IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. **YES**
(4)

22 November 2022
DATE SIGNATURE

Case No: **22363/2021**

In the matter between:

VOESTALPINE VAE SA (PTY) LTD Applicant

and

TRANSNET FREIGHT RAIL First Respondent

A DIVISION OF TRANSNET SOC LTD

RAIL 2 RAIL (PTY) LTD Second Respondent

JUDGMENT

NEUKIRCHER J:

1] On 30 October 2020 the first respondent (Transnet) issued a request for proposals (the RFB) under RFP number HOAC-HO-333654 for a) the transportation of railway rails from Port Elizabeth[1] and b) and the storage and flash-butt welding of rails in a fixed plant/facility, for a period of two years on an "as and when required" basis. On 8 March 2021, the applicant (Voestalpine) received a "letter of regret" from the General Manager of Transnet in which it was informed that its bid was unsuccessful primarily because it scored only 41,07% with regard to price and B-BBEE evaluation as opposed to the successful bidder's score of 99%. It was also informed that the successful bidder was the second respondent (R2R).

2] As a result, Voestalpine then launched the present review. It seeks an order that, *inter alia*:

2.1 Transnet's decision to award the bid to R2R be reviewed and set aside; and

2.2 that the court award the tender to it (the substitution relief).

3] Transnet does not oppose the relief sought in paragraph 2.1 supra. In fact, it concedes that that relief should be granted. It does oppose the substitution relief and it also counterclaims for an order that the tender specifications are unconstitutional, that they be set aside and that a new tender process be undertaken and completed within 120 days of that closing date.

[1] Now called Gqeberha

4] R2R opposes all the relief sought. Its position is that the bid was correctly awarded in the first place.

THE ISSUES

5] The parties are agreed that the following issues must be determined:

5.1 whether R2R's answering affidavit should be admitted;

5.2 whether the award to R2R was lawful;

5.3 whether the RFB is constitutionally sound and, if not, whether it should be set aside;

5.4 whether the substitution relief is just and equitable.

BACKGROUND

6] According to the RFB, Transnet has a rail network of 30 400 track kilometres comprising 20 953km route of which 12 801km comprises the core network. Transnet's Rail Network department maintains this rail network infrastructure[2] for the safe and reliable passage of trains. The maintenance work is essential to keep the rail infrastructure in a safe and service-worthy condition.

7] Transnet has 22 rail network depots that are responsible for the maintenance of track infrastructure along ±20 953 route km. The rails used for the maintenance of the railway track are imported by the supplier in 60m lengths which are then flash-butt welded in a fixed plant to produce 240m lengths to

[2] Consisting of Permanent Way, electrical (overhead traction equipment's sub-stations), train authorisation systems (signaling) and telecommunications.

be supplied to Transnet. These 240m lengths are then transported to site for rail replacement.

8] The RFB was issued on 30 October 2020 and the closing date was 24 November 2020 which was later extended to 1 December 2020. A non-compulsory briefing session was conducted, virtually, on 10 November 2020. The bids would be scored in several stages of which the third stage is the most important for purposes of the present application – this is the stage where it is determined whether the bid meets the minimum thresholds for technical compliance (100%) and functionality (70%) in order to proceed to the final stages of the evaluation.

9] In an addendum to the RFB dated 19 November 2020, the bidders were informed of an amendment to the scoring weightings at the functionality evaluation matrix. This required a minimum threshold of 70% to proceed to the next level of the evaluation process and was weighted as follows:

Readiness of welding facility lead times	60
Proven track record of the welding facility	10[3]
Technical skills and capacity for after sales support	30

10] Importantly, and to understand the context of Transnet's position, it states in its answering affidavit that at the time of publication of the RFB, Voestalpine had the only flash-built welding facility in the South Africa which could produce the rails needed by it and as it is very expensive for new entrants into the

[3] For example, the RFP states that a proven track record of the welding facility of a year or less is considered to be non-responsive

market to invest in such a facility without a guarantee of work. As a result, Voestalpine in effect, monopolised this market.

11] Transnet's vision was to create a more competitive market by designing "*unbiased tender specifications which do not prescribe requirements which can only be met by one or few bidders.*" The vision was to empower local businesses "*by creating an enabling environment for them to transport weld and supply rails to it*." To do so it intended to relax the minimum requirements, one of which was that a bidder must have an existing flash-butt welding facility, which was a qualifying requirement, in order to pass the technical compliance and functionality requirements set out in paragraph 9 supra.

