FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5972/2009

In the matter between:

HAW AND INGLIS CIVIL ENGINEERING (PTY) LTD Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL:
POLICE, ROADS AND TRANSPORT
FREE STATE PROVINCIAL GOVERNMENT
AND 11 OTHERS Respondents

HEARD ON: 29 APRIL 2010

JUDGMENT BY: MOLEMELA, J

DELIVERED ON: 28 MAY 2010

INTRODUCTION:

[1] This is a review application brought in terms of rule 53 of the Uniform Rules for the setting aside of an award of tender by the Free State Department of Police, Roads and Transport (first respondent) ("the department") herein represented by its MEC. The applicant is the unsuccessful tenderer. The successful tenderer, Tau Pele Construction (Pty) Ltd is cited as a second

respondent. The other unsuccessful tenderers have also been cited as co-respondents. Prior to this review application, the applicant initiated an urgent application wherein it sought to interdict the implementation of the tender. Pursuant to the applicant's institution of its urgent application, all the parties agreed to an order interdicting the implementation of the tender pending the finalisation of the review application. The review application is opposed only by the first respondent.

THE LEGAL FRAMEWORK:

[2] The award of government tenders is governed by section 217(1) of the Constitution, Act 108 of 1996 ("the Constitution"), which provides that such awards must be made in accordance with a system that is "fair, equitable, transparent, competitive and cost-effective". Section 217(2) of the Constitution acknowledges that a procurement system may provide for categories of preference and for the advancement of categories of persons. Section 217(3) of the Constitution provides that national legislation must prescribe the framework for the implementation of any preferential policy. This is done by the

Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA"), which provides that organs of state must determine their preferential procurement policy based on a points system. In a nutshell, it provides that a 90/10 point system must apply to tenders valued above a certain threshold, with ten points awarded for specific goals in respect of preferential procurement. Section 2(1)(f) of the PPPFA provides that once the bids have been scored in terms of the PPPFA, the contract

> "must be awarded to the bidder who scored the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another bidder".

Regulation 9 of the PPPFA Regulations states that an award can be made to a bidder other than the highest scorer "on reasonable and justifiable grounds".

[3] The Construction Industry Development Board Act, 38 of 2000 ("CIDB Act") provides for a national register of contractors. In terms of section 6(1) of the CIDB Act, contractors are categorised "in a manner that facilitates public sector procurement and

promotes contractor development". Contractors in a particular category are, in terms of regulation 12 under this Act, considered to be capable of undertaking a contract in a particular range of tender values. The CIDB grading ranges from 1 to 9. As at the 30th October 2009 (the closing date of the tender), an 8CE CIDB grading signified a civil engineer contractor considered capable of performing contracts of a value of up to R100 million. A 9CE CIDB grading signified civil engineer contractors considered capable of performing contracts having an unlimited value. The 9CE CIDB grading is in fact the highest grading that can be awarded to a civil engineer contractor.

[4] It is now settled law that when an organ of State such as the Department awards a tender, it performs an administrative action as defined in The Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") and the decision must therefore be lawful, reasonable and procedurally fair. In terms of section 6(2)(b), 6(2)(e)(i) and 6(2)(f) of PAJA, the decision must not be contrary to or unauthorised by the empowering provision. An

"empowering provision" is defined in that Act as a law, rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken. In *casu* the empowering provision would therefore be the tender document as well as the applicable statutes mentioned above.

[5] The tender data document and the tender conditions applicable *inter alia* specified the following:

5.1 the scoring system applicable;

5.2 the obligations of the tenderer;

5.3 the "undertakings" (responsibilities) of the department;

5.4 the evaluation of the tenders.

[6] The tender document further stipulated that "the standard conditions of tender as contained in annexure "F" of the CIDB Standard for Uniformity in Construction Procurement would apply". Annexure "F" provides as follows:

"F.1.6 **Procurement procedures**

F.1.6.1: Unless otherwise stated in the tender data, a contract will, subject to F.3.13 be concluded with the tenderer who in terms of F.3.11 is the highest ranked or the tenderer scoring the highest number of tender evaluation points, as relevant, based on the tender submissions that are received at the closing time for tenders.

F.2 **Tenderer's obligations**

F.2.17 Clarification of tender offer after submission

Provide clarification of a tender offer in response to a request to do so from the employer [department] during the evaluation of tender offers."

