IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 7900/2016

In the matter between: -

LDM CONSULTING (PTY) LTD	**APPLICANT**
and	
DUBE TRADEPORT CORPORATION	**FIRST RESPONDENT**
AECOM SA (PTY) LTD	**SECOND RESPONDENT**
ARUP (PTY) LTD	**THIRD RESPONDENT**

ORDER

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1. The application to review and set aside the award of the tenders by the First Respondent to the Second and Third Respondents under case number 7900/2016 is dismissed.

2. The *Rule Nisi* issued under case number 6301/2016 is discharged.

3. The Applicant is directed to pay the costs of the First Respondent, such costs to include all reserved costs, the costs of the interdict application under case number 6301/2016, and costs consequent upon the employment of two counsel.

JUDGMENT

Delivered on 16 April 2021

Moodley J

Introduction

[1] In 2015 the First Respondent invited tender bids for two projects to be undertaken within the Dube Tradeport precinct. In Project 1[1] bids were invited for the appointment of a service provider to undertake Engineering Design, Procurement and Construction Management (EPCM) services for a six storey mixed use development. In Project 2[2] bids were invited for the appointment of consultants for the Engineering Design and Supervision of Construction of a purpose-built Pharmaceutical Manufacturing Facility. The Applicant tendered unsuccessfully for both projects which were awarded to the Second and Third Respondents respectively. The Applicant, as part of the Park Consult Consortium, was awarded a tender for the construction of a multi-storey parkade ('the Parkade Project') on 3 November 2015.

[2] In this application, the Applicant, seeks an order:

(a) reviewing and setting aside (in terms of s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA')), the decision of the First Respondent's Bid Evaluation Committee ('BEC'), Bid Adjudication Committee ('BAC') and the Appeals Authority ('AA') to award Projects 1 and 2 to the Second and Third Respondent respectively;

(b) setting aside any agreements concluded between the First Respondent and the Second and Third Respondents pursuant to the award of the aforesaid tenders; and

(c) substituting the Applicant as the successful tenderer in both projects.

In the alternative to (c) above, the Applicant seeks an order directing:

[1] Tender No DTP/RFP/14/IFR/07/2015
[2] Tender No DTP/RFP/!!/FR/06/2015

(d) the First Respondent to re-evaluate and re-adjudicate the tenders submitted by the Applicant and the Second and Third Respondents strictly in accordance with the prescribed criteria in the tender document on such terms and conditions as this court may deem appropriate; alternatively

(e) directing that the First Respondent commence the tender process afresh; and

(f) for costs against the First Respondent jointly and severally with any other Respondent which opposes the application, such order to include costs of the interim interdict.

[3] Only the First Respondent opposed the application.

Grounds of Review

[4] The Applicant's challenge is to the functionality assessment in both Projects 1 and 2. It has advanced the following grounds of review in respect of Project 1:

(a) Experience of Key Personnel

During the bid process, the First Respondent sought clarification from the Applicant as to how it would deal with the fact that its key personnel were committed to other projects with the First Respondent. The Applicant responded by replacing certain overcommitted personnel with similar skilled and experienced resources. However an irregular assessment was subsequently conducted by the BEC, it did not assess the Applicant's key personnel in accordance with the advertised criteria but conducted an exercise in comparison between the old and the new teams. The Applicant charged that the First Respondent caused it to change a winning formula, although there was nothing to preclude team members being involved in two or more projects.

The tender criteria did not specify that the more experienced the key personnel were, the more points would be awarded. It merely stated that 'Higher weighting will be given to consultants with five years or more experience post professional accreditations with relevant bodies.' When the Applicant supplemented the original key personnel with personnel who had substantially more than five years' experience, it ought to have been awarded higher points for key personnel with more than five years' experience.

(b) Green Building Experience

The Applicant was scored lower in respect of the experience of the key personnel because the quantity surveyor did not have GBCSA accreditation. The tender document did not indicate that the quantity surveyor was required to have GBCSA accreditation or which team members must have GBCSA accreditation, and how the key personnel would be scored according to the accreditation.

The Applicant has a quantity surveyor who is GBCSA accredited and is part of the team. Had it known that more points would have been given for a GBCSA accredited quantity surveyor, he would have been allocated as the 'lead' quantity surveyor for the project. It is however unusual to expect a quantity surveyor to have GBCSA accreditation. Therefore the assessment lacks transparency and is arbitrary as it was improper for the BAC[3] to adversely score the Applicant on criteria which were not specified in the tender document.

[5] The Applicant has advanced the following grounds of review in respect of Project 2:

(a) Bidder's Experience

The tender document did not call for medical/pharmaceutical experience. The Applicant was scored lower for bidder's experience because PGA Architects allegedly had "no medical/pharmaceutical experience". The BAC's comments also suggest that the Applicant scored less for bidder's experience as it had no medical or pharmaceutical related experience, which is irrelevant. The Applicant submitted seven medical/pharmaceutical projects as part of its work history which demonstrated that the Applicant has experience in medical/pharmaceutical projects. Some of these projects were listed as strengths in respect of the bidder's experience. The Applicant was penalised for not complying with the tender criteria although it had complied.

(b) Experience of Key Personnel

The Applicant was penalised for its key personnel not having the requisite medical or pharmaceutical experience. However the tender bid only called for bidders to provide details of their experience in projects of a similar scope. Such details were the size,

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[3] The FA refers to the BAC but the scores were allocated by BEC. The BAC ratified the scores.

monetary value and magnitude of previous projects but there was no reference to medical or pharmaceutical experience. Despite the Tender Data not calling for this specific experience, the key personnel included some medical projects as part of their experience.

(c) Methodology and Work Plan

One of the evaluators, Ms Molly Govender, commented that the Applicant's methodology and work plan required clarification. However, the First Respondent awarded the tender to the Third Respondent without seeking the appropriate clarification from the Applicant. It was procedurally incorrect to award a tender to the Third Respondent where the BAC[4] reasonably required clarification on certain aspects. Had the applicant been asked to clarify the methodology and work plan submitted, the BAC would have awarded the Applicant more points in this aspect of the functional evaluation.

[6] The Applicant therefore contends that the functionality assessment of the Applicant's tender in Projects 1 and 2 was irregular and the award of the tenders to the Second and Third Respondents is susceptible to review. It contends further that had the Applicant been properly assessed, it would have achieved the 70% threshold, and because of its superior price and preference points it would have been the preferred bidder in both tenders.

[7] The First Respondent contends in response to the aforesaid averments about the BEC's flawed evaluation, that the Applicant's bids were properly disqualified at the preliminary stage of evaluation because it failed the functionality assessment when it did not achieve the minimum 70 points out of 100. The First Respondent avers that the BEC members evaluated the Applicant's bid independently according to the criteria in the Tender Data and each evaluator exercised independent judgment on the strengths and weaknesses of the bid. A collation of the points each member accorded Applicant's bid on the various factors for functionality indicated that the Applicant's bid underperformed.

[8] The First Respondent contends further that an assessment of the merits of the BEC's decisions, as requested by the Applicant, is not the function of a reviewing court.

[4] The FA refers to the BAC but the scores were allocated by BEC. The BAC ratified the scores.

In review proceedings, the Court is not concerned with the correctness of the BEC/BAC's decisions, but with the regularity of the decisions. The Court should test the impugned decisions against the threshold of rationality and reasonableness, viz whether a reasonable authority in the position of the BEC/BAC would have made the impugned decisions. The First Respondent avers that the Applicant's bids were excluded on rational and reasonable grounds and in circumstances where all relevant factors were considered. It submits that the Applicant, however, has adopted a flawed and contradictory approach in this review application which is premised on factual misapprehensions, and also that the relief sought is inappropriate. The First Respondent contends that the Applicant's appeals also failed because of its failure to appreciate the facts and true reasons as to why it failed to pass the functionality threshold. It seeks an order dismissing the application with costs.