12] Transnet states that its intention was to write bid specifications that promoted competition to: ensure all interested parties are given an opportunity to compete for the contract, allow new entrants to the rails market, ensure that tenders are not issued for a particular supplier and that not only one supplier qualified to be awarded the bid. However, Transnet has conceded that its intention was not properly reflected in the RFB as it appears that the bid specifications were *"inadvertently drawn in such a manner that only Voestalpine could compete even though the tender was not intentionally made for it."* – this is because only an entity with an existing flash-built welding facility would pass the technical requirement and functionality stage.

13] Interestingly enough, R2R takes issue with this. Its position is stated in its answering affidavit.

R2R's ANSWERING AFFIDAVIT

14] Voestalpine has objected to the late filing of R2R's answering affidavit. It is common cause that the affidavit was to be delivered by 10 September 2021 – it was only delivered on 10 December 2021. Whilst R2R has explained the reasons for the delay of in its affidavit and, in the affidavit itself seeks condonation for the late delivery. There is no formal notice of motion that accompanies this request.

15] In its affidavit R2R explains the following:

(a) that following an exchange of correspondence between their attorney and that of Voestalpine, they sought an extension of time in a letter dated 8 September 2021 and stated:

"3. As such, we have taken instructions and will endeavour to file our client's answering affidavit by close of business on 30 September 2021.";

(b) that they were awaiting the filing of Transnet's affidavit to see what further information should be placed before court, and it was only when this was filed (on 28 September 2021) that R2R saw that (according to it) material information had been excluded. It states that Rail2Rail had to then compile the relevant information in order to fully appraise the court of the relevant facts "which took some time" and was not available when Voestalpine filed its replying affidavit on 15 October 2021;

(c) a draft answer was prepared and sent to counsel to settle on 27 October 2021. Counsel required additional information and eventually the new draft was sent back by counsel on 17 November 2021;

(d) then Voestalpine launched an urgent application for interim relief to be heard on 23 November 2021 and R2R filed an answering affidavit and Heads of Argument. The matter was heard on 25 November 2021 and struck off the roll with costs, for a lack of urgency – but more than a week had now been expended on the latter application instead of settling the answering affidavit to the review application;

(e) the final draft of the answer was returned by counsel on 7 December 2021 and filed on 10 December 2021.

16] It also so that when a case management meeting was convened on 16 March 2022 to set a date for the filing of heads of argument and a date of hearing, R2R had already filed this affidavit. At no stage has Voestalpine asserted any real prejudice. It has in any event filed a reply to the answering affidavit and dealt with R2R's allegations.

17] I agree with R2R that the late filing of the answering affidavit does not automatically require the filing of a separate application for condonation and that is it sufficient for it to have sought condonation in its answering affidavit. What is technically missing is a notice of motion to accompany the relief. But, as stated in **Meropa Communications (Pty) Ltd & Another v Verb Media (Pty) Ltd**[4] this objection is simply technical and per **Trans-African Insurance**

[4] (29646/2016) [2017] ZAGPJHC 464 (11/8/2017) at para [13]–[15]

Co Ltd v Maluleke[5] *"… technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditions and, if possible, inexpensive decision of cases on their real merits."*

18] This is precisely one of those matters: Voestalpine has not demonstrated prejudice were R2R's affidavit to be admitted, has filed a replying affidavit as it was entitled to, and has in argument made submissions to counter R2R's allegations using R2R's own papers.[6]

19] Voestalpine has argued that the late filing of the answering affidavit has delayed the hearing of the matter but there is no evidence of that whatsoever and even had there been, the meeting held with the DJP in March 2022 may have taken place slightly earlier, but at best for Voestalpine it may have been allocated a date of hearing in the second term of 2022 instead of the first week of the third term. Any possible prejudice is not so extraordinary that it should result in the exclusions of R2R's answering affidavit. It is, in any event, in the interests of justice that the facts be fully ventilated and, if anything, the abortive urgent application saw an unnecessary protraction of proceedings.

20] I therefore am of the view that R2R's late answering affidavit should be allowed.

THE DISPUTE

[5] 1956 (2) SA 273 (A) at 278 F-G
[6] It is also not in dispute that this affidavit is similar to R2R's affidavit filed in the urgent application

21] The true disputes that are evident on these papers are: what must happen if prayer 1 is granted? Should this court substitute Transnet's decision and award the bid to Voestalpine, or should the setting aside of the award be suspended pending the completion of a new tender process?