(my underlining for emphasis)

F.3 **The Employer's Undertakings**

F.3.11 Evaluation of tender offers

F.3.11.1 Appoint an evaluation panel of not less than three persons. Reduce each responsive tender offer to comparative offer and evaluate them using the tender evaluation methods and associated evaluation criteria and weighting that are specified in the tender data."

F.3.11.9 A bidder must score a minimum of 30 points for functionality/quality in order to be considered for further evaluation and adjudication.

[7] The advertised invitation for tenders stipulated that tenderers in possession of a 9CE or 8CEPE CIDB grading were eligible to have their tenders evaluated. It further provided that

> "the contract will be awarded according to the Preferential procurement Regulations, 2001, pertaining to the Preferential Procurement Policy Framework Act on a 90/10 points evaluation".

It further stipulated that

> "preferences are offered to tenderers for: price 45 points; functionality/quality 45 points; equity and specific goals 10 points".

With regards to functionality/quality, the invitation to tender simply provided as follows: "As per Contract Document". The relevant contract document (Form K of the tender document) in turn provides as follows:

> "Points for experience will be awarded <u>after verification</u> of similar types of projects (<u>rehabilitation of a road more than R130 million</u>) are <u>completed</u>" (my underlining for emphasis)

[8] The same form (From K) of the tender document indicated the points that would be allocated to a tender for previous completed projects as follows:

> "(Projects completed with (sic) *[within]* the past 5 years:
>
> - Three (3) or more similar projects completed - 30 points
> - Two (2) similar projects completed - 15 points
> - One (1) similar project completed - 5 points"

[9] With regards to Equipment, Form T of the tender document, specified the equipment regarded as critical for the project and further stated that the tenderers were required to list the relevant equipment that they

> "own or lease and will have available for this contract or will acquire or hire for this contract if their tender is accepted."

The same form further stipulated as follows:

> "Proof of ownership or proof of access to critical equipment listed below must be attached to this page. Failure to provide such proof may disqualify the tenderer."

[10] According to item F.3.11.9 of the tender data document, a bidder had to score a minimum of 30 points for functionality/quality in order to be considered for further evaluation.

THE ESSENTIAL FACTS

[11] The tenders were submitted to the Department's Bid Evaluation Committee ("BEC") for evaluation. The BEC evaluated the tenders and made a recommendation to the Bid Adjudication Committee ("BAC"), which in turn made recommendations to the head of the Department. The BEC concluded that the applicant's tender was responsive, in other words, it qualified for evaluation. After the evaluation, the BEC recommended that the tender be awarded to the 2nd respondent.

[12] The tenders that were evaluated by the BEC were scored in accordance with the scoring system set out in the invitation to tender. In other words the scoring system consisted of a number of elements which, added together, made a sum total of a 100 points allocated as follows:

Price	=	45 points
Functionality/Quality	=	45 points and
Equity & Specific goals	=	10 points.

The 45 points for Functionality/Quality were in turn broken down into two elements *viz*

(1) 30 points for experience of the bidder, the benchmark being the number of similar projects as referred to in Form K as mentioned in paragraph [9] above;

(2) 15 points for critical equipment which the bidder was required to have available for the contract. As already mentioned in paragraph [10] above, the critical equipment was specified in Form T of the tender document.

[13] According to the record of the proceedings (which is not disputed by the 1st respondent) the BEC met only once to evaluate this particular tender. On that same day it recommended to the BAC that the tender be allocated to the 2nd respondent. On that same day, the same committee (BEC) evaluated 3 other unrelated tenders, 2 of which were also

allocated to the 2nd respondent. Those tenders have also been challenged and the review proceedings are pending. With regard to the tender that is the issue of these proceedings, the minutes of the BEC do not reflect that any verification of projects was done as contemplated in Form K referred to in paragraph [7] above. It can therefore be accepted that the BEC recommended the 2nd respondent as the successful bidder, without having verified its listed completed projects as contemplated in Form K referred to in paragraph [7] above. In any event the chairperson of the BEC has not disputed this.

[14] **SCORES ALLOCATED FOR THE APPLICANT AND 2ND RESPONDENT, RESPECTIVELY**

14.1 Price

The applicant's price of R300 million was the lowest of the bids, followed by a tender of R328 570 .17 by another tenderer and a price of R347 million tendered by the 2nd respondent. There is thus a difference of R47 million between the applicant's lowest price and the 2nd respondent's price. The applicant, being the lowest

bidder, scored the full 45 points for price, while the 2nd respondent scored 37,82 points. There is no dispute with regards to this scoring.

