

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

REPORTABLE

CASE NO: 641/2012

Dates Heard: 21 and 22/06/2012

Date Delivered: 01/08/2013

In the matter between:

BKS CONSORTIUM

Applicant

and

**MAYOR, BUFFALO CITY METROPOLITAN
MUNICIPALITY**

1st Respondent

**MUNICIPAL MANAGER, BUFFALO
CITY MUNICIPALITY**

2nd Respondent

THE GOBA / SSI/ ALG CONSORTIUM

3rd Respondent

JUDGMENT

SANDI J:

[1] This is an application for review of the award of a tender issued by the second respondent, acting on behalf of the first respondent, to the third respondent.

[2] The applicant is BKS Consortium, a joint venture formed for the purpose of submitting a tender to the first respondent under contract number BCC/DDP/TPO/1153/2011 with its address at c/o BKS (Pty) Ltd, 35 Tecoma Street,

East London. It is an association within the meaning of Rule 14(1) of the Uniform Rules of Court.

[3] The first respondent is the Buffalo City Municipality, a Metropolitan Municipality established in terms of section 12 of the Local Government: Municipal Structures Act, 117 of 1998, which has its address for the purposes of section 115(3) of the Local Government: Municipal Systems Act, 32 of 2000 (“the Systems Act”) at the Office of the Municipal Manager, 10th Floor, Trust Centre Building, cnr Oxford and North Streets, East London.

[4] The second respondent is the Municipal Manager, Buffalo City Municipality, being the official appointed in that capacity from time to time pursuant to the provisions of section 54A of the Systems Act, of Office of the Municipal Manager, 10th Floor, Trust Centre Building, cnr Oxford and North Streets, East London.

[5] The third respondent is The Goba /SSI /ALG Joint Venture, an association or partnership within the meaning of Rule 14(1) of the Rules of Court, of c/o Goba Civil Engineering and Project Management, 44 Pearce Street, Berea, East London.

[6] In 2008 a consortium of transport planning consultants was appointed by the first respondent to prepare an operational plan for a proposed Bus Rapid Transit (BRT) system to be integrated with the current taxi and train services.

[7] Once the operational plan was approved, the first respondent invited interested parties by notice to “tender for the comprehensive services (including project management, communications and marketing, business planning, operational

planning, architecture and landscape, architecture, structural, electrical, mechanical and electronic engineering, quantity surveying, town planning, environmental and legal services) for the Buffalo City Municipality.”

[8] The tenders were opened on 20 May 2011 and the applicant’s tender was some R17 million lower than the next lowest tender.

[9] A group of consultants assembled by BKS (Pty) Ltd formed a joint venture for the purpose of submitting a tender to the first respondent. Such joint venture is known as the BKS Consortium, the applicant in the present proceedings. The joint venture agreement entered into is annexed to the papers and is signed by all parties involved. The applicant submitted a bid to the first respondent.

[10] The third respondent and other entities also submitted bids. The third respondent’s bid was accompanied by a joint venture agreement entered into by Goba (Pty) Ltd, SSI Engineers and Environmental Consultants (Pty) Ltd and Advanced Logistics Group. Third respondent relied for the success of its tender on a number of professionals who were not part of the joint venture. These professionals submitted letters to the third respondent. The letters are couched in identical terms as follows:

“13 May 2011

TO WHOM IT MAY CONCERN

Buffalo City Municipality: Contract no: bcc/DDP/TPO/1153/2011-
Comprehensive Services for the Buffalo City Municipality Bus Rapid Transit
System

(1) KPMG services (Pty) Ltd is a company registered in South Africa and specialises in the provision of professional advisory services. This document is to confirm that KPMG is committed to providing the service as outlined in the tender response submitted by Goba –SSI- ALG joint venture on behalf of the professional team and will enter into a sub-contractors agreement with the joint venture upon award of contract no. BCC/DDP/TPO/1153/2011.

I hereby authorise John Petzer of Goba (Pty) Ltd to sign all relevant documentation.”

[11] Similar letters from the following entities or professionals were furnished to the third respondent : (2) Ngonyama Okpanum Associates East London specialising in architectural services, (3) LDM Quantity Surveyors PE Inc specialising in quantity surveying services, (4) Bergstan South Africa Consulting and Development Engineers (Pty) Ltd specialising in the provisions of consulting and development engineering services, (5) a firm of Attorneys, specialising in the provision of legal services, (6) @ Planning, a company specialising in the provision of town planning professional services, (7) Key Projects (projects) a company which specialises in the provision of development and project management, (8) ARG Design, a company which specialises in the provision of architectural and urban design services, (9) Emonti Consulting Engineers which specialises in the provision of traffic, transportation and civil engineering consulting services, (10) CS Consulting, a company which specialises in the provision of management and development planning consulting, (11) Lindile Mteza & Associates specialising in the provision of Quantity Surveyors and Project management , (12) Tshani Consulting CC, a company which specialises in the provision of Town Planning services, (13) SMG Africa, a company which specialises in the provision of strategic design and communication services (14) Adzone Consultants, a company which specialises in

the provision of marketing and communication strategy and project management services.

[12] It is common cause that the first and second respondents are organs of state. They are bound by the Constitution, the Preferential Procurement Policy Framework Act no 5 of 2000 “the PPPFA” and the regulations made thereunder. It is trite that their decisions are subject to review by this Court in terms of the Promotion of Administrative Justice Act no. 3 of 2000 (“PAJA”).

[13] The third respondent also submitted a bid to the tender invitation.

