

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 1357/2007
Case Heard: 11 & 12/11/2008
Date delivered: 12/12/2008

In the matter between:

Actaris South Africa (Pty) Ltd

APPLICANT

and

Sol Plaatje Municipality

1ST RESPONDENT

Intelligent metering systems (Pty) Ltd

2nd RESPONDENT

Coram: Williams J et Olivier J

JUDGMENT

Olivier J:

1. The applicant, Actaris South Africa (Pty) Ltd ("Actaris") has cited the Sol Plaatje Municipality (formerly known as the Kimberley Municipality and also referred to herein as "SPM") and Intelligent Metering Systems (Pty) Ltd ("IMS") as the first and second respondents respectively in an application for the following orders:

"1. Reviewing and setting aside the decisions of the First Respondent taken in and during 2007 to award the tenders under contract numbers F/MGT-VEND/2006, CEE/T/2006,

F/INC-VEND/2006 and CE/F-RP/1/2006 to the Second Respondent;

- 2. Referring the adjudication of the aforesaid tenders back to the First Respondent and directing it to adjudicate same in accordance with section 2(1)(c) of the Preferential Procurement Policy Framework Act 5 of 2000, as read with the Regulations promulgated thereunder and with paragraph 27(1) of the First Respondent's Supply Chain Management Policy;*
 - 3 Ordering the First Respondent to pay the costs of this application, such costs to be paid jointly and severally with the Second Respondent only in the event that the latter opposes the application."*
2. This application was preceded by an urgent application in which the applicant applied for and obtained an order preventing the further execution of these contracts pending the finalisation of the review application.
 3. In its replying affidavit Actaris raised certain new issues and invited the respondents to file supplementary affidavit in this regard. IMS did not file its supplementary affidavits timeously and had to apply for condonation and for leave to file such affidavit. That interlocutory application was settled between the parties on 9 September 2008 on the basis that the hearing of the main application was postponed, that IMS was ordered to file its supplementary affidavits on or before 12 September 2008, that IMS would pay Actaris' wasted costs and that SPM's wasted costs would be reserved for later determination.

4. On 11 September 2008 Actaris filed a further affidavit, which mainly dealt with the financial standing of IMS.
5. IMS' supplementary affidavit was not filed timeously. It was only filed on 25 September 2008. IMS was therefore once again compelled to apply for condonation. This it did, but it also applied for the rescission of the order in terms of which it had to pay Actaris' wasted costs of 9 September 2008, apparently on the basis that Actaris had fraudulently withheld the fact that it would in any event make use of the opportunity to file a further affidavit.
6. The circumstances which had led to the filing of Actaris' further affidavit have been fully explained and at the hearing Mr Stein, counsel for IMS, did not contend otherwise.
7. The filing of both these affidavits was therefore condoned and there will be no rescission or amendment of the order of 9 September 2008.
8. In the circumstances there is no reason why IMS should not be ordered to pay SPM's wasted costs of 9 September 2008.

BACKGROUND

9. On 1 November 2003 Actaris Measurement & Systems (Pty) Ltd ("*Actaris M&S*"), an associate of Actaris, concluded a contract with SPM in terms of which Actaris M&S would supply to SPM (for a period of three years) pre-payment vending software and hardware for the provision of electricity. Revenue protection services were expressly excluded from that contract.

10. By agreement between the parties Actaris M&S was at some stage during the course of the contract replaced by Actaris as service provider and at the end of the contract period it was extended on a month to month basis until 31 August 2007.
11. On 5 November 2006, however, SPM published invitations for tenders for four contracts which are described as follows in the answering affidavit of SPM's municipal manager, mr T F Mashilo:

"contract number CEE/T/2006, to finance, supply, deliver and install pre-payment electricity meters or compatible software and devices for revenue protection ("the pre-payment electricity meters contract");

contract number F/MGT-VEND/2006, for ownership, maintenance and management of the pre-paid vending machines, hardware and stationary, as well as the management of third-party vendors ("the maintenance and management contract");

contract number CE/F-RP/1/2006, for the provision of revenue protection services with respect to electricity service provision ("the revenue protection contract"); and

contract number F/INC-VEND/2006, for the provision and installation of a pre-payment electricity vending system ("the pre-paid vending machines contract").

12. After a briefing session in November 2007 the bids were publicly opened on the closing date for the tenders, **viz** 8 December 2006.

13. SPM then appointed Khatima Engineering Services (“KES”) for a technical evaluation of the submitted tenders in order to, in the words of mr Mashilo, *“provide an initial evaluation for the purpose of short-listing bidders and a final evaluation for the purpose of evaluation and/or adjudication”*. It needs to be emphasised that KES’ mandate and obligations were limited to a technical assessment, and excluded the assessment of the financial aspects of the tenders.
14. KES provided SPM with an initial technical report on 13 March 2007, recommending the short-listing of four companies, **viz** Actaris, IMS, Netgroup and Conlog.
15. KES then requested further information from the tenderers. Site visits were conducted between 17 and 19 April 2007. The site visits were also attended by certain representatives of SPM. According to mr Mashilo the *“purpose of the site visits was to conduct a proper assessment of the technical aspects of the bids”*.
16. On 20 April 2007 the short-listed bidders made further presentations to representatives of SPM and KES.
17. KES then provided SPM with its final technical report on 24 May 2007, and immediately thereafter with an amended version thereof. In its amended form it recommended the award of the tenders for the pre-payment electricity meters contract (contract number CEE/T/2006), the revenue protection contract (contract number CE/F-RP/1/2006) and the pre-paid vending machines contract (contract number F/INC-VEND/2006) to IMS.

