



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. CA213/2021

In the matter between:

THE MINISTER: NATIONAL DEPARTMENT OF
PUBLIC WORKS & INFRASTRUCTURE

Appellant

and

HBC CONSTRUCTION (PTY) LTD
RODPAUL CONSTRUCTION (PTY) LTD
NDC GENERAL BUILDING CONSTRUCTION
SERVICES CC

First Respondent

Second Respondent

Third Respondent

APPEAL JUDGMENT

HARTLE J

Introduction

[1] The appellant appeals, with the leave of the Supreme Court of Appeal, against the whole of the judgment and orders of the court *a quo* handed down on 10 November 2020 pursuant to an application for judicial review under the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”). The concerned orders read as follows:

- “1. The impugned decisions are reviewed and set aside.
2. The tender is remitted back to the department for reconsideration in terms of the provisions of section 8 (1)(c)(i) of PAJA.
3. That the first respondent (appellant) shall pay the applicant’s (first respondent on appeal) taxed or agreed party and party costs in this application, as well as the applicant’s (first respondent on appeal) taxed or agreed party and party costs under case number 661 / 2020 in the Eastern Cape High Court, Grahamstown.”

[2] The “impugned decisions” were made during the evaluation and award by the appellant as “employer” of a tender in the arena of public procurement. The administrative action under scrutiny entailed the following:

- 2.1 the decisions to declare as administratively responsive the bids of the second and third respondents;
- 2.2 the decision to award the tender to the second respondent; and
- 2.3 the decision to declare the bid of the first respondent ineligible for the tender.

[3] The tender was described as for:

“Port Elizabeth Kwazakhele SAPS: Application for condition based maintenance of civil, electrical & structural elements of Station and Official Quarters- Reference Number 19/2/4/2/2/6405/151” (“the “tender”).

Salient facts

[4] The appellant placed an advertisement for the tender during April 2019 inviting bids from interested parties.

[5] The bid invitation for the tender recorded that the bid would be evaluated in terms of the 80/20 preference points scoring system. To pre-qualify for the tender, bidders would have to have a B-BBEE status level of between 1 and 3 and would have to subcontract a minimum of 30% of the value of the tender to EME’s or QSE’s that are 51% owned by “black people”.

[6] A minimum functionality score of 50% in relation to the criteria set out in the bid invitation was required for further evaluation and only bidders that met the minimum threshold for local production and content would be considered.

[7] A compulsory site meeting for prospective bidders held on 16 May 2019 for the purpose of clarification was duly attended by the first respondent and it submitted its bid together with 28 other tender hopefuls prior to the stipulated closing date for the bid of 18 June 2019.

[8] All three of the respondents’ bids survived the responsive phase. The other 26 bids were declared “administratively non-responsive” for a variety of reasons

including that mandatory pre-qualification criteria were not met, and mandatory documents were either not submitted at all or were not correctly completed and submitted.

[9] In the final outcome the first respondent's bid was declared ineligible by the appellant and the tender was awarded to the second respondent.

[10] As an aside it was initially understood by the first respondent that it had been trounced from the bidding contest even before having been evaluated for price and preference. (Mr. Nepgen who appeared on its behalf however fairly conceded that it had to be accepted, on the application of the *Plascon-Evans* Rule, that the first respondent had endured the "race" until it was excluded as a result of a risk determination undertaken by the appellant in the final evaluation stage of the tender process, that is, after it had been scored points for price and preference.)¹

[11] The brief reason indicated to the first respondent for the appellant's decision reached in the procurement process that it had been unsuccessful (*sans* any justification given for why the second respondent had instead been awarded the tender since it was not a bone of contention at the time) is that it had "*Failed the risk assessment due to non-compliance with quality and adherence to contractual commitments.*"

¹ This conclusion follows properly upon an application of the *Plascon-Evans* Rule referred to in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 631 I – 635 C.

The Tender

[12] In terms of the tender Data, the Standard Conditions of Tender (SCT) as contained in Annexure “F” of the CIDB’s revised Standard for Uniformity in Construction Procurement (“the Standard”) promulgated in Government Gazette Number 29138 dated 18 August 2006, as amended from time to time, were applicable to the tender, as varied by the tender Data.²

[13] The tender Data amended and supplemented the Standard Conditions of tender and were required to have precedence in the interpretation of any ambiguity or inconsistency between it and the SCT.

[14] Clause F.2.1 of the tender Data set out the eligibility criteria for the submission of a tender offer which included the following:

14.1 eligibility requirements in relation to CIDB grading in part A;

14.2 functionality criteria, weighting and threshold value in Part B, recording specifically that *“Functionality may only be applied as a prequalification criterion. Such criteria establish minimum*

²²² The standard is issued in terms of sections 4 (f), 5 (3) (c) and 5 (4) (b) of the Construction Industry Development Board Act 38 of 2000 read with Regulation 24 of the Construction Industry Development Regulations, 2004 (as amended) issued in terms of section 33. The Standard for Uniformity in Construction Procurement was first published in Board Notice 62 of 2004 in *Government Gazette* No 26427 of 9 June 2004. It was subsequently amended in Board Notice 67 of 2005 in *Government Gazette* No 27831 of 22 July 2005, Board Notice 99 of 2005 in *Government Gazette* No 28127 of 14 October 2005, Board Notice 93 of 2006 in *Government Gazette* No 29138 of 18 August 2006, Board Notice 9 of 2008 in *Government Gazette* No 30692, of 1 February 2008, Board Notice 11 of 2009 in *Government Gazette* No 31823 of 30 January 2009, Board Notice 86 of 2010 in *Government Gazette* No 33239 of 28 May 2010 and Board Notice 136 of 2015 in *Government Gazette* 38960 of 10 July 2015.

requirements whereafter bids will be evaluated solely on the basis of price and preference”; and

14.3 eligibility requirements in respect of “*risk to employer*” in Part C.

[15] Clause F.3.11.1 of the tender Data recorded that “*the evaluation of responsive tenders is Method 2.*”³

[16] Clause F.3.11.1 of the STC sets out method 2 and records that “*Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point system prescribed in paragraphs 4 and 5 below.*” This is indeed consistent with what is set out in Part B of F.2.1 of the tender Data.

[17] Clause F.3.11.3 of the STC, under the rubric of “*Method 2: Functionality, Price and Preference*”, sets out the basis upon which points will be allocated for both price and preference and records at paragraph 4 (e) thereunder that “*Subject to paragraph 4.3.8 the contract must be awarded to the tender (Sic) who scores the highest total number of points.*”

[18] The reference to paragraph 4.3.8 is a reference to the Standard. This paragraph in the Standard records that: “*A contract may be awarded to a tender (Sic) that did not score the highest points, only in accordance with section 2(1) (f) of the Preferential Policy Framework Act, 2000.*”

³ This must however be read together with the corresponding clause F.3.11.1 of the Standard which apart from requiring the employer to indicate which method is to be applied, enjoins it in evaluating tender offers to “*evaluate them using the tender evaluation methods and associated evaluation criteria and weightings that are specified in the tender data.*”

[19] Section 2 (1) (f) of the PPPFA in turn records that “*the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraph (d) and (e) justify the award to another tenderer.*”⁴

The Eligibility requirement in respect of risk to the employer

[20] It is necessary to emphasize what the tender Data provided in respect of the requirement of and procedure for the determination of risk (referenced in the review application as the “*impugned process*”) that was adopted by the appellant in declaring the first respondent’s bid ineligible.

[21] Clause C thereof states as follows:

**“C. ELIGIBILITY IN RESPECT OF RISK TO EMPLOYER:
Provisions applicable to Evaluation Method 1 and 2:**

Tender offers will be evaluated by an Evaluation Committee based on the technical and commercial risk criteria listed hereunder. Each criterion carries the same weight/importance and will be evaluated individually based on reports presented to the Evaluation Committee by the Professional Team appointed on the project. A tender will be declared non-responsive and removed from any further evaluation if any one criterion is found to present an unacceptable risk to the Employer.

In order for the evaluation reports to be prepared by the Professional Team, the Tenderer is obliged to provide comprehensive information on form DPW- 09 (EC). Failure to complete the said form will cause the tender to be declared non- responsive and removed from any further consideration. The employer reserves the right to request additional information over and above that which is provided by the Tenderer on said form. The

⁴ These sub-provisions relate to the recognition of specific goals to be outlined in a preferential procurement framework that are not of relevance for present purposes.

information must be provided by the Tenderer within the stipulated time as determined by the Project Manager, failing which the tender offer will *mutatis mutandis* be declared non-responsive.

C.1 Technical Risks:

C.1.1 Criterion 1: Quality of current and previous work

Quality of current and previous work performed by the Tenderer in the class of construction work stated above as per the evaluation report prepared by the Professional Team, based on its research and inspection of a representative sample of the Tender's current and previous work as reflected on form DPW 09 (EC), as well as, if necessary, of any additional work executed by the Tenderer, not reflected on form DPW- 09 (EC).