[14] Thereafter the validity of the tenders were extended on a number of occasions. The last extension was granted until 20 November 2011. Thereafter enquiries made by the applicant to the second respondent revealed that the tender had been awarded to the third respondent. Deponent to the applicant’s affidavit said that the information came as a considerable surprise to him because he was present when the tenders were opened and he saw the prices tendered by the various tenderers. According to him the applicant’s tender was the lowest in respect of the tenders submitted. He avers that the applicant’s tender was some R17 million below the next lowest tender.

[15] On 15 March 2012 the applicant was granted an interdict preventing the second respondent from implementing the agreement it entered into with the third respondent.

[16] It appears from the papers that the first respondent's Bid Evaluation Committee considered the various bids and made a recommendation to the Bid Adjudication Committee which, in turn, made a recommendation to the second respondent. The recommendation was that the tender be awarded to the third respondent. The applicant's bid was disqualified on the following grounds:

"From the qualifying assessment it was determined that the BKS (Pty) Ltd Consortium had not met all the minimum requirements as stipulated in the terms of reference and they were therefore disqualified from any further assessment."

[17] The applicant's bid was not evaluated in terms of the Point System prescribed by the "PPPFA". The applicant avers therefore that had such evaluation been conducted it would have scored the highest points and the tender would have been awarded to it.

[18] It was on 20 December 2011 that the applicant established that the tender had been awarded to the third respondent. This was after the applicant had addressed a letter to the first respondent enquiring as to whether the tender had been awarded and to which no response was forthcoming from the first respondent.

[19] The deponent to applicant's affidavit, one Gerhard Conrad Albertyn, (Albertyn), avers that the above information came as a "considerable surprise" to him because after the tenders were opened the prices tendered were announced as follows:

Phenyo	R13 million
BKS Consortium	R54 million
Goba/ SSI/ ALG Consortium	R71 million
Vela / VK Consortium	R76 million

HHO Consortium	R115 million
GPBR Consortium	R129 million

[20] In terms of s 239 of the Constitution, Act 108 of 1996 the first respondent is an organ of state and is obliged to determine its own preferential procurement policy and implement it. It is obliged to follow a preference point system. According to s 2(f) of the PPPFA “the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in para (d) and (e) justify the award to another tender.”

[21] In terms of the PPPFA Act and Regulations made thereunder, being GG no 22549 dated 10 August 2001, 90 points are allocated to price and 10 points as follows: Black Economic Empowerment (4 points); women participation (2 points); youth participation (2 points); disabled individuals (1 point) and based within the municipal area (1 point).

[22] As is evident from the above the applicant’s tender was some R17 million lower than the lowest tenderer.

[23] The applicant avers that in awarding the tender to the third respondent, the first respondent failed to follow the prescripts of the Constitution of the country and its own framework for Preferential Procurement Regulations contained in GN dated 10 August 2001. This Regulation prescribes the manner of allocating points to tenderers. Regulation 8 provides specifically that:

“(1) An organ of State must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price.”

The amended Regulation published in GNR 502 of 08 June 2011 provides at paragraph 4 as follows:

“ (1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.”

These two regulations are similar and deal with the same issue.

[24] The applicant avers that in so far as the decision reached by the second respondent to award the tender to the third respondent is concerned, it was obliged to contract for goods and services in a “fair, equitable, transparent, competitive and cost effective manner.” According to the applicant, the first respondent failed to do so as prescribed in s 217(1) of the Constitution.

[25] Though, according to applicant, the first respondent properly prepared and advertised a tender notice in terms of the applicable law, in adjudicating upon the tenders it applied subjective criteria which are not contained in the tender document. The applicant avers that it was on that wrong premise that the applicant was disqualified.

[26] As stated above, the first respondent stated that the applicant “did not comply with the qualification criteria as set out in the bid document” and further that the applicant had not met the minimum requirements as stipulated in the terms of reference and they were therefore disqualified from the financial / HDI assessment.

[27] The tender notice states that the first respondent wishes to enter into a contract with a professional service provider with “proven experience for the design and implementation of the BRT system for phase 1A. A comprehensive plan, extending into the implementation phase, will be required to provide for the successful implementation of the programme.”

[28] The tender notice states further that:

“The service provider will be required to manage the project to ensure that the required objectives are met successfully. The service provider will take on overall responsibility for the management of the project and this will include the management of activities of other service providers, such as those appointed to the detailed designs, intelligent transport plan and operation plan (Ph. 1A).”

[29] In terms of the tender notice, the following experts were expected to be part of the successful bidder:

“Position descriptions for each of the positions in the table below must be prepared for the tender document.

The tender document should require that the tenderers propose specific individuals for each of the positions below. The tender document should also require a summary of experience and a full curriculum vitae (CV) for each of the proposed individuals.

The same individual can potentially fill more than one activity. A single position could be supplemented with an additional person(s), if deemed appropriate by the tenderer.”

[30] The bid qualification criteria prescribed by the first respondent is that “the bidder must have successfully completed a minimum of two similar type and size of projects in each specialist category of work as follows.

Public transport planning - a minimum of two projects of similar type and size by the firm or member of joint venture.

AND

Public transport infrastructure - a minimum of two projects of similar type and size by firm or member of a joint venture.

AND

Business planning in public transport environment - minimum of two projects of similar type and size by firm or member of joint venture.

AND

Architecture - minimum of two projects of similar type and size by firm or member of a joint venture

AND

Marketing and communication - minimum of two projects of similar type and size by firm or member of a joint venture.

AND

Town planning - minimum of two projects of similar type and size by firm or member of a joint venture.

AND

Environmental impact assessment

- minimum of two projects of similar type and size by firm or member of a joint venture.

AND

Legal experience in transport legislation

- minimum of two projects of similar type and size by firm or member of a joint venture.

[31] It is a requirement of the tender that there have to be project teams and that the tenderer had to “propose specific individuals for each of the following positions:- project leader, communications plan specialist, marketing brand specialist, media relations specialist, website developer, public participation specialist(s), customer service specialist, fashion designer and implementation specialist.” These were communication and marketing specialists required by the first respondent.

