IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE	**SIGNATURE**

CASE NO: 22496/2013

DATE: 12/1/2015

IN THE MATTER BETWEEN

CFIT (PTY) LTD	APPLICANT
AND	
THE MINISTER OF DEFENCE	1ST RESPONDENT
THE CENTRAL PROCUREMENT SERVICES CENTRE: DEPARTMENT OF DEFENCE	2ND RESPONDENT
THE DEPARTMENTAL CENTRAL PROCUREMENT BOARD: DEPARTMENT OF DEFENCE	3RD RESPONDENT
SPECSOFT SOFTWARE SOLUTIONS (PTY) LTD	4TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant applies for the reviewing and setting aside of the respondents' decision to withdraw the tender issued under the Request for Proposal concerning the National Codification System (BID CPSC/B/PC/013/2011R) ("the tender").

[2] Before me, Mr Vetten appeared for the applicant and Mr Motepe appeared for the 1st, 2nd and 3rd respondents. There was no appearance for the fourth respondent. The fourth respondent also did not file any papers.

[3] The fourth respondent will be referred to as "Specsoft" and the respondents, as 1st to 3rd respondents or as "no 1", "no 2" or "no 3".

Brief synopsis

[4] On 11 May 2012, the first respondent issued a Request for Proposals ("the RFP") in relation to the provision of a codification system for implementation within the Department of Defence, for a five year period ("the tender"). This is nothing new. The existing codification system was already implemented in 1982.

[5] The closing date of the bid was 14 June 2012. It had a tender validity period of 120 days.

[6] There were four tenderers, but only the applicant and Specsoft had passed phase 1 of the process involving compliance with mandatory criteria for tender submission.

[7] The applicant and Specsoft were then allowed to carry on with the tendering process and the other tenderers were excluded.

[8] No 2 is a committee created within the Department of Defence responsible for evaluation of the validity of tenders and for recommending to the third respondent the most suitable service provider in respect of the relevant goods and services.

No 3 is a departmental Board within the Department of Defence responsible for awarding tenders upon recommendations from no 2.

[9] No 2 unanimously and repeatedly (because no 3 kept on referring the matter back to no 2 for further consideration) recommended that the tender be awarded to the applicant.

Broadly speaking, the applicant scored some 98 points and Specsoft only 35. The tender price offered by the applicant was some R119 million compared to the R348 million demanded by Specsoft. As to Broad Based Black Economic Empowerment ("BBBEE") the applicant is a level 3 contributor and Specsoft a (lower) level 4 contributor.

[10] When no 3 persisted in its refusal to award the tender and kept on referring the matter back to no 2, the applicant, through its attorneys, on 6 December 2012, placed the respondents on terms to take a decision by 13 December 2012 failing which steps would be taken in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") to force the respondents to make a decision.

This threat, clearly, did not make a favourable impression on no 3, which resolved, on 13 December 2014, to withdraw or "cancel" the tender.

The applicant's attorney was not informed of this withdrawal or cancellation and, on 28 February 2013, the applicant obtained an order from this court directing no 3 to make a decision in relation to the award of the tender within 10 days of the service of that order.

It was only thereafter, in March 2013, that the applicant was informed of the cancellation.

[11] The applicant contends that the cancellation was unlawful because it flies in the face of the provisions of section 2 of the Preferential Procurement Policy Framework Act no 5 of 2000 ("the PPPFA") and also contravenes the regulations promulgated in terms of that Act by *Government Notice* R510 of 8 June 2011. The applicant also contends that the reasons advanced for the purported cancellation are spurious and without any merit.

[12] The applicant did not agree with the stance adopted by the respondents that it complied with the order of 28 February 2013 by cancelling the tender. The applicant, initially, asked for declaratory relief to the effect that the respondents are in contempt of that order but later abandoned its quest for that relief.

[13] The respondents, in the *Government Tender Bulletin*, published another invitation to bidders to tender for a similar codification system, but the applicant obtained interdictory relief restraining the respondents from proceeding with a new tender process pending the outcome of this case.

[14] There were some interlocutory skirmishes between the parties when the respondents failed to timeously and comprehensively furnish the record of proceedings in terms of the requirements of rule 53. The applicant also obtained an order from this court compelling the respondents to file the record of their decision and reasons for the decision in the evaluation and withdrawal of the tender within 10 days of service of this order. On a general reading of the papers, the order was never, in my view, properly complied with. Northing further turns on this. I will not dwell on the subject. The record supplied enabled the applicant to file a supplementary affidavit in terms of rule 53.

[15] This application was launched in April 2013.