C.1.2 Criterion 2: Contractual commitment

Adherence to contractual commitments, demonstrated by the Tenderer in the performance on current and previous work, evaluated in terms of:

- a) the level of progress on current projects in relation to the project programme or, if such is not available/applicable, to the contractual construction period in general;
- b) the degree to which previous projects have been completed within the contractual completion periods and/or extensions thereto;
- c) general contract administration, i.e., compliance with contractual aspects such as laws and regulations, insurances, security, written contract instructions, subcontractors, time delay claims, etc. as can generally be expected in standard/normal conditions of contract.

C.2 Commercial risks:

The level to which agreement with the Tenderer is reached in respect of the adjustment of rates which are considered to be imbalanced or unreasonable and to eliminate errors or discrepancies without changing the tendered total price, over and above the correction of arithmetical errors as provided for in F.3.9.”

[22] Despite the method and criteria for eligibility in respect of risk provided for separately under Part C, on the face of it there appears to be an overlap of the criteria relating to quality, contractual commitment, and financial capacity listed under the table for the functionality criteria corresponding to a particular weighting factor. This imparts that these considerations were required to be traversed in the responsive

or qualification phase as an incident of functionality and may have been the reason the court *a quo* determined that the risk assessment that was applied in declaring the first respondent's bid ineligible was "*part of the pre-qualifying criteria that had to be used to evaluate the responsiveness of the submitted bids.*" The tender Data however warned that functionality could only be applied as a pre-qualifying criteria before proceeding to the evaluation that was to ensue thereupon solely on the basis of price and preference.

[23] Clause B provided as follows in this respect:

"B. INDICATE THE FUNCTIONALITY WEIGHTING APPLICABLE TO THIS BID:

Note: Functionality may only be applied as a prequalification criterion. Such criteria is used to establish minimum requirements where after bids will be evaluated solely on the basis of price and preference.

<i>Functionality Criteria</i>	<i>Weighting Factor</i>
RELEVANT CONSTRUCTION WORKS EXPERIENCE ON PREVIOUS CONTRACTS OF A SIMILAR NATURE, SCOPE AND/OR COMPLEXITY	30
REFERENCES FROM CLIENTS/CONSULTANTS FOR PROJECTS OF SIMILAR IN NATURE AND SCOPE	20
FINANCIAL CAPACITY	30
COMPETENCE OF KEY PERSON(S), PROFESSIONAL AND TECHNICAL PERSONNEL	20
Total	100 Points

(Weightings will be multiplied by the scores allocated during the evaluation process to arrive at the total functionality points)

Minimum functionality score to qualify for further evaluation	50
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(Total minimum qualifying score for functionality is 50 Percent)"

[24] It is also relevant to note that the tender Data did not adopt the standard refrain employed in F.3.13 which enjoins an employer to accept the tender offer if in its opinion “*it does not present any risk*” to it. The tender Data provided instead as follows:

“Tender offers will only be accepted if:

- a) the tenderer or any of its directors is not listed on the Register of Tender Defaulters in terms of the Prevention and Combatting of Corrupt Activities Act, 2004 (Act No. 12 of 2004) as a person prohibited from doing business with the public sector;
- b) the tenderer has not:
 - i. abused the Employer’s Supply Chain Management System; or
 - ii. failed to perform on any previous contract and has been given a written notice to this effect;
- c) the tenderer has completed, signed and submitted the PA-11 Declaration of Interest and Tenderer’s Past Supply Chain Management Practices and there are no conflicts of interest which may impact on the tenderer’s ability to perform the contract in the best interests of the employer or potentially compromise the tender process; and
- d) the tenderer is registered with:
 - i the Unemployment Insurance Fund (UIF); and
 - ii) the Workmen’s Compensation Fund.”

The review application

[25] The orders that are the subject of the present appeal were granted in favour of the first respondent who successfully challenged both the award of the tender by the appellant to the second respondent (the culminating decision) and the related decision declaring the first respondent’s bid ineligible pursuant to the risk assessment (the risk decision) undertaken in terms of Clause C. In response to the complaint that the second and third respondents should have been eliminated during the responsive phase already (decisive from the first respondent’s perspective as to what instead happened during the evaluation or award phase and bearing on the issue

of prejudice to it),⁵ the court *a quo* also set aside two discrete decisions of the Bid Evaluation Committee (“BEC”) of the Department declaring these bids as administratively responsive.⁶

[26] The first respondent competed with the second and third respondents (who did not oppose any of the relief sought by the first respondent) in the final contest for the award of the tender, that is in the evaluation phase, theirs being the only three bids that passed the functionality threshold.⁷ The third respondent’s bid was disqualified in this final phase purportedly due to commercial risk, and the first respondent’s due to technical risk.

[27] It is the first respondent’s case that, after having been scored positively for functionality in accordance with the tender Data and applicable regulatory framework, its tender had only to be adjudicated based on price and preference, on which basis it should have prevailed as the winner since its bid was some R3 700 000.00 less expensive than the second respondent’s.⁸ According to the appellant, however, the three responsive bidders, after scoring them points for price and preference, were in any event required still to be subjected to the risk evaluation that had been well portended in the tender data under Part C, as they in due course were, in respect of which the first and third respondents came up short, resulting in the BEC recommending the second respondent for appointment.

⁵ *South African National Road Agency Limited v The Toll Collect Consortium & Another* [2013] 4 All SA 393 SCA (“*Tolcon*”).

⁶ The four decisions, although discrete, are inextricably interrelated.

⁷ In the early outlining of what its case was, the appellant’s treatment of the second and third respondents as responsive bidders was not in issue. Indeed, the premise was initially accepted by the first respondent that both had fairly achieved the functionality threshold.

⁸ It was not less expensive than the third respondent’s bid but the first respondent was happy to theorize that the third respondent was out of the race by this point, having been eliminated by the same risk assessment that it took issue with as being legally impermissible *vis-à-vis* itself.

[28] It is not in contention that the first respondent's tender was responsive and met the required functionality and pre-qualification criteria but, according to the appellant, it floundered when it came to the risk assessment.⁹

[29] It is that risk evaluation that caused certain controversy in the matter and provided the impetus for the review in the first instance before the court *a quo*. Although the first respondent perceived that it had been excluded from the contest even without having been scored on price and preference despite having passed on functionality (a claimed irregularity all on its own according to it), the appellant pleaded that it had been disqualified only in the final stages of the process, and then, as a result of the risk evaluation undertaken by it as foreshadowed in clause C of the tender Data.¹⁰

[30] In its founding affidavit the first respondent maintained that once it had achieved the functionality threshold, the tender Data and legislative framework required its bid to be allocated points for price and preference, but instead of doing so, the department "*undertook the impugned process*" and declared its bid ineligible. The appellant averred to the contrary that, in accordance with the statutory and tender contractual requirements, it scored all three respondents for price and preference, in fact elevating the first respondent to the highest scoring, at least in relation to the second respondent who was in the penultimate contest with it after the

⁹ The first respondent achieved a functionality score of 78%. The second and third respondents achieved scores of 64% and 60% respectively, both considerably lower than the first respondent. All three were thereafter scored for price and points, which put the third respondent in the lead. The third respondent fell out of the race due to the same impugned process that the first respondent complained was unfairly utilized to disqualify it.

¹⁰ The appellant referenced four stages in the tender process: 1) the checking on pre-qualification items, 2) the functionality evaluation, 3) the evaluation on price and preference points, and 4) the determination of risk.

third respondent's bid was disqualified,¹¹ and lastly carried out its risk evaluation, which is when it disqualified its bid.

[31] In its founding papers launching the review application the first respondent criticized the “impugned process” in trenchant terms:

- “20. It has become standard practice for the Department to incorporate into its tender documentation, as occurred in this matter, a process to declare bidders ineligible as a result of “risk to the employer” (“the impugned process”).
- 21. This application concerns, *inter alia*, the lawfulness of the utilization of this process, which utilization self-evidently results in acceptable bids otherwise being declared ineligible often at the expense of the South African taxpayer, as occurred in this matter, where the second respondent was awarded the tender at a price substantially more expensive than that of the Applicant.
- 22. The prudent use of the resources of national government, especially after the much publicized widescale state capture, is a national imperative.
- 23. It is respectfully submitted that the widescale use of the impugned process by the Department and the consequent impugned decisions which flowed therefrom amounts to administrative action which directly affected the constitutional rights and expectations of not only the applicant (first respondent on appeal) but also taxpayers in general.”

[32] To this opening salvo, the appellant retorted:

- “14.1 It is denied that the process whereby risk assessment is utilized is an “impugned process” and denies therefore that utilization thereof justifies the present review application.
- 14.2 It is in fact a constitutional imperative under section 217 of the Constitution, particularly in relation to the principle of cost-effectiveness, that risk assessment forms an integral part of the evaluation process, more particularly as it is not cost-

¹¹ The technical risk assessment in respect of the third respondent was carried out earlier than that of the first and second respondents but not the commercial risk one. The ultimate date when the third respondent was disqualified is unclear but it appears from the record of decision that the third respondent was regarded as the highest scoring bidder among the three of them so must have been reckoned in as a responsive bidder until the end.

effective to award a tender to a party who simply scores favorably on price and preference but there are risks involved in executing the work, whether through lack of experience, adequate personnel or financial resources.”

