROVINCIAL GOVERNMENT</b>      |                        |
| <b>THE BID EVALUATION COMMITTEE OF THE</b>     | Seventh Respondent     |
| <b>DEPARTMENT OF INFRASTRUCTURE</b>            |                        |
| <b>WESTERN CAPE PROVINCIAL GOVERNMENT</b>      |                        |
| <b>THE BID ADJUDICATION COMMITTEE OF THE</b>   | Eight Respondent       |
| <b>DEPARTMENT OF INFRASTRUCTURE</b>            |                        |
| <b>WESTERN CAPE PROVINCIAL GOVERNMENT</b>      |                        |
| <b>THE DEPARTMENT OF POLICE OVERSIGHT AND</b>  | Ninth Respondent       |
| <b>COMMUNITY SAFETY WESTERN CAPE</b>           |                        |
| <b>PROVINCIAL GOVERNMENT</b>                   |                        |
| <b>ROYAL SECURITY CC</b>                       | Tenth Respondent       |
| <b>RED ANT SECURITY CONSORTIUM</b>             | Eleventh Respondent    |
| <b>S ISMAIL t/a ALCATRAZ</b>                   | Twelfth Respondent     |
| <b>MASIBAMBANE SECURITY SERVICES (PTY) LTD</b> | Thirteenth Respondent  |
| <b>UTHEMBEKILE SECURITY SERVICES CC</b>        | Fourteenth Respondent  |
| <b>AMA SECURITY (PTY) LTD</b>                  | Fifteenth Respondent   |
| <b>SILVER SOLUTIONS 1522 CC</b>                | Sixteenth Respondent   |
| <b>DC SECURITY (PTY) LTD</b>                   | Seventeenth Respondent |

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|----------------------------------------------|--------------------------|
| <b>ENSEMBLE SECURITY</b>                     | Eighteenth Respondent    |
| <b>SECHABA PROTECTION SERVICES (PTY) LTD</b> | Nineteenth Respondent    |
| <b>PROSEC GUARDS CC</b>                      | Twentieth Respondent     |
| <b>SECURICAPE SERVICES (PTY) LTD</b>         | Twenty-First Respondent  |
| <b>TYTE SECURITY SERVICES CC</b>             | Twenty-Second Respondent |

Coram: Gamble *et* Wille, JJ

Heard: 28, 29 and 30 November 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to Saflii on Wednesday, 21 February 2024 at 10h00.

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## **JUDGMENT**

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**WILLE, J (Gamble J, concurring by way of a separate judgment):**

### ***Introduction***

[1] The problems in this review application are easy to state but difficult to resolve. This judgment hopefully offers the parties definitive responses to these fiercely debated matters. In this judgment, I have attempted to address the primary concerns raised in this application for review. My lack of engagement with a specific argument or aspect should not be interpreted as disregarding its importance or a lack of consideration thereof on my part. In this context, 'applicant' will refer to the challenging party involved. The term 'provincial respondents' will refer to the first respondent and other parties representing other provincial departments. The term 'incumbent' will refer to the tenth respondent, while the term 'unsuccessful bidder' will refer to the twenty-second respondent.

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[2] Roughly ten months ago, the provincial respondents released a tender award for a two-year contract for security services. These protection services were focused on immovable properties owned by the provincial respondents. These protection services were to include, among other things, providing a control room, security vehicles, firearm management, armed response vehicles, security relocation and eviction services.

[3] The provincial respondents extended invitations to the parties and several other security firms to compete to offer for these security services. These review processes were initiated by the applicant and the other unsuccessful bidder through a counterapplication. The issue pertains to the decision to provide a private security contract to the incumbent. This judgment concerns the applicant's challenge and the counterapplication made by the unsuccessful bidder.

### ***Overview***

[4] During the second quarter of this year, the provincial respondents initiated a new tender for these specific security services through a competitive procedure. Fourteen bids were submitted by the specified deadline, including offers from the applicant, the incumbent, and the unsuccessful bidder.

[5] Following the reception of the bids, they underwent an evaluation process encompassing an assessment of their functionality. Out of these proposals, ten still needed to pass the functionality test. As a result, the applicant, the incumbent, the eleventh respondent, and the unsuccessful bidder remained, as they had completed the functionality test.

[6] Subsequently, a risk assessment was conducted, and the remaining four bidders successfully met its requirements. Following that, the pricing was evaluated. The current price offered by the incumbent was significantly lower than the competition. The provincial respondents assessed and made decisions on all of these bids. Approximately one month later, the security contract was granted to the incumbent, which is currently the focus of this evaluation and the subject of this review application.

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## **Context**

[7] Approximately one year ago, this division issued a ruling regarding a review process concerning a previous bidding process involving essentially the same parties.<sup>1</sup> The previous tender was granted to the applicant and the unsuccessful bidder.

[8] Another bidder who believed it could have been more successful in the bidding process became dissatisfied and commenced review proceedings to contest the previous tender. The court determined to re-assess and invalidate the decision and to grant the contract to both the applicant and the unsuccessful bidder, *albeit* on an interim basis.

[9] The cancellation of the tender was temporarily halted until the re-run of an expedited process for acquiring these services in question was finished. Subsequently, the provincial respondents initiated a fresh tendering process, ultimately resulting in this current application for review.

[10] The applicant filed this application for review and an urgent application for interim relief regarding the award of the tender to the incumbent. The applicant sought an interim remedy until the conclusion of this application for review. The application for interim relief was heard around half a year ago.

[11] The process led to establishing an order through mutual agreement, which specified the timeframes for submitting the record, statement of reasons, supplementary documents, responses, replies, and affidavits.

[12] According to the agreed order, the party making the request, the applicant, the incumbent, and the unsuccessful bidder, mutually agreed to offer security services to the provincial respondents while awaiting the outcome of this review application. What this meant in essence that this was an agreed temporary arrangement pending an entire re-run of the tender process for these specified security services.

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<sup>1</sup> *Red Ant Security Relocation and Eviction Services (Pty) Ltd v The Department of Human Settlements (Western Cape) and Two Others* (unreported judgment of Western Cape High Court delivered on 8 August 2022).

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### ***Review grounds***

[13] I shall categorize the grounds for evaluation and analysis into two distinct categories. The initial category pertains to the primary justifications for examination that necessitate meticulous examination. These pertain to the functioning and operational evaluation of the incumbent and how they acquired the contract. The second category pertains to the technical concerns against granting the contract to the incumbent, explicitly focusing on arguments about prioritizing substance above form.

[14] For now, I will shift my focus to the initial category. Following the successful resolution of numerous procedural obstacles, the bidders with the best scores underwent an evaluation of their operational risk. This step was necessary to confirm and measure the bidder's capacity to deliver the security services as outlined in the bid document following the requested scope of work.

[15] The risk assessment evaluates various factors, including the bidder's quality, reliability, viability, and technical proficiency to execute the contract. The incumbent still needed to pass the initial evaluation concerning local operational risk. The provincial respondents discovered that they had assessed the incumbent at an incorrect location.<sup>2</sup>

[16] The applicant and the unsuccessful bidder made some claims that evaluating the incumbent at the incorrect address was considered an afterthought, indicating a prejudice in favour of the incumbent bidder. The accusation was that this action was taken to create the illusion of credibility for the later evaluation of the incumbent. It was claimed that this 'second evaluation' was both procedurally unjust and substantively incorrect according to the law.

[17] Due to this process and procedure, it was alleged that the provincial respondents preferred the incumbent's position. In summary, it was contended that the subsequent examination was carried out with the hidden intention of prioritizing the incumbent's interests over those of the other bidders.

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<sup>2</sup> The incumbent was initially assessed in the Western Cape and thereafter in Kwa-Zulu Natal at its Head Office.

[18] Therefore, the applicant and the unsuccessful bidder claimed that assessments by the provincial respondents were conducted with ill intentions or without reason and violated our constitution and the law. This was the situation (so they say) since no other bidder had been given an additional opportunity to undergo a risk assessment. This was their argument.

[19] Consequently, it was contended that the choice to carry out an additional risk assessment to ascertain the incumbent's capability to deliver on-site services was deemed unsuitable. The contention was that the abilities and qualifications of the incumbent should have been evaluated and verified within the local context before the tender was granted to it. Furthermore, it was argued that there were even uncertainties regarding the ability of the incumbent to deliver the services once the tender had been granted to it.

[20] Further, the applicant expressed dissatisfaction with the fact that, if pricing was of utmost importance, the other bidders should have also been given additional chances to enhance their pricing, like the incumbent, who was provided with further opportunities to demonstrate its capability and competence in delivering the services as per both risk assessments.

[21] This claim pertains to the need for uniformity and impartiality in how the provincial respondents handled the other bidders. Essentially, it was claimed that the incumbent was favoured over and above the other bidders due to the strategy adopted by the provincial respondents. Thus, the fundamental concern in the initial category of this analysis was that the tender awarded to the incumbent should be re-evaluated and invalidated solely due to these irregularities.