18. No recommendation was made regarding the remaining tender (for the maintenance and management contract) and it was eventually not awarded to any of the bidders, on the basis that the required maintenance and management would be included as part of the services tendered for by IMS in respect of the other three contracts.
19. Mr N Mpolokeng, the cost and management accountant of SPM, was then saddled with the task to calculate the price of each bid and the points scored by each bidder in respect of functionality (out of 45 points), price (also out of 45 points) and specific contract participation goals (out of 10 points). These were recorded in an excel spreadsheet designed for the purposes of the Preferential Procurement Policy Framework Act, 5 of 2000 (*"the PPPFA"*).
20. On 8 May 2008 Mpolokeng addressed letters to each of the short-listed bidders, in which he requested certain information regarding their pricing in respect of the pre-payment electricity meters contract and the revenue protection contract. Actaris never responded to this letter, but the other bidders did (albeit in some cases not within the time set by Mpolokeng in his letter).
21. On 25 May 2007 the bid evaluation committee and the bid adjudication committee of SPM convened to consider the tenders. Both recommended the award of the three contracts to IMS.
22. The recommendation of the bid adjudication committee was then submitted to mr Mashilo, who was also the accounting officer of

SPM and who finally took the decisions in accordance with the recommendations.

23. It is SPM's case that Actaris had, in respect of the pre-payment electricity meters contract, failed to meet the 60 % threshold for functionality. It had been a condition of the invitations that a bidder that failed to meet this threshold would be disqualified from further consideration. According to SPM the Actaris tender for this contract was therefore not further considered.
24. It is furthermore SPM's case that IMS had outscored Actaris in respect of the revenue protection contract and the pre-payment vending machines contract.
25. Actaris has based its application for the setting aside of the decisions on numerous grounds, but in view of what follows it will not be necessary to deal with all of them.

COMPOSITION OF BID EVALUATION COMMITTEE AND BID ADJUDICATION COMMITTEE ON 25 MAY 2007

26. In terms of section 111 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("the *LGMFM Act*"), and in accordance with the Municipal Supply Chain Management Regulations ("*the Regulations*") published under government notice 868 in the Government Gazette of 30 May 2005, SPM adopted a supply chain management policy ("*the policy*") which prescribes the procedure to be followed in respect of tenders like these. In terms of regulation 12(1)(d) SPM was compelled to apply a "*competitive bidding process*" in this case, *inter alia* because of the "*transaction value*" of the tenders.

27. In terms of paragraph 26 of the policy (read with regulation 25) a "committee system *for competitive bids shall consist of the following committees:*
- "(a) *a bid specification committee;*
 - (b) *a bid evaluation committee; and*
 - (c) *a bid adjudication committee"*
28. Such a bid evaluation committee has to evaluate bids in accordance with the particular specifications of a tender and the applicable points system and **must** then "***submit to the adjudication committee a report and recommendations regarding the award of the bid ...***" (paragraph 27 of the policy and regulation 28).
29. In terms of paragraph 28(1)(a) of the policy (and regulation 29(1)(a)) the bid adjudication committee "***must ... consider the report and recommendations of the bid evaluation committee***" before, in this case, making "*a recommendation to the accounting officer to make the final award*".
30. As already mentioned mr Mashilo, in his capacity as the municipal manager of SPM, was the accounting officer for such purposes (section 60 of the LGMFMA Act).
31. As far as the composition of a bid evaluation committee and a bid adjudication committee is concerned, paragraphs 27(2) and 28(2) of the policy (read with, respectively, regulations 28(2) and 29(2)) provide as follows:
- "27(2) *A bid evaluation committee **must** as far as possible be composed of –*

(a) **officials from departments requiring the goods or *services***; and

(b) *at least one supply chain management practitioner of the municipality"*

"28(2) *A bid adjudication committee must consist of at least four senior managers of the municipality which **must** include –*

(a) *the chief financial officer or, if the chief financial officer is not available, another manager in the budget and treasury office reporting directly to the chief financial officer and designated by the chief financial officer; and*

(b) *at least one senior supply chain management practitioner who is an official of the municipality; and*

(c) ***a technical expert in the relevant field who is an official, if such an official exists."***

32. Paragraph 28(4) of the policy (regulation 29(4)) provides that:
"Neither a member of a bid evaluation committee, nor an advisor or person assisting the evaluation committee, may be a member of a bid adjudication committee".

33. It was argued on behalf of Actaris that the composition of both the bid evaluation committee and the bid adjudication committee did not comply with the policy in this case and that on this basis alone the decision to award the tender to IMS fell

to be set aside on the basis that “*mandatory and material procedure or conditions prescribed by an empowering provision was not complied with*” (**s 6(2)(b)** of the **Promotion of Administrative Justice Act**, 3 of 2000 (‘the PAJA’’)).

34. Mnr Cassim SC, counsel for SPM, contended that it was only in Actaris’ heads of argument that the composition of these bodies was for the first time “*directly challenged*” and that these arguments should and could have been raised after the minutes of these committees (presumably for the meetings of 25 May 2007) were made available to Actaris.
35. The composition of these committees was, however, raised as an issue in the replying affidavit, where it was stated that none of the members of the bid evaluation committee had technical expertise and doubt was expressed about whether the composition of that committee had complied with the requirement that, as far as possible, that committee had to be composed of “*officials from departments requiring the goods or services*”. As far as the bid adjudication committee is concerned it was stated that there was no indication that “*any person serving on (that committee) had technical expertise*”.
36. The minutes of the bid evaluation committee meeting of 25 May 2007 could by no stretch of the imagination have alerted Actaris to the fact that none of its members had been from the electricity department or “*electricity division*”, as described by Mashilo in a supplementary affidavit to which I will revert in due course. Quite to the contrary, it creates the impression that messrs Pretorius, Engelbrecht and Ludik had been members of the committee in their capacities as “MANAGER RESPONSIBLE FOR THE USER DEPARTMENT”; which would clearly be

irreconcilable with Mashilo's own description of the members of that committee, both in his answering affidavit and in the supplementary affidavit already referred to.