[33] It is the question of the legal permissibility of this process or practice made provision for in its tender Data that the appellant says it adopts as an “integral part” of its evaluation process in awarding a tender (including the one under consideration), and how it is and was applied in this case (not pertinently dealt with by the court *a quo* in its judgment), that appears to have been a further basis for it to have persuaded the SCA, this apart from its contention that there were reasonable prospects of the appeal succeeding, that the matter was one of substantial importance to the general public and constituted a compelling reason why the appeal should be heard. The appellant contended in the application for leave to appeal in this respect that the matter involved “*an important question of law and the administration of justice generally*” that particularly required the appeal to be heard before this court.

[34] As is illuminated in *Watt Power Solutions CC v Transnet SOC Limited*¹² that question of law, evidently framed as whether functionality can be used as an assessment tool in the adjudication of a tender in the award phase (since the 2017 Regulations applicable in this instance distinguished between objective functionality criteria required to meet the functionality threshold and “objective criteria” applied thereafter in the award phase as a reason not to award a tender to a bidder scoring the highest), has clearly generated controversy that has not yet been

¹² [2022] 1 All SA 892 (KZD) at para [17].

resolved by the courts.¹³ Whether the controversy still needs to be resolved however seems no longer to be an imperative in the light of the recent substitution of the 2017 regulations.¹⁴

[35] In any event the appellant laid the basis concerning this challenge as follows:

- “31. Inasmuch as the provisions related to risk assessment are contained in various tender documentation of the Applicant (Appellant) and are frequently used, a discrete issue of public importance arises which will have an effect on future matters.
32. This is particularly so as indicated, where members of the general public who tender for works through the National Department of Public Works are faced with tender data which is widely used and which contains risk assessment procedures as is in the present instance.
33. It is accordingly imperative to determine whether a risk assessment of a particular tenderer could only be validly employed as part of the functionality considerations or whether it can be utilized elsewhere.
34. In this regard the provisions of section 217 of the Constitution are paramount and a contextual clarification by the above Honorable Court regarding the provisions of section 2 (1)(f) of the Preferential Procurement Policy Framework Act No. 5 of 2000 and the Regulations thereunder are necessary (in this regard this Honorable Court has recently found that certain of the Regulations are unconstitutional).
35. Regulation 11 of the Regulations provide that a contract may be awarded to a tenderer who did not score the highest points whilst regulation 5 (7) provides that each tenderer that obtained a minimum qualifying score for functionality must be evaluated further in terms of price and preference points and any objective criteria

¹³ See in this regard *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* (21158/2012) [2013] ZAWCHC 3 (6 February 2013) in which the court held that functionality criteria must play a role also after the award of points for price and preference. In other words, it must serve as both qualification and award criteria. A controversy regarding the import of the 2017 Regulations is also discussed in *Minister of Finance v Sakeliga NPS (previously Afribusiness NPC) and Others* 2022 (4) SA 362 (CC) but relates instead to the use of pre-qualification criteria in the procurement process to achieve the Constitution’s transformational goals. In any event the order of the SCA in *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) declaring that the Preferential Procurement Regulations, 2017 are inconsistent with the Preferential Procurement Policy Framework Act 5 of 2000 and are invalid was upheld by the Constitutional Court. The ancillary order of the SCA that the declaration of validity was suspended for a period of 12 months from the date of its order expired on 16 January 2023.

¹⁴ The challenge may still require reflection when considering a challenge to the award of a tender under the 2017 Regulations, but in this instance it is really an academic exercise given our decision herein.

- envisaged in regulation 11. The applicant contends that the risk assessment it employed complied with regulation 11.
36. The Standard for Uniformity in Construction Procurement (July 2015) which formed part of the application papers also provides in clause 4.3.8 that a “...contract may be awarded to a tender that did not score the highest of points, only in accordance with Section 2 (1) (f) of the Preferential Procurement Policy Framework Act 2000.
 37. The entire issue of risk assessment and whether or not it is part and parcel of functionality and how it is to be applied is of critical importance and this issue requires the attention with respect of the above Honourable Court.
 38. There is in any event already strong indication in our law that risk assessment could be utilized in a tender process where functionality and price and preference has been considered (see *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (February 2013)).”

[36] In formulating its grounds for the PAJA review the first respondent initially complained primarily that the appellant had utilized the impugned process to declare its bid ineligible *before* having scored it for price and preference. It claimed that it was wrong to have ignored the prescripts of the law and the tender documentation relying on Method 2 that stipulated to the contrary that the appellant was obliged, after it had met the functionality threshold, to so have scored it. Thus, a mandatory and material procedure or condition prescribed by an empowering provision (read here the cumulative provisions of the Preferential Procurement Policy Framework Act, No. 5 of 2000 (“PPPFA”), the Preferential Procurement regulations, 2017 (“the regulations”)¹⁵ and the tender document itself) was not complied with.¹⁶

[37] But even if it was acceptable for the appellant to have used such a process to have eliminated it from the race, so it went on, nowhere in the tender documentation

¹⁵ GNR.32 of 20 January 2017: Preferential Procurement Regulations, 2017 (*Government Gazette* No. 40553), since repealed by GN 2721 published in *Government Gazette* 47452 of 4 November 2022.

¹⁶ See in this respect section 6 (2) (b) of PAJA.

was this risk evaluation stipulated as objective criteria within the contemplation of regulation 11 (2) of the PPPFA Regulations, that being the only recognized basis upon which it could be bested in the final contest as the tenderer “that had scored the highest total number of points.”¹⁷ This too in its view constituted a reviewable ground in terms of the provisions of section 6 (2) (b) of PAJA.

[38] It complained further that the appellant was materially influenced by an error of law in relying on the process it claimed it was both prudently obliged and entitled to employ as a basis to have ruled it out of the competition and, generally, that it had made its decisions flowing from the process arbitrarily and capriciously, that they were irrational, unreasonably asserted, or otherwise unconstitutional or unlawful.

[39] After having had sight of the review record and in amplifying its papers, as it was entitled to, the first respondent raised for the first time the contention that the second and third respondent’s bids should co-incidentally not have been declared administratively responsive in any event.

[40] It asserted that the BEC, and ultimately the Bid Award Committee (“BAC”) that endorsed its findings, had committed a reviewable irregularity when it declared each of their bids administratively responsive.¹⁸

[41] The reason advanced by it for seeking such an order, firstly concerning the second respondent, was essentially that there had been insufficient compliance by it with the PA-09 (EC): List of Returnable Documents that formed part of the tender

¹⁷ According to the record of decision it was not in fact the highest scoring tenderer amongst the three responsive bids. The third respondent scored best but the appellant seemed happy to theorize that the end contest was between the first and second respondents, with the former scoring the highest points.

¹⁸ The provisions of section 6 (2) (b) of PAJA were also relied upon in this respect.

document which listed which documents it was mandatory to submit with the bid. The tender conditions stated that the fully completed sectional summary pages and the final summary page were required to be returned with the tender document. It pointed out that paragraph 1 of the PA-09 (EC): List of Returnable Documents provided unequivocally that *“Failure to submit the applicable documents will result in the tender offer being disqualified from further consideration”*.

[42] It contended as a result that the decision of the BEC to have declared the second respondent’s bid as administratively responsive was unlawful as the latter did not fully complete the sectional summary page but had instead inserted a globular total at the bottom of each section.

[43] The materiality contended for by this irregularity is that the conditions with regard to the list of returnable documents required mandatory completion of the sectional summary pages and the final summary page and, moreover, the BEC had held some bidders strictly thereto by disqualifying them in the early stage of pre-qualification (underscoring the materiality of these conditions certainly as it pertained to them) yet had given the second respondent a free pass by condoning its noncompliance for no special reason. This in the first respondent’s view constituted a further ground for the decision awarding the bid to the second respondent to be declared unlawful and set aside.

[44] The prejudice to it caused by the appellant’s failure to have eliminated the second respondent at this point meant that it had unfairly had to contend with it as a competitor in the final evaluation round and that the bid had as a fact been awarded to the latter as if its tender were responsive. Additionally, on the premise that the third respondent’s bid had also as a fact been disqualified in the final phase (or on

the further projected premise that it should have been disqualified earlier), it pointed out that there ought in any event to have been no call for the appellant to have had any resort to the objective criteria contemplated in regulation 11, as such criteria applies only where there are at least two (valid) competing bids in contention at this juncture. Thus, so the contention went, if the process had been regular in respect of what the BEC was supposed to have found instead, the award of the bid to the first respondent should have been a mere formality once it had achieved the functionality threshold.