### ***Tender specifications***

[22] The main features of the tender document were as follows: (a) the bidder was required to have the necessary infrastructure and capacity to provide the services; (b) an operational risk assessment was required to assess whether the bidder had the capacity, knowledge, infrastructure, support and systems relevant to the risks associated with the provision of the required security services; (c) the provincial respondents reserved the right to conduct personal visits to the premises of all

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potential bidders (and those of specified references) to assess the bidder's operational capabilities; (d) the highest scoring bidder would receive a risk score, which would be converted into a risk rating that would allow the provincial respondents to decide on the expected level of service and risk tolerance that they were willing to accept; (e) thereafter, a minimum qualifying score of sixty-one percent was required to pass the risk assessment, with the understanding that any bidder failing to achieve this minimum score would not be considered further.

[23] Subsequently, the operational risk assessment process would be reiterated with the bidder who obtained the second-highest score. The operational risk evaluation would primarily involve evaluating the control room, security vehicles, firearms management, and armed response vehicles. Furthermore, the evaluation of the operational risk for the headquarters and control room tender specified that the service provider must possess a physical location or facility that serves as a headquarters, control room, or visible representation in the specific area for which it was submitting the tender.

[24] Alternatively, the service provider had to clearly define the method for managing its security personnel without a physical office in the local area. This alternate requirement would be evaluated as a component of the operational risk assessment. The service provider was required to demonstrate its presence by submitting a municipal bill or a lease agreement. Consequently, the bidder must have possessed a 'registered office/control room/demonstrable presence' locally.

### ***Consideration***

[25] The provincial respondents evaluated the functioning of the incumbent's physical guard control room and specialized tactical vehicles as having a moderate to high level of risk. This was because the incumbent did not have armed guards or response vehicles in the field. The applicant expressed dissatisfaction with the evaluation and noted that only two references were considered for the incumbent instead of the required number, and an extra risk assessment was carried out. However, the most recent on-site risk assessment revealed the incumbent's notable progress in all areas.

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[26] Due to these significant favourable changes reported, there were suspicions about the authenticity of these assessments. Furthermore, considering the incumbent's capacity, the applicant claimed that the risk assessment should be conducted at the site where the service provider would finally deliver the services. The fairness and reasonableness of these criteria were the main objections by the applicant and the unsuccessful bidder.

[27] The primary contention was that it was inappropriate for the provincial respondents to assess the incumbent externally at its principal office.<sup>3</sup> This was because the objective of the bid was to procure security services from within the local area. This complaint alleges that it was unjust for the provincial respondents to assess the incumbent at their local office and at its headquarters outside the province before the contract was granted to the incumbent. I have some difficulty with these arguments. I say this because assessing the incumbent (externally) in a different province would seem to me to be logical because this is, in essence, an exercise about evaluating the overall operational risk. It does not matter if part of this evaluation occurred in a different province.

[28] The provincial respondents contended that the tender was openly and nationally advertised. Consequently, no bidder was disqualified from submitting a proposal due to the absence of a fully-fledged local company location. The objective of the tender procedure was not to limit the submission of bids exclusively to enterprises operating within the local area. Conversely, the objective was to broaden the offer range to enhance competition among potential bidders, leading to a more competitive and cost-efficient procedure. The tender agreement does not explicitly forbid external evaluations. I agree with this interpretation of the facts.

[29] The applicant and the unsuccessful bidder contended that the assessment should have taken place at the geographical location where the bidder's security assets were situated. As per the tender documents, a service provider must have a registered office, control room, or a verifiable presence inside their bidding area.

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<sup>3</sup> In Kwa-Zulu Natal.

[30] Suppose the service provider had a physical presence in the area. In that case, it had to explicitly state the method it would employ to exercise management control over guards in that region. There was no fundamental uncertainty over the criteria for determining a tangible presence locally within the specified region. Undoubtedly, the incumbent met the prerequisites for this tangible presence.

[31] The applicant argued that the published tender document mandated the tenderer to have a control center and a physical presence in the specified location. Given the circumstances, they contended that it would not be unfeasible to anticipate tenderers to possess all accessible resources on-site at the time of tender submission. Additionally, they proposed that implementing such a condition would not unfairly disqualify other competent bidders.

[32] This argument should be considered within the framework of a nationwide bidding process. The replies from the provincial respondents assert that it was necessary to consider all the incumbent's resources regardless of their location in a different region. Upon awarding the contract, the incumbent would only have been obliged to implement the required operational and administrative steps. The applicant and the unsuccessful bidder expressed strenuous concerns over the actual 'assessment' of the incumbent's performance. They claimed that the incumbent needed to meet the requirements for functionality and risk assessments locally.

[34] This accusation needed more evidence and muddled the distinction between review and appeal matters. I will analyze these complaints when I analyze the second group of review grounds raised by the applicant and the unsuccessful bidder. To summarize, the incumbent contended that the objections and grievances raised by the applicant and the unsuccessful bidder were irrelevant and did not compromise the fairness or integrity of the tender process.

[35] By elaborating on and supporting the incumbent, the provincial respondents asserted that the court should refrain from using a mechanical approach and ensure the intended objective of the tender was accomplished. A method guided by a 'clear purpose' should be used. I concur with this viewpoint as well. This functionality argument is closely intertwined with the price argument I will now turn to.

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[36] The complaint was that the incumbent submitted a bid lower than the prevailing market price to undermine and outperform rival bids. While neither party openly claimed it, the incumbent's low price could have been attributed to a dearth of substantial infrastructure on site. The incumbent asserts that it offered a bid advantageous to the provincial respondents, much lower than the competing bids, contributing to them being awarded the tender. They contended that their partial local infrastructure (during the bidding process) did not automatically lead to a failure of its risk assessment. Once more, I agree.

[37] The incumbent contended that the objective of a procurement process was to acquire a tender with a minimal cost, hence facilitating competition among other potential bidders. From my understanding of the applicant's position, the claim is not that the incumbent's bid was illegal or a clear violation of any procurement term simply because the incumbent filed a more competitive proposal.

[38] As I understand it, the main issue was that the incumbent's bid needed to be more regular, including the price, because it would have been impossible for them to provide the essential services at the given price without being physically present on-site, as stipulated by the bid conditions. If this was the crux of the argument, I do not understand how this issue constituted a legal basis for review.

[39] I say this because this irregularity is promoted by the assertion that the assessment was conducted assuming that the incumbent could not depend on the external control room and that the mentioned local premises needed to be more sufficient to provide the necessary resources. Put another way, the incumbent should have set up a local operational control center to provide the necessary services. This was the argument.

[40] It is essential to highlight that the provincial respondents' evaluation of the local control room regarded the issue of the control room as adequate. The local assessment yielded a negative result concerning firearms and armoured vehicles. Furthermore, the claim that the control room was a 'non-functioning control room' was not the core complaint by the applicant nor the unsuccessful bidder.

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[41] Now, I shall briefly discuss the situation of the unsuccessful bidder. The unsuccessful bidder filed a counterapplication concerning the previous motion for an interlocutory injunction. The unsuccessful bidder requested a review and reversal of the decision to grant the contract to the incumbent and asked for the matter to be remitted to the provincial respondents for further consideration. Their principal points reflected the applicant's primary claims on the purportedly defective risk assessment. The unsuccessful bidder did not support the applicant's assertion that the provincial respondents neglected to address a claimed association between the incumbent and the enquiry into the state capture allegations.

[42] In general, it is unquestionably true that procuring bodies should only consider compliant and conforming tenders. Therefore, tenders must adhere to every tender component, following the specifications provided by the purchasing entity in the tender paperwork. Failure to achieve these conditions would undermine the objective of soliciting information and documents from potential bidders. When assessing compliance with tender terms, the provincial respondents must prioritize the actual content rather than the appearance or complaints about the content.

[43] I say this because it will allow the provincial respondents to differentiate between rectifying mistakes or omissions and making significant amendments to bids. It is essential to distinguish between failure to comply with tender criteria and procedural formalities. The provincial respondents must exercise discretion in addressing non-compliance with procedural requirements, prioritizing substance over form, mainly when dealing with public procurement contracts.

[44] In the context of an open tender, the provincial respondents could perform the risk assessment on the incumbent both locally and externally. I say this because the services offered in the tender were essential for safeguarding the assets of the provincial government, and any disruption would have adverse consequences for the citizens. Thus, a proper and thorough risk analysis cannot be faulted. Also, these very same facts undoubtedly impacted the provincial respondents' stance concerning the applicant and the unsuccessful bidder's request for temporary relief.

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[45] The standards governing written document interpretation must also be applied to tenders. Four potential bidders advanced to the risk assessment phase. Three of these bidders satisfied the criteria for the on-site risk assessment. One bidder needed to fulfill the minimum requirement for the on-site evaluation. This organization was the incumbent in the competition. As a result, the incumbent was subjected to an additional risk evaluation in a separate province. Both the applicant and the unsuccessful bidder contend that this was unjust. I hold a different opinion. I say this primarily because it is essential to consider the provincial respondents' arguments concerning the purpose and nature of assessing the usefulness of the bid made by the incumbent. This is precisely what was achieved by the provincial respondents.

[46] I will now turn to the second set of challenges identified as the basis for the review. The incumbent's proposal was found to be inadequate for the required functionality evaluation for the following reasons: (a) the contract manager's alleged lack of experience, (b) the contract manager's alleged weak record, and (c) the alleged improvement in the bidder's functionality rating, while all other bidders' ratings remained unchanged, and they received a lower rating.