Factual Matrix

[9] It is common cause that:

(a) the First Respondent, an organ of State, invited bids for two projects;

(b) the Applicant submitted bids for both tenders;

(c) the Applicant, as part of the Park Consult Consortium, also submitted a bid for the Parkade Project at or about the same time that it submitted the bid in respect of Project 1. The Parkade Project was awarded to the Park Consult Consortium on 3 November 2015, whilst the evaluation of bids in relation to Project 1 was ongoing;

(d) by letter dated 6 December 2015, Mr Sibusiso Mkhize ('Mr Mkhize'), the Senior Manager: Supply Chain Management Department of the First Respondent, raised the potential risk in the execution of the first project because the Applicant's proposed team for the execution of the work was already committed to other projects;

(e) the Applicant responded that it would deploy new resources and supplement other resources in its bid;

(f) by letter dated 23 December 2015, Mr Mkhize sought clarity from the Applicant as to which specific members of the team would be replaced, and what role the proposed new resources would play;

(g) on 13 January 2016, the Applicant responded with details of the individuals with whom its team would be supplemented in order to meet the First Respondent's requirements;

(h) the BEC had in the interim evaluated the Applicant and scored it 73% for Project 1. When advised of the Applicant's deployment of new resources, the BEC agreed that the bid had to be assessed with reference to the new resources;

(i) the BEC and Mr Mkhize compiled a comparative table of the old and new resources;

(j) the BEC subsequently evaluated the Applicant's bids in accordance with its new personnel. Five of the six evaluators changed their scores, which resulted in a score lower than the previous team had been awarded;

(k) the Applicant failed the functionality assessment having achieved 69.67% in the first project and 67.5% in the second project;

(l) the BEC's report on the evaluation was endorsed by the BAC on 10 February 2016;

(m) on 18 February 2016, the First Respondent advised the Applicant that it had failed to meet the minimum threshold of 70% in the functional evaluation;

(n) the Applicant thereafter submitted an appeal on both tenders to the AA in terms of the First Respondent's internal appeal policy on 5 April 2016;

(o) on 20 June 2016 the AA dismissed both appeals on the following basis: -

(i) it was unable to interfere with the BAC's decision unless there was substantial illegality;

(ii) it should not interfere with the BAC's discretion to make a finding by submitting it with a new finding;

(iii) it would be improper for it to embark on a remarking exercise;

(p) the tenders were then awarded to the Second and Third Respondents respectively; and

(q) the Applicant obtained an urgent interim interdict of both Projects 1 and 2, pending the review application.

The legislative framework applicable to public procurement and relevant legal authority

[10] Section 217[5] of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), regulates public procurement. In *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*[6] ('*AllPay SCA'*) Nugent JA succinctly stated that:

'[20] The procurement of goods and services by the state and other public entities is subject to various legal constraints. Section 217(1) of the Constitution requires all organs of state, when they contract for goods or services, to do so "in accordance with a system which is fair, equitable, transparent, competitive and cost effective". That is taken up in the Public Finance Management Act 1 of 1999, which provides in s 51(1)(*a*)(iii) that the accounting authority of a public entity (which includes SASSA) –

"(*a*) must ensure that the public entity has and maintains –

…

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective;…."

It has also been held that public procurement constitutes "administrative action" as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and must comply with the provisions of that Act.'

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[5] Section 217 of the Constitution provides:
'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[6] *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2013 (4) SA 557 (SCA).

[11] Section 217(2) of the Constitution permits organs of state to implement a preferential procurement policy, but any pre-qualification requirement which is sought to be imposed, must advance the provisions of s 217(1) of the Constitution. Section 217(3) of the Constitution provides for the enactment of legislation that will prescribe a framework within which the s 217(2) policy must be implemented. As Ponnan JA explained in *Airports Company South Africa SOC Ltd v Imperial Group Ltd & others*:[7]

'[64] The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The only exception to that general rule is that envisaged by s 217(2) and (3). Section 217(2) allows organs of state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in s 9 of the Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by s 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation...'

[12] The Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPFA') gives effect to s 217(3) of the Constitution and provides the framework for implementation of procurement policy contemplated in s 217(2). The implementation of the PPPFA is enabled by the Preferential Procurement Regulations ('the PPR').[8] The PPR regulates bids based on functionality as a criterion. The PPR also incorporated the 80/20 and 90/10 preference point system.[9]

[13] The Constitutional Court in *AllPay Consolidated Investments Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Agency & others*[10] ('*Allpay CC*') stated:

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[7] *Airports Company South Africa SOC Ltd v Imperial Group Ltd & others* 2020 (4) SA 17 (SCA).

[8] The PPR applicable to this matter were promulgated with effect from 7 December 2011.

[9] The "2017 Regulations", promulgated on 20 January 2017 were declared unconstitutional by the SCA in *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA).

[10] *AllPay Consolidated Investments Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Agency & others* 2014 (1) SA 604 (CC).

'[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that [the tender awarding body] may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.' (Footnotes omitted.)

[14] In *South African National Roads Agency Ltd v Toll Collect Consortium*[11] Wallis JA held that:

[18] Transparency in a tender process requires that the tender take place in an environment where it is subject to public scrutiny. In other words, the tender must be advertised publicly and its terms be available for public inspection. Those terms must set out clearly what must be submitted by those competing for the award of the contract. The adjudication of the tender must take place in an impartial manner and the results made publicly available. If there is a challenge to the outcome of the tender there must be a record that discloses how the process of adjudication was conducted. In that way the tender process is transparent and the public can see that it was conducted fairly. When the Constitution, in s 217, requires that the procurement of goods and services by organs of state shall be transparent, its purpose is to ensure that the tender process is not abused to favour those who have influence within the institutions of the state or those whose interests the relevant officials and office bearers in organs of state wish to advance. It requires that public procurement take place in public view and not by way of back-door deals, the peddling of influence or other forms of corruption. But, once a tender is issued and evaluated and a contract awarded in an open and public fashion that discharges the constitutional requirement of transparency. It is not there to be used by a disappointed tenderer to find some ground for reversing the outcome or commencing the process anew, by claiming that there should have been greater disclosure of the methodology to be adopted in evaluating the tenders.

…

[20] As to objectivity, which is an aspect of the constitutional requirement that the public procurement process be fair, it requires that the evaluation of the tender be undertaken by

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[11] *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA).

means that are explicable and clear and by standards that do not permit individual bias and preference to intrude. It does not, and cannot, mean that in every case the process is purely mechanical. There will be tenders where the process is relatively mechanical, for example, where the price tendered is the only relevant factor and the competing prices are capable of ready comparison. The application of the formula for adjudicating preferences under the PPPFA may provide another example. However, the evaluation of many tenders is a complex process involving the consideration and weighing of a number of diverse factors. The assessment of the relative importance of these requires skill, expertise and the exercise of judgment on the part of the person or body undertaking the evaluation. That cannot be a mechanical process. The evaluator must decide how to weigh each factor and determine its significance in arriving at an appropriate decision. Where that occurs it does not mean that the evaluation is not objective. Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair. (Footnotes omitted.)

[15] In procurement documents functionality means 'the measurement according to predetermined norms, as set out in the bid documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and technical capacity and ability of a Bidder.'[12] It is therefore the means of assessing the substantive quality of the goods or services which are meant to be procured through the PPPFA. This assessment takes place after the minimum requirements for viability are met (stage 1 of the evaluation of the tender bid) and before price and preference points are determined according to a prescribed formula (stage 3).