37. The same applies to the minutes of the bid adjudication committee's meeting on 25 May 2007, which erroneously reflect that Pretorius and Ludik were members of that committee.
38. There is accordingly no basis upon which it can be argued that these minutes provided Actaris with the facts necessary for this challenge.
39. Those facts came to light for the first time when they were volunteered in Mashilo's answering affidavit on behalf of SPM.
40. Actaris then raised the issue in its replying affidavit and invited both SPM and IMS to file supplementary papers. This IMS did eventually do on 25 September 2008. SPM did not, at that stage, take up this invitation. It was only well after these issues had pertinently been raised in heads of argument filed on behalf of Actaris on 19 August 2008, that a supplementary affidavit by Mashilo was filed on 20 October 2008.
41. This supplementary affidavit deals exclusively with the composition of the committees as at 25 May 2007 and there can therefore be no prejudice whatsoever for SPM if these issues are taken into account and considered.
42. It appears to be common cause that, although mr Raymond Pretorius (the Chief Electrical Engineer seconded to SPM from Eskom) and mr Engelbrecht (at the time the Chief Superintendent: Testing and Metering of SPM) attended the

meeting of the bid evaluation committee on 25 May 2007, neither of them were members of that committee.

43. There appears to be no reason why it would not have been "*possible*" (see paragraph 27(2) of the Policy) for Mashilo to appoint at least one of these officials as a member of the bid evaluation committee (paragraph 25(2) of the Policy and regulation 26(1)(b)). No such reason was suggested on behalf of SPM, and no attempt has been made to demonstrate that it would not have been possible to appoint any of the other officials from the relevant department (concerned with the supply of electricity) as members of the bid evaluation committee.
44. None of the members of this committee were therefore officials of the department concerned.
45. Even if Pretorius or Engelbrecht had attended the meeting of the bid evaluation committee on 25 May 2007 they would, as non-members, not have been entitled to vote or to take part in the decision of the bid evaluation committee.
46. This puts paid to not only Mashilo's statement that Pretorius had attended the meeting of the bid evaluation committee, but also to his contention that all "*line managers*" (whatever that may be) had been invited. On his own version those "*line managers*" would not have had voting powers and their presence could never have fulfilled the requirement that at least one official of the relevant department had to be a member of the committee.

47. It was argued on behalf of IMS that the words "*as far as possible*" in paragraph 27 (2) of the policy are indicative of a directory rather than a peremptory provision.
48. I disagree. These words must be read in context and the intention quite clearly was that, should such officials be available for appointment as members, at least one "*must*" serve as a member for the purpose of at least those meetings where decisions will be taken and recommendations will be made which would affect the particular department.
49. There was not even the faintest suggestion that it had not been possible to appoint at least one official of the electricity department as a member of the bid evaluation committee, even if only for the purpose of these tenders.
50. There is absolutely no reason why the composition of these committees could not be revised from time to time, depending on the nature of the tenders to be considered and the departments to be affected, and the provisions of the policy and the regulations cannot be interpreted in any other way.
51. There is even less merit in the further argument of mr Stein, on behalf of IMS, that the provisions of paragraph 28(4) of the policy would have precluded Pretorius from being a member of the bid evaluation committee on the basis that he was an "*advisor*".
52. Pretorius was not an "*external*" advisor, as suggested by mr Stein. He was an employee and official in the employ of SPM, albeit seconded from Eskom.

53. In any event, these provisions deal with membership of the bid adjudication committee, and not the bid evaluation committee.
54. Despite the availability of officials like Pretorius and Engelbrecht, who had clearly been "*technical expert(s) in the relevant field*", neither of them had been appointed as a member of the bid adjudication committee.
55. There appears to be no reason why at least one of them could not have been so appointed, which would have left the other available to advise and assist the bid evaluation committee (paragraph 28(4) of the policy and regulation 29(4)).
56. It was argued on behalf of SPM that nothing had prevented Pretorius from attending the meeting of the bid adjudication committee on 25 May 2007, and that he had himself chosen not to attend that meeting. This argument misses the point. Even if he had attended, he would still not have been a member of the committee and would therefore not have been entitled to vote or to take part in the decision itself.
57. The unwillingness of an official (if that was indeed the reason for the absence of Pretorius at the meeting of the bid adjudication committee) would in any event not have relieved SPM of the obligation to see to it that such a committee is properly constituted, in order to ensure that decisions taken by such a committee are properly taken.
58. The accounting officer of SPM had therefore failed to comply with the requirements regarding the appointment of members and the composition of these committees, and when the decisions were taken to disqualify Actaris on the basis of functionality in

respect of the one contract and to recommend the award of the tenders to IMS these two committees were not properly constituted.