[32] Each bidder is required to have successfully completed a minimum of two *similar type and size* of projects in each of the specialists categories: public transport planning, public transport infrastructure, business planning in public transport environment, architecture, marketing and communication, town planning, environment impact assessment and legal experience in transport.

[33] The applicant states that it should not have been disqualified by the respondent on the ground of functionality because functionality is not one of the bid specifications.

[34] Counsel for the applicant submitted that the tender document was prepared by the respondent and that it is bound by it.

[35] Save for the public transport planning, public transport infrastructure and business planning in a public transport environment the rest of the bid qualification criteria did not require experience in a public transport environment. They are architecture, marketing and communication, town planning, environmental impact assessment (later abandoned by the respondent). Counsel for the applicant, quite correctly, submitted that, if the respondent required the bidders to have experience in public transport, it should have said so as it did in respect of other specialist categories.

[36] The criteria specify that the “firm or joint venture must demonstrate that it has the necessary experience in respect of all the mentioned specialists fields before it will be considered for the tender. In the case of a joint venture it is sufficient to demonstrate that each of the above-mentioned criteria are met by the individual members of a joint venture.

[37] The bid qualification criteria with which tenderers had to comply are set out in the invitation to tender, namely, the applicant must have successfully completed a “minimum of two similar type and size of projects in each of the seven specialist categories. The specialist categories are set out above. A minimum requirement is

that seven of the listed professionals should “form part of the team” and “at least four of them must demonstrate that they have played an active role in their relevant professions in at least one of the BRT projects that have been completed or have advanced significantly further than the BCM project.

[38] The applicant states that it has complied with all of the requirements and that its bid was wrongly disqualified.

[39] The tender requires the bidders to “submit a satisfactory project plan in the form of a Gantt Chart indicating the identified tasks with estimated durations and labour allocations. In addition, bidders must clearly show that they understand the scope of work and that the necessary resources are allocated to the task at hand.”

[40] The applicant states that the second respondent disqualified its bid on the basis that the Gantt Chart provided by it was not in accordance with the requirements, but at the same time it did not disqualify the third respondent for an identical chart.

[41] Applicant states that when it was disqualified for the tender the second respondent used a wrong criteria which was not part of the invitation to tender document.

[42] In respect of public transport planning and public transport infrastructure and business planning each of these specialists categories were assessed by the respondent against the criterion – “minimum two similar size public transport project.”

[43] Architecture, marketing and town planning were assessed against the criterion – “minimum two similar size transport projects.”

[44] The legal specialist area was assessed against the criterion – “minimum two similar size transport legislation oriented projects.”

[45] The applicant also states that in evaluating its bid the second respondent failed to have regard to whether the bid specification criteria would be met by the joint venture as a whole or by one or more of its individual members.

[46] According to the applicant the respondent had regard to criteria not set out in the invitation to tender, including that the applicant’s tender was “non-responsive based on an assessment of functionality.”

[47] On behalf of the applicant *Mr Ford SC*, who appeared together with *Mr Richards*, submitted that the first and second respondents are not permitted to import additional criteria in assessing the applicant’s bid. Counsel for the first and second respondents submitted that they are bound by the terms of the invitation to tender which the applicant applied its mind to when preparing its tender document. Counsel submitted that the first and second respondents are not entitled to have regard to their own perception of the nature of the contract or of what is necessary in terms of experience and expertise outside what is specifically stated in the bid or interpret the bid criteria subject to their perceptions.

[48] As is evident from the invitation to tender functionality is not one of the bid specifications. Consideration of functionality in these circumstances could only fall within the terms of the invitation of the tender document and not go beyond that.

[49] In the answering affidavit the respondent referred to the project as “unique”, “separate and distinct from other road based public transport,” with features which require specific experience “understanding and specialists skills’ to implement it.

[50] What I have just referred to above does not form part of the bid specification. There is no doubt that skill, expertise, knowledge and understanding were required within the four corners of the invitation to tender. The key is the bid invitation document which contains the specifications for qualification of the tender.

[51] Regarding the requirement that the applicant was required to have “successfully completed a minimum of two similar type and size of projects in each of the stipulated categories, the second respondent had to consider, in the case of a joint venture, that each of the criteria could be met by the individuals of the joint venture.

[52] The invitation to tender require the identification of key staff with which requirement the applicant complied. In addition the applicant prepared the gantt chart.

[53] In assessing the applicant's qualification it had regard to criteria not set out in the invitation to tender document. It found wrongly that the applicant's tender was "non-responsive based on an assessment of functionality."

[54] The grounds referred to above and those set out in the respondent's affidavit which seek to introduce new bid qualification criteria are irrelevant. They seek to introduce new criteria for acceptance of the bid on grounds not contained in the bid invitation document. The respondents were responsible for the drafting of the invitation to tender to which the applicant has responded. They are bound by the invitation to tender document. Had the respondent wanted to refer to those factors it should have incorporated them in the tender document.

[55] In *Sanyathi Civil Engineering and Construction (Pty) Ltd and another v Ethekwini Municipality and others; Group Five Construction (Pty) Ltd and others* (2012) 1 All SA 45 (KZP) it was held at para. 34 that the procurement laws are prescriptive because the award of tenders is notoriously prone to manipulation and that if an organ of state wishes to exercise discretion it must reserve that discretion for itself in the tender document in the interest of fairness, transparency and competitiveness provided, that the PPPFA permits such discretion.