[16] The functionality of services is assessed through objective, predetermined measurement criterion:

(a) the evaluation criteria for measuring functionality;

(b) the points for each criteria and, if any, each sub-criterion; and

(c) the minimum qualifying score for functionality.

[12] This definition appears in Tender Data T2.25 of the First Respondent's tender document.

Therefore the tender documents must set out the evaluation criteria with clarity. The Constitutional Court in *Allpay CC* determined that:

'[92] The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive.' (Footnote omitted.)

[17] Procurement disputes generally involve the application of s 217 of the Constitution, which raises constitutional matters.[13] Where an organ of state acts contrary to the prescripts of s 217, the High Court is empowered under PAJA to review such administrative action and to grant orders which are just and equitable in the circumstances.[14] The precept was confirmed by the Constitutional Court in *AllPay CC*.[15]

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[13] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 20-23.

[14] Section 6 of PAJA provides: 'Judicial review of administrative action.- (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—
  (i) was not authorised to do so by the empowering provision;
  (ii) acted under a delegation of power which was not authorised by the empowering provision; or
  (iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—
  (i) for a reason not authorised by the empowering provision;
  (ii) for an ulterior purpose or motive;
  (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
  (iv) because of the unauthorised or unwarranted dictates of another person or body;
  (v) in bad faith; or
  (vi) arbitrarily or capriciously;

(f) the action itself—
  (i) contravenes a law or is not authorised by the empowering provision; or
  (ii) is not rationally connected to
    (aa) the purpose for which it was taken;
    (bb) the purpose of the empowering provision;
    (cc) the information before the administrator; or
    (dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.'

[15] *Allpay CC* para 56 states: 'Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made'.

Supply Chain Management Guidelines

[18] The BEC and BAC are established in terms of the SCM guidelines. The BEC's role is to evaluate bids received in accordance with specifications and the points system (PPR). In addition, the BEC must, inter alia, assess each bidder's ability to execute the contract, and submit a report with recommendations regarding the awarding of the bid or any other related matter to the BAC.

[19] The BAC must consider the recommendations and reports from the BEC and ensure inter alia that:

(a) Disqualifications are justified and valid and accountable reasons/motivations were furnished for passing over of bids;

(b) Scoring has been fair, consistent and correctly calculated and applied.

Then, depending on the official written delegations, the BAC must make the final award or make a recommendation to the Accounting Officer to make the final award or on how to proceed with the relevant procurement.

The First Respondent's Tender Criteria and Evaluation process

[20] It is common cause that the project details and the criteria upon which the bids for Projects 1 and 2 would be evaluated for functionality were detailed in the tender documents. The weight and values each sub-criterion would carry were stipulated as follows:

i Bidders' Experience - 25%

ii Experience of Key Personnel – 25%

iii Methodology and Work plan – 25%

iv Programme – 15%

v Location – 10%

Total 100%

[21] Each criterion was further elaborated upon in the tender document with an explanation of the points allocated for scoring on functionality. The Tender Data also

specified that a bidder would only be eligible to submit a proposal if the Built Environment Professionals are registered with their respective council and if in the opinion of the First Respondent 'the bidder can demonstrate that it possesses the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and personnel to perform the project as per functional evaluation criteria prescribed in this document.' The Tender Data recorded further that any bidder who failed to comply with any of the above would be deemed non-compliant.

[22] It is not in dispute that the following procedure was followed by the First Respondent/ BEC when weighing the original bids for functionality:

(a) Each individual evaluator noted his/her comments on each aspect of the weighting factors constituting of the functionality criteria and independently scored each bid received in manuscript by indicating the score between 0-5 he/she deemed appropriate.

(b) The scores by and individual comments by each evaluator were submitted to Mr Mkhize for purposes of collation and condensation into one document.

(c) The manuscript notes and scores accorded by individual evaluators were also extrapolated into a spreadsheet. The accorded points were calculated from the scores using a formula indicated in the Tender Data to derive the baseline/final functionality points achieved by a particular bid.

(d) Manuscript comments made by each individual evaluator were extrapolated from the evaluation sheet into a single typed document, except that repetitive comments were omitted. The document formed part of the BEC's report to the BAC.

(e) It is the convention and established practice of the BEC that the scores accorded by each member/evaluator are not debated and/or discussed unless, upon collation, there appears to be a disparity of more than two points between the members. If the disparity is marginal (two points or less) the scores are left intact and transposed into a spreadsheet for calculation in order to determine whether the bid exceeds the 70 points threshold for functionality.

[23] In this case the evaluation of functionality of the Applicant's replaced resources in Project 1 took place after the initial resources were scored. The BEC considered a comparison table of the old and new resources and then scored the new resources. The report to the BAC included the evaluation of the replaced resources.

Resolving the dispute

[24] The Constitutional Court has provided the following guidance for review applications in *AllPay CC*:

'[44] … In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

…

(f) ***Approach to remedy***

[56] Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. ...The rights or expectations of an unsuccessful bidder will have to be assessed in that context.

Application of law to the facts

[57] In accordance with the approach set out above it is now necessary to consider whether the evidence on record establishes the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that any of the grounds for review under PAJA exist.

[58] The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved…This important overall purpose of the request for proposals must be kept in mind when assessing whether any non-compliance with its particular provisions was material.'

[25] This court must therefore determine whether the Applicant's bid for Project 1 and Project 2 were assessed and evaluated in accordance with the prescriptive requirements of s 217 of the Constitution, the PPPFA and the PPR, and whether there

is factual proof that the conduct of the evaluators in the BEC and BAC in assessing the Applicant's tender bids constituted reviewable administrative action under s 6(2) of PAJA. The averments by the parties and the argument advanced by their respective counsel in respect of each project are dealt with under separate headings.

Project 1

The Applicant's averments

[26] It is common cause that when the Applicant's bid was to be evaluated on functionality, the First Respondent sought clarification about the Applicant's resources. The Applicant avers that the First Respondent queried which specific members of the team would be replaced and what role the proposed new resources would play. This query caused the Applicant to believe that the First Respondent required the Applicant to replace its personnel. Consequently on 13 January 2016, the Applicant responded with details of the individuals with whom its team would be supplemented in order to meet the First Respondent's requirements, but its team structure remained unchanged. However the BEC evaluated the Applicant's new resources by comparing them with the old resources, instead of evaluating them according to the functionality criteria, and scored the new team lower at 69.67% than it had the first. As a result of this irregular procedure, the Applicant failed to meet the minimum threshold of 70% in the functional evaluation.

[27] The Applicant persists with the view that the First Respondent failed to justify the reasons for the BEC's scoring. The transcribed comments reveal that the Applicant failed to meet the minimum threshold because:

(a) none of the consultants have a track record of "green star" buildings;

(b) the work plan and methodology did not include project relevant aspects but were generic;

(c) the applicant failed to demonstrate that a sufficient number of its professional team members were registered with the GBCSA;

(d) the programme had tight design timelines;

(e) the replacements submitted as a result of the key consultants' commitment in other projects were not equivalent to the original team.

[28] The Applicant contends that:

(a) nothing in the tender suggested that additional points would be awarded if professional members of the team had more than five years' experience. Five years' experience was seen as the threshold for achieving maximum points;

(b) the tender documents did not state that a particular number of a bidder's team needed to be GBSCA accredited nor did it give any particularity of which members of the team should be accredited;

(c) nowhere in the tender criteria was it recorded that bidders were obliged to set out "green building" experience at all, nor was it recorded that higher points would be awarded if the bidder demonstrated the number of "green building" projects carried out; the Applicant had however submitted its "green building" experience in its tender documentation;

(d) the programme timeline was based on the time frames provided by the First Respondent.