The review relief

22] In my view, the answer to this lies partly in the question of whether or not R2R's bid was responsive. R2R's argument is that it was. It argues that it did have a flash-butt welding facility at the time that it submitted its bid, that the facility was immediately available for use, that Transnet's officials inspected the facility as well as a second potential facility and decided that the latter was more suitable – it is clear from the papers that these inspections took place in February 2021 after the bid had closed.

23] Voestalpine argues that the facilities inspected and approved by Transnet however were not existing flash-butt welding facilities and that, on R2R's own papers, the facilities were no more than leased premises where a facility could be established subsequent to a successful bid.

24] R2R states that its access to a flash-butt welding facility was demonstrated by the lease agreement put up in its bid document. However, an inspection of that document does not reveal that the premises is in fact an existing flash-butt welding facility. In fact, this is confirmed by an email from Zimkhitha Zatu Moloi of R2R to various Transnet representatives dated 1 April 2021 (ie after the bid had closed) where it is stated:

"… From a group point of view we have decided to move the setting up the facility to one of vacant premises of TNPA, which we view as the most logistically efficient solution.

This change was highlighted to TFR on their due diligence meeting held in Uitenhage. As a result, the team of Transnet Freight Rail was taken to the TNPA site so that they could view it and offer their input.

As mentioned during that visit, we have been in negotiations with TNPA for some time but we couldn't conclude the deal until we have received the award letter from Transnet Freight Rail.

The motivation of the move to TNPA:

- *Quicker Turnaround time for rail wagons from the Port to Welding Facility due to shorter destance*
- *Financial gain for Transnet Group as we will be hiring property from TNPA.*
- *Upgrading of TPNA owned premises at no cost to Transnet.*

The move does not affect our commitment on timing which we have previously communicated to TFR.

We hope you find the above in order."

25] This email followed an inspection by Transnet of the leased premises[7] in February 2021 as well as a second facility based at a vacant premises of Transnet National Ports Authority in Port Elizabeth. Transnet deemed the second premises more suitable, hence the aforementioned email.

26] But the conclusion is thus inescapable that R2R did not have an existing flash-butt welding facility at close of bid.

[7] Ie the one put up as the "existing" facility per the bid document

27] This must be seen in the context of the RFB itself, which requires:

(a) a minimum threshold of 100% for technical criteria which will include:

"Proof of a fixed flash-butt welding plant/facility sufficient to serve Transnet for two years on an "as and when" required basis at a Transnet approved siding equipped to handle loading and offloading of rails"; and

(b) a minimum threshold of 70% for functionality criteria as set out in paragraph 9 supra.

28] Bearing in mind that the original lease agreement was only concluded between R2R and the landlord on 18 November 2020 with effective date 1 November 2020, it is difficult to understand how it could be said that this facility has a "proven track record" as per the requirements. As stated supra, a proven track record of a year or less has the result that the bid is considered to be non-responsive. Furthermore, given that a) the lease was concluded12 days before the initial bid closing date, b) Transnet and R2R's admission that it cannot be expected of prospective new bidders to establish such an expensive facility without a guarantee of work and c) the fact that the final lease agreement for Transnet's PE facility was only concluded in April 2021, it is very clear that R2R, despite its protestations to the contrary, did not have an established flash-butt welding facility at close of bid. It therefore could not score enough points on functionality and should have been ousted at this stage of the evaluation process, which Transnet in effect concedes:

"2.15 In the premises, only the applicant could meet the technical compliance requirements and the functionality requirement because the tender specifications were unintentionally drawn in such a manner that only a bidder with an existing facility would meet those requirements…"

29] Given the above, I am of the view that R2R's bid was non-responsive and the award was therefore unlawful and the review relief must be granted.

The appropriate remedy

30] At issue now is the appropriate remedy:

(a) Voestalpine argues that the court should set aside the award and instead of remitting it, should substitute Transnet's decision with its own and appoint Voestalpine;

(b) Transnet argues that the court should:

(i) declare the specs unlawful as only one bidder could comply;

(ii) set aside the invitation to bid;

(iii) order it to publish a fresh invitation to bid within 30 days and conclude the tender process within 120 days from the closing date in the new invitation;

(iv) suspend the setting aside of R2R's appointment until the above tender process is concluded or the expiry of the 120-day period, whichever is the first.

31] Transnet argues that, this aside, Voestalpine failed to meet several crucial criteria which militate against it being awarded the bid:

(a) it failed to submit its functionality questionnaire when it submitted its bid. Despite this, it was awarded 85% for functionality for which there was actually no basis;

(b) Voestalpine bid price was also in excess of that of R2R and this not cost effective and not market related and;

(c) Voestalpine did not provide proof of its BBBEE status and therefore did not obtain any BBBEE points[8]. Accordingly, awarding the tender to it is not going to advance the government's economic development objectives.