14.2 Functionality/Quality

For experience, both the applicant and the 2nd respondent were allocated 30 points. For plant and equipment, the applicant was awarded 0 points, while the 2nd respondent was awarded 15 points. This scoring is the main bone of contention in these proceedings. It is attacked on 2 grounds, *viz*

(1) that the applicant was wrongly not allocated any points when it should have been allocated the full 15 points; and

(2) that the 2nd respondent was allocated 15 points when it actually deserved only 5 points on the ground that it had completed only one similar project in the past five years.

14.3 Equity and Specific Goals

The total points allottable for this item was 10 points which were broken down as follows:

- "100% disfranchised (*sic*) 5 points
- Woman 100% ownership 1 point
- Youth 100% ownership 1 point
- Disabled 100% ownership 1 point
- Free State Based 2 points"

The applicant was allocated 3.23 points and the 2nd respondent was allocated 5.12 points. There is no dispute with regards to this scoring.

14.4 Total Points Scored

The 2nd respondent received the highest score of 87.94 points while the applicant scored 78.23 points. The Department awarded the tender to the 2nd respondent on the basis that it (the 2nd respondent) had received the highest score.

[15] **THE APPLICANT'S CASE**

In its papers, the applicant relied on the following grounds of review:

15.1 That the department's officials failed to open the tenders and announce the details thereof in public in compliance with the conditions of tender. The department's officials instead opened the tenders in a separate room from the one the tenderers had converged in and were already in possession of a list bearing the names of the tenderers and their respective tender prices. The department therefore failed to follow the mandatory procedures specified in the contract document as required by the principles of fairness, transparency and openness in respect of the opening of the tenders and the announcement of the results. The applicant averred that on this basis alone the tender fell to be set aside on the basis of non-compliance with the provisions of PAJA.

15.2 The applicant further contends that

(1) it was therefore entitled to an allocation of 15 points for equipment, as it had, together with its tender, submitted an affidavit specifying that the company

that owned the critical equipment needed for the project, was its subsidiary. It had further attached photographs of the relevant equipment, which incidentally bore the applicant's own logo. The applicant thus contended that it had provided proof of ownership of or access to equipment. The applicant further alleged that its CIDB grading of 9 CE served as proof that it had unlimited equipment that was relevant for the tender;

(2) the 2nd respondent was not entitled to the 15 points that it was allocated for functionality (experience) as it had not completed three similar projects before the closing date of the tender. It was contended that the 2nd respondent had in fact misrepresented facts to the Department in its tender documents, thus necessitating the cancellation of the tender as provided for in the standard conditions and Form T.

The two grounds mentioned in the sub-paragraph above are the main thrust of the applicant's review application.

15.3 The applicant further contended that the first respondent exhibited conduct suggesting bias against it when adjudicating the tender. In this regard the applicant relied on the following:

(1) the opening of tenders by the department's officials behind closed doors;

(2) the failure by the department to make use of its appointed expert consulting engineers for purposes of evaluation of the contract;

(3) the manner in which the department scored the 2nd respondent in comparison to the manner in which the applicant was scored.

[16] **1ST RESPONDENT (DEPARTMENT)'S CASE**

16.1 It was contended on behalf of the department that in a review the question to be considered, is not whether the decision is capable of being justified, but whether the decision-maker properly exercised the powers entrusted to him or her, the focus being the process in which the decision-maker came to the challenged conclusion,

16.2 It was further contended that when awarding the tender to the second respondent and not to the applicant, the 1st respondent (department) had properly exercised its powers entrusted to it, having followed a fair, lawful and transparent process and came to a decision that was rationally connected to the fair procedure that was followed, especially considering the material on which such decision was based.

16.3 The department contended further that the applicant's challenge to the manner in which the tenders were opened was a challenge to the form rather than the substance of a fair and transparent process itself. The department conceded that the tenders were not opened in the room where the tenderers had converged, but rather in an adjoining room. It cited non-availability of space as one of the reasons why tenders were dealt with in that fashion and went on to add that it was decided to rather reduce the information pertaining to the name of the tenderer and the price to writing and to provide a list to

tenderers to avoid any confusion that may ensue from tenderers not having the names of the tenderers properly.