[47] The incumbent's training methods were given near-perfect ratings. The contention was that the documentation supporting the bid (suggesting that only a small proportion of staff were trained) should have more accurately reflected the outcome. The incumbent scored poorly on this aspect of the functional evaluation, receiving a score of less than fifty percent. It also allegedly presented with a list of security officers whose firearms licenses had expired.

[48] As a result, a dispute emerged about interpreting specific firearm regulations about handgun permits and competency certifications. The argument was that the supporting material for the bid indicated that a mere fraction of the workers received training and needed to be more accurate in portraying the outcome. Again, the incumbent performed poorly in this aspect of the functioning assessment, receiving a score below fifty percent. Additionally, they were presented with a roster of security officers whose pistol qualifications had allegedly expired.

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[49] Whatever happens with this argument does not matter because it is crucial not to be too mechanical when dealing with these technical problems. The main goal of the investigation should be to find out if the requirement's goal has been met. I will now consider the technical points of view the applicant and the unsuccessful bidder advanced.

[50] The applicant's initial assessment states that the administrative officials working for the provincial respondents treated the information provided by the state capture enquiry with great disrespect. They say how the provincial respondents handled this information appeared to advance the incumbent's position. For some reason, this also seems to be used to support the idea that the incumbent's award was so unjust that any reasonable person could not have approved it.

[51] The main aim of the bidding process should be to determine whether the requirement's aim was achieved. The allegation was that the incumbent was identified and implicated in widespread state theft in the state capture report. The applicant based this attack on an impartial excerpt from the enquiry report and a transcript of an interview.

[52] After carefully reviewing the original and supplemental documents, including the attached supporting documents and the affidavits in the injunction application, I can find no evidence of any wrongdoing by the incumbent. The incumbent was not involved in any illegal activity. In summary, the state capture enquiry did not uncover any negative findings against the incumbent or its current member, which would have prevented the provincial respondents from doing business with the incumbent.

[53] The applicant and the unsuccessful bidder both argue that the incumbent's letters of good standing with the security industry and their standing regarding workforce compliance were compromised and had expired before the submission of their bid and/or before the granting of the bid.<sup>4</sup> This is, in fact, one of the primary grounds upon which each case is founded.

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<sup>4</sup> The Private Security Regulation Industry (the PSIRA letter of good standing) and with the Department of Labour in respect of the Compensation for Occupational Injuries and Diseases Act, 1993 (the COIDA letter of good standing)

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[54] Regarding the security legislation, the incumbent's registration certificate was valid at the time of the bid submission. The bid invitation document stipulates that should any of the requisite documents expire before the award of the contract, updated, valid documents could be requested from bidders before the award of the contract. Thus, the entitlement of the provincial respondents to request updated documents is not to be unreasonably curtailed. Moreover, an amended letter of good standing was issued and thus valid at the time of the tender award. Thus, this argument by the applicant and the unsuccessful bidder is not the basis for sophisticated reasoning.

[55] Regarding workplace compliance, this letter of good standing did expire before the submission of the incumbent's proposal. This scenario is dealt with in the bid document. The incumbent explains that it was in good standing in all respects. Still, it had not yet received its updated letter of good standing due to an unforeseen delay by the relevant government department. The incumbent attached its previous certificate as proof of registration and authorized the provincial respondents to verify it. In any event, the amended updated letter of good standing was subsequently issued.

[54] The provincial respondents declared that following receipt of the tenders, they verified the bidders' bids to ensure formal compliance regarding registration certificates and letters of good standing. They verified the incumbent's good standing and that it was compliant. A copy of the certificate of good standing was downloaded as part of their procedures, and the incumbent was compliant at the time of the contract award. I am thus stretched to begin to understand the complaints in this connection.

[55] The police clearance certificate is the next thing I will consider. Some would argue that the current member's police clearance certificate needs to be updated. However, the bidding specifications must be more specific on how long police clearance certificates must endure and when they expire. They seem invalid only when the information they were given is no longer correct or the certificate must be corrected.

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[56] In this case, the fact that the time deadline had passed did not mean that the certificate was invalid or that the award should be thrown out. The point is that the police clearance certificates remained valid. In summary, all these complaints are complaints of no moment.

[57] Turning now to our jurisprudence and our intervening legislation dealing with judicial reviews. Even before our new constitution came into effect, there was adequate judicial precedent that an award could be thrown out as invalid if it was based on either no evidence or evidence that was insufficient to make it reasonable. This also applied to cases where the decision-maker was required to consider clear evidence but did not.

[58] Our constitutional principle of legality demands that people who make public decisions must use the powers given to them and do their jobs in a legal manner that makes sense and is done in good faith. According to our constitutional order, the provincial respondents must follow the rule that they can only do what the law permits. This is true generally in all areas of their work. I must emphasize that the legality principle is at the heart of our new democratic dispensation. In addition, our 'common law' rules about what is 'fair and reasonable' fashion the ideas of the rule of law concerning what is legal and what should be considered illegal.

[59] In our constitutional dispensation, our government does not have an unlimited freedom to deal with persons to get goods and services. Our government's human agencies cannot buy and sell goods and services to anyone or on their chosen terms.<sup>5</sup> Instead, they must follow a set of rules. Further, our laws allow for creating a national treasury and setting rules to control all spending levels.<sup>6</sup> These rules include using generally accepted accounting methods, categorizing expenses, and ensuring that all treasury norms and standards are identical. Thus, when the government buys goods and services, it must follow a fair, equal, open, competitive, and cost-effective system.

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<sup>5</sup> Section 217 of the Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Section 216 (1) of the Constitution of the Republic of South Africa, 1996.



[60] Against this canvass, the provincial respondents must set up a procurement policy that gives certain groups of people preference in awarding contracts and protects or promotes people who have been discriminated against. They must set out a framework within which the procurement process must take place. When the system is set up and follows the above constitutional requirements, the law must be used to judge the legality of the procurement process. This must be done while considering the constitutional principles of administrative justice and the fundamental values governing public administration and procurement.

[61] When the provincial respondents call for bids to hire private people, they do not have to hire the best bidder or anyone at all. This is the main benefit of using this method to get goods and services. A tender invitation is just 'an invitation to treat' in the eyes of the law. Thus, several laws give every person who bids on something to the government a constitutional duty and a right to have their bid considered during an administrative process that is legal, reasonable, and procedurally fair. This must be done fairly, equitably, transparently, competitively, and cost-effectively. Following this process, our constitution dictates that everyone has the right to administrative action that is legal and reasonable. In addition, it prescribes that anyone whose rights have been violated by administrative action has the right to be given written reasons.<sup>7</sup>

[62] For these rights to be implemented, national laws were made. These laws had to include ways for the courts or other independent and fair tribunals to review administrative actions. Parts of our constitution were put into law through specific targeted legislation.<sup>8</sup> The first part of this targeted legislation specifies that any administrative action materially and adversely affecting any person's rights or legitimate expectations is procedurally unfair. When the provincial respondents act by way of procurement following the provisions of our constitution, they are exercising public power and performing a public function. Deciding to award a bid is an administrative action, so the targeted legislation applies.

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<sup>7</sup> Section 33 (1) and Section 33 (2) of the Constitution of the Republic of South Africa, 1996.

<sup>8</sup> The Promotion of Administrative Justice Act, 3 of 2000.

[63] Therefore, the provincial respondents' public power must be used in line with the rights protected under our constitution.<sup>9</sup> Thus, the provincial respondents have onerous duties and must weigh up different public interests, such as the public good from getting a lower price.<sup>10</sup> The provincial respondents should do this rather than a court of law. As a general proposition, a reviewing court must respect:

*'...a decision that requires an equilibrium to be struck between a range of competing interests or consideration and which is to be taken by a person or institution with specific expertise in that area...'*<sup>11</sup>

[64] The targeted legislation dictates that a court could investigate administrative action following several criteria specified in the targeted legislation. At the end of the day, what is required is that the administrative action taken must make sense.<sup>12</sup> Similarly, following the targeted legislation, our courts are vested with the power to investigate the actions taken by the provincial respondents that otherwise may be unlawful or violate our constitutional principles. Also, a court can review an administrative action if it is illegal or not allowed by the law that gives the power.

[65] This means that public figures and people in power should follow the law. Thus, it is straightforward for me to see why the provincial respondents opposed this application, given their requirement of transparency and the expectation that they engage with this review honestly and in terms of the law. This they did so following the letter of the law.

[66] I turn now to the most seminal case in our procurement law, which extensively deals with the primary issue of materiality.<sup>13</sup> It must be so that reviewing courts should not be influenced by the mere suspicion of wrongdoing or moral turpitude. Innuendo and suggestion are also unfair and unjust ways to accuse someone of wrongdoing or moral turpitude by way of judicial review.

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<sup>9</sup> Section 33 and Section 217 of the Constitution of the Republic of South Africa, 1996.

<sup>10</sup> *Logbro Properties CC v Beddison NO* 2003 (2) SA 460 (SCA).

<sup>11</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 CC.