59. According to Mashilo one Khuza Bogacwi, the director of the Infrastructure and Technologies Directorate, under which Directorate the line functions for electricity, water, roads and fleets fall, was a member of the bid adjudication committee and can be assumed to have obtained "*all the relevant information regarding the requirements of this line function for the purposes of informing the evaluation of the tenders*" at the meeting of this committee.
60. Even if this assumption, which clearly amounts to pure conjecture and is not confirmed by an affidavit from Bogacwi, could be made, the *ad hoc* acquisition of such information would not have made Bogacwi a "*technical expert in the relevant field*".
61. This attempt by Mashilo to justify the composition of the bid adjudication committee makes it clear that no "*technical expert*" as envisaged in paragraph 28(2)(c) of the policy served as a member of the committee at the meeting of 25 May 2007.
62. The fact is that there is no suggestion that no official who was such an expert, and who could therefore have been appointed as a member (even if only for the purposes of that particular meeting), "*existed*" at the time of the meeting. To the contrary, even on SPM's own version, at least Pretorius or Engelbrecht (both of whom are conceded to have been such experts) could have been appointed as a member and the other would still have been available to serve as a member of the bid evaluation committee for the purposes of its meeting.

63. Neither Pretorius nor Engelbrecht would have been an "*external consultant*", as suggested by mr Stein, and neither of them would therefore have been precluded (by paragraph 28(4) of the policy) from serving as a member of the bid adjudication committee.
64. Once again I do not agree with mr Stein's argument that the phrase "*if such an expert exists*" in paragraph 28(2)(c) of the policy is indicative of a directory (rather than a peremptory) requirement. When the provisions of that paragraph are viewed in context it is clear that, where such an expert official is available, he or she "*must*" be appointed for the purposes of at least that particular meeting where a tender which falls within his or her field of expertise is going to be considered.
65. It goes without saying that the contents of these tenders and contracts are of a highly technical and specialised nature.
66. As already concluded, the relevant provisions of the policy (and of the corresponding regulations) are couched in peremptory terms. Apart from the fact that there is no reason why they were not complied with, there are clear indications that such non-compliance may have had a prejudicial effect on the activities of these committees and the conclusions reached by them.
67. The failure to appoint an official of the relevant department of SPM as a member of the bid evaluation committee resulted in a decision being made which affected that department (and the taxpayers and electricity consumers), but to which such department was not able to contribute effectively by way of a

vote or votes. Even if Pretorius and Engelbrecht had at that meeting advised against recommending the award of the contracts to IMS, they would not have been able to vote.

68. The position is even worse as far as the meeting of the bid adjudication committee on 25 May 2007 is concerned. The absence of a technical expert as a member at that meeting not only resulted in the fact that no technical expert took part in the vote and in the decision to recommend IMS, but also meant that the members of that committee did not have the advantage of technical explanations or advice. More in this regard below, when the actual proceedings at that meeting of the bid adjudication committee will be dealt with.
69. I cannot agree with mr Cassim's submission that Actaris' "*persistence with*" (this) "*challenge seeks to elevate form over substance*". It is quite obvious what the reasons for these requirements in the policy and the regulations are. The requirements are intended to ensure that the votes of the affected department and of a technical expert form part of the decision-making process. It is not at all hard to understand the need for this where the financial implications and the technical specifications of tenders of these proportions have to be considered.
70. The accounting officer's decision to award the particular bids to IMS was therefore based upon recommendations made by a bid adjudication committee which had not been properly constituted. Its decisions and recommendations could not have been valid, not only because of the way that it was itself constituted, but also because of the fact that its decisions were based upon the

decisions and recommendations of a bid evaluation committee which had also not been properly constituted.

71. On this ground alone the decisions fall to be set aside on the basis that “*mandatory and material*” empowering provisions were not complied with (**s 6(2)(b)** of the **PAJA**).

**PROCEEDINGS AT THE MEETING OF THE BID
ADJUDICATION MEETING ON 25 MAY 2007**

72. The prejudice emanating from the deficiencies in the composition of the two bid committees was both accentuated and compounded by the manner in which the meeting of the bid adjudication committee on 25 May 2007 was conducted. The meeting was convened and conducted with undue, and indeed inexplicable, haste.
73. It started immediately after the conclusion of the meeting of the bid evaluation committee.
74. The meeting of the bid evaluation committee was only concluded at 16:45 on Friday 25 May 2007. If the meeting of the bid adjudication committee did indeed take place after the conclusion of the meeting of the bid evaluation committee (a question which will be reverted to in due course) it would therefore have started at some time after 16:45 and would probably have lasted well past the end of normal office hours.
75. The letters informing IMS of the award of the tenders to it were dated 25 May 2007, which would mean that Mashilo must have received the recommendations of the bid adjudication committee sometime after hours on that Friday and must then on that same

day not only have come to a conclusion on the final award, but also, somewhat amazingly, have had the need and the time to immediately address these letters to IMS.

76. He did apparently not, however, at that stage have the need or the time to inform Actaris of the fact that its bids had been unsuccessful. This was only done on 4 July 2007, and only after Actaris had made enquiries in this regard on 29 June 2007.
77. Those who attended the bid adjudication committee's meeting of 25 May 2007 were clearly brought under the impression that they had to come to a conclusion urgently. According to the transcript of the proceedings at the meeting a certain Mr Mogatwe (it is not clear whether the transcript should perhaps have referred to Mr Bogacwi) repeatedly stated that he understood the urgency. For some strange reason the transcript does not, however, reflect what had led to these remarks.
78. It is of some interest to note that, although the competitive bid mechanism clearly requires that the meeting of the bid adjudication committee takes place after the bid evaluation committee has already concluded its meeting and has come to a conclusion, the notice of the meeting of the bid adjudication committee informed members that the meeting of that committee would start at 14:00. The notice of the meeting of the bid evaluation committee read that that meeting would start at 14:30 on the same day.
79. Although the transcript has been made available by SPM on the basis that it is a transcription of the proceedings at the meeting of the bid adjudication committee on 25 May 2007, it has been annexed to the answering affidavit of Mashilo under cover of a

page purporting to be the cover page of a transcription of the meeting of the bid "EVALUATION" committee of 6 September 2007 (a meeting which did indeed take place and will be reverted to in due course).