16.4 The department contended that the documents provided by the applicant as proof of ownership of equipment were not acceptable as the BEC had decided that the only acceptable proof would in terms of the Road Traffic Act, be registration certificates or purchase document or letter of commitment from lessor to lessee. It was contended that the department was under no obligation to ask for further documents from tenderers after closing date of tender. It was further contended that asking for further information could actually taint the tender process.

16.5 With regards to the applicant's allegations of lack of verification of second respondent's listed previous projects, (supported by affidavits from third parties) it was contended that such information could not have been considered by the BEC as it was not at the BEC's disposal at the time of the evaluation. It was argued that the information in front of the BEC as at that time

reflected three qualifying projects that the BEC rightly took into account.

[17] It needs to be pointed out that during the hearing of the application the applicant's counsel submitted that the applicant was not persisting with its contention that the award of the tender could be set aside on the ground of failure to open tenders in the presence of the tenderers. In view of that submission I therefore need not address myself to this particular ground of review. In coming to this conclusion I have taken into account that all the other unsuccessful tenderers were served with this application and thus had an opportunity of opposing, but chose not do so. I have also considered first respondent's stance, i.e. that there was substantial compliance with the relevant provisions and that the applicant's challenge on this aspect was a challenge against the form rather than the substance of a fair and transparent process which had not prejudiced any tenderer. Without necessarily pronouncing myself on this submission, I am of the view that in the context of

this application, nothing really turns on this issue and I need therefore not address myself pertinently to it.

[18] **ANALYSIS OF THE FACTS AND APPLICATION OF THE LAW**

The applicable legal prescripts to the tender at issue have already been mentioned. The answering affidavit filed on behalf of the Department was deposed to by the chairperson of the BEC. In his affidavit, the chairperson of the BEC seems to be conceding that there was vagueness with regards to the exact proof of ownership of critical equipment that was required. In his affidavit he stated that

> "I accept that form T of the conditions' of tender does not stipulate in precise terms, the form of proof of ownership of critical requirement (*sic*) [equipment], which would have been sufficient for the purposes of compliance with the requirements of the tender. I nevertheless point out that the relevant part of Form T leaves it up to the bidder to provide the necessary information which would constitute proof. The fact that it is not prescriptive gives the bidder

an opportunity to present the necessary information which amounts to proof of ownership in the way the bidder chooses".

[19] It is inexplicable why, if the tenderers were indeed given a wide latitude as averred, the applicant's affidavit to which photographs bearing the applicant's logo were attached, was not accepted as proof that the applicant owned or had access to the required critical equipment. It is clear from the content of the answering affidavit that the BEC was either not aware of some of the requirements specified in the tender or did not understand them.

[20] As stated before, the CIDB Act and its regulations, as well as its standard conditions were applicable to this tender. The CIDB grading prescribed was an 8 CE PE (signifying a civil engineering contractor who is regarded as "potentially emerging", graded at level 8) or 9 CE (a civil engineer contractor graded at level 9). It would seem that the BEC did not know what this contractor grading signified. The significance of this grading has been explained in the

applicant's papers and stands unchallenged. As stated before, this grading is done in accordance with regulations made in terms of a statute (CIDB Act) and they are thus easily ascertainable. In my view, if it is accepted that 9CE CIDB grading signifies that the contractor awarded such a grading can tender for an unlimited amount, it can also be accepted that such contractor possesses the relevant equipment and experience for any project. After all, an allocated CIDB grading is not a once-off affair, it is reviewed periodically and may be reduced if the contractor concerned is no longer considered to be satisfying all the requirements for that grading. While I am not suggesting that the CIDB grading should have been the only consideration to determine a contractor's functionality, I accept that if the BEC had taken this aspect into account, there would not have been any ambiguity in interpreting the affidavit that the applicant submitted as proof of ownership.

[21] Given that no specific form of proof was specified in the invitation to tender, the concession made by the chairperson as quoted in paragraph 18 above was, in my view correctly made.

The Department did not specify beforehand the type of documentary proof it would require. This requirement was stipulated by the BEC only during the tender-evaluation stage. I therefore disagree with the BEC's conclusion that the applicant failed to attach proof of ownership or of access to critical equipment. I find that the proof of ownership of equipment supplied by the applicant was adequate, under the circumstances.