<sup>12</sup> Section 6 (2) (h) of The Promotion of Administrative Justice Act, 3 of 2000.

<sup>13</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and others* 2014 (1) SA 604 (CC).

[67] In addition, it is clear that small changes to a tender process do not matter, and only significant differences would be a reason for a successful review under the targeted legislation. The real question that needs to be answered is whether the bid's requirement's primary goal has been met. The correct approach regarding the materiality of compliance with legal requirements in administrative law has since been clarified in the seminal case referenced earlier. Materiality is determined by assessing the requirements and the extent of any deviations from the tender.

[68] Material deviations remain the only grounds for review under the targeted legislation. It must be emphasized that the proper approach is to establish factually whether an irregularity occurred. The irregularity must be legally evaluated to determine if it constitutes a ground of review under the targeted legislation. The strict mechanical approach to matters such as this one finds no application.

[69] The focus of emphasizing substance over form in a legal argument is prioritizing a case's essential elements and underlying principles rather than getting caught up in technicalities or procedural requirements. It involves giving more weight to the argument's substance, merits, and fairness rather than strictly adhering to formalities or superficial aspects of the law. Emphasizing substance over form aims to achieve a just and equitable outcome. It recognizes that the purpose of the law is to serve justice and protect the rights of individuals rather than becoming overly rigid and procedural.

[70] This approach allows for a more comprehensive analysis of a legal dispute's facts, principles, and consequences, ultimately leading to a more fair and equitable resolution. In my view, there existed a dearth of material grounds supporting a review of the grant of the tender to the incumbent. Put another way, there were no material grounds or a scintilla of evidence for setting aside the tender awarded to the incumbent.

[71] I say this because materiality in a tender award refers to the significance or importance of certain factors or criteria in the decision-making process. It is the consideration of critical elements that significantly impact the overall outcome of the tender evaluation.

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[72] These factors can vary depending on the nature of the procurement process. When assessing materiality in a tender award, it is crucial to determine which aspects of the tender submission are most critical to the project's success. The evaluation committee or decision-makers can prioritize these critical factors by assessing materiality. This ensures the decision-making process is fair, transparent, and aligned with the tender's objectives and requirements. The provincial respondents did precisely this. This notwithstanding, it is essential to emphasize that the determination of materiality may differ from one organization to another or even from one project to another.

[73] Therefore, it's essential to carefully review the tender documentation and any specific guidelines provided to understand how materiality will be assessed in a particular tender award process. In this case, the tender documents did not prevent an external risk assessment of the incumbent as it was a national tender. The remaining complaints raised were not material and were technical objections that did not touch on the merits of the tender. Further, the legal reasoning behind these arguments needed to be revised as they were highly technical and narrow.

### **Remedy**

[74] Following our jurisprudence, the correct test for a reasonable and equitable resolution in matters concerning judicial review was formulated as follows:

*'...It goes without saying that any incorrect use of an administrative function implicates the Constitution and entitles the aggrieved person to an equitable remedy. In any scenario, the remedy must be proportionate to the harm. The solution must be fair to all harmed and yet successfully vindicate the right that has been violated. It must be fair and equitable in light of the facts of the case, any constitutional principles and the applicable legislation. Nevertheless, it is necessary to point out that a breach of administrative jurisdiction normally implies public law remedies and not private law remedies. The goal of a public law remedy is to avoid, correct or reverse an abusive administrative action...'*<sup>14</sup>

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<sup>14</sup> Steenkamp N.O. v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC).

[75] This means that a just and equitable remedy must have the following characteristics, and it must: (a) be proportionate, (b) be fair and equitable in the context of the dispute, and (c) be comprehensive and flexible, prioritizing substance over form. In summary, courts must strive to be pragmatic in exercising their reviewing powers in devising reasonable and equitable remedies.

[76] This does not mean that courts have the power to make any kind of fair and just order to remedy the problem. A public remedy aims to prevent, remedy, or undo an improper administrative action, provide administrative justice to the wronged person, promote efficient and effective public administration, and strengthen the rule of law. This means that a court is enjoined to provide a fair and reasonable remedy, considering the specific circumstances of each case. This power ensures justice is achieved and any unfairness or injustice is rectified.

[77] The court may consider various factors, such as the rights and interests of the parties involved, the principles of fairness and equity, and any relevant legal principles or precedents. Ultimately, the goal is to provide a remedy appropriate and proportionate to the situation.

[78] It is now appropriate to briefly explore what interim relief has been given in this instance. The current *status quo* is that the applicant, the twenty-second respondent, and the incumbent deliver the services required under the security agreement when and if required. Given the public policy and constitutional issues in this matter, the provisions of the interim injunction should be extended to allow these services to be supplied to the provincial respondents pending the final handing over of all these security services to the incumbent.

[79] This will allow these essential services to be supplied while safeguarding the fundamental rights of all parties. The services will help avoid the loss of life, promote liberty and security, prevent the impairment of property, and promote the right to housing. As the right to housing in certain circumstances is linked to the right to dignity, this is likewise guaranteed. This court is consequently empowered to order a just and equitable remedy to prevent potential abuses of these constitutional rights.

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[80] This approach is compatible with the court's powers under our new democratic dispensation.<sup>15</sup> These powers are extensive and flexible and should be used to address genuine disagreements between the parties. Thus, I would be inclined to give the applicant and the twenty-second respondent an entire calendar month to engage with the incumbent in the handover process, as there may well be workplace-related issues that need to be addressed. This would allow for a smooth transition of these essential services and lend some respect and dignity to the contracted security personnel currently employed by the applicant and the unsuccessful bidder so they will not to be summarily stripped of their employment on truncated notice.

### **Costs**

[81] The subject of the costs of the urgent interim application is also for determination by this court. Our jurisprudence dictates that special cost orders may be awarded in vexatious litigation cases. Vexatious litigation may be defined as frivolous, improper or without adequate substance. I am not persuaded that the litigation in this case was vexatious by any parties. Further, undoubtedly, this is a matter that requires that the services of senior counsel be retained. There are no exceptional circumstances or reasons why costs should not follow the usual party and party scale result.

### **Order**

[82] In the circumstances, I propose that the following order be granted:

1. The applicant's application and the twenty-second respondent's counter application for the judicial review and setting aside the award by the first to ninth respondents of Tender [T002/23] to the tenth respondent are dismissed.
2. The tenth respondent shall take over and commence the operations required under the tender contract within *one calendar month* of the date of this order.

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<sup>15</sup> Section 172 of the Constitution of the Republic of South Africa, 1996.

3. The applicant and the twenty-second respondent shall hand over such operations to the tenth respondent and do everything necessary to enable the tenth respondent to commence with the required security services within the stipulated timeframe.
4. The applicant shall pay the tenth respondent's costs of the review application (including the costs of two counsel where retained).
5. The twenty-second respondent shall pay the tenth respondent's costs of and incidental to the counter application (including the costs of two counsel where retained).
6. The applicant shall pay the tenth respondent's costs of the interdict application brought under case number 9698 / 2023.
7. There shall be no further orders regarding costs.

**E.D. WILLE**  
(Cape Town)

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**GAMBLE, J:**

INTRODUCTION

[83] I concur with the order proposed in the first judgment for the reasons set forth hereunder.

THE MATERIAL FACTS

[84] Since about 2019, the first to ninth respondents (collectively referred to hereinafter as “the Province”) have been attempting to procure a service provider for certain security services required to protect their immovable assets. In particular, the Province sought to avoid the unlawful occupation and vandalism of its land when under construction for public housing projects. This necessitated the availability of a specialised unit of security personnel which might be deployed rapidly to nip the problem of illegal occupation of the land in the bud, or to remove structures illegally erected on the Province’s property. The Province set about this task by advertising a tender which was initially responded to by, inter alia, the applicant (Seal), the tenth respondent (Royal), the eleventh respondent (Red Ant) and the twenty second respondent (Tyte).

[85] That tender (the original tender) was allocated by the Province to Seal and Tyte in April 2021. Red Ant was dissatisfied with the allocation of the original tender and sought to review the allocation thereof in this Division under case no. 9370/2021, citing the Province’s erstwhile Department of Human Settlements<sup>16</sup>, Seal and Tyte as respondents.

[86] When the matter came before Binns-Ward J in June 2022, it was common cause that the Province had bungled the process and that the original tender fell to be set aside. On 8 August 2022, His Lordship delivered a considered

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<sup>16</sup> Subsequently that department merged with the Province’s erstwhile Department of Transport and Public Works to form the Department of Infrastructure – the sixth respondent herein.



judgment and, inter alia, granted an order declaring that the original tender was invalid and fell to be reviewed. The court suspended the declaration of invalidity and directed that an expedited process be commenced *de novo* in order to procure the same services. That process was to be completed within six months. The Solomonic intention of the suspension of the declaration of invalidity was to permit Seal and Tyte to continue to discharge their obligations under the original tender, thus providing the Province with services it so desperately required.

[87] The Province then embarked on a fresh exercise to procure a suitable service provider. On 21 April 2023 it advertised a revised tender (the subject of this review) through the issue of a competitive bidding document. I shall refer to this as the new tender. Prospective bidders were invited to bid for a fixed term contract of 24 months with the closing date being 9 May 2023. Certain of the relevant details in the bid document in the new tender will be referred to later in this judgment.