[45] The first respondent's concern with the third respondent is that it has a 6 GB CIDB grading limiting the value of the work that could be completed by it up to R20 000 000.00.¹⁹ Although the third respondent was registered as a potentially emerging enterprise which allowed it to submit bids for work in a category higher than it was registered for at the time, in this instance 7 GB, it clarified that this was only permissible when certain preconditions are satisfied which were certainly not met as far as it was concerned. The decision to accept its bid was thus reviewable on the basis that it was not authorised by Regulation 25 (8),²⁰ or that it was influenced by an error of law in accepting that it somehow qualified.

¹⁹ The value of the bid in this instance exceeded R20 million.

²⁰ Construction Industry Development Regulations, Government Notice GN 692 of 9 June 2004 published in Government Gazette No. 26427.

[46] It complained further that the third respondent had also failed to submit a mandatory returnable document, namely a sectional summary page in respect of “*Earthing and Lighting Protection*”, this requirement similarly being a material one.²¹

[47] As for the review grounds concerning the application of the risk assessment, the first respondent in its supplementary affidavit repeated its complaint that the use of such a process undertaken by or on behalf of the department was unlawful, irregular and contrary to the legislative framework applicable to public procurement. It asserted that it did not form part of the functionality assessment (a postulate that the appellant accepted) but contended that if it instead formed part of the award phase, it was certainly not capable of having been used as an objective reason not to award the tender to the highest point scoring bidder.

[48] Leave aside the fact that according to the first respondent it had not at all been scored for price and preference before its disqualification, it bemoaned the fact that the Department had in any event carried out a comparative risk assessment to determine which of the three standing bidders posed the least risk rather than concluding that its own risk profile somehow presented an “unacceptable risk” to it on the basis of its supposed risk eligibility criteria. In this regard it noted that the risk assessment (assuming it to be legally permissible) even on its own terms was problematic in relation to its wording set out in Clause C, in not meeting the standard

²¹ This second ground that the first respondent relied upon enveloped the first. Its primary contention was that the third respondent had been entirely ineligible to have competed for the bid. It raised in its supplementary affidavit a further issue that the third respondent’s BBEE affidavit was also invalid and that it was thus not entitled to have been allocated points for BBEE, an aspect that the appellant simply avoided dealing with in its answering affidavit at all. The appellant purported to gloss over even the first respondent’s primary concern as an inconsequential one and of mere academic interest since the third respondent’s bid had in any event been disqualified.

envisaged by regulation 11 (2) that requires objective criteria to be relied upon to be stipulated in the tender document.

[49] Finally, it asserted that the tender process fell woefully short of being procedurally or substantively fair in the appellant's purported utilization of the risk assessment. In this regard it had, for example, come to its conclusion unfavourable to the first respondent on the basis of a subjective opinion.

[50] It transpired in this regard that on 18 September 2019, the Department had instructed the principal agent ("BNM") to undertake a technical risk assessment of the first and second respondents. (The third respondent was not assessed together with the first and second respondents but had instead been subjected to an earlier technical risk assessment together with Sinclair Gershan Troskie Construction ("SGT") and Blue Disa Trading 754 CC t/a Ulutsha Trading ("Ulutsha Trading"), both of who's bids had been declared administratively nonresponsive yet they were strangely assessed together with the third respondent for risk).²² BNM prepared a report dated 27 September indicating that the second respondent "appears to be the favourable bidder" as between it and the first respondent. It further advised that "From the information available, it appears that the Contractor (meaning the first respondent) is NOT recommended by 50% of referees."

[51] By the appellant's own admission such report was merely a "guideline" and not binding on it. It assured the court that Mr. Ndwandwa, the Department's own

²² The appellant volunteered this information in its answering affidavit claiming it to have been a mistake. Evidently it seems that this trio of bidders (including the third respondent) had tendered more beneficially in respect of price. Why the rules were bent to permit the two nonresponsive tenders back into the contest remains a mystery, but the taint in respect of SGT and Ulutsha Trading at least was self-remedied. From the review record it appears that these five tenderers were thereafter subjected to the commercial risk assessment all together.

project manager (who was said to have then still been in training despite the Department's critical technical skill contended for that made *it* rather than the court better suited to determine any risk to it) had undertaken his "own final risk assessment". But in his report submitted to the BEC this purported evaluation by him was not elaborated upon. Instead, he merely summarized the subjective reflections of BNM, which had been especially qualified with the proviso that its views were "*not to be used for adjudication and appointment purposes as this is subjective and based on opinions of respondents*".

[52] The alleged "*extensive discussions*" that were supposedly had concerning the risk that the first respondent's bid posed to the appellant during meetings of the BEC and BAC were not confirmed in evidence by any member of the committees neither was it borne out by the minutes of the relevant meetings. Indeed, no person on behalf of the Department ventured a reason at all why the first respondent's bid, on its own merit, presented an "unacceptable risk" to it by its acceptance as it were.

[53] Mr. Ndwandwa perfunctorily filed a confirmatory affidavit, without any elaboration of the role played by him in conducing to the decision made by the evaluation committees that the first respondent's bid should be disqualified, neither were the photographs he supposedly presented of sites worked on by the first and second respondents, offered as a visual aide in making their decision and especially condemning the first respondent on the basis of the technical criteria stipulated in clause C, put up in evidence.

[54] The first respondent thus contended that the risk assessment and its application was vague, arbitrary, unfair, entirely subjective (as confirmed by the principal agent) and irrational.

[55] I should add with regard to the process that had pertained in the tender process that other anomalies were also relied upon by the first respondent none of which are especially relevant for present purposes. I do however wish to highlight the first respondent's complaint that the Department had instructed BNM to undertake a risk assessment of SGT and Ulutsha Trading (together with the third respondent) on 7 August 2019, that is after their bids had been declared administratively nonresponsive. Leaving aside the arbitrary and irrational nature of that technical risk assessment revealed in the review record, the first respondent especially questioned how those tenderer's bids could have progressed to a technical risk assessment at the instruction of the Department at all since their bids had already been declared administratively nonresponsive (even if they had tendered more beneficially in respect of price). If it was a mistake to have revived their bids, which the appellant readily conceded, the question remains why theirs were singled out amongst all the other bidders who were similarly disqualified for want of complying with mandatory pre-qualification criteria. A financial risk assessment by the appellant also ensued in respect of the latter two bidders. Except to admit the mistake, the invitation to the appellant to explain how this had happened was simply glossed over in the answering papers.

The appellant's case:

[56] The appellant in its answering affidavit made no bones about the fact that it had declared the first respondent's bid nonresponsive on the basis of the technical risk assessment. It asserted that it had done so only in the last stage of the tender process and on the basis that the requirements for the exercise entailed objective criteria made allowance for in Regulation 11 read together with the provisions of section 2 (1) (f) of the PPPFA. It denied that the evaluation was applied as a part of the original functionality assessment.

[57] As far as it was concerned the basis upon which the risk determination would ensue for all responsive bidders (even if there had been only one in the final run) was unequivocally heralded by the provisions of Clause C. Although conceding that the wording set out in Clause C was not a model of precision, it maintained that on a purposeful and constitutional interpretation of the tender Data that its objective, whilst coincidentally also serving as a condition for the award of the tender, was formulated with sufficient clarity to be applied as objective criteria such as is envisaged in regulation 11. Indeed, so the argument went, if it were simply a question of passing functionality and having an acceptable price and preference rating it would not have been necessary for it to have included it in the tender Data. It further saw no notional impediment or objection to the risk assessment being applied to all qualifying tenders, and not only the highest scoring tender, as a further requirement after scoring on price and preference, as a clearly stipulated condition of the tender.

[58] It defended its utilisation of the tool to evaluate tenders on elements of risk as one that was constitutionally compliant and necessary. It further asserted that the

risk evaluation was fairly undertaken and that it was not open to the court to second guess either its requirements as to eligibility stated in the tender Data, or its ability to recognise and measure what it needed technically as far as it concerned the work to be performed or how it would uniquely evaluate what in its opinion might pose a risk to it in accepting the tender.²³

[59] It added that its entitlement to subject all responsive tenders to the risk assessment is underscored by the provisions of clause F13.3 of the Standard which urges it to: *“Accept the tender offer, if in the opinion of the employer, it does not present any risk.”*²⁴

[60] On the issue of the non-responsiveness of the second respondent’s bid, the appellant readily conceded that the second respondent did not fully complete the sectional summary pages of one of the mandatory returnable documents, instead simply inserting a globular total at the bottom of each section.

[61] It however contended in this respect, as if the element of materiality was there for its convenience only, that there had been sufficient compliance *“in that at the foot of each page the amounts or the particular items were recorded and the Department was in a position to evaluate the tender based on the price and other considerations”*; and that *“(t)he instances where there were disqualifications as a result of tenderers being non-responsive cannot be compared with the completion*

²³ See *Dr JS Moroka Municipality & Others v Betram (Pty) Ltd & Another* (2014 (1) All SA 545 (SCA) at para 10, read with the orbiter remarks in *Millennium Waste Management Supra* at para 16, where the SCA held that: *“It was for the municipality, and not the court to decide what should be a prerequisite for a valid tender...”* Also, in respect of the unique work cut out for bid evaluation committees, our court apply due deference. (*Tolcon* at [27]).