[22] The Department's stance is that there was a "discrepancy" as to the ownership of the critical equipment in question as it appeared to be owned by a third party. In my view, if the Department's contention that the documents attached by the applicant as proof of ownership showed that the equipment was owned by a third party as opposed to the applicant is to be accepted, then, considering that the applicant in its affidavit averred that the equipment was owned by its wholly owned subsidiary, this document ought to have sufficed as proof that the applicant had access to such equipment. As set out before, form T of the tender document allowed for the critical

equipment criterion to be satisfied by either proof of ownership or proof of **access** to the equipment. The applicant should therefore have been granted the full 30 points for critical equipment.

[23] In any event, even if the proof furnished by the applicant were to be found to be inadequate, then on the basis of the same concession of the BEC chairperson as mentioned in paragraph 18 above, I would find that the BEC ought to have granted the applicant an opportunity of furnishing it with the required documents. After all, the applicant did, in its tender document, undertake to make registration documents available should same be required. Considering that the tendering conditions allow the department to seek clarification on certain aspects even at the evaluation stage of the tender as set out in F.2.17 in paragraph [6] above, the least that the BEC could have done would have been to seek clarity from the applicant.

[24] The chairperson of the BEC, however, demonstrated his ignorance of these prescripts by stating that he would be

tainting the tendering process by contacting the applicant. This is clearly not the case. There would have been nothing wrong in the BEC contacting all the tenderers who, according to the scoring sheet, failed to attach proof of critical equipment owned in the form prescribed or desired by the BEC. I am fortified in this view by the case of **GVK SIYAZAMA BUILDING CONTRACTORS (PTY) LTD v MINISTER OF PUBLIC WORKS & OTHERS** [2007] JOL 20439 (D) where the following was stated:

> "[68] In my judgment, section 217 of the Constitution requires that the material terms and conditions of a public tender, objectively considered, should be such as to enable the person to whom it is addressed, namely a prospective bidder, to know with reasonable and sufficient certainty what is required of him or her in order to submit a valid and acceptable tender. In my judgment, this is a necessary threshold to a fair, equitable, transparent, competitive and cost-effective tender process." ...
>
> "[75] ….If documents had to be submitted to support the fact that a bidder was capable of being registered as a potentially

emerging enterprise, then the invitation should at least have stated what those documents were."

"[78] In my judgment, having not stipulated any formal requirements that a bidder had to comply with in order to show that it was a potentially emerging enterprise, it was incumbent upon the first respondent to make enquiries, either of the CIDB or the applicant in order to determine whether the applicant was 'capable' of being registered as a 'potentially emerging enterprise' in addition to having a contractor grading of 7GB. Having not stipulated any formal requirements in this regard, it was hardly fair of the first respondent to reject the applicant's tender out of hand because the applicant did not submit any documentation reflecting that it was capable of being registered as a potentially emerging enterprise. I would have thought that the tender documentation considered as a whole would have alerted the first respondent to the likelihood that the applicant was indeed capable of being registered as a potentially emerging enterprise and have put the first respondent on its enquiry.

[79] The actions of Mr Dube and his Administration Committee ... in rejecting the applicant's tender as non-responsive because a 7GB certificate was submitted, without making

> enquiries as to whether the applicant was capable of being registered as a potentially emerging enterprise, was procedurally unfair and had the unacceptable result that a potentially meritorious contractor was excluded from the evaluation process." (my underlining for emphasis.)

[25] The court concluded in the afore-mentioned case that because the decision-maker had failed to 'prescribe the required formalities', it had erred as a matter of law in rejecting the bid of GVK Siyazama when it failed to provide the proof the decision-maker required. I further agree with the applicant's contention that in *casu*, if the Department was not satisfied with the proof provided, and intended insisting on registration certificates, then by parity of reasoning and in terms of the **GVK SIYAZAMA** judgment it was obliged to request the registration certificates from the applicant.

[26] Furthermore, regulation 14(c) under the PPPFA states that:

> "A bidder must, in the stipulated manner, declare that documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state."

This regulation obviously recognises that documentary proof may be called for after the tender closure, where appropriate. In the case of **METRO PROJECTS CC AND ANOTHER v KLERKSDORP LOCAL MUNICIPALITY & OTHERS** 2004 (1) SA 16 (SCA) it was held that fairness in a tender process will, under the appropriate circumstances, mean asking

> "a bidder to explain an ambiguity in its tender; it may be fair to allow a bidder to correct an obvious mistake; it may particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation."