80. It will for purposes of this judgment be accepted that it is indeed a transcription of the proceedings at the bid adjudication meeting of 25 May 2007. It does, however, quite clearly reflect that for some reason only part of those proceedings was recorded.
81. According to Mashilo the meeting of the bid adjudication committee was held immediately after the meeting of the bid evaluation committee in order "*to expedite a tender decision*", apparently because "*The contract with Actaris had already been extended twice and the continuation of this state of affairs was not desirable*".
82. I have to say that I find this explanation completely improbable and extremely difficult to believe.
 - 82.1. As already mentioned, the existing contract was in any event extended on a month to month basis until 31 August 2007. What could the need for such an urgent decision have been if the contract was in any event going to be extended again for firstly June 2007, then July 2007 and finally for August 2007?
 - 82.2. If the reason for the urgency was to put an end to the contract with Actaris as soon as possible, why was Actaris not informed of the outcome of its bids

with the same measure of urgency as in the case of
IMS?

83. According to the transcript, Mogatwe right at the outset remarked as follows:

"We will be taking, we will reach decisions. I will be uncomfortable to decide with these and we need to see those conditions.

I would say I am uncomfortable because I want us, I understand the urgency, but I want us to have the documentation so that we decide on what we can proceed, given the workshop that we have on budgets. Because we are going to take adverse decisions and it will not be a bidder, I speak briefly about the magnitude of the bidder contract.

So I think we need to put it right. I understand the urgency but we need to have a look at the (inaudible) ment, apply our minds to the documents because of the (inaudible) contract.

So I could be a bit uncomfortable to agree to something that I don't see."

84. The chairperson then asked somebody called Pierre whether it was possible to have the required documentation available that day.

85. It appears quite clearly from the transcript that the documentation required was actually the report and the recommendations of the bid evaluation committee, because mention was specifically made of the conditions decided upon by that committee.

86. It is equally clear that no written report or recommendations was made available and that, instead, the members of the bid adjudication committee had to rely on what "*Eugene*" (presumably Mr Eugene Baise, a member of the bid evaluation committee), who by his own admission had not even made notes of the proceedings and discussions of the bid evaluation committee, told them in this regard.
87. According to the transcript Baise also said that he would merely "*highlight a few (conditions) that was mentioned*", and he therefore clearly did not intend to even attempt to convey the contents of the bid evaluation committee's deliberations, conclusions and recommendations comprehensively.
88. When regard is had to the contents of the transcript it is very clear that it could by no stretch of the imagination be said that a comprehensive version of the decisions and recommendations of the bid evaluation committee was furnished to those who attended the meeting of the bid adjudication committee.
89. As only one of many examples of the inadequacy of Baise's responses and explanations, reference can be made to the following answer of Baise to Mogatwe's question regarding the duration of the pre-payment electricity meters contract:
"They guarantee, they are open for ten years, but we need to have a maintenance agreement with IMS to maintain the system. So it is the three year process, but I think also that was asked to be included in the MOU, is to give a detail as to the project plan for them to install these meters within that three years, obviously of that I think they have mentioned something

like that. They guarantee the system for ten years, but it's only three years."

90. The "MOU" was apparently a reference to a memorandum of understanding which would contain the conditions applicable to the awarding of the bids to IMS. Despite requests on behalf of Actaris no such documentation have been made available by SPM.

91. When somebody identified only as "Speaker 1" wanted to discuss questions regarding the financial implications of "Financial offer number 3" (a clear reference to one of the offers of IMS) the chairperson reacted by making the following remark:

"Can I suggest something? Normally when we adjudicate we don't normally get a detailed history in terms of what questions was asked and what answer was given. Let us rather concentrate on the questions that will help ourselves, and let Eugene clarify any conditions are included here. ...

Because we are going to be confused because now we are not the people that were part of the committee, we are not be getting those questions in detail."

92. It is clear that the chairperson wanted to discourage those present from considering what was discussed at the meeting of the bid evaluation committee. That the chairperson was only concerned with getting the meeting over with as soon as possible is also borne out by her remark:

"I am trying to act, I am really feeling so sick. I want to be out of here".

93. Repeated questions about whether the IMS system was a closed or proprietary one and about whether its meters and system would be STS compliant or compatible were on the face of it not met with comprehensible answers or explanations.
94. This is perhaps not surprising, because these questions were put to Baise, who by his own further admission was not "*a technical person*". He was attached to the treasury department of SPM. That Baise was unable to provide any meaningful explanations to these questions appears clearly from the chairperson's remark: "*I am not understanding why Raymond (a clear reference to mr Raymond Pretorius) isn't here*".
95. That the question whether the IMS system would be fully STS compliant did indeed involve issues of a highly technical nature, is borne out very clearly by the evidence that has been tendered in this regard by all three parties.
96. It is clear on the papers that the STS compatibility or non-compatibility of the IMS system bore serious financial and other implications and therefore the absence of a technical expert as a member (or at least technical input) at the meeting of the bid adjudication committee obviously resulted in prejudice. Not only did it result in a decision being taken on a highly technical issue without the contribution or influence of the vote of an expert, but also the absence of technical advice and input resulted in the members and others who attended not being properly informed and not being able to properly apply their minds.
97. Among the vague answers given by Baise regarding the STS compatibility of the IMS system was the remark that "*the item*

page 33 and 34 there it addresses the STS meters and the non-STs meters as well".