[88] At the closing date of the new tender 14 bids had been submitted including those of Seal, Tyte and Royal. These bids were classified by the Province as “responsive bids” and accordingly clause 9.4 of the bid document came into operation. That clause establishes a procedure for the evaluation of responsive bids in terms of –

- (i) functionality,
- (ii) price,
- (iii) preference, and
- (iv) assessment of risk.

[89] I shall deal with these individual criteria more fully below. Suffice it to say at this juncture that when the responsive bids were subjected to the functionality test, 10 of them failed with only Seal, Tyte, Red Ant and Royal passing muster on

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this score. The Province was further satisfied that each of these 4 bidders passed the price and preference criteria and it then considered risk assessment. As far as price was concerned, Royal (at R282m) was significantly lower than Red Ant (R391m), Seal (R365m) and Tyte (R350m): the pre-tender estimate by the Province having been calculated to be R345m. After considering that all 4 of the qualifying bidders passed the functionality, preference and risk assessment criteria, the Province awarded the tender to Royal on account of its significantly lower price.

[90] The evaluation of the bids was conducted by the Province's Bid Evaluation Committee (the seventh respondent) and the adjudication thereof was conducted by the Province's Bid Adjudication Committee (the eighth respondent). On 31 May 2023 the Province informed Royal in writing that the bid had been awarded to it in the tendered amount referred to above. Royal was further informed that the 24 month period of the contract awarded under the new tender would run from the date of the letter.

#### STEPS IN THE CURRENT LITIGATION

[91] Seal lost little time in responding to its failure to secure the contract. On 15 June 2023, it approached this court with a brace of associated applications. Firstly, it applied under case no 9698/23 for an urgent interim order stopping the implementation of the tender in its tracks. I shall refer to this as "the urgent application." At the same time, and under case no 9697/23, it sought an order urgently reviewing and setting aside the allocation of the tender to Royal. That is the review currently before this Court.

[92] It bears mention that Royal did not follow the by now customary approach by asking for Part A (interim interdictory) and Part B (final review relief) in a single application. It could not do so because it fired off its salvo demanding urgent judicial intervention even before it had requested (let alone procured) the Province's reasons for its decision. Seal's approach demonstrates that it was intent on securing

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the tactical advantage it had secured in the litigation involving the setting aside of the original tender: if it could stall the implementation of the new tender, it and Tyte could remain in the driving seat and continue to perform the services which they had never acquired under a validly issued tender.

[93] On 27 June 2023 the urgent application was heard by Francis J. His Lordship granted the interim relief sought and fixed a timetable for the filing of the papers in the review. By way of an interim arrangement, Seal and Tyte remained in the driving seat but had to take on Royal as a passenger in the interim execution of the contract, with delivery of the services being split geographically across the Province. In agreeing to that interim arrangement, Seal and Tyte did not question Royal's ability to perform its allocated functions.

[94] The Province and Royal opposed the review (which was intended to secure the entire contract for Seal), while Tyte opposed Seal's application and filed a counter application which would make it the sole provider of services to the Province. And, of course, costs orders were sought all round.

[95] The review application was set down for hearing on Friday 3 November 2023 in circumstances where it ought to have been manifestly clear to the parties that argument would not be concluded in a day. The matter was thus postponed at the suggestion of the Court and as it turned out, argument lasted 3 days – from 28 to 30 November 2023 – whereafter judgment was reserved with the interim order of Francis J to remain in place.

[96] The application by Seal is cast in strident and sometimes emotive language with aspersions of corruption and fraud bandied about. Tyte's application is more focused. At the end of it all, though, matters crystalised and the issues were fairly limited.

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## THE APPROACH ON REVIEW

[97] It is trite that a review such as this is to be determined under the provisions of PAJA<sup>17</sup>: the relevant authorities are set out in [98] below. Before detailing the individual grounds of review eventually settled upon by Seal and Tyte, I propose to briefly set out the approach mandated by the Constitutional Court in reviewing procurement cases such. The leading matter is AllPay<sup>18</sup> which concerned the allocation of a contentious procurement contract for the payment of social security grants to needy South Africans. The matter generated a series of judgments in the apex court and the Supreme Court of Appeal (SCA), including AllPay SCA<sup>19</sup>.

[98] However, before considering the import of AllPay, it is instructive to have regard to what Froneman J said in that case about the general principles of State procurement in our law.

“(c) *Procurement framework legality*

[31] In *Steenkamp*,<sup>20</sup> Moseneke DCJ stated:

“Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1)...

In *Millennium Waste*<sup>21</sup> the Supreme Court of Appeal (per Jafta JA) elaborated:

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<sup>17</sup> Promotion of Administrative Justice Act, 3 of 2000

<sup>18</sup> AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others 2014 (1) SA 604 (CC)

<sup>19</sup> See 2013 (4) SA 557 (SCA).

<sup>20</sup> 2007 (3) SA 121 (CC)

<sup>21</sup> 2008 (2) SA 481 (SCA)

“The . . . Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (section 217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be ‘fair, equitable, transparent, competitive and cost-effective’. Finally, as the decision to award a tender constitutes administrative action, it follows that that the provisions of [PAJA] apply to the process.”

[32] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus section 217 of the Constitution:

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

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.’

[33] The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act<sup>22</sup> (Procurement Act). The Public Finance Management Act<sup>23</sup> is also relevant.

[34] An “acceptable tender” under the Procurement Act is any “tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender

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<sup>22</sup> Act 5 of 2000

<sup>23</sup> Act 1 of 1999

document”. The Preferential Procurement Regulations<sup>24</sup> (Procurement Regulations) define a tender as “a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals”.

[35] An organ of state must indicate in the invitation to submit a tender:

- (a) if that tender will be evaluated on functionality;
- (b) that the evaluation criteria for measuring functionality are objective;
- (c) the evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality;
- (d) that no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and
- (e) that tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the applicable prescribed point systems.

[36] The object of the Public Finance Management Act is to “secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions” to which it applies, SASSA being one of them. Section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure and maintain “an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”. (All internal references omitted)

[99] Froneman J commenced his evaluation of the review in AllPay, by pointing out that in AllPay SCA that court had sought to distinguish between irregularities in the procurement process that were described as, on the one hand, “inconsequential” and, on the other hand, “immaterial”.

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<sup>24</sup> R502 of 2011

“[19] AllPay argues that the Supreme Court of Appeal’s analysis was flawed. On the approach of the Supreme Court of Appeal, an inconsequential irregularity is an irregularity which, despite its existence, would not affect the final outcome of the award. On this approach, an irregularity is inconsequential when, on a hindsight assessment of the process, the successful bidder would likely still have been successful despite the presence of the irregularity. This focus on an inconsequential irregularity is a different enquiry from that commonly used where the courts look at immaterial irregularities.” (Internal references omitted)

[100]           The learned Justice stressed that the correct approach was as follows.

“Proper legal approach

[22] This judgment holds that:

(a) The suggestion that “inconsequential irregularities” are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act<sup>18</sup> (PAJA).

(e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.

(f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.”

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[101] Froneman J discussed the materiality of an alleged irregularity in the procurement process as follows.

**“(b) Materiality**

[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

[29] Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the re-running of the flawed tender process if it can be confidently predicted that the result will be the same.

[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O’Regan J succinctly put the question in ACDP v Electoral Commission<sup>25</sup> as being ‘whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose’. This is not the same as asking whether compliance with the provisions will lead to a different result.” (Internal references omitted)

[102] The record reflects that the Province advertised and evaluated the

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<sup>25</sup> 2006 (3) SA 305 (CC) at [25]



tender process in accordance with its own supply chain policy and regulations. It is not contended that the process was thus unlawful because the Province operated without the requisite procurement instruments in place<sup>26</sup>. Rather, and aside from the first ground *infra* raised by Seal, it is contended that the Province committed a series of reviewable errors under its own procurement policies which warrant the setting aside of the allocation of the tender to Royal.

[103] Against that tapestry, I proceed to set out the several grounds of review relied upon by Seal. All but the first alleged irregularity, were similarly relied upon by Tyte.

#### GROUND 1 – STATE CAPTURE

[104] In its founding affidavit, Seal complains that “*Royal Security has been named by the Zondo Commission<sup>27</sup> and implicated in extensive State capture activities*” and castigates the Province for treating its allegations in that regard with disdain. The Province is accused of “*willfully*” disregarding the allegedly adverse comments made in the Zondo Commission Report (the Report) about Royal when deciding to award the tender to it.

[105] In its affidavit, Seal reproduces an excerpt from the Report in which there are references to a certain Mr. Roy Moodley and alleges that he has an interest in various companies, including Royal. The clear insinuation is that the Province has appointed a service provider which is corrupt and involved in allegations of State capture and that the conduct of the Province is similarly egregious. These allegations are persisted with in the replying affidavit and the heads of argument filed on behalf of Seal.