[56] In *Ekuphumleni Resort (Pty) Ltd and Another v Eastern Cape Gambling and Betting Board and Others*, Kroon J held at paras 77 and 78 as follows:

"Mr *Soni* sought to meet any such finding by me with the submission that the Board was entitled to put such interpretation on the clause as it saw fit, and even if that interpretation were to be wrong in law, the Board's implementation thereof could not found the review of the Board's decision. Counsel invoked

the dictum in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* that 'laws, regulations and rules are legislative instruments, whereas policy determinations are not'. He argued that the RFP was not a legislative instrument, but, presumably, a policy determination; hence, if I understood the submission, it was open to the Board to place what interpretation it wished on a provision therein, even one incorrect in law.

The argument cannot be upheld. I am not persuaded that the parallel which counsel sought to draw with policy determinations was apposite. The vehicle which the Board utilized to elicit bids for casino licences was the RFP. It was specifically stated therein *inter alia* that failure to comply with any of the minimum requirements would result in disqualification of the bid. One of those requirements was set in terms of the wording of clause 5.3.8(k). Accordingly (and contrary to counsel's further submission that the Board had the power to determine what the meaning of the clause was, a submission which did not, as counsel argued it did, find support in the judgment in *Hira and Another v Booyesen and Another*), it was incumbent on the Board to accord to the clause the meaning which, as a matter of law, it bore. That it failed to do. It therefore committed an error of law and, it is hardly necessary to state, its administrative action, the disqualification of Elonwabeni's bid, was materially influenced by that error as envisaged in s 6(2)(d) of PAJA; indeed, it was dictated by that error, which precluded the Board, however well-intentioned it might have been, from directing its mind to the real issues before it and fairly determining same."

[57] Accordingly, in my view the first and second respondents cannot interpret the invitation to tender document in a manner that is suitable to them in spite of the clear language used in the document.

[58] According to the tender notice each of the experts referred to above must “have completed a minimum of two projects of similar type and size by the firm or member of the joint venture.”

[59] Further the tender notice specifies that “(t)he firm or joint venture must demonstrate that it has the necessary experience in all of the above-mentioned specialists fields before it will be considered for this tender. In the case of a joint venture, it is sufficient to demonstrate that each of the above-mentioned criteria are met by the individuals in the joint venture.”

[60] A minimum requirement for the tender is: (1) one professional engineer (civil, transport, planning); (2) a professional engineer (civil, transport, infrastructure), (3) an architect; (4) a professional engineer (civil, structural); (5) a professional engineer (electrical); (6) one professional town and regional planner; (7) an environmental practitioner and (8) a legal practitioner. Each of the professionals referred to above has to have a minimum of six years’ experience and registered as such with the professional body of his/her profession.

[61] The tender notice further provides that “at least four of the key staff must have played an active role in their relevant professions in at least one of the BRT projects that have been completed or have advanced significantly further than the BCM project, or they must demonstrate that they have played an active role in their relevant professions in at least one of the BRT projects that have been completed or have advanced significantly further than the BCM project, or they must demonstrate that they have experience in similar BRT projects from other countries. These local

projects would be limited to Cape Town, Johannesburg, Nelson Mandela Bay or Tshwane.”

[62] A bidder has to submit a Gant Chart identifying the task to be performed by each bidder together with the estimated duration of the task and labour required to perform that task.

[63] The applicant duly submitted its bid to the first respondent. Later the applicant’s bid was disqualified on the basis that it did not comply with the minimum terms of reference.

[64] At the foot of each page of the tender document the following instruction is to be found “Comprehensive Services for the Buffalo City Municipality Bus Rapid Transit System.” This inscription does not add any further requirement to the invitation to tender. It merely restates what is already in the document.

[65] The applicant avers that the second respondent informed it that “on an unstated date it had been determined that the applicant had not met all the minimum requirements as stipulated in the terms of reference and they were therefore disqualified from financial / HDI assessment.”

[66] After the exchange of correspondence, the second respondent forwarded to the applicant a letter dated 23 January 2012 couched in the following terms: Under the heading, Grounds for disqualification of the BKS Consortium, the City Manager, a certain Mr Fani, advised the applicant as follows:-

“On investigation of the tender submissions, it was established that the BKS Consortium did not comply with the qualification criteria as set out in the bid document. The reasons are as captured under the table column followed by a further explanation thereof.

The table below summarises the assessment in terms of the experience and expertise:

Functionality Assessment of BRT Tenders			
Qualifying Proposals			
BKS (Pty) Ltd Consortium			
Functionality Criteria	Experience		
Minimum two similar size Public Transport Planning Projects	This JV has carried out Public Transport Planning work for Gautrain and the initial transport operational for the 2010 World Cup		
Minimum two similar size Public Transport Infrastructure Projects	This JV has carried out Public Transport Infrastructure design projects for Gautrain and NMBM IPTS.		
	This JV has carried out planning work		

<p>Minimum two similar size Public Transport business planning projects</p>	<p>for Tshwane BRT and the Gautrain Rail Link.</p>		
<p>Minimum two similar size Public Transport oriented Architectural Projects</p>	<p>Kei rail station project</p>		
<p>Minimum two similar size Public Transport oriented Marketing and communications Projects</p>	<p>No evidence of transport and communications experience.</p>		
<p>Minimum two similar size Public Transport oriented town planning projects</p>	<p>No evidence of transport related town or regional planning experience. Experience largely to do with housing projects.</p>		
<p>Minimum two similar size Public Transport legislation oriented Projects</p>	<p>The JV have carried out the development of policies and by-laws for the NMBM inner</p>		