98. Due to the fact that mr Baise did not bother to elaborate on this, it is impossible to determine what exactly he was referring to or to conclude that the question had been answered (and the technical position explained) sufficiently to ensure that the members of the bid adjudication committee properly understood the technical position and, more importantly, what the findings and recommendations of the bid evaluation committee in this regard were.

99. What one does, however, have to go on (from Mashilo's affidavit) is that the final technical report by KES was taken into account and relied upon at these meetings of the bid evaluation committee and the bid adjudication committee. In its final report KES concluded and advised that:

"Although IMS meters have a unique metering system, however don't comply with STS specification ... "

"The priority points comparison score sheets indicate that ACTARIS and CONLOG systems are the only two interoperable metering solutions that complies with the STS specification".

100. Both SPM and IMS are adamant that the IMS system is STS compliant. On this version it would therefore have to be assumed that the members of the bid adjudication committee had come to their conclusions and had made their recommendations on the basis that the IMS system was STS compliant. This would, however, be irreconcilable with the KES

report, which was according to Mashilo adopted as correct and taken into account at that meeting.

101. According to its minutes the bid adjudication committee had, however, approached the matter on the basis that "... *IMS meters ... don't comply with STS specification ...*" and that only the system of Actaris and Conlog "... *complies with the STS specifications*".
102. Such an approach (and an acceptance of this as the correct factual position) by the bid adjudication committee would not only have been in line with what Actaris' case is as regards the STS compatibility of the IMS system and with KES' findings, but more importantly also with the contents of a document which forms part of the record and which, according to the typed heading on its cover page, purports to be the "*AGENDA & MINUTES*" of the "*BID EVALUATION COMMITTEE MEETING ... HELD ON ... 25-05-07*" (on the cover page the handwritten word "*Draft*" also appears). Exactly the same remarks regarding the issue of STS compatibility, word for word, appear in this document.
103. Although the minutes of a bid evaluation committee meeting on 11 July 2007 reflect that the minutes of its meeting on 25 May 2007 were adopted as correct, it is SPM's case that this is in fact not what happened and that the minutes of 25 May 2007 (which according to Mashilo were only draft minutes) were eventually revised and amended at a meeting on 6 September 2007.
104. The amended version of these minutes differs drastically from the initial version. In particular the remarks about the IMS system not being STS compliant do not appear in the amended

version at all. In fact, according to the amended version there could not have been any consideration of the STS issue, which would raise the question how on earth the mistake could have been made, by the person who prepared the so-called draft minutes, to note a fairly detailed discussion of this issue.

105. The amended version also contains a number of material additions regarding what had transpired and what had been discussed and recommended at the bid evaluation committee meeting of 25 May 2007. The most notable of these would perhaps be the "NOTE" to the affect that Actaris' failure to respond to the letter regarding its pricing had left the committee without information which *"was very critical in making the final decision"*.
106. I find the timing of this addition very interesting. It was effected after Actaris had requested reasons on 29 June and 3 August 2007, but before Actaris' failure to respond was stated as a reason (for the awards) on 2 October 2007.
107. This must be seen against the background of the further strange coincidence that, according to Mashilo, not only had the proceedings at the meeting of the bid evaluation committee on 25 May 2007 been minuted completely incorrectly and incomplete, but also a mistake had once again been made in the minutes of 11 July 2007 as regards whether the minutes of 25 May 2007 were approved and adopted or not.
108. If it was realised at the meeting of 11 July 2007 that the draft minutes of 25 May 2007 were not correct, as claimed by Mashilo, why was the problem not discussed and corrected there and then?

109. Even more strange are the minutes of the meeting of the bid adjudication committee of 25 May 2007, which meeting is supposed to have taken place immediately after the bid evaluation committee meeting and where Baise is claimed to have apprised members of that committee of what had transpired at the earlier meeting of the bid evaluation committee. Those minutes correspond perfectly with the draft ("*incorrect*") minutes, to the finest detail, but do not reflect any of the amendments or additions of the amended version.
110. I deem it unnecessary to burden this judgment with a detailed description of the similarities between the "*incorrect*" bid evaluation committee minutes and the bid adjudication committee minutes, or of the differences between the contents of these two sets of minutes, on the one hand, and the amended minutes, on the other hand. Even a superficial reading of these documents will reveal these similarities and differences.
111. The minutes of the bid adjudication committee's meeting of 25 May 2007 have not been claimed to also be incorrect. Neither these minutes nor the transcript of that meeting reflect any mention of a problem regarding Actaris's costing or of the fact that Actaris had failed to respond to a letter in this regard.
112. In fact, the transcript reflects not even a mention of the name Actaris. For some strange reason Actaris' failure to respond, which according to both the note in the amended minutes of the bid evaluation committee and SPM's reasons had played such a vital role in the consideration of the tenders, was according to the transcript not even mentioned at the meeting of the bid

adjudication committee and was not noted in the minutes of that meeting.