32] R2R also raises several other issues: that Voestalpine did not demonstrate it was tax compliant as it did not submit a Tax Compliance certificate. Firstly, the RFB does not call for a Tax Compliance certificate – it calls for the following:

"14 TAX COMPLIANCE

Respondents must be compliant when submitting a proposal to Transnet and remain compliant for the entire contract term with all applicable tax legislation, including but not limited to the Income Tax Act, 1962 (Act no. 58 of 1962) and Value Added Tax Act, 1991 (Act No. 89 of 1991).

It is a condition of this bid that the tax matters of the successful Respondents be in order, or that satisfactory arrangements have been made with South African Revenue Service (SARS) to meet the Respondents tax obligations.

The Tax Compliance status requirements are also applicable to foreign Respondents/individuals who wish to submit bids.

It is a requirement that bidders grant a written confirmation when submitting this bid that SARS may on an ongoing basis during the tenure of the contract

[8] These were the only reasons provided in the answering affidavit

disclose the bidder's tax compliance status and by submitting this bid such confirmation is deemed to have been granted."

And secondly, this was not the basis upon which Voestalpine's bid was rejected. There are several further complaints raised by R2R regarding why Voestalpine could not be awarded the bid, but none of these are factors that Transnet took into account when evaluating the bid and they therefore played no role in the award of the bid to R2R.

33] Transnet argues that, whatever the situation, these are not issues which a court is in a better position to determine and therefore the substitution relief cannot, and should not, be granted.

34] I will deal with Transnet's argument first.

35] Transnet argues that if the review relief is granted, the counter application must also be granted as they are premised on the same argument – ie that only Voestalpine could comply with the tender specifications. This, says Transnet, is because the tender specifications prevented a competitive bidding process from taking place because they were clearly tailored to the strengths of a particular bidder which defeats the purposes of a competitive public procurement process.[9]This, however, must not be interpreted to mean that Transnet's case is that it is unconstitutional to have one responsive bidder

[9] Phoebe Bolton: The Law of Government Procurement in South Africa, pages 40-41: *"Custom-made contracts are contracts that are 'tailored to the strengths of a particular supplier'. Tender specifications are thus drawn up in such a way that the contract 'competed' for is specifically made for a particular supplier. This clearly defeats competition (and also fairness to all who participate)."*

– it is not. Its case is that the framing of the tender specifications resulted in actual bias as it was only Voestalpine that would have a responsive bid.

36] It is in exorable part of our law that one of the components of procedural fairness[10] is the rule against bias. In **Tshwane City v Link Africa and Others**[11] the minority stated on the issue of bias the following:

" [73] Administrative action that is tainted with bias is void and falls to be set aside on review. The common-law rule against bias is part of the principles of natural justice. The other principle is the audi rule which requires that a person to be affected by an administrative decision must be afforded a fair hearing before the decision is taken. Both these principles have now been codified in PAJA as grounds of review. Section 6(2) of PAJA permits a court to review and set aside administrative action that is procedurally unfair or if the decision-maker who undertook it was biased or was reasonably suspected of bias. The rule against bias is underpinned by the principle that administrative justice must not only be done but must also be seen to be done. The purpose of the rule is to establish and maintain public confidence in administrative justice. Therefore, s 22 of the Act cannot be read as authorising administrative action that is invalid under PAJA, owing to non-compliance with the requirements of PAJA."

37] The question is now whether it contravenes section 217 of the Constitution[12].

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[10] PAJA section 6(2)(a)(iii)
[11] 2015 (6) SA 440 (CC)
[12] **217.** (*1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

38] In **AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others**[13] (AllPay) the court stated:

"The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness, or any other review ground under PAJA".

39] Transnet's argument is that, on a proper interpretation of the invitation to bid, it is unconstitutional in that it was tailored to the strengths of a particular supplier and that this constitutes a violation section 217 of the Constitution. It is trite that an invalid administrative action may not simply be ignored, and that it remains valid and effectual and may continue to have legal consequences until set aside by proper legal process[14].