[29] The Applicant contends further that had it scored only 0,36% more on the technical evaluation, it would have proceeded to stage 3, and its bid would then have been scored on price and preference point components and it would have secured the tender. The Applicant further submits that the AA erred in the application of the First Respondent's internal appeal policy which clearly provides in clause 2 that the grounds for appeal includes instances where the BAC has committed a gross irregularity or where a bid has been awarded in an improper manner.

[30] The Applicant finally avers that as the decisions of the First Respondent's BEC, BAC and AA were based on criteria that were not part of the tender invitation, the decisions are irregular, unprocedural and wrong. Further, the individual evaluators made decisions that were either not rationally connected to the material before them, or based on irrelevant criteria. They failed to seek clarity on matters of importance when they (not the Applicant) failed to understand matters of relevance. The BAC in particular unlawfully or wrongfully caused the Applicant, which had already scored 70%, to supplement its team and then held that against the Applicant. The Applicant therefor contends that it is entitled to relief under s 6(2) of PAJA.

The First Respondent's responses

[31] The First Respondent contends that the Applicant's challenge to Project 1 is misguided because it is based on incorrect assumptions. The first is that the First Respondent's evaluating team deliberately solicited the replacement of key personnel. The First Respondent has explained how the replacement of personnel arose as a result of a routine request for clarification by Mr Mkhize. The request by the SCM Department had been precipitated by an intervening event, which was at that time unknown to the evaluating team. The applicant had been awarded another tender by the First Respondent, i.e. for provision of Engineering and Project Management Services in respect of the Parkade Project.

[32] The Applicant's second incorrect assumption is that the BEC was aware that its team with the original resources was a winning formula. The First Respondent points out that on 7 December 2015, long before the finalisation of its bid evaluation, the Applicant acknowledged that it had duplicated its resources because some of its critical team members deployed for the execution of Project 1 were also part of the Parkade Project. When the Applicant became aware that the Parkade Project had been awarded to the Park Consortium of which it is a member, the Applicant augmented its bid by replacing the original team with new team members. Consequently, the Applicant's bid had to be evaluated on the basis that its original team (deployed for Project 1) was no longer available.

[33] It was only thereafter, at the BEC meeting of 17 December 2015 that the scores of the evaluators were collated and totalled. Although the Applicant attained 73 points for functionality, it had already acknowledged that some of its resources were duplicated in the Parkade Project. Therefore the BEC acknowledged the risk to the capacity of the Applicant to execute Project 1 and decided that it would have to re-evaluate the Applicant's bid. In the interim Mr Mkhize sought further clarification from the Applicant, which elicited the details of the replacement resources on 13 January 2016. He also obtained confirmation from National Treasury, that the replaced resources could be evaluated on functionality.

[34] At the reconvened meeting of the BEC scheduled for purposes of assessing the effect of the proposed changes by the Applicant to its original resources, BEC

members agreed that the proposed resources were not equivalent to the originally proposed resources. They tasked Mr Mkhize to analyse and compare the proposed changes, which he duly did and circulated to the BEC. The BEC members themselves also compared the original resources with the proposed replacements, and then assessed the new team. Of the six evaluators, five changed their scores. Each evaluator provided reasons for the new score. The new team was therefore properly assessed at a lower score, especially its score for 'Experience of Key Personnel'.

[35] The First Respondent denies that the Applicant was singularly targeted to provide information to be used to penalise its bid, because the same request for clarification for the very same reasons was made to similarly placed tenderers, viz AECOM and DELTA. In respect of the complaint that the First Respondent did not specify what points would be awarded for experience above five years, the First Respondent points out that the minimum experience (of five years) was set out in the tender criteria; and there is no legal requirement for the First Respondent to disclose with greater specificity how experience in excess of five years would be weighed or scored. The First Respondent avers that the challenge premised on the "Green Building Experience" is also misplaced: the Applicant attained a low score not because its quantity surveyor did not have the GBCSA accreditation but mainly because its replaced architect lacked sufficient GBCSA accreditation experience.

Argument

[36] Mr *Pillay* who represented the Applicant herein, submitted that because public tenders are notoriously prone to manipulation they must be assessed with a higher degree of certainty and transparency.[16] He argued that the scope for manipulation of a tender lies in the functionality assessment, and that consequently the functionality criteria must be explicitly set out, met and evaluated with certainty and transparency.[17] If these basic tenets of functionality are not met, the process would offend against the requirements of s 217 of Constitution, the PPPFA and the PPR. He emphasised that a prospective bidder must be able to ascertain what is required from the tender and

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[16] In *Sanyathi Civil Engineering& Construction (Pty) Ltd & another v Ethekwini Municipality & others; Group Five Construction (Pty) Ltd v Ethekwini Municipality & others* [2012] 1 All SA 200 (KZP) it was held at paras 34-35 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.

[17] *AllPay CC* para 92.

the criteria for the assessment must be fully disclosed to allow an interested bidder to achieve the pre-determined score. The purpose of a tender is not to award bidders who are clever enough to decipher unclear directions.[18]

[37] Mr *Pillay* referred to *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality & others*[19] which determined that the role of functionality as a qualification criterion and not an award criterion. The judgment precipitated the 2011 PPR.[20] He pointed out that by virtue of the judgment in *Sizabonke,* organs of state must adopt a two stage approach to tender adjudication in procurement where functionality forms part of the tender specifications. The definition of functionality postulates two main elements, namely the quality of the services procured i.e. the substantive characteristics of the subject matter of the procurement, and the characteristics of the tenderer to the extent that those relate to the subject matter of the procurement. Mr *Pillay* argued that the characteristics of the supplier of the goods or services are therefore relevant in this context only to the extent that they impact on the substantive quality of the goods or services. In other words characteristics of the tenderer that do not directly impact on the actual substantive quality of the services procured in the particular contract are irrelevant for the purposes of determining functionality.[21]

[38] Mr *Pillay* argued further that there is no room for departure from the evaluation criteria in the tender invitation, which with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded.[22] He provided as authority *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality & others*[23] in which the court confirmed that bids can only be assessed for functionality on criteria strictly set out in the tender documents and not on criteria that are not so indicated. Mr *Pillay* submitted that because functionality determines the tenderer’s ability to do the job and

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[18] *AllPay CC ibid; Westinghouse Electric Belgium SA v Eskom Holdings (Soc) Ltd & another* 2016 (3) SA 1 (SCA) para 41.
[19] *Sizabonke Civils CC trading as Pilcon Projects v Zululand District Municipality & others* 2011 (4) SA 406 (KZP).
[20] See in this regard National Treasury Instruction Note dated 3 September 2010 - The amended guidelines in respect of Bids that include functionality as a criterion for evaluation (National Treasury website).
[21] G Quinot ‘The Role of Quality in the Adjudication of Public Tenders’ [2014] *PER* 32 at 7.
[22] *All Pay CC* para 38.
[23] *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality & others* [2013] 4 All SA 461 (ECG) paras 89 and 92-94.

effectively serves a gatekeeper function, there must also be clarity on how prospective tenderers can get through the gate.