	CBD regeneration and business planning work for the Tshwane BRT project and the Gautrain Rail link.		
	Personnel Expertise		
ECSA Registered Professional Engineer (Civil, Transport Planning) with a minimum six years related experience	Chris Vorster – 35 years experience Reg no: 770199 (involved in NMBM conceptual planning and BRT implementation from 2006-2010)		
ECSA registered Professional Engineer (Civil, Transport Infrastructure with a minimum six years related experience	Gerhard Conrad Albertyn-39 years experience Reg no. 760037 (no indication of BRT experience)		
SACAP Registered Professional Architect with a minimum six years related experience	Dominic Bonnesse-31 years experience Reg no 4759 (no indication of BRT experience)		
ECSA Registered Professional Engineer	Robert William Mcsporrans-8 years		

<p>(Civil, Structural) with a minimum six years related experience.</p>	<p>experience Reg no D20085514 (no indication of BRT experience)</p>		
<p>ECSA Registered Professional Engineer (Electrical) with a minimum six years experience</p>	<p>Brett Jon Ansell-16 years experience Reg no 980726 (no indication of BRT experience)</p>		
<p>SACPLAN Registered Professional Town and Regional Planner with a minimum six years related experience</p>	<p>Ndaba Ndzombane-25 years experience Reg no: A/786/1994 (involved in the NMBM BRT (WC 2010 transportation))</p>		
<p>Legal Practitioner with NQF 7 related qualification and minimum six years experience</p>	<p>Nico Francois de Villiers-30 years experience LLB (NQF 7) (no indication of BRT experience)</p>		

- The architectural company of this consortium have indicated that they have carried out work on only one transport related project, which is below the minimum requirement of two similar type and size of projects.
- The marketing/communications company for this consortium have shown no evidence of any transport related experience, which is below the minimum requirement for two similar type and size of projects.
- The BKS Consortium have indicated that only two key staff have played an active role in their relevant professions in at least one of the local BRT projects or similar BRT projects from other countries. The requirement was that a minimum of four staff with BRT experience were required.
- The Gantt Chart that was submitted by the BKS Consortium failed to indicate resources allocated to the different activities.

From the qualifying assessment it was determined that the BKS (Pty) Ltd Consortium had not met all the minimum requirements as stipulated in the terms of reference and they were therefore disqualified from the financial / HDI assessment.”

[67] From the above, the applicant concludes that the applicant’s bid was not evaluated or adjudicated upon in terms of the points system and was excluded for consideration in that process.

[68] On 15 March 2012 an order by agreement was issued by this Court in terms of which, *inter alia*, the second respondent was ordered to furnish its reasons for it to award the tender to the third respondent. In addition thereto the first respondent was ordered to deliver to the applicant the record of the proceedings pertaining to the tender, the tender criteria was set out in the tender invitation, the specification and

evaluation of the tender allocation of points to tenderers, recommendations made in respect thereof and the decision to award the tender to any of the tenderers.

[69] It is not in dispute that the first and second respondent complied with the Court order.

[70] Thereafter the applicant filed a supplementary affidavit after having received the reasons and the documentation set out above from the first and second respondent.

[71] The first point taken by the applicant is that the joint venture agreement submitted by the third respondent with its tender to the first respondent was entered into by three entities only, namely, Goba (Proprietary) Limited SSI Engineering and Environmental Consultants (Proprietary) Limited and Advanced Logistics Group SA. The other professionals or entities on which the third respondent relied in support of the tender were not party to the joint venture agreement they only furnished to the third respondent what counsel for the applicant referred to as letters of comfort. The letter stated that the company is “committed to providing services as outlined in the tender response submitted by Goba – SSI - ALG joint venture on behalf of the professional team and will enter it into a sub-contractor agreement with the joint venture upon award of the contract.”

[72] It is to be noted that apart from the letters of comfort there is no firm commitment forthcoming from these entities in the sense of entering into a joint venture agreement with the third respondent. One has to take into account that the

first respondent is dealing with public funds and that, in my opinion, certainty is required as to which of the entities are involved in the joint venture. A loose arrangement such as that proposed by the respondent in this case is not sufficient. Counsel for the applicant correctly, in my view, referred to it as an amorphous body of entities against whom it would be difficult for the first respondent to enforce its rights, should the need arise. In my view it is not enough for these entities to merely state that they will enter into a joint venture agreement once the tender is awarded. When the tender was awarded to the third respondent it had not met the minimum requirements of the tender notice. It seems to me that the first respondent did not apply its mind to this issue. At the least it must have relied on the say so of the third respondent without considering the damage and prejudice that the public purse might be exposed to at the end of the day.

[73] It is advantageous in a case like this to require bidders to form joint ventures. In *Nelson Mandela Metropolitan Municipality v Hewitt-Coleman and others* 2012 JOL 28602 (SCA) Malan JA held at para. 55:

“The relationship between the parties to a joint venture is that of partners. Partners are liable jointly and severally *in solidum*. It follows that the members of each joint venture are liable jointly and severally *in solidum* to the Municipality. . . Any order made should therefore be against the partners in the particular joint venture concerned.”

[74] At the risk of repeating myself, the first respondent has not complied with its own tender notice. Therefore I find that the award of the tender to the third respondent was void and invalid *ab initio*. In the absence of a joint venture agreement entered into by the other parties, one wonders whether those entities have any part to play in these proceedings.

[75] It is difficult to understand the basis on which the second respondent allocated points to groups of persons, HDI, BEE, disabled persons, the youth and women if such persons do not form part of a joint venture with the third respondent. In passing I wish to say that had I decided to remit the matter to first and second respondents for consideration I would not have appointed a neutral and independent observer as was ordered in the matter of *Vodacom (Pty) Ltd and another v Nelson Mandela Bay Municipality and others* 2012 (3) SA 139 (E). The law dealing with tenders is very clear and the second respondent should not find it difficult to apply it.