40] Given that, in order to put this before court, Transnet was obliged to bring its challenge[15] which it then did in its answering affidavit, Transnet states that if it

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

[13] 2014 (1) SA 604 (CC)

[14] MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) 481 (CC) at para [90] and [101] (Kirland) ; Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) at para [26] (Oudekraal) – which Kirland (supra) confirmed

[15] Magnificent Mile Trading 30 (Pty) Ltd v Celliers No 2020 (4) SA 375 (CC) at paras [60]-[61]

is established that the tender specifications are unconstitutional, this court is not vested with a discretion to save them - they must be set aside in terms of section 172 of the Constitution[16].

41] The inadvertent outcome of the framing of the tender specifications that Voestalpine was the only responsive bidder is, of itself, not of itself an indication that they are unconstitutional:

(a) In **AllPay** the court stated that the fact that an outcome is inevitable is not of itself determinate of the invalidity of administrative action:

"[23] To the extent that the judgment of the Supreme of Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action." (my emphasis)

(b) in **Aurecon South Africa (Pty) Ltd v City of Cape Town**[17] Aurecon's tender was the only responsive one amongst those submitted[18]. In upholding an appeal which saw the award to Aurecon, the Supreme Court of Appeal did not regard the fact that there was only a single responsive bidder to be unconstitutional;

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[16] State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) (Gijima)
[17] 2016 (2) SA 199 (SCA)
[18] At para [44]

(c) in **VE Reticulation (Pty) Ltd and Others v Mossel Bay Municipality and Others**[19], despite there being only one qualifying bidder, the Court held that there was no evidence of bias in the specification of the tender requirements.

42] Whilst this is all so, what differentiates these cases from the present one is that the non-responsiveness of the bidders was due to the framing of the bid requirements which skewed the bid outcome to favour Voestalpine. As a result, the foregone conclusion of the entire process tainted the bid and resulted in a biased decision in favour of Voestalpine.

43] I agree with Transnet's submission that the tender specifications themselves defeated competition which then rendered them unconstitutional.[20]

44] Voestalpine argues that the manner in which Transnet has brought its counter-application is wrong but Transnet's answering affidavit specifically deals with its counter-application, and all the issues pertaining to the argument on the issue of constitutional invalidity are properly canvassed in the papers to which Voestalpine has replied[21]. There is thus no prejudice to Voestalpine with regard to the manner in which the counter-application has been raised. In any event, Transnet's jurisdiction for its relief emanates not

[19] [2013] 2 All SA 489 (WCC) at para [32]-[33]
[20] Valor IT v Premier, North West Province & Others 2021 (1) SA 42 (SCA) (Valor IT) the purpose of section 217 was said to be *"[40] Section 217 of the Constitution requires organs of state such as the Department, when it procures goods and services, to do so in terms of a system that is 'fair, equitable, transparent, competitive and cost-effective'. Its purpose is to prevent patronage and corruption, on the one hand, and to promote fairness and impartiality in the award of public procurement contracts, on the other. In order to do so, statutes such as the Public Finance Management Act 1 of 1999 (the PFMA), subordinate legislation made under the PFMA, such as the Treasury Regulations, and supply chain management policies that have to be applied by organs of state, and give effect to section 217."*
[21] Gobela Consulting CC v Makhado Municipality (910/19) [2020] ZASCA 180 (22 December 2020)

from PAJA[22], but is rather founded in the principle of legality and it was thus required to apply for its relief within a reasonable time. As was pointed out in **Valor IT** (supra)[23], the test involves a two-stage enquiry, the first part of which is to determine whether or not the delay was unreasonable and if so, then whether the delay may be condoned.

"[30] Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors - the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other."

45] The award was made in March 2021. It resulted in the launch of this application in 4 May 2021 and a Notice to Oppose on 18 May 2021. Voestalpine's supplementary affidavit was delivered on 17 June 2021 and Transnet's answering affidavit was filed on 28 September 2021. In my view, given the above, there has been no unreasonable delay in instituting the counter-application.[24]

46] In my view, as the tender specifications are unconstitutional, they must be set aside. This being so, the issue now is: what remedy must be granted? As stated, Voestalpine asks for the substitution relief; Transnet asks that the

[22] Gijima at para [35]
[23] Fn 21. At para [28]-[30]
[24] Especially if one were to use the yardstick of the 180-day period provided for in section 7 of PAJA

setting aside of R2R's appointment be suspended pending the conclusion of the new tender process.

47] I agree that part of the remedy to be granted is the publication of a fresh invitation to tender within 30 days from date if this order. The tender process, commencing with the new invitation to tender, must be concluded within 120 days from the closing date prescribed in the invitation.