[39] Mr *Pillay* submitted that the reliance by the First Respondent on the judgment in *Toll Collect* in which Wallis JA held that public contracts should not be invalidated for inconsequential irregularities, is ill-conceived. He clarified that reliance in *Toll Collect* on the *AllPay SCA* judgment could not be sustained because that judgment is at odds with the *AllPay CC* judgment and pre-dates the 2011 PPR. It therefore does not reflect current procurement jurisprudence. He argued that in *Westinghouse Electric Belgium SA v Eskom Holdings (Soc) Ltd & another*[24] the SCA finally determined that a contracting authority may not rely on criteria other than those expressly communicated to the bidders in the tender documents. The Court held at paragraph 50 that "if any of the considerations that caused the BTC to award the tender … is outside the parameters of the bid criteria the decision is bad in law". The SCA concluded that because irrelevant considerations were taken into account the award decision was reviewable in terms of s 6(2)(e)(iii) of PAJA.

[40] Mr *Pillay* submitted that because price is central to preferential procurement,[25] functionality is used to obtain the cheapest price from all the parties which meet the minimum qualifying criteria. A tenderer must therefore be told expressly how to achieve the pre-determined scoring.[26] Therefore, on the reasoning in *BKS* and *Westinghouse,* the First Respondent could not in its evaluation penalise the Applicant utilising criteria that were not stipulated or called for.

[41] Mr *Pillay* contended that the First Respondent nevertheless caused the Applicant to replace certain key personnel, although the tender did not stipulate that personnel could not serve on more than one project. He argued that as key personnel such as engineers, architects and quantity surveyors in big consortiums often work on more than one project, the rationale of the First Respondent was defective. Further the BEC did not evaluate the new personnel according to the evaluation criteria in the tender. Instead the BEC compared the new personnel to their predecessors and, where their experience was even marginally less, they were penalised. All but one of

[24] *Westinghouse Electric Belgium SA v Eskom Holdings (Soc) Ltd & another* 2016 (3) SA 1 (SCA).
[25] See *Sanyathi* above para 35.
[26] See the judgment of the court *a quo* in the *Toll Collect* matter para 62.

the evaluators reduced scores, which was both at odds with the assessment criteria set out in the tender and unfair.

[42] Mr *Pillay* submitted that on that basis alone the tender evaluation is irregular, and once there is irregularity it must be set aside, as per the decision in *Allpay CC*.[27] He pointed out there were however other deficiencies in the evaluation in Project 1. The BEC determined a weakness because the Applicant's quantity surveyor was not GBCSA accredited. Further the Applicant's key personnel were penalised for not having disclosed green star accredited building experience although this was not a stipulated criterion in the tender document and there was nevertheless evidence of such experience in the Applicant's bid. Mr *Pillay* concluded with the argument that the conduct of the BEC constituted invalid administrative conduct, and that there is a constitutional obligation on the First Respondent not to seek to uphold such conduct. He also proposed that the appropriate order would be the alternate relief sought.

[43] Mr *Madonsela SC* who appeared with Ms *Mahabeer,* responded that Mr *Pillay* had in argument substantially expounded what is in fact a trite principle: the criteria for assessing 'functionality' must be set out in the tender documents. The principle that that tenders must be assessed on specified criteria was settled law and only regularised by the promulgation of the 2011 PPR.

[44] He pointed out that the First Respondent's averments detailing five components in the tender documents for assessing 'functionality' were not disputed by the Applicant. That the evaluation of the Applicant's bid was made on these identified components of 'functionality' criteria specified in the bid documents is evident from the *'evaluation sheets',*[28] the *BEC Minutes,*[29] *and evaluators' comments.*[30] Mr *Madonsela* submitted that *Toll Collect*[31] was decided on the premise that:

'The tender documents provided that the assessment of tenders would take place in two stages. First they would be assessed for quality and given a score out of 100.'

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[27] *All Pay CC* para 22.
[28] Annexure "K1-13": Vol. 5 at 317-329.
[29] Annexure "I1-3": Vol. 5 at 313-315.
[30] Annexure "N1-17": Vol. 5 at 336-352; Regulations, 2011.
[31] *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA) para 2.

It was therefore relevant to this case. He contended that what Wallis JA authoritatively rejected in *Toll Collect* was the contention that the tender documents must provide the breakdown of the already broken-down points for 'functionality':

'[22] The prior disclosure of any such points system – assuming that it was adopted in advance of the evaluation process and not in the course of that process – is not ordinarily required, provided that the basic criteria upon which tenders will be evaluated are disclosed… Provided the tender documents make clear to participants what is required from them, their task is to submit that information for evaluation. If they do not do so, or the information is inadequate when scrutinised, they run the risk that on that aspect their tender will fare less well. This is what happened in this case with two of the experienced tenderers… Disclosure of any such refined process of scoring in relation to a tender evaluation process will only be required if its non-disclosure would mislead tenderers or leave them in the dark as to the information they should provide in order to satisfy the requirements of the tender.' (Footnote omitted.)

He pointed out that contrary to the Applicant's assertion that it was no longer reliable authority, *Toll Collect* has been followed in *Cape Town City v South African National Roads Agency Ltd & others*[32] and is binding.[33]

[45] Mr *Madonsela* contended further that although the Applicant complained that the First Respondent had called for clarification in Project 1 and had failed to call for clarification in Project 2, the First Respondent has a duty to call for clarification during evaluation of tenders when it is fair to do so, and the clarification could not be ignored. In *Metro Projects CC & another v Klerksdorp Local Municipality & others*,[34] Conradie JA delineated the duty as follows:

'[13] …It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer 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. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

[46] Mr *Madonsela* argued that Applicant was not penalised for having personnel in two of the First Respondent's projects. It misinterpreted the request for clarification which could not be attributed to the First Respondent. The Applicant acknowledged

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[32] *Cape Town City v South African National Roads Agency Ltd & others* 2015 (6) SA 535 (WCC) paras 213-224.
[33] *Turnbull-Jackson v Hibiscus Coast Municipality & others* 2014 (6) SA 592 (CC) paras 54-57.
[34] *Metro Projects CC & another v Klerksdorp Local Municipality & others* 2004 (1) SA 16 (SCA).

that its (original) resources were duplicated and proposed to replace and re-adjust the deployment of its resources. It would have been improper to evaluate and adjudicate the tender on the wrong factual footing.

[47] Mr *Madonsela* pointed out that although the Applicant initially contended that the requirement that the team must include GBCSA approved professionals was not a specified tender criterion (and claimed that its bid was disqualified using that criterion), it did accept in its replying affidavit that the tender rules made green building experience/accreditation a requirement. The Applicant persists with its subsidiary argument that the tender documents did not require a quantity surveyor to be GBSCSA approved. Mr *Madonsela* submitted that this, however, was not why the Applicant's bid failed. The Applicant scored lower because the evaluators assessed its replaced resources[35] to be weak. Specifically, the Applicant's replaced lead architect did not have sufficient green building experience.

[48] Mr *Madonsela* contended further that the criticism that the BEC's comparison of old and replaced personnel departed from the criterion was ill-conceived. The point of the comparison (which the BEC itself discussed) was an exercise to help BEC members to ascertain if their previous score on the criterion of 'Key Personnel' should remain the same. All but one evaluator reconsidered their scores and reduced them in accordance with their judgment.[36] The First Respondent had also demonstrated fully in its answering affidavit that the Applicant was not singularly targeted when clarifications were sought. It was integral to the routine risk management process to address changes caused by the award of the Parkade Project in the intervening period, and any risks (perceived or real) which could result from duplication of resources deployed by the Applicant to both tenders.

[49] Mr *Madonsela* emphasised that when the clarifications were sought and provided on 7 and 8 December 2015, the BEC was not aware that the Applicant's bid had passed the functionality threshold because the evaluators' scores were only tallied and totalled on 17 December 2017. Mr *Madonsela* contended that the relief sought by the Applicant in respect of Project 1 was consequently without merit. Not only did it

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[35] See comparison of 'original' and 'replaced' Key Personnel in Annexures "M" and "N" (together with Evaluators' comments thereon), Vol. 5 at 332-352.