[76] The other entities who are not part of the third respondent's joint venture will be at liberty to unilaterally opt out of the BRT system and there is nothing to suggest what the third respondent's remedy would be in such circumstances. What is clear to me is that the first respondent would not be in a position to compel those other entities to comply with the terms of the joint venture agreement. The letters of comfort were not designed to conclude a contract with the third respondent. Instead, they are no more than a hope to third respondent that the other entities will participate in third respondent's joint venture once the award is granted to it.

[77] It being quite clear that the first respondent clearly was dealing with public funds, it ought to have been alert to the issue referred to above.

[78] One of the requirements of the tender was the provisions of a Gantt Chart indicating the tasks; the estimated duration of the tasks and labour allocations.

[79] The applicant avers that it should not have been disqualified on this ground because the third respondent failed to produce a gantt chart. Applicant submitted therefore that for this reason alone the third respondent's bid should have been disqualified.

[80] According to the applicant all its members comply with the bid specification criteria and are members of the joint venture (BKS Consortium). In a situation like this a joint venture agreement is necessary. Evidence of this is the joint venture agreement put up by the applicant. The terms of the agreement are comprehensive and deal with every conceivable legal problem that might arise in the course of the execution of the tender. For instance there is a requirement that each member of the joint venture "shall maintain insurance cover in accordance with and in the amounts stated in the services agreement as protection against all legal liabilities arising out of or in connection with the performance, or otherwise, of its legal obligations under this agreement."

[81] In this matter the taxpayer would have paid R17 million more than was necessary. Awarding a huge tender such as this to an entity such as the third respondent, with all its loose arrangements, is reckless and careless in the extreme. It shows that the first respondent has no regard whatsoever to its fiduciary duty with respect to the taxpayers' money. Not only that, I shall demonstrate hereunder that the first respondent flouted the Constitution of the country and all laws and regulations applicable to tenders.

[82] The regulations promulgated in terms of the Local Government: Municipal Finance Management Act 56 of 2003 set out the process of administering tenders.

[83] A bid is evaluated by the bid evaluation committee (BEC) which then makes recommendations to the bid adjudication committee (BAC). In turn the BAC makes a recommendation to the second respondent who makes a final decision regarding the bid.

[84] At the evaluation stage of the bid a point system is employed. In this case a 90/10 point system was employed.

[85] The applicant did not enjoy the benefit of this procedure. Its bid was disqualified without any points having been allocated to it. Of note is the fact that the price proposed by the applicant in its bid was R17 million less than that of the third respondent which had quoted an amount of R71 million.

[86] The applicant submits that, when inviting tenders, the first respondent did not advise potential tenderers that bidders would be assessed on the basis of functionality (i.e. the ability of the tenderers to provide service for which they were invited to tender.)

[87] The applicant states that its bid was complete and acceptable in that it complied with the specifications and conditions of the tender. Therefore, the applicant avers that the task of the BEC and the BAC, in considering the applicant's

bid was limited to whether the applicant's bid was acceptable as compliant with the specifications and conditions of the tender as set out in the invitation to tender.

[88] The second respondent alleges that the applicant is not capable of complying with the specifications set out in the tender notice because it lacks the expertise necessary to implement the BRT system. It is evident from what is stated above that the applicant was disqualified on grounds not set out in the tender notice. In this judgment I mention the disqualification alleged by the respondent. Among other things, the second respondent mentions the functionality to be able to carry out the work set out in the tender document and that the applicant has no capacity to carry out the work in terms of contract (tender notice).

[89] I must mention that functionality is not one of the requirements set out in the tender notice. The PPPFA says in peremptory terms that if the award is to be based, *inter alia*, on functionality this must be mentioned in the invitation to tender. It is startling now that the respondent disqualified the applicant on the basis of functionality which is not a requirement in terms of the invitation to tender. The respondent is not allowed to import specifications or conditions not set out in the tender document. *Bolton: The Law of Government Procurement in South Africa*; page 182 says the following:

“2.4 Changes to tender specifications

Tenderers prepare their tenders based on the specifications laid down in a call for tenders. As a general rule, therefore, an organ of state should not be allowed to make changes to tender specifications after a call for tenders has been advertised. It is in the interests of fairness and transparency (and also competitiveness) for organs of state to abide by the tender specifications initially provided.”

[90] The case of the first and second respondents is that the applicant's bid was disqualified for the reason that it was non-responsive whereas that of the third respondent was. The second respondent states that a tender of this nature will not necessarily be awarded to the bidder who offers the lowest price. By this I understand the respondent to be referring to s 2(a)(f) of the PPPFA which permits the award of a tender to the tenderer who does not score the highest points if "objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer." No such case is made out by the second respondent in its answering affidavit. It says that the third respondents' bid was responsive; it met all the requisite minimum requirements; and its price was the lowest of the responsive bids that met the requirements for the award of the contract. Had it been so, I would have expected the respondent to have placed some evidence before me in this regard.

[91] Of importance in this matter is a comparison between the invitation to tender, the bids submitted by the applicant and the third respondent as well as the respondent's assessment, the adjudication and the award of the tender to the third respondent.

[92] Not only did the second respondent have regard to criteria which were not covered by the invitation to tender but he also took into account that the applicant's tender was "non-responsive based on an assessment of its functionality". I have already dealt with the requirements of the PPPFA insofar as functionality in an invitation to tender. The invitation to tender document itself states that the criterion in

the specialist areas set out in the tender may be met by the consortium as a whole or by anyone or more of its individual members. In this regard the applicant contends that in assessing its bid the second respondent failed to have regard to an important requirement of the invitation to tender document, namely, that any of the criteria prescribed by the invitation to tender document may be met by a joint venture as a whole or by anyone or more of its individual members. The applicant therefore avers that the second respondent failed to take this into account when assessing its bid.