[16] The relief now sought by the applicant, after abandoning the prayer for declaratory relief flowing from the alleged contempt of the order of February 2013, and after amending one of the prayers, now amounts to the following:

1. Reviewing and setting aside the first, second and/or third respondents' decision to withdraw the tender issued under the relevant RFP (the terms "cancel" and "withdraw" have been loosely applied by the parties and, for present purposes, I regard them as having the same meaning).
2. Reviewing and setting aside the first, second and/or third respondents' refusal to take a decision in the tender.
3. Substituting the first, second and/or third respondents' decision and awarding the tender to the applicant. (There is an alternative prayer to refer the tender back to a differently constituted evaluation committee for decision in accordance with

the tender specifications and evaluation procedures, but, before me, the applicant pressed for the main relief of substituting the decision.)

4. Ordering the first respondent to pay the costs.

[17] So much for a brief synopsis of the case. I now turn to the relevant issues in more detail.

<u>The tender process and some notes on the chronological sequence of events</u>

[18] The RFP was for the "procurement of (a) ... Compliant Codification System with five year Maintenance (contract)".

[19] The mandatory evaluation criteria involved four phases:

1. phase 1: compliance with mandatory criteria for tender submission;
2. phase 2: compliance with functionality, specification and scope of work (a threshold of 70% was required to progress);
3. phase 3: price; and
4. phase 4: BBBEE.

[20] As mentioned, only the applicant and Specsoft passed phase 1.

[21] The applicant and Specsoft were invited to a Power Point presentation of their respective bids to be held on 27 July 2012.

[22] On 2 August 2012 a minute of the Technical Evaluation Committee's deliberations was produced. According to this, both the tenderers passed the 70% threshold. Members of no 2, having evaluated the tenders, "concluded unanimously that CFIT was the cheapest

bidder and possessed international experience and expertise in accordance with NATO standards. Accordingly CFIT was selected by the panel as the preferred bidder."

[23] On 6 August 2012 no 2 prepared a submission to no 3, recording all the details and points scored (98 versus 35.74 in favour of the applicant) and the recommendation stated: "13 ... the requirement at stake be awarded to Messrs CFIT (Pty) Ltd with the highest points (98) and is in accordance with the specification".

[24] On 8 August 2012 no 3 met to consider the submission. The recommendation was not accepted and the matter was referred back for four reasons which, in my view, have no merit. The one deals with a calculation error of a minor nature which is irrelevant in the greater context of the case and another one, which is also groundless, as will appear later, reads as follows:

> "(iii) On paragraph 5(b) of the Power Point verification report it is indicated that 'CFIT project is based on the five year contract period as per bid Terms of Reference (TOR). Specsoft pitched their project for a life cycle of 20 to 25 years.' The Board concluded that, in terms of the period, the bidders was not comparable and advised that the verification panel should have asked Specsoft to shrink everything to five (5) years as per the TOR ... asked Specsoft to break down their prices so that it could be understood."

[25] On 21 August 2012 no 2 responded to the queries raised by no 3 on 8 August 2012 pointing out that the Technical Evaluation Process was followed by the evaluation conducted through the Power Point presentation on 27 July 2012 where it was

established that both bidders had met the technical requirements. The process of technical evaluation was described again by an item-by-item comparison between the two tenders and this bid comparison demonstrated the manifest difference in the price between the respective tenderers. As indicated, the applicant scored 98 out of a possible 100 points and Specsoft only 35.74 out of a total of 100 points. It was recorded that the recommendation was made in accordance with the so-called 90/10 principle.

[26] Importantly, the recommendation that the contract be awarded to CFIT was repeated. This was now the second identical recommendation.

[27] On 30 August 2012 no 3 met to discuss the minute. In terms of the minutes of their discussion no 3 again declined to approve the recommendation. The main "objection", such as it was, raised in the minute again had something to do with the "five year argument" the contents of which I quoted above. No 3 complained that Specsoft "was not afforded the opportunity to give a clear itemisation of costs and shrink everything to five (5) years as per the last Board resolution on 8 August 2012". No 3 demanded that the applicant "must be asked to demonstrate how their product will work on the ground". There was an instruction that the two bidders should be called once again to present to the verification panel and "this time Mat Gov should form part of that meeting and sign off".

There was also a query about licence fees.

[28] On 6 September 2012 the applicant was invited to attend a second compulsory Power Point presentation on 21 September 2012. Issues identified for reconfirmation included

that "the presentation must be strictly based on a five year contract period as per approved TOR", and "clarity must be made on cost break down as per already submitted quotation, especially on the once-off as well as licence renewal and system maintenance".

[29] The applicant attended the second Power Point presentation on 21 September 2012 and so did Specsoft.