[36] Summary of Evaluators' reconsideration on 'Key Personnel' at answering affidavit: Vol. 4 paras 96-102 at 236-239.

failed to establish that the First Respondent deliberately misled it when seeking clarification, but it also failed to objectively identify:

'29.1 Where in any of the functionality weighting factors the BEC underscored the LDM's bid and why;

29.2 By how many more points applicant should have been scored and why;

29.3 Who amongst the evaluators should have awarded it more points and why.'

Therefore as the Applicant has failed to establish that any reviewable irregularities in the evaluation of its bid for Project 1, the application for review falls to be dismissed with costs. However should the Applicant succeed, Mr *Madonsela* proposed that the matter should be remitted to the First Respondent for reconsideration.

Discussion

[50] It is apparent from the legislative framework set out earlier in this judgment as well as the judicial principles propounded by the Constitutional Court in *AllPay CC* and the cases relied on by both counsel, that the invitation to tender by an organ of state as well as the evaluation of the tender bids must be consistent with constitutional and legislative imperatives. Firstly the content of tender documents issued by organs of state inviting bids, specifically the Tender Data and the criteria specified therein, must be clear as to the project to be undertaken and the services required for the timeous, cost-effective and proper completion of the project.

[51] Although Mr *Pillay* resisted the relevance of *Toll Collect,* I am not persuaded that the comments of Wallis JA in that judgment have no relevance whatsoever within current jurisprudence relating to procurement by organs of state. Wallis JA confirmed that tender documents must disclose the basic criteria upon which tenders will be evaluated and make clear to participants what is required from them. Therefore although the basic criteria under the PPR may not be what Wallis JA contemplated in *Toll Collect*, his comments remain relevant as he confirms that the responsibility to submit the requisite information for evaluation is that of the bidder. Mandatory clarification briefings are also held for the benefit of the bidders during the procurement process. It is again the responsibility of the bidders to utilise these briefing sessions to facilitate the resolution of any problems they have with the scope of the tender or the requirements for the project or the evaluation criteria. If a bidder fails to obtain clarity

and his bid falls short, he should not complain later that his bid suffered failure because of shortcomings in the tender document.

[52] Secondly the evaluations at all stages must be carried out according to the stipulated criteria in an objective, transparent and fair manner. In *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works & others*[37] the SCA held:

'[9] …[F]airness is inherent in the tender procedure. Its very essence is to ensure that, before government, national or provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in s 217 [of the Constitution] permeate the procedure for awarding or refusing tenders.'

[53] Should the process be unfair or irregular, then the tender or the award thereof may be susceptible to review. Therefore where an administrative body takes into account considerations that are extraneous to the tender evaluation criteria, as set out in the invitation to bid, its decision to make the award is unlawful and procedurally unfair.[38] However it is also important to be mindful that the process may not be flawless. In *Allpay SCA*[39] the court held:

'There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal.'

Lewis JA in *Westinghouse v Eskom Holdings*[40] pointed out that:

'…It is, of course, only immaterial flaws (termed "inconsequential" by that court) that may be overlooked. The judgment in *Allpay SCA* was reversed on appeal to the Constitutional Court… but, as I understand it, that principle was not attacked.'

[54] The Constitutional Court however warned against a dismissive attitude towards inconsequential irregularities in *AllPay CC*[41] and set out the proper legal approach as follows:

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[37] *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works & others* 2008 (1) SA 438 (SCA).
[38] *Westinghouse Eskom Holdings* above para 43.
[39] *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2013 (4) SA 557 (SCA) para 21.
[40] *Westinghouse v Eskom Holdings* above para 36.
[41] *AllPay Consolidated Investments Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Agency & others* 2014 (1) SA 604 (CC).

'[22] This judgment holds that:

(a) The suggestion that "inconsequential irregularities" are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act "(PAJA").

(e) …

(f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.' (Footnote omitted.)

Did the First Respondent cause the Applicant to replace its key personnel?

[55] In the evaluation clarification letter dated 6 December 2015 Mr Mkhize advised:

'…during the evaluation it has been identified that your proposed team for the execution of the work is already committed to other current projects and /or current tenders at Dube TradePort Corporation.

This *may* pose a risk to the execution of the proposed project should you are (be?) eventually recommended. Kindly advise *how are you planning to address this and mitigate this risk* should you be awarded this contract?' (Emphasis added.)

[56] In its response dated 7 December 2015, the Applicant acknowledged that there were some duplications in the tender submission for Project 1 because it was unaware of the preferred status provider status of the tender submitted by Park Consult Consortium. It then advised as follows:

'Accordingly, in mitigation of the potential risk of duplication of resources should this project be awarded to LDM Consulting (Pty) Ltd, the strategies that shall be implemented includes, inter alia, the following:

- In general, the resources concerned *shall be replaced and/or supplemented* with other appropriately skilled and qualified resources to undertake the various tasks.

- The Lead Project Manager *shall be replaced* …
- The architectural team *has already been supplemented*…
- The quantity surveying team *shall be replaced* …
- The Resident Engineer, which is the only full time requirement on this project, *shall be replaced.*
- All other duplicated personnel *shall be either replaced or supplemented* with other resources.

Further, we advise that on analysis of the program timelines and resource demands, it appears that some resources will be able to allocate time on both projects.' (Emphasis added.)

[57] Mr Mkhize thereafter dispatched a letter dated 23 December 2015 requesting further clarification. In respect of the Applicant's statement that 'resources concerned shall be replaced and/or supplemented with other appropriately skilled and qualified resources to undertake the various tasks, Mr Mkhize responded:

'Kindly indicate which resources would you wish to propose for replacement?

What would be the roles of those proposed resources?

If the replacement resources do not form part of the list of resources that was submitted in the original proposal, kindly provide detailed information (of?) such resources (ie their qualifications, CVs, summary of work experience) for review, by DTPC.

It should be noted that this request for information on the replacement resources does not inevitably imply that the said resources will be accepted as replacements to the resources submitted in the original proposal.'

[58] The First Respondent also requested documentation: a man-hours plan or schedule for Project 1 using the original resources and another such schedule using the replacement personnel where applicable; and a well-defined methodology, with a comparative summary, indicating how the Applicant proposed to allocate resources and administer related activities for two projects because the proposed timelines for both projects were analogous. Mr Mkhize advised further that in order to complete the Applicant's proposal evaluation, the First Respondent needed to assess how the Applicant would properly manage and synergize the two projects should it be awarded both the Parkade Project and Project 1. In response thereto the Applicant submitted a letter dated 13 January 2016 marked 'without prejudice', setting out in detail the 'Replacement Resources' and their curriculum vitae and the other requested documentation.

[59] It is not in dispute that the First Respondent is entitled to seek clarification in respect of tender bids and did not act outside its empowering provisions in doing so. Further the First Respondent has explained that the SCM Department ordinarily undertakes a routine risk management process through which any overlap or duplication of resources between current projects and new proposals is detected. This process identified the Applicant's potential involvement in two parallel projects and motivated Mr Mkhize's letter dated 6 December 2015. Similar letters were dispatched to the Second Respondent and a third tenderer. There is no basis to conclude that the clarification was sought for an ulterior purpose or motive.

[60] Further, contrary to the assertion by the Applicant, I am unable to find that there was any undue pressure or coercion on the Applicant to replace its team by the First Respondent in both Mr Mkhize's requests for clarification. I am in agreement with Mr *Madonsela* that the First Respondent was correct in seeking clarification in respect of the resources to be deployed by the Applicant as the two projects were to be analogous and potentially this sharing of resources may have impacted adversely on the time line of the projects and its cost effectiveness.