[106] In AllPay SCA Nugent JA cautioned against the making of such

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<sup>26</sup> Municipal Manager: Quakeni Local Municipality and another v FV General Trading CC 2010 (1) SA 356 (SCA) at [13]

<sup>27</sup> This is a reference to The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State established in 2018 under the chairmanship of then Deputy Chief Justice Zondo and eponymously known as “The Zondo Commission”. The same phrase will be used here.

allegations in a matter such as this.

“[3] It is as well at the outset to clear the atmosphere in which this case has been conducted so as to have certainty on what is before us.

[4] Whatever place mere suspicion of malfeasance or moral turpitude might have in other discourse it has no place in the courts – neither in the evidence nor in the atmosphere in which cases are conducted. It is unfair if not improper to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if cases are adjudicated with innuendo and suggestion hovering in the air without the allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which cases are argued and decided to be openly ventilated.

[5] The affidavits of AllPay evoke suspicion of corruption and dishonesty by innuendo and suggestion but without ever making the accusation directly and to a degree that has carried over to the heads of argument filed on its behalf. To clarify the position AllPay’s counsel was asked at the outset of the hearing whether corruption or dishonesty was any part of its case, and that was unequivocally disavowed. It confined its case to what were said to have been fatal irregularities and it was on that basis that the appeal proceeded.”

[107]           The Zondo Commission point was not abandoned but counsel for Seal did not formally address the Court on it either, preferring to stand by the submissions in the heads. Nevertheless, it remains part of Seal’s attack on the unlawful award of the tender to Royal and must thus be dealt with briefly.

[108]           In the first place, the extract from the Report annexed to the founding affidavit does not say what Seal claims it does. The Report refers to the alleged misconduct of Mr. Moodley in relation to his dealings with, inter alia, the Passenger Rail Association of South Africa (PRASA). While mention is made in a single sentence that Mr. Moodley had “*direct or indirect interests in several companies that provided services to PRASA, including Royal Security...*” there is no evidence placed

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before this Court to indicate the extent of Mr. Moodley's association with Royal, whether corporate or otherwise. Further, the Report does not suggest that Royal per se was guilty of any criminal or other improper conduct

[109] Secondly, Royal has denied in its answering affidavit that Mr. Moodley was a director of Royal at the time of the tender, an allegation which stands uncontested. Thirdly, it is common cause that Royal has not been placed on any list by any organ of State which would preclude it from tendering to do business with the State.

[110] Fourthly, in its replying affidavit, Seal attempts to dredge up further dirt on Seal by referring to a transcript of one of the Zondo Commission's hearings in which it was claimed that Royal had been involved in potential acts of corruption more than 10 years ago. Leaving aside for the moment the fact that Seal improperly sought to introduce new matter in reply without the permission of the Court, the passage relied upon relates to the address of one of the Zondo Commission's evidence leaders in which he sketched the evidence which he intended presenting. The transcript contains no evidence presented to, nor any findings made by, the Zondo Commission in relation to Royal.

[111] These loose and unsubstantiated allegations have no place in a review such as this and only serve as a patent attempt to debase the integrity of the tender proceedings conducted by the Province. Little wonder then that Tyte refused to support Seal on this front. There is no merit in the first ground of review.

## GROUND 2 – NON-COMPLIANT LETTERS OF GOOD STANDING

[112] One of the express requirements of the bid document was that interested parties were required to provide documentary proof of their good standing within the security industry. Firstly, tenderers were to file a letter from PSIRA<sup>28</sup>

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<sup>28</sup> Private Security Industry Regulatory Authority

confirming that they were registered with it, that their registration was up to date and that their dues had been paid. Secondly, tenderers were required to establish that their COIDA<sup>29</sup> registration was in order and that their contributions to that fund were current. Thirdly, there was a series of police clearance certificates relating to the authorization to possess firearms which had to be lodged as part of the bid document.

## PSIRA

[113] Royal's registration certificate with PSIRA had been issued on 8 August 2022 and was valid for 12 months. The company was thus validly registered at the time its bid was lodged on 9 May 2023. In addition to proving that it was duly registered, Royal had to show that its PSIRA levies were up to date. To do so, it procured a letter of good standing from PSIRA which was included with the documents that accompanied its bid. Those bid documents were signed at Royal's head office in KwaZulu-Natal (KZN) on 2 May 2023 and included a PSIRA letter of good standing which expired on 8 May 2023. Evidently, the bid documents were then couriered to Cape Town for submission to the Province by 9 May 2023. Accordingly, when the bid was opened on 9 May 2023 its PSIRA letter of good standing had lapsed the day before. In its answering affidavit, Royal says that PSIRA does not issue updated letters of good standing before the lapse of the previous document. It says it was thus unable to apply for a new document before 9 May 2023.

[114] Relying on the terms of cl 10.2 of the bid document<sup>30</sup>, the Province requested Royal to furnish it with an updated letter of good standing from PSIRA. Royal complied with this request on 7 June 2023 and emailed to the Province a copy of a PSIRA letter dated 16 May 2023, which stated that Royal was in good standing until 14 August 2023.

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<sup>29</sup> Compensation for Occupational Injuries and Diseases Act, 1993

<sup>30</sup> "To note: Should any of the below documents expire prior to the award of the Contract, updated, valid documents will be requested from bidders prior to the award of the Contract."

[115] Seal complains that by purporting to act under cl 10.2 in these circumstances, the Province committed a material irregularity because the document had expired prior to submission of the bid, not after submission and before allocation of the tender. Further, Seal argued that this instance was identical to that which obtained before Binns-Ward J in June 2022 and that the tender fell to be set aside on that basis alone.

[116] In the first instance, the case is fundamentally different to that which was considered Binns-Ward J. In that matter, Seal did not submit any proof whatsoever that it was in good standing with PSIRA. Here, the letter had lapsed the day before the bid was submitted and it is reasonable to understand the difficulty Royal had in timeously procuring an updated letter by 9 May 2023. Most importantly, though, by the time its tender was evaluated by the Province, Royal was, as a matter of fact, in good standing with PSIRA.

[117] In my considered view, the present situation falls squarely within the approach sanctioned in AllPay. The purpose of requiring Royal to submit a letter of good standing was to ensure that it was in good standing with PSIRA at the time the tender was issued and this was factually established. The materiality of Royal's compliance has been conclusively established and in the circumstances there has been no violation of the rights of either Seal or Tyte to just and fair administrative action. The PSIRA argument must thus fail.

### COIDA

[118] The COIDA point is really a different shade of grey. Royal's bid included a letter of good standing under COIDA which had expired on 30 April 2023. In its bid document it explained that it was currently in good standing with the Department of Labour in all respects but that it had not yet received the requisite letter due to an alleged unforeseen delay on the part of the Department. It attached its earlier certificate as proof of registration and consented to the Province verifying

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this should the need arise.

[119] In the process of evaluating the bid the Province took its own steps to verify whether Royal was in good standing with the Department of Labour by downloading a copy of the COIDA letter of good standing from the internet. In my considered view, this situation is similarly addressed by the materiality approach advocated in AllPay. Royal was hamstrung by bureaucratic issues beyond its control and was unable to furnish an updated letter through no fault of its own. But the point remains – it was COIDA compliant when the tender was awarded.

[120] Once again, Seal and Tyte have not established that their rights to fair and just administrative action have been materially affected and the review must fail on the COIDA point too.

#### Police Clearances

[121] Lastly, there was a requirement that Royal's director was required to submit a police clearance certificate. Seal complains in its supplementary founding affidavit that the document lodged by Seal was outdated. The problem that Seal has is that there is no statutory or regulatory provision that it could rely on to establish that such a certificate was time bound and had a limited shelf-life.

[122] In its heads of argument, Seal seeks to extricate itself from its self-created snare by referring to provisions of the Immigration Act and the regulations promulgated thereunder which fix a time-period for the validity of a police clearance certificate issued in relation to immigration applications. The inapplicability of the comparison is self-evident. The Immigration Act and its regulations are specific to that area of the law and do not create a binding requirement in respect of police clearance certificates generally. This ground of review must similarly fail.

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### GROUND 3: FUNCTIONALITY

[123] As para [35] of AllPay makes plain, if the invitation to tender prescribes functionality as a criterion for consideration by the evaluating authority, there are a number of considerations that come into play. In this case, para 9.4 of the bid invitation sets the parameters for the evaluation by stating that “*The procedure for the evaluation of responsive bids is **Functionality, Price and Preference.***”

[124] The invitation proceeds to set out the manner in which, first, functionality will be scored. To this end the bidder is to complete a lengthy questionnaire in tabular form in which all manner of its operational abilities is assessed through a self-scoring exercise. The bidder is informed that it must achieve a minimum score of 70% on functionality before it will be entitled to be evaluated on the price and preference criteria. The price tendered is then evaluated according to a prescribed formula, as is the tenderer’s entitlement to claim points for preference under the relevant Preferential Procurement Regulations of 2022. This step involves the consideration of Black economic empowerment scoring. The Province’s evaluation of Royal’s “Risk Assessment” (the last criterion for consideration) was a keenly contested aspect of this case and will be dealt with later in this judgment.