[30] On 1 October 2012 no 2 produced minutes of the oral presentation carried out by the two bidders on 21 September 2012.

In the minute, it is disclosed that the two bidders were re-invited to clarify the following:

"(a) presentation must strictly be based on a five (5) year contract period as per approved Terms of Reference (TOR);

(b) clarity must be made on cost break down as per already submitted quotation, especially on the once-off as well as licence renewal and system maintenance;

(c) demonstration of the system especially on deployment."

The minutes show that Mr Klein, on behalf of the applicant, "gave a well and informative presentation including demonstration of how the codification system or tool works especially on deployment. There were no questions asked in terms of the system."

Specsoft also confirmed that their bid price was for the five year contract. To this extent it appears, and seems to be common cause between the parties, that the two bids were "comparable". Unlike the conclusion by no 3, *supra*, on 8 August 2012, that "the bidders was (*sic*) not comparable".

[31] Of particular interest, in my view, is the fact that the 21 September presentation by the two bidders was attended by Mr P M Mokoena who is the Deputy Director of Materials Governance ("Mat Gov"), also referred to as Materials Governance and Risk Compliance or "Mat GRC". Mr Mokoena prepared a lengthy report on the presentation which is dated 24 October 2012. I must assume that this report was prepared for the attention of no 3. In the report, Mr Mokoena also identifies the three issues which had to be clarified (quoted, *supra*, with reference to the minute by no 2) and in the report Mr Mokoena, *inter alia*, states that -

> "Mr Klein gave a clear and informative presentation of how the system works. There was a thorough demonstration on how the system works on deployment or mission areas. The system is web based; information can be loaded offline then be up loaded when system is back online."

He said more or less the same about the presentation on behalf of Specsoft. In the report, Mr Mokoena again high lighted the difference in cost between what is offered by the two bidders: some R119 million by the applicant and some R348 million by Specsoft.

Mr Mokoena then offers the following observation in conclusion: "Both companies/bidders gave clear presentation respectively in responding to the issues to be clarified or addressed." He therefore records that all outstanding points were regarded as having been clarified. He confirms that the soft copies of presentations of both bidders were made available and given to representatives of no 2.

[32] Significantly, Mr Mokoena raises no reservations about any of the bids. More significantly, Mr Mokoena is the deponent to the answering affidavit filed on behalf of the respondents.

[33] On the same date, 24 October 2012, no 2 finalised a submission to no 3 under the heading "re-submission on the recommendation of bid ... for the procurement of ... National Codification System (NCS) with a five year maintenance period". This "re-submission" is a lengthy affair again traversing the whole history of the bids and the performance of the bidders and the clear superiority of the bid of the applicant, and also dealing with the last Power Point presentation of 21 September 2012.

With regard to the original "five year argument" raised by no 3 when declining the earlier recommendation, *supra*, the following remarks by no 2 in this lengthy re-submission are telling:

"(a) <u>CFIT</u>. The bidder has demonstrated the operation of the system and provided cost break down for a contract period of five years as per the approved TOR. The entire panel was satisfied with the presentation and believes that it will satisfy the uncertainty from the DCPB (<u>my note</u>: this is no 3).

(b) <u>Specsoft</u>. The bidder has demonstrated the operation of the system and the panel confirmed its satisfaction thereof. The bidder again confirmed that the offered cost break down was for a five-year period as requested

> on the tender documents; therefore the emphasis on licence period of 20-25 years was based on their previous experience that the system has to be sustained for a longer period. On its final remarks, the evaluation panel concurred that Specsoft was off the mark by providing information which was not requested on the approved TOR hence this was not a Request for Information (RFI) but Request for Quotation (RFQ)."

In the re-submission, it is then stated by no 2 that the recommendation has been done in accordance with Delegated Powers with a certain reference number and in accordance with the 90/10 principle.

No 2 then goes on to recommend the applicant as the successful bidder in the following terms:

> "Based on the consolidated procurement process points and latest Power Point evaluation outcomes, it is recommended that the requirement at stake be awarded to CFIT (Pty) Ltd with the highest points (98) and is in accordance with the specification.
>
> Points break down: price 90, B-BBEE status level is 3 which is 8 points
>
> Price: R119 978 750,00 (total price)
>
> Price and delivery: firm
>
> Delivery period: 5 year maintenance period."

[34] This was now the third time that no 2 recommended that the contract be awarded to the applicant: the first recommendation was dated 6 August 2012, the second one 21 August 2012 and the third one 24 October 2012.

[35] It is common cause (also from the side of the deponent to the answering affidavit) that all concerns raised by no 3 had been addressed.