[61] There is also no reason to conclude that the First Respondent intended to singularly target the Applicant to its detriment, or was biased against the Applicant. In the minutes of the BEC meeting held on 15 February 2016 to discuss the evaluation of the Applicant's bid, committee member Ms D Sukdeo placed on record that 'she had made edits to the letter sent to the bidders (LSG) because she wanted them to understand when receiving the letter that they did not want them to change the resources but they required an explanation that the proposed resources will be able to handle both projects…the new resources will be included for assistance.'

[62] It was the Applicant who saw fit to replace eight of its key personnel resources[42] as set out in its letter dated 13 January 2016, although it initially acknowledged that only *some* of its resources in the bid for Project 1 were deployed in the Parkade Project and that three personnel would be replaced. It was a strategic decision taken by the Applicant and the responsibility therefor is its own, and not that of the First Respondent. This finding is consistent with Wallis JA's comments in *Toll Collect*. It also cannot be contentious that following on the replacements made by the Applicant,

[42] Ten key personnel are listed in the Tender Data for evaluation under functionality.

the functionality of the new resources had to be evaluated, for which reason their details were requested. I am not satisfied that there is factual basis for the Applicant's allegation that it was unduly and prejudicially pressured or 'caused' by the First Respondent to change its 'winning team.' I am also unable to find any merit in the Applicant's averment that 'the BAC in particular unlawfully or wrongfully caused the Applicant, which had already scored seventy percent (70%), to supplement its team and then held that against the Applicant.'

Were the Applicant's new resources assessed irregularly?

[63] The factual matrix relevant to this issue is constituted by the requirements for 'Experience of Key Personnel' and its score of 25% as set out in the Tender Data, the comparison table, the scoring and comments of the BEC in its evaluations,[43] meetings and its report to the BAC. It is common cause that before the BEC assessed the Applicant's new team, the members of the BEC and Mr Mkhize drew up a comparison table of the old and new resources, which is the focal point of contention between the parties. The Applicant objects to the assessment because it contends that the BEC carried out a comparative exercise only and did not assess the new key personnel in terms of the functionality criteria. The First Respondent disputes this contention, and contends that the BEC conducted the evaluation of the new team with the due and proper exercise of its discretion although the comparison of resources was utilised in the evaluation of the new resources. It is also relevant to note that the Applicant had no complaint about the lack of specificity in the criteria set out in the Tender Data during the briefing meetings or when the functionality of its original resources was assessed.

[64] The summary of the assessment for the criterion 'experience of key personnel' records:

'**Strengths**:

- The professional team have adequate qualifications and relevant experience of projects of similar size.
- Three members of the team are GBCSA accredited.

[43] Record: Vol. 3 at 296-297, BEC scoring before and after clarification.

Weaknesses:

- None of the consultants have a track record of green star buildings shown in the CVs.
- QS does not have GBCSA accreditation.'

[65] The summary is consistent with the comments of the evaluators in the comments sheets on the original team. The adverse impact of the functionality re-assessment on the Applicant's bid is that three of the evaluators dropped the Applicant's score by 1/25 and one evaluator by 2/50 points in the re-assessment. The motivation and basis for the rescoring is provided in the minutes of the BEC meeting of 15 February 2016, which reflects the following discussion:

'…DP asked the members if they all agree that if they departing from what they scored, then they need to effectively be given an opportunity to review the scores.

…. now *they need to look at everybody's CV*

DP called SM (SCM manager) that they received a reply letter from LDM and now *they require a direction since a lot of the resources has been replace*…. His concerned is that they are replacing the resources with a B team and it is a shared concern with the members currently present. He then asked if they are not happy with this package and it is a fundamental change from the original bid, would it be possible for them to look at their scores*, re-assess and update those scores based on the current pack of CV's* that they have in front of them?' (Emphasis added.)

This discussion indicates that the BEC members were aware that the new team had to be rescored according to their CVs.

[66] The minutes further record that:

'SM responded by saying that there are *two things to consider, one being that they should look thoroughly on the people that has been raised,…*Secondly, the now proposed lead resources they have to be accessed if they are equivalent or exceeds the qualifications of the original submission. Which means those CV's has to be rescored on the bases of the first response that was given by LDM, so if this resources are less or not equivalent to the original it will mean they do not qualify to go further.'

Similarly Mr Mkhize himself advised that the replaced resources must be properly considered. It is significant that Mr Mkhize himself had obtained clarification in the interim from the National Treasury 'as to whether DTPC can accept the new proposed list of resources and *evaluate and score them accordingly in terms of functional*

evaluation as set out in the tender…'. (emphasis added). The comparison he proposes is the second leg in the re-assessment of the Applicant's bid. He was then tasked to prepare the comparison table he proposed.

[67] In the comparison table, Mr Mkhize specified which position and role was being replaced by each of the eight new personnel/resources and the name of the old personnel/resource. The criteria utilised in the comparison are university qualifications, years of experience and relevancy and professional accreditation. Then Mr Mkhize compared the old and new resources under each criterion and recorded the result under assessment and outcome. The information about the resources in the comparison is extracted from the Applicant's documents submitted with the bid and in its letter dated 13 January 2016. The actual comparison between the old and new resources is stated under assessment. Under outcome, Mr Mhize recorded whether the new resource is equivalent or not equivalent to the old resource. He further recorded when the new resource did not meet the requirement for that particular criterion.

[68] Did this exercise in comparison necessarily entail the BEC ignoring the tender criteria for functionality of key personnel or does it constitute a departure from the criteria in the tender document? It is common cause that the original team was scored using the correct criteria. It is apparent that the BEC were aware that the new team had to be rescored on their CVs in the first leg of the reassessment. In the second leg of the re-assessment, the new resources were compared with the properly evaluated old resources. It may therefore properly be inferred that even in the second leg, the new resources were in fact also evaluated against the same criteria for the functionality of key personnel, albeit with the benefit of a comparison table. This is demonstrated by the fact that where the resources had the same qualifications and experience, the outcome was recorded as 'equivalent'.

[69] Effectively therefore the resources were still evaluated according to the relevant criteria for key personnel and the score remained unaltered. Similarly, where the new resources fell short and were not equivalent in qualification or experience to the old resources, they too were effectively evaluated according to the relevant criteria for key personnel, although the outcome was that they did not meet the Tender Data requirements for that position and role.

[70] D Patel, D Sukdeo, T Hudson and M Mosia specify their reasons for scoring the new team lower. S Bogale provided reasons for not scoring the new team lower. W Mhlongo however merely states that 'the experience of the proposed (team B) is not equivalent or more if compared with the earlier submitted team.' That does not conclusively indicate that he did not exercise his discretion or apply the correct criteria. D Patel also dropped his score in respect of Bidder's experience from 3/75 to 2/50. Some of their comments are recorded on the annexure to the BEC report.[44]

[71] In his letter dated 18 February 2016, Mr Mkhize advised the Applicant that under the functionality evaluation:

'After the receipt of all your confirmation of clarification, the process of evaluation continued including the reviewed and assessment of the proposed team. On completion of the evaluation it was found that some of the team resources that were subsequently proposed were not equivalent to the initially (original) proposed team members which resources are part of the assessment.'

This statement is not a model of clarity, but further clarity of how the new resources were assessed is provided by the BEC report.

[72] Note 2 to the Functional Evaluation[45] records that the Applicant's score 'was subsequently changed due to changes in its resources, having taken into account *the level of experience and qualifications of the new resources.'* (emphasis added). Under 'Finalisation of Functional Evaluation' the BEC confirm in their report that:

'BEC members had compared the original submission of resources to the replacement resources in detail according to years of experience, qualification as well as expertise in their specific fields. Experience of key personnel: Based on a comparison of experience of the new/replacement resources to the resources that formed part of the original bid proposal, most of the (new) proposed lead resources were previously playing a supporting role in the original document….