48] Voestalpine says that, pending this procedure, it should be substituted as the successful bidder. Section 8(1)(c)(ii) of PAJA states:

"(1) The court or tribunal in proceedings for judicial review in terms of section 6(1) may grant any order that us just and equitable, including orders –

(a) …

(b) …

(c) Setting aside the administrative action and –

(i) ….

(ii) In exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action …"

49] The question is whether Voestalpine has established exceptional circumstances. In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another**[25] the court took into account 2 main factors: the first was whether the court was in as good a position as the IDC to award the tender and the second was based on

[25] 2015 (5) SA 245 (CC) at para [56]

a finding that the IDC's decision is a foregone conclusion and that a remittal would serve no further purpose.

50] In **Trencon**, the two-stage process of bidding an evaluation had been completed; the various committees, consultants and Quantity Surveyors had considered the bids and undertaken all the technical components of the process; the bids had been evaluated on price an empowerment points a recommendation had been made to Exco and Exco had fully considered Trencon's bid. Thus, the technical and administrative recommendations and processes had already been completed – thus the court was in as good a position as the IDC to decide whether to award the tender to Trencon.

51] *"[42] The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course.*

[43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

52] Voestalpine argues that the fact that a clearly unresponsive bidder was awarded the bid in the face of the fact that it was the only responsive bidder, is

a clear indication of not only bias, but also incompetence[26].

53] Transnet argues that substitution relief is not competent as, Voestalpine is not BBBEE compliant, nor did it submit a tax clearance certificate. But more importantly, it argues that Voestalpine's bid price is clearly not market related, is over-priced and therefore fails the test of cost-effectiveness set out in s217 of the Constitution.

[26] Stefanutti Stocks Civils, a Division of Stefanutti Stocks (Pty) Ltd v Trans Caledon Tunnel Authority and Another [2014] JOL 31357 (GNP) at para [18] where the court took into account that setting aside the award would delay the project, have "catastrophic consequences to the 1st respondent in having to start the tender process de novo and the potential escalated costs of completing the project – none of these issue raise their head in casu.

54] **In Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & Others**[27] the court stated:

"To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable."

55] In my view there are several factors that militate against the substitution order:

(a) the fact that Voestalpine's is, on its own version, not BBBEE compliant;

(b) the fact that its price is significantly higher than R2R's[28];

(c) R2R is in a position to flash-butt weld rails for Transnet and has been doing so since early 2021 and Transnet argues that, if the contract with R2R is set aside it will be forced to embark on an ad hoc procurement of the same services which will militate against the cost-effectiveness of the procurement;

(d) there is 6 ½ months left of the present contract.

56] Given the above, I am of the view that I do not possess the skills and expertise required to properly evaluate the bids in order to grant the substitution order. Accordingly, the substitution relief must be refused and the

[27] 2008 (2) SA 481 (SCA) at para [23]
[28] Especially given that section 217 enjoins a procurement system that is "competitive and cost-effective."

declaration of invalidity suspended pending the outcome of the new tender process.

COSTS

57] The fact that Transnet has been partially successful does not detract from the fact that its conduct has resulted in the present application – it has conceded that in as many words by conceding that it is the framing if the bid specifications as well as the incorrect evaluation of the bid requirements that forced Voestalpine's hand. It is for this reason that it must pay the costs of this application, including these of R2R.

ORDER

58] The order made is the following:

1. The decision of the first respondent to award RFP number HOAC – HO 333654 (RFP) to the second respondent is reviewed and set aside with effect from the date of the order.
2. It is declared that the bid specifications are unconstitutional to the extent that only one bidder could comply with its conditions.
3. The invitation to tender is set aside.
4. Transnet is ordered to prepare and publish a fresh invitation to tender within 30 days of date of this order and to conclude that tender process within 120 days of the closing date set out in this invitation to tender.
5. The setting aside of the second respondent's appointment in terms of paragraph 1 of this order is suspended until the tender process

contemplated in paragraph 4 (supra) is concluded, or the expiry of the 120 day period set out in paragraph 4 supra, whichever comes first.

6. The first respondent is ordered to pay the costs of the applicant and the second respondent.

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B NEUKIRCHER

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 November 2022.

Appearances:

For the Applicant	: Adv JP Daniels SC with E Webber
Instructed by	: Baker & McKenzie
For the First Respondent	: Adv K Tsatsawane SC with C Marule
Instructed by	: Ledwaba Mazwai
For the Second Respondent	: Adv L Hollander with C Shahim
Instructed by	: Beech Veltman Incorporated
Date of hearing	: 21 July 2022