[36] Despite all this, no 3, yet again, at its meeting of 15 November 2012 did not approve the recommendation. Its resolution in this regard reads as follows:

"(a) Resolution: The Board noted that:

(i) The bidders were called again for clarification of their respective proposals.

(ii) Although the minutes of the presentation meeting were made available, there is no clear position and recommendation from the technical evaluation that listened to the presentation.

(iii) Not all issues of concern raised by the DCPB (ie no 3) in its previous meetings had been addressed.

(iv) Arrogance and lack of co-operative attitude from the project officer.

(v) Concerns raised by Mat GRC with regards to the manner in which the bid was handled.

(b) The Board resolved that:

(i) The submission was not approved.

(ii) A sub-committee would be appointed to look at the nature of the nominees, and advice (*sic*) the DCPB (ie no 3) on the way forward."

Mr Vetten, in comprehensive heads of argument, pointed out that no such committee was appointed and there is no minute or record of any advice submitted by such a committee.

It was argued on behalf of the applicant that these "reasons" for declining the recommendation for a third time are incorrect and amount to misstatements:

1. The bidders did indeed clarify their bids. This appears from the documents from which I have quoted, including the report from Mr Mokoena.
2. There is a perfectly clear and unequivocal position and recommendation from the body charged with technical evaluation (no 2) who had listened to the presentation.
3. All issues of concern raised by no 3 had in fact been addressed.
4. The reference to arrogance on the part of the project officer is irrelevant and the alleged "lack of co-operative attitude" may be the result of frustration on the part of this member of no 2 with no 3's failure to have executed its functions.
5. There were no concerns, or at least no legally cognisable concerns, that were or could have been raised by Mat GRC. Indeed, this also appears from the report of Mr Mokoena.

[37] On 4 December 2012, no 2 again asked for an extension of the tender validity period (until 31 January 2013) which was granted by the applicant, but, on 6 December 2012,

the applicant, through its attorneys, placed no 3 on terms to take a decision on the award of the tender by 13 December, as I have explained. I mentioned that this letter of demand incorporates a notice of the intention of the applicant to take steps in terms of PAJA in the event of further failure to take a decision. This part of the letter is crafted as follows:

> "We remind you that the decision to award a tender constitutes administrative action under the Promotion of Administrative Justice Act, 3 of 2000 ('the PAJA'), and is defined, in section 1 thereof, to include a refusal to make a decision; and that in terms of section 6(2)(g) read together with section 6(3) of the PAJA, a court has the power to Judicially Review an administrative action if the action concerned consists of a failure to take a decision within a reasonable time."

[38] As I pointed out earlier, this demand did not appear to go down well with no 3, who resolved, on 13 December 2012, to cancel the tender. The relevant resolution reads as follows:

> "(a) <u>Resolution</u>: Board resolves that the submission contained numerous irregularities, and had to be cancelled. The Board further directed as follows:
>
> (i) The end-user must be given guidance on the submission, should they wish to resurrect it. The Department needs to look at what its needs are in the short term and in the long term, because they can be particular solutions which are sustainable for a short term and a long term. It is necessary to look at what the needs of the Department are in the long term and the value for money.

(ii) The bench mark report should indicate what necessitated it, the value for money for the Department, the benefit thereof and the outcome thereof.

(iii) It was noted on the individual scoring sheets that some of the elements were not scored. The Board therefore instructed that in future any element which is not for scoring should not be included in the Terms of Reference (TOR)."

[39] As I pointed out earlier, the decision to cancel the tender was not communicated to the applicant until March 2013, more than three months later. I have referred to the fact that the applicant, ignorant of the cancellation, and true to its threat of 6 December 2012, obtained an order compelling the respondents to make a decision. This order was granted on 28 February 2013 and served on 13 March 2013 whereupon the State Attorney, on 28 March 2013, informed the applicant in writing that the RFP had been withdrawn.

[40] On 4 April 2013 the applicant advised the State Attorney that it considered the act of withdrawal of the tender to be unlawful and that a review application would be launched and, in addition, requested reasons for the withdrawal of the tender. No reasons were forthcoming and on 18 April 2013 this application was served.

<u>Reasons initially advanced for the cancellation of the tender</u>

[41] The respondents did not file reasons in accordance with rule 53. They were ordered to do so by an order of this court on 27 June 2013 and placed on terms regarding the breach of this order in a letter of 24 July 2013.