[93] In assessing the applicant's bid the second respondent concluded that the term "projects of similar type and size", in the architecture, referred to "similar size transport oriented architectural projects". As pointed out by counsel where the second respondent wanted transport to be a requirement of a specific area he said so in the invitation to tender document. Infact on three occasions in that document, he qualified each specific area by making use of the words "public transport."

[94] The first and second respondents are not entitled to import additional criteria or factors not stipulated for. They are not entitled to have regard to their own perception of the nature of the contract or of what is necessary in terms of experience and expertise, outside of what is specifically stated in the bid criteria or to interpret the bid criteria to suit such perceptions. See: *Sanyathi Civil Engineering and Construction (Pty) Ltd and another v Ethekewini Municipality and others*; *Group Five Construction (Pty) Ltd v Ethekewini Municipality and others* [2012] 1 All SA 200 (KZP); *Logbro Properties CC v Bedderson N.O* 2003 (2) SA 460 (SCA); *Ekuphumleni Resort (Pty) Ltd and another v Gambling and Betting Board, Eastern*

Cape and others 2010 (1) SA 228 (E); *Municipal Manager : Qaukeni Local Municipality and another v FV General Trading* [2009] 4 All SA 231 (SCA).

[95] Among other things, the second respondent disqualified the applicant on the basis that its architect had only one transport related project. In disqualifying the applicant it also took into account that “the expertise required specifically designs experience of BRT projects” and, insofar as it relates to this aspect was interpreted as “by the architect involves experience in designing interface between buses manoeuvring into position alongside an enclosed passengers centre that has glass sliding doors which must open simultaneously with the bus doors to enable the rapid unloading and boarding of passengers, before one bus departs and the next arrives.”

[96] As can be held from the first and second respondent’s answering affidavits subjective factors were taken into account in assessing the applicant’s functionality. It is stated in the answering affidavit that “one of the main reasons why the tender required an architect with experience of similar type BRT projects is because inexperienced architectural design of the interface between bus and passenger shelters can lead to an operational problem. It is to be noted that the criteria in terms of which the applicant was disqualified in this regard is not set out in the invitation to tender document. The requirement of architecture is not in any way qualified in the bid document. Neither is functionality, as stated above, one of the criteria to be taken into account.

[97] The bid document requires that the bidder should demonstrate its experience or even that of an individual who is going to partake in the joint venture.

[98] The document further states that “where joint ventures are undertaken, bidders are required to submit detailed documentation indicating the qualifications and the years of experience of key staff (Office Manager / Director and senior management from the local office Buffalo City Municipality area BCM).”

[99] Again, in the case of a joint venture submission of a notarised copy of a joint venture agreement detailing the responsibility of all the parties is a requirement. It is also stated fairly clearly that non-fulfilment of any of the prescribed conditions may lead to disqualification of the proposal.

[100] Regarding the requirement of marketing and communications the second respondent concluded that the term “similar type and size of projects” means “transport oriented marketing and communications projects, whereas the term “similar type and size of project” simply means “a project of similar scope and structure”.

[101] There are many more instances which the second respondent imported or added material to the bid invitation document. In many of the bid specifications he added terms such as “transport oriented”; “transport related” and “legislation oriented projects”. There are instances where the second respondent used terms not stipulated in the bid document such as that the project is “unique” and “specialised” in nature. The same applies to the requirement of a “minimum two similar type and size town planning projects” which when assessing the applicant the second

respondent referred to it as “a minimum of two similar size transport oriented town planning projects.”

[102] The respondent disqualified the applicant on the basis that he had completed a “minimum of two projects of similar transport oriented projects” whereas the invitation to tender referred to a “minimum of two projects of similar type and size.” In respect of town planning the invitation to tender does not refer to “public transport oriented town planning.”

[103] The second respondent incorrectly assessed the capacity or ability of the applicant to fulfil town planning functions which requirement is not contained in the bid document. It’s a subjective factor to the bid specifications.

[104] The applicant, as required by the invitation to tender, has demonstrated that it has the seven professional persons who should form part of the project team. It has also been able to demonstrate that of the seven experts at least four of them have played a role in a BRT project.

[105] The applicant has supplied the names of their experts, their curriculum vitae and as well as their years of experience in the various professions in which they qualify. The second respondent incorrectly concluded that the applicant should be disqualified on the basis that it had provided no evidence of “transport oriented town or regional planning experience.” This requirement has been imported by the second respondent into the bid invitation document. The applicant contends that it has completed a minimum of “two similar type and size of projects” in the architecture

fields including the East London to Mthatha Railway line project (Kei rail); the George airport project; the Nelson Mandela Bay multipurpose stadium; the Port Elizabeth New Law Courts).

[106] In addition the applicant contends that it has been able to demonstrate that it had completed at least two projects of similar type and size in respect of Develop Brand Eastern Cape Project; communication and media campaign for Nelson Mandela Bay as 2010 World Cup host city; the Integrated Marketing Communication plan to the integrated transport system for the world cup 2010.

[107] The applicant further contends that it has met the bid qualification criteria in that it had completed a “minimum of two projects of a similar type and size’ including Khulani Corridor Project; Koega package of plan; Jeffreys Bay structure plan and CBD plan; Njoli square project; Nelson Mandela Bay 2010 world cup transportation project and Motherwell transportation development plan.

[108] Regarding key staff members the invitation to bid requires that at least four of key staff “must demonstrate that they have played an active role in their relevant professions in at least one of the local BRT projects that have been completed or have advanced significantly further than the BCM project , or they must demonstrate that they have experience in similar BRT projects from other countries.” Among other things, the respondent disqualified the applicant on the basis that Mr Albertyn, did not “provide sufficient details of his actual involvement in NMBM BRT for the first respondent to satisfy itself that he possessed the required level of experience as set out in the tender specifications.” Yet the specification is clear as quoted above. The

invitation to tender requires an active role in the relevant profession in at least one of the local BRT projects and not that the professional “possessed the required level of experience”. Here again the respondent shows that it has had regard to extraneous factors in evaluating applicant’s bid. On the other hand, the information supplied by the applicant in its bid document indicates to me that it has complied with this requirement.