[27] The record of the proceedings, in particular the scoring sheet, shows that apart from the applicant, four other tenderers were penalised for not providing these registration documents, thus only five tenderers did not satisfy the Department's requirements in as far as its preferred method of proof was

concerned. It would thus not have been too cumbersome a task for the Department to ask them to submit the preferred proof. Given the nature of the remedy I consider appropriate to grant, it is critical to mention that even if all five tenderers had been requested to furnish these documents and if all of them had satisfied this requirement, then each one of them would have qualified for the maximum score of 15 points. If 15 points had then been allocated to all these five tenderers (including the applicant), then the applicant would still have been the highest scorer in all the tenders that were evaluated by the BEC. On this ground, the BEC would have been obliged to recommend that the tender be allocated to the applicant, seeing that the minutes of the BEC and the BAC did not suggest that there be a departure with the norm, i.e. that the tender be awarded to the tenderer with the highest points.

[28] I am thus satisfied that failure to award the applicant the full 15 points for critical equipment or at least to request it to furnish the registration documents under circumstances as mentioned above was procedurally unfair and not in compliance with the

applicable tender procedures as set out in the conditions, the regulations of PPPFA and PAJA and ultimately the Constitution. This non-compliance constitutes a serious irregularity that warrants the setting aside of the tender award.

[29] The scoring of the second respondent in respect of equipment is also contested by the applicant on the ground that the second respondent was granted points even for experience that it did not have. As pointed out before, Form K of the tender documents clearly stipulates how prior experience ought to be scored. This form provides that for three similar projects completed within the past five years 30 points should be allocated. For two similar projects completed the score to be allocated would be 15 points and for one similar project completed 5 points would be allocated. The same form also stipulated that a similar type project was one for rehabilitation of a road more than R130-m. Importantly, it also provided that

> "points for experience will be awarded <u>after</u> verification of similar types of projects". (my underlining for emphasis)

[30] Mr. Mokoena, on behalf of the Department, argued that the lawfulness, or otherwise, of the Department's decision must be determined on the basis of information that was placed before the BEC and not the information that became afterwards. I will demonstrate that even this approach does not come to the second respondent and the Department's assistance in any way. The record of proceedings shows that the second respondent included in its schedule of completed projects projects that had not been completed by the closing date of the tender or that were not of a similar nature in that they did not exceed R130-m. The second respondent included among its tender documents a document entitled "Work completed" where it reflected projects whose completion dates were beyond the closing date of the tender and which could, for this reason, should not have been taken into account by the BEC. What is baffling is that one particular project had conflicting completion dates in that in the schedule it reflected a completion date of 29 October 2009 and in the document entitled "Completed work" the same project reflected the date "31 October 2010" as the completion date. Both these documents served before the BEC

committee which, for some inexplicable reason, did not notice this obvious discrepancy. The BEC committee chairperson was, in his affidavit very evasive on the projects that it scored the second respondent on. He even suggested that the BEC "did not place much weight to that project" in the evaluation of the second respondent's experience. When one considers the documents that were in possession of the BEC at the time of evaluation of the tender, it is quite clear that the following tenders did not qualify for consideration:

(1) Rehabilitation of the road between Reitz and Petrus Steyn (could not have been considered because the completion date of 15 November 2009 was beyond the closing date of the tender).

(2) Rehabilitation of road P28/4 from Lichtenburg to Mafikeng (conflicting closing dates, one being beyond the closing date of the tender). These conflicting dates are reflected on the documents on page 100 and 105 of the Record of Proceedings that served before the BEC.

(3) Rehabilitation of the road between Parys and the N1 (tender amount below the minimum threshold of R130-m).

[31] This means that the BEC could, on the face of the documents it received from the second respondent, have considered only two projects as qualifying projects. Yet the BEC went on to allocate maximum points allowable for three projects, i.e. 30 points instead of 15 points. As the second respondent could, on the face of the documents that served before the BEC, only score less than the prescribed 30 points threshold (see clause F3.11.9 in para 11.3 above), this means that the second respondent's tender ought not to have been considered for any further evaluation and adjudication. If this had happened, the applicant would still have been the highest scorer even if the 15 points that it was denied in respect of critical equipment was no taken into account.

[32] The fact that the 2nd respondent was allocated points even for projects that it had not yet completed serves as proof that the BEC did not verify the 2nd respondent's projects. This is contrary to the peremptory provisions of the tender conditions as specified in Form K.