[42] Eventually, in an affidavit opposing the contempt application, the respondents, in the words of counsel for the applicant, "pinned their colours to the mast by stating that the reason for the cancellation of the tender was as stated in the minutes of 13 December 2012, namely irregularities ('the irregularities justification'), and that these irregularities had been identified in the minutes of 8 August 2012". This has already been dealt with and Mr Vetten submitted, correctly in my view, that there is nothing in the minutes of 8 August 2012 that can qualify as an irregularity of the kind that would justify the cancellation of the tender. Counsel also reminded me that the "irregularities justification" for the decision to cancel is not pursued in the answering affidavit and he submits that those "irregularities" relied upon are unsustainable. With that submission I agree.

[43] I was also referred to authority for the proposition that a decision-maker is bound by the reasons that are given – in this case, those disclosed in the minutes, since no others were given – and cannot depart from their terms – see *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 1 SA 116 (C) at 121E-122D; *National Lotteries Board and others v South African Education and Environment Project* 2012 4 SA 504 (SCA) at 513B-514D and *Van Zyl and others v Government of the Republic of South Africa and others* 2008 3 SA 294 (SCA) at 311D-F.

<u>Reasons later advanced for the cancellation of the tender</u>

[44] The reasons now advanced in the answering affidavit, for cancelling the tender, are set out in paragraphs 9 and 10 of that document. It is useful to quote the full text:

"9.1 I pause to mention that after the presentations of the third respondent, questions were raised by the Department about the long term feasibility of the National Codification System. It became clear to the Department that even though the applicant's tender might appear to be a cheaper option, it did not make an allowance for a period after the initial five year period. What was meant was that the Department had to enter into a further agreement for the maintenance of this system after five years. The difficulty however is that only the applicant will be having the source codes which are used to operate and maintain the system. The Department may then not be in the position to go on an open tender to obtain a competitive price and value for money but will be bound to contract the applicant for a further period after five years. This may turn out to be expensive because the applicant will be in a position where it will have no competition.

9.2 The Department felt that the point raised by the fourth respondent made sense. It is better to contract a service provider for a long term and agree on the charges upfront. For example, if the system is for twenty or thirty years the price must be agreed at this stage with necessary escalations.

9.3 The Department realised therefore that the initial Terms of Reference did not cater for this scenario. A decision was then taken by the third respondent to cancel the previous tender on this basis. A decision was made to issue a new tender which will take into account the long term maintenance of the system as already stated above. The new Terms of Reference were advertised on 6 December 2013. I attach a copy thereof hereto as annexure 'PMM4'. A very important provision that was added in this Terms of Reference reads as follows: 'The winning bidder will be required to enter into a long term maintenance and support contract with respect to Through Life Capability Management (TLCM) of Defence Systems.'

10.1 While the applicant is unhappy about the cancellation and re-issue of the new Terms of Reference, it is clear that these new Terms of Reference are in the interest of the Department. The old Terms of Reference were not in the interest of the Department in that the issue of long term maintenance and the possible cost thereof was not taken into account. This was a *bona fide* error by the Department and the new Terms of Reference seeks to correct this error. All the entities including the applicant will have an equal opportunity in the process that will continue to be <u>fair, equitable, transparent, competitive and cost effective</u>. While I understand the applicant's disappointment in not being awarded the tender, I deny any insinuation that there is anything untoward with the cancellation of the tender." (The emphasis is that of the drafter of the affidavit.)

[45] In my view, there are a number of grounds on which these reasons (indeed, there is only one reason, evidently aimed at the lack of providing for a longer term maintenance arrangement) advanced for cancelling the tender can be challenged, both for lawfulness and rationality:

1. The reason was never minuted anywhere as far as I can make out. On the respondents' own version, as set out in the answering affidavit, it was nothing more than an after-thought. The fact that the purported new Terms of Reference

were not reflected in the old Terms of Reference is described as a *bona fide* error in the answering affidavit. To advance this as the reason for the cancellation, raised only in the answering affidavit, flies in the face of the authorities quoted, *supra*, that a decision-maker is bound by the reasons given (in the minutes referred to in the first answering affidavit mentioned) and cannot depart from their terms later.

2. The rationality of this purported reason for the cancellation (and the decision to cancel) must also be seriously questioned in view of the fact that the new tender published in the *Government Tender Bulletin* of 6 December 2013 only makes provision for a five year period. This makes nonsense of the suggestion in the opposing affidavit that "though the applicant's tender might appear to be a cheaper option, it did not make an allowance for a period after the initial five year period ..."

Moreover, the specifications of the existing tender documentation make clear provision for a maintenance contract to be entered into with the successful bidder. Paragraph 8(e) of those specifications reads as follows:

> "8. Support and maintain. The supplier shall offer the following functional support and maintenance:
>
> ...
>
> (e) maintenance and support contract to be quoted for a minimum of ten years."