²⁴ However, see paragraph 24 above concerning the corresponding provision of the Standard that was instead included in the tender Data. It is further notable that there is a significant difference between “any risk” and an “unacceptable risk” postulated in Clause C under the risk eligibility criteria. See paragraph 13 above regarding how that conflict ought to be resolved.

by the second respondent of the sectional summary where there was sufficient compliance”.

[62] In as much as there might have been any differences, it failed to take the court *a quo* into its confidence regarding what those differences were in the comparison to demonstrate exactly why it thought certain disqualifications mattered and why the non-compliance by the second respondent with a mandatory requirement for qualification was inconsequential.²⁵

[63] Concerning the position of the third respondent, it simply brushed aside the first respondent’s concern raised that its bid should have been declared nonresponsive especially for want of compliance with the tender’s requirements under Part A because it had been disqualified on risk in any event.

The reasoning and judgment of the court *a quo*

[64] The court *a quo* gave short shrift to the appellant’s pithy explanation as to why it gave a special pass to the second respondent despite its accepted noncompliance with the mandatory tender conditions regarding the returnable documents as follows:

“[34] the only reasonable inference that can be drawn from the fact that the bid document, in particular PA-09, the list of returnable documents requires “**fully completed sectional summary pages...**” is that it is precisely what was required. I’m therefore not persuaded by submissions on behalf of the department (the appellant) that there was sufficient compliance by the second respondent and for this reason, its bid should have been disqualified.”

²⁵ This must be seen against the background that it was not consistent in its approach regarding the assessment of nonresponsive tenders, especially since it purported to give *SGT* and *Ulusha Trading* another go at it as it were. As indicated above, however, the mistake in respect of the latter two tenderers was noted and corrected.

[65] Concerning the weightier complaint against the third respondent that it had been *entirely* ineligible for consideration and should not have gotten past the prequalification threshold, the court *a quo* criticized it for its failure to have provided any substantiation for its bald assertion that the third respondent qualified to be recognized as a 7 GB grading. It properly held against the appellant its election not to respond to the other grounds relied upon as to why the latter's bid should not in the unique circumstances have been declared administratively non-responsive (or have been scored favorably for B-BBEE points) and determined that the BAC's contrary decision reached that its eligibility to have properly advanced to the award phase (where it in fact competed with the first and second respondent in the final round) was undefendable.

[66] As an aside, despite a difference of opinion between the parties regarding when and how the third respondent's bid should have fallen by the wayside, it was not seriously contended before this court that the fact of the third respondent's *exclusion* from the running should not have happened. The appellant's case in this regard was that the third respondent's bid had been declared ineligible only in the final award phase when it failed it on commercial risk. The first respondent argued however that its bid was ineligible from the outset and should not have proceeded beyond the qualification stage into the final round. The latter submission was entirely relevant to its claim of prejudice by the review ground(s) relied upon in this respect.

[67] The court *a quo*'s reasoning in the judgment regarding why it concluded that the application of the risk assessment "as applied by the department was irregular resulting in the entire process being unlawful" was however somewhat confusing.

[68] On the one hand it appeared to accept that it was permissible for the appellant to have utilized the risk assessment as an award criteria but condemned it for having applied it wrongly as a subjective comparison of bidders to determine which bidder posed the least risk, and/or because it did not apply it in a consistent manner in so far as all responsive bidders were concerned.²⁶

[69] On the other hand however it also found that “upon a proper reading of the tender data”, it was “*evident that the risk assessment was part of the pre-qualification criteria that had to be used to evaluate the responsiveness of the submitted bids,*” evidently agreeing with the first respondent that this should have been surpassed by each of the present respondents achieving the required functionality threshold whereafter method 2 required them thence to be evaluated further only in terms of price and preference, *sans* any consideration of risk to the employer.

[70] The impression is created that the court *a quo* meant to conclude that any concerns of any risk to the employer should have been properly dealt with under the mantle of functionality (perhaps not surprisingly since by Mr. Beyleveld conceded that the tender Data was not a model of clarity) and the only consideration going forward would, or should rather, solely have been focused on scoring the responsive bidders on the basis of price and preference. In other words, there was in its view no room to reconsider or re-evaluate functionality (despite what Clause C in the

²⁶ Although it is an academic exercise I consider this to be a persuasive reason why the risk assessment was not applied as Clause C forewarned it would be. In any event one is still left wondering what about the purported risk determination justified the Department in concluding that an acceptance of the first respondent’s bid posed an *unacceptable* risk to it on its own merit.

tender Data might have otherwise indicated) once the functionality threshold had been surpassed.

[71] It further appeared to accept the first respondent's version (in terms of which a dispute of fact existed on the papers that ought to have properly been resolved in the appellant's favour) that its decision to disqualify the first respondent was taken prior to the allocation of points to it for price and preference. This was evidently in its view in itself irregular and enough reason to set aside the decision regarding the purported ineligibility of the first respondent's bid.

[72] The conclusion that the tender process in effect had to be set aside for this reason primarily (without the court below having pertinently pronounced on the issue of the application of the impugned risk assessment or the concept of objective criteria) led to an unsatisfactory outcome. In this regard, although the court *a quo* had discretely found that the second and third respondents' bids should have been disqualified, and by implication that the tender as a matter of formality should have been awarded to the first respondent who was the highest scoring bidder, it ordered that the matter be referred back to the Department for *reconsideration*.

The appeal:

[73] The parties fairly agreed that whatever reasoning the court *a quo* had applied, the focus on appeal should rather be on determining whether it had reached the proper outcome in the circumstances by setting aside each of the impugned decisions under scrutiny before it.

[74] That leaves the next consideration, which is whether the court *a quo* was correct to have granted the remedy it did, assuming that its primary findings in respect of each of the impugned decisions were correct.²⁷

[75] In its application for leave to appeal the appellant complained that a rehearing was necessary because of the order of the court *a quo* referring the matter back to the Department for *reconsideration* in terms of the provisions of section 8 (1)(c)(i) of PAJA. The appellant complained that this in itself caused a conundrum to it yet Mr. Beyleveld who appeared for the appellant had ironically contended in argument before the court *a quo* that the only appropriate order for it to have made consequent to a finding that the process was flawed was indeed to have referred the matter back to the Department for reconsideration.²⁸

[76] It was contended in the appeal however that the court *a quo*, in relegating the risk assessment to a pre-qualification functionality evaluation, had left begging what purpose could be served by referring the matter back for *reconsideration* as opposed to setting the tender process aside in its entirety exactly because the permissibility and application of the risk assessment had not been pertinently addressed in the judgment and would still have to be contended with in any rerun of the tender process as it were. It was asked, for example, whether the appellant had in terms of the court *a quo*'s unclear judgment to now only adjudicate the first, second and third respondents on price and preference (*sans* any risk assessment), in which case, so it

²⁷ As indicated elsewhere, although these were pleaded discretely, each decision was entirely interrelated.

²⁸ See paragraph [49] of the judgment. The order as it stands ought to have caused consternation for the first respondent as well but Mr. Nepgen who appeared for the first respondent contended that it had been unnecessary for it to cross appeal because the effect of the remitting together with the other orders granted should in effect have had as a result that his client would have been the only remaining bidder who was legally eligible to be awarded the contract. From the appellant's perspective however the elephant in the room, being the issue of legal permissibility of the risk determination as an eligibility criteria, will continue to vex the parties going forward.

was theorized, the tender would be awarded to the third respondent which had as a fact come in with the best price (risk aside). It was also certainly not clear whether the second and third respondents were to be excluded in a rerun, this as a result of the court *a quo*'s conflicting finding that because in its view the risk assessment was part of the pre-qualification criteria to be used to evaluate the responsiveness of bids, it followed logically that: "*all three bids (of the applicant, second respondent and third respondents) should have been declared responsive as to functionality*" (Sic). Assuming their bids were to the contrary to be excluded, so the argument went, it would follow that the first respondent would be the only remaining tenderer, in which event, the remitting would serve no purpose.²⁹

[77] Mr. Beyleveld argued before this court against a remittal back to the Department for reconsideration. He contended that if the finding upon appeal was that the risk evaluation offends constitutional imperatives and the provisions of the PPPFA and the regulations thereunder,³⁰ it would amount to the entire process being flawed and the only appropriate order would be one similar to that which was upheld in *Minister of Social and Development and Others v Phoenix Cash and Carry*.³¹

[78] Mr. Nepgen contended conversely that if this court was inclined to uphold the court *a quo*'s order setting aside the award of the tender in effect under paragraph 1,

²⁹ This comment is in conflict with the court's orders setting aside the BEC's findings that the 2nd and 3rd respondents' bids were administratively responsive, meaning that they should not have proceeded to a functionality evaluation.