[33] With the benefit of the affidavits filed by various deponents who played a key role in the projects concerned, contents of which have not been disputed by the Department, it is now evident that the second respondent misrepresented facts with regards to the second project (Reitz – Petrus Steyn Road) third project (Lichtenburg – Mafikeng Road) and the fifth project (the Delmas – Ogies Road) by furnishing erroneous completion dates. One project's date of completion was a full year after the tender closure date and one project had still not been completed by the 29th January 2010 even though the completion date thereof was reflected in the tender documents as 30 September 2009.

[34] With the benefit of the same affidavits mentioned in the afore-going paragraph, it is clear that the actual score which the second respondent deserved on experience was five points only, i.e. in respect of only one project that qualified as "a similar project". Obviously this score of five points is also below the minimum threshold of 30 points and thus the second respondent's tender should not have been evaluated any further. Even if this tender was not disqualified for failing to

meet the minimum threshold of 30 points in respect of functionality the second respondent's total score would have been 62.94 points, which is a lower score than the applicant's total score of 78.23. Thus the applicant would still have been the highest scorer. The effect hereof is that the second respondent was not entitled to be awarded the tender and that there is no rational connection between the decision made by the Department with regards to the score and the reason for the decision. The tender therefore falls to be reviewed and set aside.

[35] With regards to the applicant's contention that the first respondent exhibited conduct suggesting bias against it when adjudicating the tender, I do not agree that the conduct relied on by the applicant in this regard, as alluded to in paragraph 17.3 above, suffices to indicate bias. In my view, such conduct is rather indicative of incompetence on the part of the BEC. This is indeed regrettable when one considers that the BEC, for some inexplicable reason, decided not to seek any guidance from the firm of consulting engineers appointed by the

Department in connection with this tender whereas one of this company's mandates was to assist in the evaluation of the tender documents. The BEC indeed denied itself of the benefit of the objective oversight of experts.

[36] The chairperson of the BEC contended that involving the appointed firm of consulting engineers in this way would amount to the BEC abdicating its functions to third parties and would defeat the nature of decision making processes. Far from it, considering that the contract concluded between the Department and the consulting engineers clearly stipulates that the company concerned would, after the evaluations, only make a recommendation to the Department. Its decision would clearly not be binding on the Department. I remain unpersuaded of any bias on the part of the Department despite the fact that the it insisted on attempting to justify the second respondent's unsupportable claims on functionality despite the fact that the second respondent chose not to pursue its opposition of the matter.

APPLICABLE REMEDY:

[37] The next question is whether the matter should be referred back to the Department for re-evaluation or whether the Department be directed to award the tender to the applicant and to enter into a contract with it. Mr Mokoena contended that if I found that the Department's decision was reviewable, then I must refer the matter back to the Department and should not substitute it. He submitted that recognition of separation of powers dictated that the matter be referred back to the department for re-evaluation. As authority for his submission he referred me to the case of **BATO STAR FISHING (PTY) LTD V MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS, 2004(4) SA 490 (CC)** specifically at paragraph 46 where the court stated as follows:

> "The use of the word "deference" may give rise to a misunderstanding as to the true functions of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental principle of the separation of powers itself." I agree with the

> aforesaid remarks. I must point out that in the same judgment, the learned judge agreed with the following remarks expressed by another judge: "judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function".

[38] Section 8(1)(c)(ii) of PAJA provides that under appropriate circumstances a court may set aside an administrative action and, in *exceptional* cases, substitute or vary the administrative action or correct a defect resulting from the administrative action. In my view, the rationale for stipulating that the court substitute its decision for that of an administrative functionary in exceptional circumstances is on the basis of the principle of separation of powers and also on the basis that the administrative functionary is generally best equipped by reason of its experience and knowledge of the particular field.

[39] There is no *numerus clausus* of what constitutes exceptional circumstances and as such, every case should be decided on its own facts. Thus, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the

designated functionary. See **GAUTENG GAMBLING BOARD v SILVERSTAR DEVELOPMENT LTD AND OTHERS** 2005 (4) SA 67 (SCA) at 75 E – F where the court remarked as follows:

> "... The court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ..., although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides."

[40] In **JOHANNESBURG CITY COUNCIL v ADMINISTRATOR, TRANSVAAL, AND ANOTHER** 1969 (2) SA 72 (T) at 76 E – G the court stated as follows:

> "2. The Court will depart from the ordinary course in these circumstances:
>
> (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the

further delay which would be caused by reference back is significant in the context.

(ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."