In addition, while both the bidders limited their licence fees for the five year period, the analysis of no 2 of the tender admissions and technical evaluation clearly states that "irrespective of which bidder wins, the SANDF will have to enter into Service Level Agreement for the utilisation of licences after five years". As stated, this agreement would only be entered into with the successful bidder. Entering into such an agreement will not require a new tender. There is, accordingly, no need to cancel the present tender. On behalf of the applicant, repeated submissions were made in the papers that it is generally not the practice for organs of state in this category to enter into tender contracts extending over a period longer than five years. The ten year period provided for in the specifications, is realistic, so it is submitted, because the Department or principal itself may wish to resile from the contract after that period. It stands to reason, as submitted on behalf of the applicant, that any continuation with a service provider beyond five years will continue to involve annual licence renewal fees. This appears to be a logical consequence of entering into a long term maintenance agreement with the successful bidder, as foreshadowed in the specifications.

In addition, and on the same subject, it was argued on behalf of the applicant that the allegation in the answering affidavit that

> "A very important provision was added in this (the new) Terms of Reference which reads as follows:
>
> 'The winning bidder will be required to enter into a long term maintenance and support contract with respect to Through Life Capability Management (TLCM) of defence systems.'",

must be open to serious question. It was submitted by counsel that the (new) Terms of Reference submitted for approval are identical to the Terms of

Reference applicable to the present bid, save for this purported insertion of the alleged "very important provision": the (old and new) Terms of Reference consist of twenty typed pages. In the record before me, it now has two pages 20 (record pages 388 and 389). Page 388 (the first page 20) now contains, as a new clause (c), the "very important provision" whereas the second page 20 (record page 389) is without this provision and ends at clause (b). The difficulty is that the second page 20 follows logically on page 19 (record page 387) which the first page 20 does not do. It appears that someone inserted the page 20 (record page 388) containing the "very important provision" but forgot to remove the old page 20 (record page 389).

In the result, the respondents' reliance on this "very important provision" appears to be strained and artificial. In any event, the introduction of this clause, questionable as it may be, does not represent any departure from the existing provision, in the specifications, *supra*, and more particularly in paragraph 8(e) thereof, which provides for the conclusion of a maintenance and support contract for a minimum of ten years.

Consequently, so it was argued on behalf of the applicant, the reason given for the cancellation of the tender is contrived because it is exposed in the fact of the re-issue of the tender which is on identical functional terms to the one that has been issued. It is argued on behalf of the applicant that there are clear signs of bias in favour of the fourth respondent who appears to have advised the decision-maker on certain issues if one considers repeated references to the fourth respondent in the answering affidavit. See, for example, paragraphs 6.1, 6.2 and 9.2 of the answering affidavit.

3. The cancellation of the tender also appears to be unlawful because it flies in the face of the regulations published in terms of the PPPFA in *Government Gazette* R502 of 8 June 2011. Regulation 8 goes under the heading "**cancellation and re-invitation of tenders**". Regulation 8(4) reads as follows:

> "An organ of state may, prior to the award of a tender, cancel a tender if –
>
> (a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or
>
> (b) funds are no longer available to cover the total envisaged expenditure; or
>
> (c) no acceptable tenders are received."

Regulation 8(5) provides:

> "The decision to cancel a tender in terms of sub-regulation (4) must be published in the *Government Tender Bulletin* or the media in which the original tender invitation was advertised."

There is no indication that such an advertisement was placed. Moreover, in my view, the cancellation of the tender under these circumstances, does not fall within the ambit of regulation 8(4): there is clearly still a need for the services, otherwise the tender would not have been re-advertised, and such a need appears from the allegations made in the answering affidavit as quoted. There is no suggestion that funds are no longer available and, clearly, acceptable tenders were received. Under these circumstances, it would appear to be unacceptable for the goal posts to be shifted and the tender to be cancelled. This cancellation is also not in line with the provisions of section 2(1)(f) of the PPPFA which provides:

> "The contract <u>must be awarded</u> to the tenderer who scores the highest points, unless objective criteria ... justify the award to another tenderer." (Emphasis added.)

The cancellation of the tender, under these particular circumstances, is also at odds with the provisions of the General Bid Conditions that are part of the tender. Clause 18 stipulates:

> "18. **Award of bids.**
>
> After prices have been brought to a comparative level and/or points calculated according to a preferential points system, the bid <u>will be awarded</u> considering the following order of priority:
>
> (a) If the preferential point system is applicable (<u>my note</u>: as in the present instance), normally <u>to the bidder with the highest points</u>, unless reasonable and justifiable grounds, eg negative previous service record, negative references, etc, exist for passing over the bidder with the highest points ...
>
> (b) ..." (Emphasis added.)