³⁰ He made this suggestion well knowing that the first respondent had not sought to set aside the tender documentation or focused primarily on the fact that the criteria had been vaguely framed in the tender document but had instead relied on the fact that the actual utilisation of the risk assessment was vague, arbitrary and irrational and that the process of evaluation was unfair and biased.

³¹ [2007] SCA 26 (RSA) 189/2006 & 244/2006 at par 4 under par (c) of the order there referred to. In that matter the order concerned (which was subject to confirmation on the return date) entailed that the employer would invite fresh tenders for the supply and delivery of food hampers should it have *decided to pursue* such a service going forward in terms of a National Food Emergency Scheme and to take cognizance of the court's judgment in that event in forming new tender terms and conditions.

a substitution order might be more appropriate in the unique circumstances as had been contended for by him in the court below, because it was a foregone conclusion, so he submitted, that the first respondent ought to have been the only bidder left standing in the final running who should further not have been disqualified by virtue of the impugned process.³²

[79] Although one is tempted concerning this house of cards to begin with the enquiry whether the appellant acted lawfully by invoking the risk assessment and in its factual application thereof, it seems to me to be necessary to instead begin with what happened in the earlier responsive or qualification phase and more particularly with reference to the appellant's grounds of appeal that the court *a quo* erred, firstly in not finding that the second respondent's bid was responsive in all respects and, secondly, in finding that the third respondent's bid should also have been declared as administratively unresponsive.

[80] In the concatenation of events, if the administrative decision concerning the second respondent's bid is found to be inconsistent with the provisions of PAJA, it will in my view be unnecessary to consider the other review grounds relied upon except to reflect on what should instead have ensued in the final award stage of the tender. This is necessary to determine the issue of prejudice to the first respondent and how best to ameliorate its effect in the circumstances.

[81] That of course also requires a consideration of the issue whether the third respondent's bid properly passed beyond the qualification stage, otherwise the question of the prejudice to the first respondent must be decided against the

³² According to the first respondent's contention, it would (by the elimination of the second and third respondent as nonresponsive tenderers in the first phase) be deemed to be the only tenderer left in the final evaluation phase.

background that the two of them fairly competed with each other to the end. Either of these “decisions” (there was in reality only one decision of the BEC on 26 July 2019 concerning which bidders met the pre-qualification criteria) had implications all on their own. Interestingly though the first respondent’s case was not that these “bad decisions” entirely vitiated the tender proceedings even though it might be said that they are symptoms on their own of a tainted process.

The responsiveness of the second and third respondent’s bids

[82] The primary question is this regard is whether the second and third respondent’s bids complied with the specifications of the tender.

[83] There is no question that the evaluation and award of a tender constitutes administrative action and is reviewable under PAJA, hence the first’s respondent’s principal reliance in the review application on section 6 (2) (b) of PAJA to the effect that the appellant had not complied with a mandatory and material procedure or condition prescribed by an empowering provision.³³

[84] Section 217 of the Constitution prescribes that the procurement of goods and services by an organ of state must be carried out in terms of the principles set out in section 217 (1) of the Constitution, which reads:

“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.”

³³ *Steenkamp N.O. v Provincial Tender Board EC*, 2007 (3) SA 121 (CC) at par 21. *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board, Limpopo Province & Others* 2008 (2) 481 (SCA) at par 4.

[85] Section 217 (3) requires that national legislation must prescribe a framework for the implementation of a preferential procurement policy. The PPPFA is legislation pursuant to this injunction.

[86] An “acceptable tender” is defined in section 1 of the PPPFA as any “tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”. In this regard the tender Data forewarned that any material non-compliance with the tender requirements would render the bid non-responsive.³⁴

[87] PA-09 (EC): List of Returnable Documents that formed part of the tender documents listed which documents it was mandatory for the tenderers to submit with a bid.

[88] Two of the documents required to be submitted were:

88.1 *“Submission of PA-36: Declaration Certificate for Local Production and Content for Designated Sectors and Annexure C thereof”.*

88.2 *“Fully completed sectional summary pages and the Final Summary page with the returnable tender document”.*

³⁴ In relation to the documents listed in paragraph 1 of PA-09 (EC): List of Returnable Documents, the tender recorded especially that *“Failure to submit the applicable documents will result in the tender offer being disqualified from further consideration”.*

[89] It is common cause as stated above that the second respondent failed to complete the summary pages, reflecting only the globular totals of each section which the appellant brushed off as immaterial because all it needed was the final total(s) to make its decision based on price, but this begs the question why the requirement for fully completed sectional pages was stated as a mandatory requirement in the tender conditions in the first place with a clear indication of what would ensue in the case of non-compliance. These minimum standards, obviously to be fair and equitable to all who wanted to compete for the bid, applied to every tenderer alike, and the requirement of transparency would ensure for each tenderer hopeful that the Department would adopt an even hand in applying the standard consistently.

[90] Although we are presently concerned only with the requirement highlighted in paragraph 88.2 above, one cannot ignore how the appellant in fact dealt with issues of noncompliance that it was bound to encounter in its processes. The requirement for the submission of PA-36 was not qualified by the necessity that it be “Fully completed” yet the record reveals that no fewer than 4 bidders were declared administratively non-responsive because PA-36 was not “Fully completed”. Two such bidders made a reappearance after the pre-qualifying stage and were subjected to a risk assessment as if their disqualifications counted for nothing. The appellant in its answering affidavit however acknowledged that this had been a mistake that should not have happened, and which it ultimately self-corrected, underscoring the importance of following the script to the letter of the law.³⁵

³⁵ Included in the record of decision is an internal memorandum addressed by the BEC to the Regional BAC dated 22 October 2019 (at page 1638 of the record) which appears to have been written in response to a request by the BAC to review the nonresponsive bids of Alfdav Construction CC and Ulutsha Trading which had initially been disqualified because “PA 36 not fully completed” ahead of finally accepting its recommendation to award the bid to the second

[91] When it came to the second respondent, however it self-evidently treated its noncompliance differently than other bid contenders and therein lies the “rub”. It offered no insight into its reasoning process except to remark that the second respondent’s non-compliance was not material as far as it was concerned. It further failed to take the court into its confidence regarding why it could make an exception for the second respondent’s shortcomings in its bid submission save to offer the reason that it could determine the competitiveness of its bid simply from the globular total(s) and that it was unnecessary to consider the line-item totals or absent figures. As for the explanation that the first respondent’s noncompliance could not be held up to a comparison of those bids that were in fact disqualified by reason of noncompliance, the appellant did not even try to explain the reason for the differentiation.

[92] In *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd*³⁶ the SCA considered the question whether our law permits condonation of noncompliance with peremptory bid requirements as follows:

“For reasons that will become apparent, it is not necessary to resolve the apparent differences in the decisions of this Court in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others* 2008 (2) SA 481 (SCA) and *Dr J S Moroka Municipality v Betram (Pty) Ltd and another* 2014 (1) SA 545 (SCA). This Court, in *Millennium*, said at paragraph 17:

“[O]ur law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted.” (Citation omitted.)

respondent. The BEC’s approach is commendable in that it advises the BAC that its own strict and uniform approach of “applying the approved procurement strategy” should prevail even though in that instance the bidders might have been misdirected regarding what was required of them to fill out in tables on the forms supplied and despite the fact that the detail missed could be supplemented or sourced from other documents. The BEC was clearly not in that instance persuaded that it was proper that their bids be *deemed* to be complete.

³⁶ [2018] 2 All SA 644 (SCA).

Under the heading “A flexible approach”, P Volmink³⁷ described the effect of the decision in *Moroka Municipality*, as follows:

“[A]dministrative bodies do not enjoy a blanket discretion to condone non-compliance with mandatory bid requirements in all instances. Rather, they have the power to condone non-compliance with mandatory provisions only when they have been afforded the discretion to do so in the RFP document or some other enabling provision.”³⁸

[93] In this regard the Standard³⁹ generically endorses some leeway as follows although the appellant did not even address the issue whether it was competent for it to have condoned any noncompliance with mandatory requirements stated in the tender Data.⁴⁰

“F.3.8 Test for responsiveness

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

- a) complies with the requirements of these Conditions of Tender,
- b) has been properly and fully completed and signed, and
- c) is responsive to the other requirements of the tender documents.

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

- a) detrimentally affect the scope, quality, or performance of the works, services or supply identified in the Scope of Work,
- b) significantly change the Employer's or the tenderer's risks and responsibilities under the contract, or
- c) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.

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

(Emphasis added)

³⁷ P Volmink, “*Legal Consequences of Non Compliance with Bid Requirements*” (2014) 1 *African Public Procurement Law Journal* 41, 49. See also paras [16] and [18] of *Moroka Municipality*.

³⁸ *Supra*, at par [46].