[125] Before doing so it is necessary to consider Seal’s attack on the Province’s assessment of Royal’s functionality score. As is customary in exercises of this kind, the losing bidder embarks on a detailed examination of the scoring exercise in an endeavour to reduce the winner’s score below the set minimum - here 70%. It is a painful and pedantic exercise in nit-picking in which points are sought to be pared down bit by bit until the aggregate score is reduced to below the threshold. In an attempt to avoid prolixity, I shall endeavour to deal only with the most important functionality arguments raised by Seal.

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Mr. Ndhlovu

[126] Seal alleges, firstly, that an incorrect scoring was provided by Royal in respect of the experience of its contracts manager, Mr. Themba Ndhlovu, who is singled out for allegedly failing to make the 20 year mark required for his experience to count in full. In the bid document, Mr. Ndhlovu's experience is listed with 4 different employers in the aggregate of 18 years, the last of which was with a firm called Isidingo Security Services (Isidingo). Seal proclaims that he is short of 2 years and that Royal's score of 5 points for this employee should have been marked down accordingly.

[127] The Province counters this challenge by pointing out that according to his curriculum vitae, Mr. Ndhlovu had last worked for Isidingo in 2018 and that Seal had not taken his employment over the period 2018 – 2023 into account. It had thus accepted Royal's answer that Mr. Ndhlovu had the requisite 20 year period of employment in respect of the points claimed, on the assumption that he had been employed in the interim by Royal.

Training

[128] Then there is the scoring on Royal's training practices where it was scored 9 out of a possible 10 points. Seal complains, for instance, that there is no supporting documentation that a designated training company had been duly accredited; that no training certificates were attached and that the names of persons allegedly trained were repeated on the attendance registers at such training.

[129] The Province argues, in my view quite correctly, that Seal has sought to demand a level of detail which was not called for. Importantly, there is no provision in the bid document which provides that the failure to render the level of detail contended for by Seal would lead to disqualification of the tender.

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## Firearms

[130] Next there is the scoring for firearms, in particular handguns and shotguns, which Seal complains was incorrectly calculated. In particular, it complains about one mark out of a possible four being awarded in respect of shotgun proficiency. In my view, Seal has misinterpreted the import of paragraph 6.1 of the functionality assessment.

[131] That paragraph provides for a sliding scale, which operates as follows. Clause 6.1.1.1 provides for a maximum of 24 staff and shotguns, for which one point will be awarded. In other words, anything below this threshold qualifies for one point. The provision does not stipulate, as Seal seeks to suggest, that it is only if a minimum of 24 shotguns are available, one point will be awarded. Clause 6.1.2 contains a similar sliding scale in respect of handguns.

[132] Clauses 6.1.1.2 and 6.1.2.2 of the functionality assessment state that for between 25 and 50 staff and shotguns or handguns, as the case may be, a maximum of two points is available to be claimed. Thus, this requirement has a minimum threshold - the bidder must have 25 or more, and fewer than 50, staff and handguns or shotguns to obtain the necessary points. And finally, there are clauses 6.1.1.3 and 6.1.2.3 which provide that if there is in excess of 51 staff and shotguns or handguns, the bidder is entitled to claim a maximum of four points.

[133] Royal put up three valid shotgun competency certificates and two valid handgun certificates. In the circumstances the awarding of one point out of four in respect of these firearms by the Province cannot be assailed.

## Reaction teams

[134] Seal makes a similar complaint regarding the fact that Royal was incorrectly awarded three points (out of a possible ten) in respect of the claim for its reaction team. Once again the relevant table in the bid document comprises a sliding

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scale with a minimum of three points on offer if the bidder has a minimum of 24 staff and shotguns available for its reaction team – there is no mention of handguns. Thus Royal was allocated the minimum number of points in view of the size of its staff component and the Province has not been shown to have erred in that regard.

### Competency certificates

[135] Seal's next quibble relates to competency certificates issued to firearm licensees employed by Royal. It says that the competency certificates issued to a number of Royal's personnel had expired and that the Province erred in allocating points on this score. The Province and Royal both contend that under the Firearms Act<sup>31</sup> a competency certificate is a document that is to be distinguished from a firearm licence.

[136] The Province contends further that if s10(2) of the Firearms Act is properly interpreted it is apparent that a competency certificate runs hand-in-hand with a firearm licence: for so long as firearm holders' licences are valid, their competency certificates remain valid and, when the former lapse after 5 years, so do the latter. Royal has produced a series of competency certificates that are prima facie valid and there is no obvious reason to doubt this.

[137] In reply to this argument, Seal relies on sections 10, 20 and 27 of the Firearms Act to contend that a competency certificate used for business purposes automatically expires after five years. In my view, the argument is flawed. Section 10(2) provides that a competency certificate remains valid for the duration of the validity of the licence to which it attaches. Section 27 provides that the period of validity of a firearm used for business purposes, not the competency certificate, is 5 years. Then section 28(1)(a) provides that a licence issued under that act only terminates on the expiry of the relevant period contemplated in section 27, unless it

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<sup>31</sup> 60 of 2000

is renewed in terms of section 24.

[138] Consequently, the position is that when a firearm licence is renewed, the competency certificate to which it relates retains its validity and does not terminate automatically after any specified period. It follows, in my view, that there was no reason for the Province to conclude that the relevant competency certificates complained of had expired and, as mentioned already, the certificates themselves appear on the face of it to be valid. In the circumstances, there is no merit in the claim that Royal's employees' competency certificates are not in order.

[139] For these reasons, the complaints raised by Seal under ground 4 do not support its claim that the allocation of the tender falls to be reviewed.

#### GROUND 4: OPERATIONAL RISK ASSESSMENT - "A SECOND BITE AT THE CHERRY"

[140] This ground of review was the most hotly contested area in argument. The background to the argument is that the bid document required a physical assessment of a tenderer's ability to render the services tendered for after a so-called desk-top assessment had been made. Broadly speaking, this involved employees of the Province's Department of Police Oversight and Community Safety (DoCS) visiting a tenderer's premises and conducting an inspection to see whether it measured up to the requirements of the bid document. This is called an Operational Risk Assessment (ORA) and its purpose was to evaluate what risk of failure might eventuate if the tender was awarded.

#### The Bid Document

[141] For the sake of completeness it is necessary to quote *in extenso* from the bid document regarding the ORA in order to evaluate the issues in dispute.

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#### “9.4.4 Risk Assessment

The highest scoring bidder, after the evaluation of Functionality, Price and Preference, will be subjected to an operational risk assessment to **verify** the actual ability of the bidder to provide the services in accordance with the scope of the work set out in the bid documents relevant to the risk for the [Province] in using the highest scoring bidder to render the services. The risk assessment takes, inter alia, into account quality, reliability, viability and durability of a service and the bidder's technical capacity and ability to execute the contract.

The operational risk assessment will be performed in terms of an evaluation performed by the Department of Police Oversight and Community Safety (DoCS) according to the criteria set out in the Operational Risk Assessment attached hereto as **Schedule D4**.

In accordance with section 5 of the PSIRA regulations, every security business applying for registration as a security service provider must, for the purposes of compliance with the provisions of section 23(2)(b) of the Act<sup>32</sup> have the infrastructure as listed under Infrastructure and capacity necessary to render a security service and as such the operational risk assessment will assess whether the prospective service provider's business has the capacity, knowledge, infrastructure, support and systems in place, relevant to the risks involved to deliver the required security service.

The Department Of Infrastructure, via DoCS, reserves the right to conduct in person visits to the premises of any prospective bidders and those of the references provided by prospective bidders, to assess the operational capabilities of bidders applicable to this bid relevant to the risks involved.

The highest scoring bidder will achieve a risk assessment score (by using the Operational Risk Assessment hereto attached as Scheduled D4) which is then converted to a risk rating that will enable the [Province] to make an informed decision as to the level of expected service and the risk tolerance that the [Province] is willing to absorb.

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<sup>32</sup> Apparently a reference to the Private Security Regulation Act, 56 of 2001

The operational risk assessment will result in a score that will equate to a risk rating as depicted in Table 1, below...<sup>33</sup>

The **minimum qualifying score is 61%** in order to pass the risk assessment in accordance with the Purchaser's acceptable supplier risks tolerance categories of moderate and low.

Should the highest scoring bidder not achieve the minimum score of 61%, the bidder will not be considered further, and the process of the operational risk assessment shall be repeated with the second highest scoring bidder, and the process may be further repeated, if necessary, until a bidder achieves the minimum qualifying score. This is also done in the interest of time and to avoid the [Province] spending unnecessary time and cost on assessment of all bidders which have passed the minimum functionality threshold.

The successful bidder's risk remains valid for a year after which it will be reviewed by the...DoCS... according to the criteria set out in the attached Operational Risk Assessment.

While the operational risk assessment will be done by means of personal interviews, site visits and reference checks, the operational risk assessment is guided by Regulation 5 of the Private Security Industry Regulation Act, 2001 (Act No. 56 of 2001).

The operational risk assessment questionnaire is structured in such a manner that a set of questions relating to a specific security service function, may be applicable to more than one security service category/categories and service items per category.

The operational risk assessment will include but is not limited to the evaluation of the following aspects of delivering a security service to the [Province] and Provincial Public Entities.

a) Management profile...

b) Communication...