> I am alive to the fact that clause 18(c) provides that the Department is not obliged to accept the lowest or any bid, but, in my view, such a cause of action should be taken on justifiable grounds, and not following upon a cancellation based on spurious grounds, particularly not under circumstances where the relevant body of the decision-maker (no 2) repeatedly recommended the award of the tender to the preferred bidder.

<u>Is there any reason not to award the tender to the applicant?</u>

[46] On three occasions, after preparing voluminous reports reflecting technical evaluation, pricing and other relevant aspects, no 2 recommended that the tender be awarded to the applicant. The later recommendations followed after no 3 requested further clarification and after a second Power Point presentation.

[47] The deponent to the answering affidavit, Mr Mokoena, brought out a report to no 3 suggesting, at least by implication, that the award of the tender to the applicant would be in order. Certainly, no reservations were raised about the bid of the applicant.

[48] Reasons advanced by no 3, over the months, in some minutes, such as they are, have no merit, and were not relied upon in the answering affidavit. Only one "reason" was raised, for the first time, in the answering affidavit. This, in itself, flies in the face of the authorities quoted. In my view, and for the reasons mentioned, this "reason" has been shown to ge groundless and irrational.

[49] The bid of the applicant was vastly superior to that of Specsoft. This could be the reason for the decision by Specsoft not to take part in these proceedings.

[50] The cancellation flies in the face of statutory provisions referred to and, consequently, is unlawful.

[51] In the circumstances, I am of the view that the applicant is entitled to the award of the tender.

Grounds of review

[52] The applicant advanced a full array of grounds falling under section 6 of PAJA. In my view, these grounds are applicable and were appropriately raised. A short overview of the grounds will suffice:

1. No 3 was not authorised to cancel the tender and was not entitled to do so for any of the grounds it has advanced.
2. No 3 was biased, alternatively is reasonably suspected of bias towards Specsoft (many instances of such perceived or real bias are listed in the papers).
3. No 3 failed to comply with the prescripts of the relevant empowering provisions which required no 2 to determine the functional compliance of the tenderer's bid and no 3 to apply the PPPFA to the evaluation process: had it done so, the applicant would have been awarded the tender.
4. No 3 took the decision:
    - 4.1 for an ulterior purpose, namely the insistance on preferring Specsoft's bid over that of the applicant when there existed no objective consideration in fact or in law to justify such an approach;
    - 4.2 because irrelevant considerations (eg the 20-25 year life cycle of the bid) were taken into account and relevant considerations were not considered

(the fact that both parties offered the same solution with an equivalent life cycle);

4.3 arbitrarily and capriciously (none of the reasons advanced withstand scrutiny).

5. The decision itself:

5.1 contravenes a law (compare regulation 8(4) and/or section 2(1)(f) of the PPPFA) or is not authorised by the empowering provision; and

5.2 is not rationally connected to –

(a) the purpose for which it was taken;

(b) the purpose of the empowering provision;

(c) the information before no 3; and/or

(d) the reasons given for it by no 3;

5.3 is so unreasonable that no reasonable person would have taken such a decision; and

6. The decision is otherwise unconstitutional and unlawful because it contravenes the constitutional requirement for a tender process and system that is open, transparent and fair.

[53] Against this background, it was submitted, correctly in my view, that the decision to cancel/withdraw the tender falls to be reviewed and set aside.

[54] Following such a review, the failure and/or refusal to take a decision on the tender also falls to be reviewed and set aside in terms of the provisions of section 6(2)(g) of PAJA. See also *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and another* 2007 6 SA 442 (CkHc) at 453E-G.

<u>Would it be appropriate, in this case, for the impugned administrative action to be substituted by this court in terms of section 8(1)(c) of PAJA?</u>

[55] The appropriate portion of section 8(1) of PAJA provides:

> "(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –
>
> (a) ...
>
> (b) ,,,
>
> (c) setting aside the administrative action and –
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases –
>
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
>
> (bb) ..."

[56] On this subject, the following is said in *Gauteng Gambling Board v Silverstar Development Ltd* 2005 4 SA 67 (SCA) at 75D-I:

> "The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to

exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Hefer AP said in *Commissioner, Competition Commission v General Council of the Bar of South Africa and others* 2002 6 SA 606 (SCA):

'[14] ... the remark in *Johannesburg City Council v Administrator, Transvaal, and another* 1969 2 SA 72 (T) at 76D-E that "the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfair to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda* 1961 1 SA 342 (A) at 349G "... the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ... although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides" ...'"