³⁹ The only reference in the tender Data to this corresponding provision is the qualification that “responsive tender” and “acceptable tender” shall be construed to have the same meaning.

⁴⁰ In the ordinary course an employer’s ability to condone a failure to comply with a peremptory tender condition is dependent on a proper construction of the documents forming part of the bid invitation but this court was not directed to any such import. To the contrary, Mr. Beyleveld contended that the scenario in which the Department was faced and the decision it took to overlook the fact that the second respondent’s bid did not have fully completed sectional summaries was akin to the waiver of a suspensive condition. This is however in my view completely anathematic to a public tender process.

[94] In order to assess whether it was permissible for the Department to have overlooked the second respondent's non-compliance it is not clear how it was going to argue that the competitive position of the first respondent (leave aside for the moment the question whether the third respondent should have been in the running), would not be affected by letting its bid through into the next phase. Perhaps it was the case that the second respondent could easily have been scored points for price on the nominal total bid price (in the anticipated scoring exercise) and that the detail in respect of the line items would only have been relevant when it came to a risk assessment under criterion 2 of Clause C that the appellant contended for, but all of this is pure speculation because the appellant failed to take the court *a quo* into its confidence regarding why it decided to be charitable towards the second respondent or to explain what the differences were in the comparison of each of the other disqualified bids to demonstrate exactly why it thought that those disqualifications mattered, but that the non-compliance by it with a mandatory requirement for qualification was inconsequential.

[95] In this instance, absent any cogent explanation offered by the appellant for its different treatment of the bids that it rejected as non-compliant in comparison with the second respondent's bid that it passed on to the next stage of evaluation, it can fairly be assumed, based on the fact that the other tenders were as a fact excluded for want of compliance with mandatory requirements, that it considered the noncompliance of a mandatory term of the tender document material in itself. One need not strain to imagine what the purpose of the provision was, especially since it

was stated to be a mandatory returnable document fully completed that each bidder was required to particularize in the respects indicated.⁴¹

[96] Beyond this the appellant did not even enter into a debate concerning the possible sufficiency of substantial or adequate compliance with what, in conventional terms, is described as mandatory requirements.⁴²

[97] As was emphasized on behalf of the first respondent, and correctly noted by the court *a quo*, the fact that the requirement prepared by the Bid Specification Committee of the appellant required “Fully completed sectional summary pages” to be submitted, must be interpreted to mean that this is in fact precisely what it wanted and needed to justify its purposes (and not only the “Final Summary page”). In that respect the second respondent’s noncompliance with a mandatory specification could not be considered to be of a trivial or minor nature. Instead, its tender was not an acceptable one within the contemplation of the PPPFA and did not “in all respects” comply with the specifications and conditions of tender as set out in the tender document. Hence the first respondent properly laid its basis for the challenge in terms of section 6 (2) (b) of PAJA.

[98] I accordingly conclude that the order of the court *a quo* setting aside the BEC’s declaration that the second respondent’s bid was responsive was a correct one to

⁴¹ One can also speculate that a tender scored on price would require the bidder to show how the end total is made up to determine if the price that it boasts as being the best in the competitive bidding process is actually sustainable with reference to the summarised parts.

⁴² *Overstrand Municipality, Supra*, at [50]. A court is enjoined to guard against invalidating a tender that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. In this regard see C Hoexter *Administrative Law in South Africa* (2ed) (2012) at 292–295 and P Bolton “Disqualification for non-compliance with public tender conditions” (2014) 17(6) Potchefstroom Electronic Law Journal 2313, 2344.

have been made in all the circumstances and that it was appropriate to deal with the adverse consequences thereof by setting it aside and in effect directing a rerun of the process against a construct that its bid is non responsive.⁴³

[99] The situation of the third respondent was slightly nuanced but the appellant failed to engage with the issue of its bid not being responsive for the three reasons advanced by the first respondent at all and the court *a quo* was in my view justified in deciding this aspect on the first respondent's version. One would have expected an answer even generally to allay the perception of a flawed process, but none was forthcoming.⁴⁴ The first respondent was confident to maintain however that the BEC's decision in this regard fell to be reviewed on the basis that it laboured under a misconception of the law regarding its contention that the third respondent was eligible to compete despite its lower grading, and that it had also given it a free pass at its expense regarding its material noncompliance with a mandatory condition of the tender. On both scores the court *a quo* correctly found in my view that the BEC's declaration that the third respondent was a responsive bidder was reviewable and also appropriately fell to be set aside on the bases relied upon by the first respondent in this respect.

[100] Although the court *a quo* extended its introspection into the award phase, it was unnecessary in my view to have gone any further. By necessary implication the

⁴³ See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at para 25 where the court held that: "Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172 (1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must be dealt with in a just and equitable order under section 172 (1)(b)."

⁴⁴ It appears that the Department was seduced by the low price of the third respondent's bid which it ultimately rejected on the basis that it posed a commercial risk to accept it.

tender could not have been awarded to the second respondent, and the third respondent should not have passed the pre-qualification stage.

[101] That having been said, it was not inappropriate in these peculiar circumstances in my view for the court below to have referred the matter back to the Department for a rerun of the process to properly determine the final outcome against the expectation of the first respondent now being the sole surviving responsive bidder, neither should the order as it stands present any problem in its implementation.⁴⁵ Indeed, the fate of the second and third respondent's being ruled out of the competition is in keeping with the expectation indicated at the foot of clause F.3.8 of the Standard enjoining the employer itself to "*(r) eject a non-responsive tender offer, and not allow it to be subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation.*" There ought properly therefore to be no claw back as it were from such a premise.

[102] I cannot agree with Mr. Beyleveld's contention that it would somehow now be appropriate to direct that the tender process be started anew as if the *entire* process was vitiated. In my view the court below was alive to the prejudice to the first respondent by such an order and intended to effectively vindicate its fair and administrative right violated by the Department's failure to have eliminated the second and third respondents from the competition when this was justifiably required to happen. Indeed, it behooves a court when fashioning an appropriate remedy pursuant to the provisions of section 8 of PAJA to ensure that the remedy fits the injury. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁴⁶ the

⁴⁵ Mr. Beyleveld fairly pointed out that the first respondent did not file a cross appeal against the remedy the court below thought was just and equitable to make in the unique circumstances of the matter.

⁴⁶ 2007 (3) SA 121 (CC) at paragraph [29].

Constitutional Court observed that the “*remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law....Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.*”

[103] In this instance the first respondent was the only party affected by the impugned administrative action of allowing the second and third respondent’s to have passed into the evaluation phase. That was the injury primarily relied upon in the first respondent’s supplemented case.⁴⁷ For the rest, the Department acted correctly in disqualifying the other tenderers who similarly failed to meet the mandatory conditions of the tender. The remedy imposed by the court below put everyone on an equal footing which is in my view the correct premise against which to rerun the tender process.⁴⁸ To require the process to commence anew (if the Department feels up to it)⁴⁹ would conversely be prejudicial to the first respondent who ought to have been reckoned with as the only responsive bidder in the final evaluation stage with no competition from the second and third respondents who were treated differentially and in breach of its right to fair and just administrative action.

⁴⁷ The appellant’s earlier concern had been with the application of the risk assessment in a reconsideration scenario, I assume because it was from its perspective unclear how it would deal with this in a rerun of the process.

⁴⁸ The scenario that pertains here is the converse of the situation that applied for example in both *Tekoa Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality and Others* [2022] 3 All SA 892 (ECG) at [93] and *Spec Joint Venture v The Minister: Department of Water and Sanitation and two others* (Gqeberha Case no. 2806/2022) at [34]. In this instance the Department treated the second and third respondents differentially from everyone else’s.

⁴⁹ One gleans the impression that it has lost its taste for the project proceeding and might not, given the lapse of time and budgetary constraints, want to proceed if it were up to it.

[104] The question whether the first respondent's bid was lawfully declared ineligible (in a 3 responsive bidders' contest at the end) is an academic exercise. So too, the fact that objective criteria were purportedly applied to justify the exclusion of the first respondents bid in a theoretical situation where it should have been the sole standing responsive bidder does not serve any purpose.⁵⁰

[105] Concerning the application of the risk assessment, how the court below perceived it and dealt with it and whether it in effect excised clause C in reckoning with its expected application, is similarly in my view a hypothetical exercise. Indeed, most of the grounds of appeal based on its significance are framed as challenges concerning what the court did not find, alternatively are based on imagined conclusions, given the unclear judgement. The ground of appeal premised in this respect on the supposed basis that the court *found* that the risk assessment was irregular is not worth pursuing, since it is not clear how that conclusion was reached, but as stated above it has become a moot exercise. The parties at least appear to be in agreement that the court's factual finding that the first respondent was disqualified before being scored points for price and preference was wrong, but that concession on its own has no impact on the matter.

[106] That notwithstanding, it appears that something needs to be said about the anticipated risk assessment that must still ensue in the reconsideration exercise.