[41] In **AIROADEXPRESS (PTY) LTD v CHAIRMAN, LOCAL ROAD TRANSPORTATION BOARD, DURBAN, AND OTHERS** 1986 (2) SA 663 (AD), in a passage at 680 E – G, Van Heerden JA said the following:

> "But, even if such a decision is set aside, it does not follow that a Court will direct a local board to exercise its functions in a manner determined by the Court, e.g. by issuing a permit. On the contrary, since the issue of a permit is in the discretion of the board and not of the Court, the ordinary course is to remit the matter to the board for reconsideration. In special cases the Court may, however, order the board to issue a permit. This Court has held that 'it is a matter of fairness to both sides': *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349. But in the absence of exceptional circumstances such as bias or gross incompetence on the part of the board, or a long delay occasioned by an arbitrary

> decision, a court will not order the issue of a permit unless the only proper decision of the board on remittal would be to grant the application. Cf *Garda's* case *supra* at 349; *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76; *Vries v Du Plessis NO* 1967 (4) SA 469 (SWA) at 482."

Although this was a minority judgment, this dicta has been quoted with approval in several judgments. See **COIN SECURITY GROUP (PTY) LTD v SMIT NO AND OTHERS** 1992 (3) SA 333 (AD) at 347 H – J.

[42] *In casu*, the method of allocation of points is prescribed in the tender document and one arrives at the total score on the basis of a very simple mathematical calculation. The end-result in as far as the score that will be allocated to the applicant is concerned is truly a foregone conclusion, as the only proper decision of the Department on remittal would be to award the tender to the applicant. Moreover, the 1st respondent has conceded that it is urgent that the rehabilitation of this road be undertaken without delay due to the "dilapidated and unrehabilitated roads" that have resulted in accidents and

fatalities. Remitting the matter back to the department would therefore be an unnecessary waste of valuable time. See **INTERTRADE TWO (PTY) LTD v MEC FOR ROADS AND PUBLIC WORKS, EASTERN CAPE, AND ANOTHER** 2007 (6) SA 442 (CK) para 42; **GRINAKER v TENDER BOARD** [2002] 3 ALL SA 338; **RHI JOINT VENTURE v MINISTER OF ROADS & PUBLIC WORKS, EASTERN CAPE & OTHERS** [2003] JOL 10790 CK.

[43] It is indeed so that a court will not substitute its own decision if it does not have proper and adequate information to enable it to do so. As stated before, the scoring process is prescribed and very simple. I am also satisfied that the applicant's undisputed 9CE CIDB grading suffices as verification of the undisputed averments made by the applicant pertaining to its functionality. Another situation in which a court would be reluctant to substitute its own decision is where implementation of the contract has already commenced. That is simply not the case here.

[44] In my view the circumstances of this case, as elucidated above, lead me to conclude that it is in the interest of justice for this court to substitute the unlawful award with the correct one. The department's contention that the mere fact that the applicant may on re-evaluation attain the highest score does not mean that the award should be awarded to it, is without merit. It is clear from the various pieces of legislation referred to above, as well as the tender prescripts, that there must be justifiable and objective grounds why the norm of awarding the tender to the highest scorer must be departed from. The department did not make any attempt to mention what these justifiable and objective grounds are. I must hasten to point out that in terms of the invitation to tender, a score has already been allocated for equity, which means that each company's Black Economic Empowerment status was taken into account and scored accordingly (see para 14.3 above). I therefore accept that there are no justifiable and objective grounds that warrant deviation from the norm and that the tender therefore ought to be awarded to the applicant as the highest scorer.

[45] The costs of the application should be borne, jointly and severally, by the parties that opposed the relief claimed for the duration of the opposition. The second respondent initially opposed the application but withdrew its opposition on the 15th February 2010.

ORDER

[46] I therefore make the following order:

46.1 The first respondent's decision to award the tender to the second respondent is reviewed and set aside.

46.2 The applicant is declared the successful tenderer in respect of the tender.

46.3 The first respondent is directed to forthwith enter into a contract with the applicant as the successful tenderer.

46.4 The first respondent, jointly and severally with the second respondent is ordered to pay the costs of this application up to the 15th February 2010. The first respondent is ordered to pay the costs of this application beyond the 15th February 2010.

M.B. MOLEMELA, J

On behalf of applicant:	Adv. G.M. Budlender SC Instructed by: Webber Wentzel Cape Town c/o Rossouws Attorneys BLOEMFONTEIN
On behalf of first respondent:	Adv. P.L. Mokoena Instructed by: State Attorney BLOEMFONTEIN

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