[57] It has to be stated, that the learned Judge of Appeal, at 76C-E, issued the following cautionary remarks:

> "An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations (here follows a reference to a number of decisions including the well-known case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 4 SA 490 (CC) at paras [46] to [49]). That is why remittal is almost always the prudent and proper course."

[58] In the language of the statute, substitution will only take place "in exceptional cases". It is clear that due deference must be given to the better equipped administrative decision-making bodies.

[59] Nevertheless, as Hefer AP stated, *supra*, "considerations of fairness also enter the picture" and he concluded in the following words (quoted in *Gauteng Gambling Board* at 76B-C):

> "This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision himself provided it is able to do so."

[60] In the present case, as I have already attempted to illustrate, the applicant submitted an impressive and fully compliant bid. It was vastly superior to that of its only opponent. It was, at least by implication, even approved by the deponent to the answering affidavit. The evaluation body (no 2) recommended, on three occasions, that the contract should

be awarded to the applicant. Reservations expressed on at least two occasions by no 3, were fully addressed and clarified. This much is confirmed by the deponent to the answering affidavit. In the end, no 3 abandoned any reservations, such as they were, expressed from time to time to support its continued refusal to accept the recommendation of no 2. In terms of the answering affidavit, the respondents were left with only one "reason", such as it was, for cancelling or withdrawing the tender. This "reason" has been found to be spurious and unsubstantiated. I have attempted to illustrate the basis for this finding. I have expressed the view that the cancellation of the tender was irrational and unlawful. The reasons for this finding have been mentioned.

It is clear that the respondents require the services offered by the applicant. There is sufficient funding available. The closing date of the tender was already in June 2012, approximately two and a half years ago. There are clear signs of bias on the part of no 3. Its conduct, throughout, was unfair and irrational. The applicant was only informed of the decision to withdraw the tender, some three months after the decision was taken. It is not improbable that remittal will result in a hostile reception of the applicant by the same decision-makers. There is no valid reason, as I have attempted to illustrate, for not awarding the tender to the applicant.

[61] In all the circumstances, I have come to the conclusion that this is a case where "considerations of fairness" and other compelling relevant considerations, as described, dictate that the administrative action falls to be substituted by this court.

[62] In conclusion, I have to state that a question which has been exercising my mind, on this subject, is whether a court has the power to substitute a decision which has not yet been taken in the first place by the administrative decision-maker.

It seems to me that the answer may lie in the following words of the learned Judge in *Intertrade* at 455I-456C (although evidently only expressed as part of the *obiter dicta*):

> "In the light of the view I take of the appropriate remedy to be awarded, it is not strictly speaking necessary to deal with *Mr Buchanan*'s argument that the court has no power to take the decision that the administrative decision-maker ought to have taken, in circumstances where, as in this case, no decision has been taken. Suffice it to say that I am not convinced that the argument is sound that the remedies listed in section 8(2) constituted a closed list. That argument appears to overlook the open-ended scheme of the remedies contemplated for breaches of the right to just administrative action: a court may, in terms of both section 8(1) and section 8(2) 'grant an order that is just and equitable' and the orders contemplated *may include* those that are listed. I see no reason why a failure to decide an application for a licence or permit, for instance, may not, in an appropriate case, be remedied by an order granting the licence or permit where its grant is a foregone conclusion and no purpose would be served in referring the matter back to the administrative decision-maker: a failure to decide may sometimes amount to a constructive refusal."

In the latter regard, see the authorities quoted in footnote 24 of *Intertrade* at 456.

[63] In the result, I have come to the conclusion that the application ought to succeed.

Costs

[64] There appears to be no reason why the normal rule should not be applied, with the costs following the result. As I stated earlier, costs are sought, for understandable reasons, only against the first respondent.

The order

[65] I make the following order:

1. The decision of the first and/or second and/or third respondent to withdraw/cancel the tender issued under the Request for Proposal concerning the National Codification System (BID CPSC/B/PC/013/2011R) ("the tender"), is reviewed and set aside.
2. The first, and/or second, and/or third respondents' refusal and/or failure to take a decision on the tender is reviewed and set aside.
3. The tender is awarded to the applicant.
4. The respondents are ordered to afford the co-operation which can reasonably be expected from them to ensure prompt implementation of the tender.
5. The first respondent is ordered to pay the costs.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

22496-2013

HEARD ON: 25 AUGUST 2014
FOR THE APPLICANT: D VETTEN
INSTRUCTED BY: B D K ATTORNEYS
FOR THE 1ST, 2ND AND 3RD RESPONDENTS: J A MOTEPE
INSTRUCTED BY: STATE ATTORNEY