⁵⁰ The first respondent contended in this regard that the provisions of regulation 11 are not of application unless there is more than one valid bid still in contention.

The risk assessment:

[107] Being well aware that it is not the function of the court to evaluate and award tenders, the comments made below are purely for guidance concerning the vexed issue whether the risk assessment process suggested under Clause C is legally permissible and how the objective criteria contended for should be applied.

[108] For better or worse the risk “eligibility” requirements are stated in the tender Data and their effect cannot simply be wished away, as inelegantly stated as clause C might be.⁵¹ Mr. Beyleveld criticized the first respondent for not having sought its excision from the tender Data, which otherwise must be contended with as a condition for “eligibility” (Sic) within the stated terms set out in the tender Data, such as they do not conflict with the applicable legal framework, no more and no less.⁵²

[109] In any event it was conceded on behalf of the appellant that the utilization of the risk evaluation in the award phase (having regard to the unique statutory and regulatory public procurement framework applicable at the time), can only be justified within the context of what regulation 11 of the 2017 regulations provides in this respect.

⁵¹ Apart from the apparent overlap with functionality criteria I mention, for example, that “*unacceptable risk*” is not defined and more importantly there is a failure in the tender Data to record what the objective standard (scope or measure) is that will be used to determine whether a bid presents an “*unacceptable risk*” to the Department.

⁵² The BEC and BAC would do well to heed the warning of the Constitutional Court in *Allpay, Supra*, at [88] – [90] regarding the clarity of administrative action that is required. See also the dictum in *Tekoa Consulting Engineers, Supra*, at [57] where the court noted that the conditions of tender must spell out, clearly and unambiguously, what is required of a bidder: “*There must be no vagueness or lack of clarity about what constitutes the “rules of the game,” so to speak.*”

[110] Regulation 11 (2) states that:

“If an organ of state intends to apply objective criteria in terms of section 2 (1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.”

[111] This the appellant contends the tender Data purports to do. I agree that it is unnecessary for the tender document to utilize the words “objective criteria” themselves as long as objective criteria can be discerned from the tender’s conditions.

[112] Regarding the imperative for the risk assessment portended in the tender Data being undertaken, Regulation 11 (1) of the PPPFA regulations provides that:

“11. Award of contracts to tenderers not scoring highest points. —
 (1) A contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2 (1)(f) of the Act.”

[113] Section 2 (1) (f) of the PPPFA, in turn, reads as follows:

“(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;”

[114] Paragraph 21 of the implementation guide to the PPPFA Regulations reads:

“AWARD OF CONTRACTS TO TENDERER NOT SCORING THE HIGHEST TOTAL POINTS

21.1. A tender must be awarded to the tenderer who scored the highest total number of points in terms of the preference point systems (price and B-BBEE points), *unless objective criteria in terms of section 2(1)(f) of the Act justify the award of the tender to another tenderer.*

21.2. If an institution intends to apply objective criteria in terms of section 2(1)(f) of the Act, the institution must state what those objective criteria are in the tender documents.

21.3. Functionality and any element of the B-BBEE scorecard may not be used as objective criteria.”

(Emphasis added)

[115] All of these provisions make it clear that it is intended by the implementation of the adopted preference point system (putting the functionality criteria beyond the pale once this threshold has been surpassed so that these considerations do not resurface in the award phase under the guise of “objective criteria” contended for in regulation 11) should conduce to the highest scoring bidder being awarded the bid. The framework recognizes however that the highest scoring tenderer may not be the successful one, but such a scenario can only pertain in highly constrained circumstances.⁵³ Thus, a tender ought to be awarded to the tenderer who scores the highest points unless objective criteria (that have been unequivocally foreshadowed in the tender Data) other than the criteria contemplated in paragraph (d) and (e) (not applicable for present purposes), justify the award to “another tenderer” (who by necessary implication can only be a tenderer that is in the final reckoning together with the highest scoring tenderer). Although it is not stated so plainly, I imagine that the second highest scoring bidder will be the next tenderer in the offing, in the usual order of a runner up so to speak, as happens in practice. The framework does not reference a second highest scoring bidder at all, but it makes logical sense that if the highest scoring bidder is disqualified, that the second highest point scorer will be elevated to first position by such elimination.⁵⁴

⁵³ See in this regard “*An analysis of the criteria used to evaluate and award public tenders*” by Prof Pheobe Bolton 2014 (1) *Speculum Juris*, who has helpfully analysed the relevant reported judgements pertaining to the issue of “objective criteria” and its application in practice.

⁵⁴ This is consistent with the present tense utilised in section 2 (1) (f) of the PPPFA as follows: “...the contract must be awarded to the tenderer who *scores* the highest points...”

[116] When section 2 (1) (f) of the PPPFA is read together with what Clause C provides for in this instance (assuming the criteria relied upon can be construed as objective criteria), it follows that the reason for not awarding the tender to the highest scoring bidder, which has after all duly achieved its place through the application of the adopted method, must be one inherently related to its own risk profile. The question must ultimately be whether an objective reason exists to disqualify the highest scoring tenderer's bid based on that risk profile.

[117] In other words, the employer is not expected to justify the award to the "other tenderer" it is entitled in the constrained circumstances to benefit as a runner up on a basis that it is *more deserving* than the one it considers it necessary to disqualify for whatever objective reason may pertain in the circumstances, but rather to justify why it cannot, by virtue of its supposed objective reason, and despite that bidder being the highest point scorer, award the tender to it after all.

[118] In my view there is no suggestion that it comes down to a further contest between the remaining bidders to ascertain which of them in the pool poses the least risk. Indeed, in my view the runners up have no vested interest in the process at all although, as I suggest above, a disqualification of the lead point scorer may elevate the second highest point scorer to first place.

[119] The only compunction is to recognize the highest scoring bidder unless there is a good, objective, pre-disclosed, reason why the employer cannot award the bid to it. There is no obligation on the employer to award the bid to another tenderer but it is authorised by regulation 11 (1) to award the contract to another tenderer (the word "may" is employed) in a scenario where it is justified in not giving it to the

lead scorer. It is it therefore irrelevant that there might be only one responsive bidder in the final evaluation stage. As the appellant fairly suggested, if a good reason existed to disqualify the first respondent for risk on the assumption that its bid was the only one that advanced to the final evaluation stage, that would be the end of the competition and the Department would have to issue out a fresh bid invitation.

[120] As for the utilisation of a risk evaluation process such as the tender Data in this instance makes provision for, our courts appear generally to accept that these are permissible in the pursuit of determining whether objective criteria might disqualify an otherwise eligible bidder who has run the gauntlet to the end of the tender process and expects to be awarded the contract as the bidder scoring the highest points.⁵⁵ There can notionally be no objection to an employer requesting an evaluation of all the bidders remaining in the final stage of the tender process, simply as a matter of convenience to it, but this should not provide a basis for any comparison of risk profiles. That would be entirely inimical to the points and preference post functionality methodology employed.

[121] By its own concession the appellant is not here concerned with a last minute eligibility leg. The winning bidder would have jumped that hurdle earlier in the process and come to the finishing line with the expectation that its status as the highest point scorer ought generally to guarantee it its win.

[122] The ultimate objective of looking for any *unacceptable* risk in the risk evaluation seems to me to set the bar for disqualification very high. Indeed, it would

⁵⁵ See *Wattpower Solutions CC, Supra*, for example. The issue is not with a due diligence exercise as long as the objective stays within the bounds of regulation 11.

be difficult in practise for the Department on the basis of what Clause C provides to trounce the highest point scorer.

Conclusion

[123] In the premises there is no reason not to uphold the court *a quo*'s orders.

[124] The first respondent was careful in framing its papers in the review application not to seek an order setting aside the entire tender process, but to focus instead on challenging the bad decisions that in the end conduced to the wrong outcome to its considerable prejudice.

[125] There is no merit in the applicant's argument that a reconsideration against this peculiar background is impossible. To the contrary, the remedy is the best fitting one.

[126] In the result I make the following order:

1. The appeal is dismissed with costs.
2. The reconsideration envisaged by paragraph 2 of the order of the court *a quo* shall be premised on the basis that:
 - 2.1 the bids of the second and third respondents are administratively non-responsive; and

2.2 the first respondent is deemed to be the only remaining tenderer in the evaluation stage.

B HARTLE
JUDGE OF THE HIGH COURT

I AGREE,

B MAJIKI
JUDGE OF THE HIGH COURT

I AGREE,

I BANDS
JUDGE OF THE HIGH COURT

DATE OF APPEAL : 21 November 2022
DATE OF JUDGMENT : 3 August 2023

Appearances:

For the Appellant: Mr. A Beyleveld SC instructed by The State Attorney, Gqeberha (ref. 0525/2020/4) care of Whitesides Attorneys, Makhanda (ref. Mr. Barrow/C12937)

For the First Respondent: Mr. J Nepgen instructed by Joubert Galpin & Searle c/o Huxtable Attorneys, Makhanda (Ref. Mr. O Huxtable)