[109] The second respondent concluded incorrectly that only two of the key staff submitted by the applicant met the requirement of having “played an active role in their professions” in a local BRT project. The second respondent incorrectly excluded in consideration such professionals as are not employed by the firm primarily responsible for the project in question. The bid qualification criteria on the contrary require only that professionals with the qualifications and experience listed must form part of the project team.

[110] In his argument Mr *Buchanan*, SC with whom Mr *Benningfield* appeared for the first and second respondent, submitted that the Court should always bear in mind that there is a fundamental distinction between an appeal and a review and that the Court should be careful not to substitute its own decision for that of the second respondent. I agree with counsel’s submission in this regard. However, the Court is not dealing with an assessment of the merits of the bid but, an assessment of the bid qualification criteria as set out in the invitation to tender document. Also important is the manner in which the second respondent applied those bid criteria in the assessment of the applicant’s tender.

[111] In essence what the applicant is asking the Court to do in this matter is to do what the second respondent ought to have done in order to fulfil its function in this case as the delegated authority assessing the bid.

[112] What the second respondent failed to do in this case was to consider whether or not the applicant's bid was an "acceptable" one. It failed to do so. Instead it had regard to matters that were outside of the bid specification criteria. I agree with the submission made by applicant's counsel that the applicant's tender was an acceptable one and that it complied with the bid specification criteria. That being so, the second respondent ought to have applied the point system to it. Had it done so it is quite clear in the papers that the applicant's bid was the cheapest one. It is pointed out correctly in the papers that the applicant's price was cheaper by R17 million. On the other hand, the third respondent's bid was not an acceptable one in that it did not comply with the bid specification criteria.

[113] One of such important requirements was that the tenderer be a joint venture and that if it consisted of more than one entity a joint venture agreement was required. In the present matter the third respondent's joint venture was entered into only by the three entities namely, Goba/SSI/ALG consortium. The third respondent annexed comfort letters, as shown above, from professionals who indicated an intention to join the venture once an award was made to the respondent. From this alone it appears that the third respondent's tender was not an acceptable one and should have been rejected.

[114] From the above it follows that the first and second respondent patently did not comply with the bid qualification criteria in disqualifying the applicant. The bid qualification criteria are plain and unambiguous and I find it difficult to understand why in these circumstances the applicant was not awarded the tender. Amongst other things the second respondent purported to disqualify the applicant's bid on the basis that the Gantt Chart was not in accordance with the requirements, but at the same time it did not disqualify the third respondent for an identical lacuna and found that the third respondent's bid was compliant when it clearly was not.

[115] What also escapes one is the fact that the second respondent, apart from not applying the qualification criteria set out in the invitation to tender, he allocated a meaning to the bid qualification criteria which was clearly not supported by the plain and unambiguous language of the invitation to tender. When assessing the applicant's functionality, which was not contained in the bid criteria, was used by the second respondent to disqualify the applicant, contrary to the clear terms of the law which provides that if functionality is going to be one of the requirements of a tender, it should be set out in the invitation itself.

[116] It is also not part of the bid qualification criteria that the BRT project proposed in this case is unique and that it requires a level of experience other than that set out in the specification. However in spite of that, the respondent purported to disqualify the applicant on this basis.

[117] Counsel for the applicant submitted that in the event that the applicant is successful in this matter, that this Court should substitute the applicant for the third

respondent as a successful bidder with an appropriate costs order. However, first and second respondent's counsel submitted that in the event that the applicant be successful the award should be reviewed and set aside and remitted to the second respondent.

[118] However, on the other hand Mr *Ford* submitted that in the light of the following factors I should, in these circumstances, award the tender to the applicant. He submitted that I should set aside the award and that in terms of s 8(c)(ii)(a) of PAJA substitute my decision for that of the second respondent and award the tender to the applicant.

[119] The award has not been acted upon but it has been suspended pending the outcome of this application. Given the history of the matter and the fact that the respondent has not of its own accord approached the Court to set aside its own flawed process but has instead persisted in defending its decision and sought to justify the award to the third respondent on grounds that are flimsy, it is unlikely that a referral of the matter back to the second respondent will produce a fair outcome.

The first and second respondents sought to discredit the applicant unfairly by importing conditions which are not contained in the bid specification criteria. In the circumstances I have to come to the conclusion that I should decide the matter. As I have all the information at my disposal to be able to do so. No purpose would be served by remitting the matter to the first and second respondents in view of the manner in which they handled the tender. It seems that they are not immune for bias.

[120] In the circumstances the following order is made:

- (1) The decision of the second respondent to disqualify the applicant from the further assessment in terms of the tender process and the further decision to award the tender to the third respondent are hereby reviewed and set aside;
- (2) Any contract concluded between the first and third respondents pursuant to the award of the tender to the third respondent is void and unlawful;
- (3) The applicant is substituted for the third respondent as successful bidder for the tender;
- (4) The first, second and third respondents, jointly and severally, pay the applicant's costs in respect of both parts A and B of the notice of motion. Such costs to include the costs of two counsel.

B. SANDI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant	:	Adv Ford, Sc
with him	:	Adv Richards
Instructed by	:	Nettelton's Attorneys
Counsel for the 1 st and 2 nd respondents	:	Adv Buchanan, SC
with him	:	Adv Benningfield
Instructed by	:	Dold & Stone Attorneys
Counsel for the 3 rd respondent	:	Adv Paterson, SC
Instructed by	:	Neville B & B Attorneys