113. The transcript also does not reflect any deliberation on the pricing of additional meters, an issue which had according to the amended minutes (but not the draft minutes) of the bid evaluation committee been discussed and deliberated and which one would have expected Baise to have raised at the bid adjudication committee's meeting if he had intended to provide that committee with an oral version of, at least, what had been recommended by the bid evaluation committee.
114. To sum up thus far, even on SPM's own version, what Baise had conveyed to the bid adjudication committee on 25 May 2007 could by no stretch of the imagination be claimed to have amounted to an oral version of the "*report and recommendations*" which the bid evaluation committee had been supposed to **submit** and which the bid adjudication committee had been supposed to **consider**.
115. It is therefore not necessary to decide whether it would in any event technically have been possible, and in compliance with paragraphs 27(1)(d) and 29(1)(a) of the policy and regulations 29(1)(d) and 29 (1)(a), to "*submit*" and "*consider*" an oral version of the bid evaluation committee's report and recommendations.
116. It follows that the mandatory provisions in this regard have also not been complied with.
117. That this had contributed to the confused and, with respect, mostly incoherent discussions (if indeed it could be called

discussions) of the bid adjudication committee is in my view clear.

118. The transcript reflects that Baise did not volunteer any information. He only responded to questions. Without a report and a full version of the recommendations of the bid evaluation committee, it would obviously not have been possible for the members of the bid adjudication committee to have had a meaningful discussion or, indeed, to properly apply their minds to the complicated technical issues and enormous financial implications involved in these bids.
119. I deem it unnecessary to burden this judgement with examples of such confusion and incoherence. Once again a simple reading of the transcript will reveal these. Suffice to say that what very little of the 18 page transcript is coherent, simply cannot seriously be contended to be indicative of a proper application of their minds by the members of the bid adjudication committee.
120. I cannot, therefore, agree with mr Stein's submission that the transcript bears evidence that the members of that committee had *"In essence ... properly considered and discussed ... issues such as affordability, proprietary issues, issues of integration, the details of the financial offer of IMS ... , legal compliance and the nature of the IMS system"*.
121. There was some argument on whether SPM had been obliged to furnish Actaris with a copy of the transcript. In view thereof that a copy of the transcript had in fact been furnished, it is not necessary to decide this issue. Suffice to say that what was decided in **Johannesburg City Council v The Administrator, Transvaal and Another** (1) 1970 (2) SA 89 (TPD) at 91E-92A

regarding a “*record of deliberations*” (also referred to in **MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd** 2006 (5) SA 1 (SCA) at 7D-H) may have to be revisited in view of the constitutional rights to administrative justice and to reasons that now exist (*cf* **Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others** 1999 (2) SA 599 (TPD) at 629F-632D).

122. I cannot, however, agree with mr Cassim’s submission that the contents of the transcript should not be taken into account by the Court in this application. SPM has, while being legally represented and in the course of the review proceedings, chosen to disclose and produce the transcript and has clearly waived whatever right it may have had not to do so.
123. The contents of the transcript are clearly highly relevant in determining whether the bid adjudication committee had functioned properly in the circumstances and whether its members had properly applied their minds.
124. There is no merit at all in mr Cassim’s argument that, at the stage when the bid adjudication committee met, “(Actaris) *had been disqualified for further evaluation in respect of the pre-payment meters contract due to its failure to meet the functionality threshold*”, that that contract had been “*the major contract financially*” and that the bid adjudication committee “*could not have reversed (Actaris’) disqualification ... however long its deliberations could have taken*”.
125. It goes without saying that neither KES nor Mpolokeng had the authority or power to disqualify any bidders. All that KES could do, was to recommend the award of points on a certain basis.

Mpolokeng's duty was then to reduce or copy those points to a spreadsheet for the purposes of consideration thereof by the bid evaluation committee and the bid adjudication committee.

126. Both the bid evaluation committee and the bid adjudication committee had only the right to make recommendations on what should eventually be decided by the accounting officer regarding the award of the bids – in this case the bid adjudication committee did not have the delegated power to make the award/s itself (see paragraphs 27(1)(d) and 28(1)(b)(ii) of the policy and regulations 28(1)(d) and 29(1)(b)(ii)).
127. Just as the bid evaluation committee did not have the power to decide to award a bid, it also did not have the power to decide to disqualify and not to award a bid. The bid evaluation committee simply had no power to decide to eliminate any of the bidders.
128. In order not to make itself guilty of mere rubberstamping, it would have had to consider the points awarded by KES, *inter alia* in respect of functionality, and to come to a decision on whether to accept those points as correct or not. If it did, it could then make recommendations to the bid adjudication committee regarding who to disqualify or eliminate and who to recommend to the accounting officer. The same applies to the bid adjudication committee.
129. On mr Cassim's argument both these committees would, at least as far as the points awarded by KES to Actaris on functionality in respect of the pre-payment electricity meters contract are concerned, have been no more than rubberstamps, having to accept that those points could not be considered by it.

130. Even if mr Cassim's argument was for the moment assumed to be correct in respect of the pre-payment electricity meters contract, the problem would remain that the other two contracts which were awarded had been "*considered*" by a bid adjudication committee which had not been properly constituted and whose members could not and did not properly apply their minds.
131. The three contracts were awarded to IMS on the basis that all three would form part of an integrated solution and quite clearly all three awards would have to be set aside if two of them were fatally flawed.
132. SPM as a municipality is an organ of State and its decision/s "*to award or reject a tender constitutes administrative action*" (see **Total Computer Services v Potchefstroom Local Municipality** 2008 (4) SA 346 (T) at 352B).
133. Counsel for Actaris, mr Rogers SC, argued that SPM had failed to give reasons within the 90 day period prescribed in section 5(2) of the PAJA and that, therefore and in terms of section 5(3) of the PAJA, its decision/s regarding the bids had to be presumed to have been taken without good reason.
134. The relevant provisions of section 5(3) of the PAJA read as follows:

*"If an administrator fails to furnish **adequate** reasons for an administrative action it must, ... in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason".*

(My emphasis)

135. What the phrase "*adequate reasons*" means was dealt with in **Minister of Environmental Affairs & Tourism v Phambili Fisheries** 2003 (6) SA 407 (SCA) at 428A-F and clearly has nothing to do with whether such reasons are given timeously.
136. Section 5(3) of the PAJA makes no reference to the 90 day time limit and it is therefore by no means clear that the legislator intended the presumption to be activated also in cases where adequate reasons were given, but outside the 90 day time limit.
137. The case of **National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd** 1972 (3) SA 726 (A), relied upon by Mr Rogers, is also not really of much assistance in this regard, because there no reasons at all were given.
138. In view of the basis upon which I have already come to the conclusion that the decision/s fall to be set aside it is unnecessary to come to a final conclusion as regards the applicability of the provisions of section 5(3) of the PAJA in these circumstances. I have in any event not approached the evidence and the above issues on the basis of that presumption, but rather on the basis that Actaris bears the onus of proof.
139. Mr Stein argued that, even if the Court should come to the conclusion that the decision/s are reviewable, it should exercise its discretion against setting aside those decisions. He submitted that it would not be just and equitable (see **s 8(1)** of the **PAJA**) to set aside these decisions, because:
- 139.1. the IMS system is "*an extremely capable system*";

- 139.2. SPM and its consumers are suffering prejudice because of the delay;
- 139.3. a new tender process might have the same outcome; and
- 139.4. IMS has always acted in good faith.
140. It is not for the Court to speculate on what the outcome of a proper reconsideration of the bids may be. It may happen that exactly the same awards are made after due compliance with all requirements and proper consideration, but it may also be that the decision is then in favour of Actaris, or another bidder.
141. There can be no doubt that Actaris has been prejudiced by SPM's conduct. It had the right to have its tenders properly evaluated and adjudicated. It may well be that, after due process and proper consideration, the conclusion is that the Actaris system is just as capable or that, although slightly less efficient, it is the most cost-effective system.
142. Much was made in the papers and in argument of the capabilities of the respective systems and of how exactly the pricing of IMS and Actaris should be interpreted, and what exactly the total costs of each of their bids and proposals were going to be. These are exactly the issues which one would have expected to have been discussed and considered by the bid evaluation committee and the bid adjudication committee, but which apparently were not.
143. In view of the conclusion to which I have already come it is not necessary to make any findings in this regard. It is in any event

not for this Court to consider the merits of the tenders and of the awards. What this Court is on review concerned with is the way in which those merits were dealt with in the bid process.

144. Both mr Rogers and mr Cassim attempted to illustrate that the costs of the tenders of, respectively, IMS and Actaris were actually much higher than would on the face of it appear to be the case.
145. The fact is, however, that when regard is had to paragraph 8 of the additional reasons of SPM, it appears that, at the very least, its own officials had been under the impression that the total costs of the IMS tender were going to be R94 653 500,00, compared to Actaris's discounted price of R35 000 000,00 excluding VAT.
146. There is, however, no indication in any of the minutes or in the transcript that this was discussed and considered at any stage and I do not think that it would be in the interest of justice or of the public to now approach the matter on the basis of the numerous calculations and interpretations of the costing structures in the tenders, which were produced in the papers and in argument, but which were on the face of it never considered by the appropriate committees and officials. To exercise my discretion in the manner suggested by mr Stein and to allow IMS to further execute these contracts while such serious financial implications were on the face of it not considered in the award of the contracts, would in my view be reckless.
147. On IMS' own version SPM and the ratepayers of Kimberley are already better off than they were under the contract with

Actaris. I therefore cannot agree that an order setting aside the awards would cause prejudice to such an extent that the relevant bodies and officials should not be afforded the opportunity of themselves properly considering the numerous technical and financial implications of these tenders.

148. As far as IMS is concerned, any possible prejudice that it may suffer as a result of such a delay is in my view by far outweighed by, one the on hand, the losses that SPM (and in effect its consumers) will suffer should it appear that the costs of the IMS tenders are significantly higher than would be necessary and justifiable on any basis and, on the other hand, the obvious prejudice that Actaris would suffer through the unlawful rejection of its tenders.

149. In my view the appropriate order would therefore be to set aside the award of the three contracts to IMS and to refer the matter back to SPM. No order will be made as regards the contract which was not awarded.

150. There is no reason why costs should not follow suit and none was suggested in argument. I will order that such costs should include the costs of two counsel. The issues in this matter are fairly complex and the papers voluminous.

151. In the premises the following orders are made:

1. **The decisions of the first respondent, taken in and during 2007, to award the tenders under contract numbers CEE/T/2006, F/INC-VEND/2006 and CE/F-RP/1/2006 to the second respondent are set aside and the adjudication of the aforesaid tenders are**

referred back to the first respondent to deal with in accordance with all applicable statutory and other requirements.

2. The first and second respondents are ordered to pay the applicant's costs jointly and severally, the one to pay the other to be absolved pro tanto, such costs to include the costs of two counsel.
3. The second respondent is ordered to pay the wasted costs of the first respondent occasioned by the postponement of the application on 9 September 2008.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree:

C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION

For the Applicant:	Adv Rogers SC
Instructed by:	Elliot, Maris, Wilamans & Hay, KIMBERLEY
For the 1 st Respondent:	Adv Cassim SC

Instructed by: Engelsman Magabane Inc., KIMBERLEY

For the 2nd Respondent: Adv Stein

Instructed by: Du Toit-Bomela, KIMBERLEY