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<sup>33</sup> The table classifies a score of 0-40% as "Extreme", 41-60% as "High", 61-80% as "Moderate" and 81-100% as "Low".

- c) Training...
- d) Control Room...
- e) Security Vehicles...
- f) Firearm Management...
- h) (sic) Armed Response Vehicles..."

The bid document contains detail of each of these elements of the operational risk assessment.

[142] Because of the time limits imposed on the revised process by the order of Binns-Ward J, the Province, in contradistinction with its expressed intention contained in the passage referred to above, decided to conduct an ORA of all four of the qualifying bids simultaneously. It explains that its thinking in this regard was that it wanted to avoid an unnecessary delay in the event that the first risk assessment failed to make the grade and it was then required to assess the remaining bidders *seriatim*.

#### The ORA procedure adopted

[143] While Seal and Tyte are both based in the Western Cape, Royal is not: as stated its head office is in KZN. Believing that the contract was intended exclusively for local firms, Seal attacked the manner in which the Province went about conducting Royal's ORA by assessing two aspects thereof (armed guarding and armed response vehicles) at its head office.

[144] In the founding affidavit Seal says that the ORA of Royal was conducted twice – on 22 May 2023 in Bellville and on 29 May 2023 in KZN – whereas it and Tyte were only assessed once. Seal goes on to assert that Royal had performed "dismally" in the Bellville assessment and that it was afforded a second

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opportunity to cure the “deficiencies uncovered” during the first assessment. Hence, Seal and Tyte’s claim that Royal was afforded the proverbial second bite at the cherry.

[145] In its answering affidavit the Province explains what happened.

“30. The first assessment of which Seal complains, which took place on 22 May 2023, was conducted by representatives of the [DoCS] pursuant to clause 9.4.4 of the bid document. A full copy of the report of the assessment is attached... I refer in particular to paragraphs 3.1 of the report. This shows that, in respect of Royal Security, item A.2, in respect of armed guarding, and item A.7, in respect of armed response vehicles were ‘not assessed’. The reason for these aspects not being assessed is provided in the fourth bullet point under the table, which is to the effect that the relevant assets were at the Durban head office of Royal Security. Accordingly, on the face of it, the assessment was incomplete.

31. When regard was had by the [Province’s] officials to the above mentioned risk assessment, it was realized that it had been conducted at the incorrect address: whereas Royal Security had leased premises in Bellville in order to establish a presence in the Western Cape, its head office was in Durban, where its principal resources were located. I refer in this regard to the bid document of Royal Security, from which it was apparent that its head office was in Durban... For this reason, it was considered that it would be unfair to Royal Security not to have it assessed at its head office, and for this reason it was assessed at its head office in Durban on 29 May 2023.”

[146] In denying that it acted unfairly towards Seal and Tyte, the Province goes on to say that it was concerned that a failure to conduct a complete ORA of Royal at both premises might have been unfair to Royal and exposed it to a review application by the latter. It points out further that the scoresheet for Royal’s ORA was not manipulated as alleged by Seal but rather that some aspects of the ORA were conducted in Bellville and the others in KZN.

[147] The Province’s affidavit also deals with Seal and Tyte’s allegations that Royal did not have the capacity, skills or infrastructure in the Western Cape to render

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the required services under the contract.

“37. The bid invitation was an open bid, advertised nationally and provincially in the Western Cape. No bidder was prohibited from participating in the bidding process because its principal operations were not in the Western Cape. The clear purpose of this approach was not to confine the submissions of bids to only local, Western Cape based companies; and to broaden the reach of the advertisement in order to enhance competition between bidders, which would result in a more competitive and cost-effective process. These are all core considerations enshrined in section 217 of the Constitution.

38. The bid document did not provide that an assessment could not be done outside the borders of the Western Cape. On the contrary, it was logical and fair that, if a bidder's head office and its principal resources were outside the borders of the Western Cape, it should be assessed there.

39. Paragraph 11 of the bid document... states that it is required that a service provider 'either have a registered office<sup>34</sup>/control room or provable presence within the area they are tendering, all the service provider must indicate in its response to the bid the mechanism the service provider will use for the management control of the guards in that area in the absence of a physical presence in the area.'

40. Royal Security complied with this requirement: it furnished as part of its bid a lease agreement in respect of its premises in Bellville.

41. I wish to add the following in respect of this issue: it could never be expected of a bidder, in the particular circumstances, to have all of its resources ready and available in the Western Cape at the time of bidding. This would simply be impractical, and would serve to exclude worthy bidders. Rather, the approach was that regard should be had to the resources of the particular bidder, even if these were situated outside the borders of the Western Cape. Obviously, this would require operational and management steps to be taken by a successful bidder, in this case Royal Security, once the tender was awarded. If, for

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<sup>34</sup> "Registered office" is defined in the bid document as "the official address of a security company".



example, it failed to perform in any of its duties, this would be taken up with it on an operational level where penalties would be applied where appropriate.

42. Finally, on this topic, I should point out that after the award of the tender, and pursuant to an order by Justice Francis in respect of the interim relief claimed by Seal and Tyte, all these entities were permitted to render the particular services, upon the request of the Province. Royal performed certain services for the Province, particularly at the Mossel Bay site referred to in the course of the application for interim relief; and no issue has arisen with respect to the services provided by it.”

[148] As a consequence of having conducted the Royal ORA both locally and in KZN, the Province was satisfied that Royal attained the highest score and that its bid should be accepted.

[149] Having considered the Province’s reply on this aspect of the case (which is the version which must be tested in the circumstances), I do not agree with Seal’s somewhat brash argument that it was reasonable to conclude *“that the Province followed Royal across the country like a puppy until it could say, and tick a box, that Royal has what the tender invitation had in mind.”* On the contrary, I consider that the Province conducted the enquiry properly and I am satisfied that neither Seal nor Tyte was treated unfairly in the ORA process.

[150] In addition, Seal and Tyte have not explained how the “second bite” argument resulted in any material irregularity as contemplated in AllPay. In the passages in the bid document cited above, the Province did not limit its ORA’s to a single interview on a particular date or at a specified place. Rather it intended to do so *“by means of personal interviews, site visits and reference checks...”* thus affording itself the requisite degree of flexibility that a tender process such as this demanded.

[151] At the end of it all, the approach adopted by the Province was in accordance with the touchstone of public procurement – the promotion of

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competition and cost-effective tendering. Importantly, the exercise resulted in a significant saving for the public purse – around R83m when compared to Seal's price. In my view, then, there is no merit in the attack advanced under ground 4 on the reviewability of ORA process.

#### GROUND 5 – PRICE TOO LOW

[152] That then leads to the last ground of review. Seal raises the rather curious point in its papers that the price put up by Royal was “*economically unsustainable*” and “*out of kilter with market related pricing*”. The suggestion is perplexing because the primary purpose behind competitive bidding is ultimately to procure a good price: there is nothing either unlawful or unconstitutional about one bidder undercutting another.

[153] Be that as it may, Seal has not demonstrated in its papers how Royal's lower bid was either unlawful or how it constituted a reviewable error. And, at the end of the day the point was not pursued in either Seal's heads or oral argument, discretion thus prevailing over valour.

#### CONCLUSION

[154] I agree with the first judgment that that the applications are without merit. The correct order in such circumstances is to dismiss the applications and it is consequently not necessary to consider a just and equitable order under s 172(1)(b) of the Constitution. The parties were all in agreement that in the event of the reviews failing, they should be afforded a meaningful period of time to facilitate the handover of the service throughout the Province to Royal. The period of 1 month contemplated in the order made in the first judgment is more than adequate to address the practicalities of the situation.

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## COSTS

[155] Counsel for Seal and Tyte argued that, in the event of the reviews succeeding, costs should follow the result. But in their world, what is good for the goose is not necessarily good for the gander, and an argument was advanced along the lines of Biowatch<sup>35</sup> that the losers should not be out of pocket for exercising their constitutionally protected rights. The argument loses sight of the fact that Seal and Tyte were vindicating contractual rights in the public law domain which were only of pecuniary interest to them. And, it has to be born in mind too that for the better part of the contemplated duration of the first tender, they have reaped the financial benefits of a contract which was never lawfully awarded to them.

[156] Counsel for the Province submitted, correctly in my view, that Seal's allegations relating to the Zondo Commission necessitated the Province entering the fray to clear its name, whereas often the Province would abide in a matter such as this. For this reason, counsel asked that Seal be ordered to bear the costs of the Province's opposition. I consider that this is fair in the circumstances, due regard being had to the baselessness of the allegations. A costs order will serve to confirm the Court's deprecation of Seal's conduct on this score.

[157] Lastly, there are the costs of the urgent application which were reserved by Francis J. The parties were in agreement that these costs should follow the result in the review and so it must be ordered that the costs of that application are to be costs in the cause.

**Accordingly it is directed that there be an order in the terms proposed in the first judgment.**

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**GAMBLE, J**

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<sup>35</sup> Biowatch v Registrar of Genetic Resources and others 2009 (6) SA 232 (CC)

Appearances

For the Applicant  
Instructed by

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For the 1-9 Respondent  
Instructed by

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For 10<sup>th</sup> Respondent  
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