The new resources were assessed against the set evaluation criteria in order to determine the scores that were finally awarded to the categories of (1) Bidder's experience and (2) Experience of the Key Personnel. Due to the level of experience, qualifications and accreditation most of the scores were dropped to align with the new resources cv's.'

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[44] Volume 6 at 400-401. Annexures "R35-36" to the BEC's report.
[45] Volume 6 at 400-401. Annexures "R35-36" to the BEC's report.

[73] Therefore the argument that the assessment of the new resources comprised only of a comparative exercise is in my view not sustainable. I am also unable to find merit in the Applicant's complaint that the use of the comparison table rendered the evaluation irregular, or that relevant considerations were not considered, or that the re-assessment was based on a departure of the stipulated criteria for the functionality of key personnel. Nor am I persuaded that the use of the comparison table constituted an infraction of the 2011 PPR 2011.

'11.1.1 … The amendment of evaluation criteria, weights, applicable values and/or the minimum qualifying score for functionality after the closure of bids is not allowed as this may jeopardise the fairness of the process.'

The GBCSA accreditation

[74] The Applicant's final complaint is that certain evaluators scored it down because of its failure to appoint a GBCSA accredited quantity surveyor, although neither the tender documents nor the briefing sessions specified or implied that the quantity surveyor had to be GBCSA accredited. The Applicant initially averred that the BEC scoring on required experience, accreditation and green building expertise as recorded in its report was inappropriate because the tender documents did not stipulate the relevant criteria.

[75] The First Respondent responded that the challenge premised on the green building experience is misplaced: the Applicant attained a low score not because its quantity surveyor did not have the GBCSA accreditation but mainly because its replaced architect lacked sufficient GBCSA accreditation experience.

[76] In argument, Mr *Pillay* submitted that although the First Respondent avers that the GBCSA accreditation 'weakness' was due to the replaced architect lacking accreditation the evaluation reflected the quantity surveyor's lack of accreditation as the weakness. This score was further reduced after the comparative assessment because the BEC determined that the new team did not have the required experience, accreditation and green building expertise. Although the Applicant accepts that some members of the team were to include green star accredited professionals, the tender does not specify which of the professional team should be so accredited. Mr *Pillay* therefore contended that it was unfair to penalise the Applicant because its quantity surveyor did not have such accreditation, especially as it is questionable that a quantity

surveyor can serve the GBCSA requirement. He submitted that the BEC also deliberately overlooked the Applicant's green star experience which had been furnished.

[77] Mr *Madonsela* contended in response that the tender document made green building experience/accreditation a requirement, which the Applicant accepted in its replying affidavit. Although the Applicant persists with its subsidiary argument that the tender documents did not require a quantity surveyor to be GBCSA approved, the Applicant's bid was scored lower because certain evaluators assessed the replaced resources as weak, specifically because the new lead architect did not have sufficient green building experience.

[78] It is common cause that Project 1 had to attain green star accreditation and that the Tender Data stipulated under C3.3 that 'The team is to include green star accredited *professionals'.* (emphasis added). The addendum to the bid documents which was sent to all the bidders, included the briefing note in which it is minuted that the First Respondent explained at the briefing session that:

'The team is to include green star accredited professionals to ensure that the building may be designed to achieve 4 star green building rating as per the Green Building Council of South Africa (GBCSA).

It is imperative that the GBSCA accredited professional have a firm track record of delivering green star building using the Office V.1 tool. Preference will be given to accredited professionals with multiple project experience or projects of similar size and scope…'

It is not disputed that the First Respondent may amend or amplify its bid documents in terms of Clause F.3.2 of the Tender Data, and the addendums issued form part of the tender documents. Further the Applicant attended the briefing when the First Respondent confirmed that GBCSA accreditation was a tender requisite.

[79] Under experience of key personnel in the functionality criteria, the tender states:

'The bidder shall submit a list of proposed professional team (registered appropriately where applicable) for the project including CV's showing experience in projects of similar nature, size and monetary value.

Provide proof of qualifications as well as professional registrations for all the built professions.

The CV's required shall include, but not limited to, the following key personnel: -...'

The ten key personnel listed include the architect and the quantity surveyor. The Applicant could not or ought not to have misconceived that GBCSA accreditation of its key personnel was irrelevant.

[80] In the comparison table in respect of the outcome of the replacement of the lead architect it is noted that 'In the context of this appointment as outlined in the tender process this is a critical qualification and does make a difference and is not equivalent.' In the functionality assessment, 'Three members of the team are GBCSA accredited' is noted as a strength and under weaknesses it is recorded that the CVs of the consultants did not reflect a track record of green star buildings and that the quantity surveyor did not have GBSCA accreditation.

[81] However under 'Finalisation of Functional Evaluation' in the BEC report, in the comments explaining the lower scoring of the replacement resources the following is recorded:

'Bidder's experience: Due to the firm PGA architects being replaced with Ruben Reddy architects as the principal architectural firm the score will now drop. This is on the basis that Ruben Reddy Architects did not have significant experience dealing with projects of a similar scale, magnitude and complexity as a lead architectural firm. Ruben Reddy architects have no proven green building experience or accreditation which is of paramount importance for the project.

The original Architect had 20+ years of experience; the Project Manager had 17 years of experience; the QS has 20+ years of experience; and were replaced with individuals that had the necessary qualifications but did not have the required experience, accreditations and green building expertise…'

[82] This assessment, which is a collation of the comments of the BEC members, is not inconsistent with the Tender Data stipulated under C3.3. Nor can it be held that 'irrelevant considerations were taken into account or relevant considerations were not considered'. Therefore Mr *Pillay's* submission that the quantity surveyor's lack of accreditation with GBCSA is the reason that the Applicant's team was scored lower is in my view not sustainable. Nor was it the comparative exercise that resulted in the lower score. The lower score was deemed appropriate because of the deficiency identified in the replacement lead architect, and the fact that three of the replacement personnel did not have the required experience, accreditations and green building.

[83] The Applicant relies on Annexure “M” to its founding affidavit to sustain its averment that the BEC deliberately overlooked the Applicant’s green star experience which had been furnished. However Annexure “M” contains a generic ‘Statement on Green Building Expertise and Methodology’. It does not provide the requisite information about GBCSA accreditation or green star experience specific to the professionals in the replacement team.

Conclusion: Project 1

[84] The Applicant has failed to establish any grounds of review under PAJA in respect of the functionality assessment by the BEC of the Applicant’s bid in Project 1. It is therefore unnecessary to consider the alleged shortcomings in the ratification of the BAC of the BEC’s report or the outcome of the appeal or the dismissal of the appeal by the AA.

Project 2

[85] The tender for Project 2 invited bids for the appointment of consultants for the engineering, design and supervision of construction of a purpose-built pharmaceutical /biotech manufacturing facility. The tender documents followed a similar structure to those in Project 1. In assessing the bids received for Project 2 the First Respondent followed the same process and procedure for evaluation of tenders as set out earlier in this judgment. The Applicant’s bid was scored below the 70-point minimum threshold.

[86] The Applicant claims that the assessment of functionality of its bid for Project 2 was irregular because it was scored lower on bidder’s experience because PGA Architects allegedly had ‘no medical/pharmaceutical experience’. However the tender document did not call for medical/pharmaceutical experience. The BAC’s comments also suggest that the Applicant was penalised on this basis. However the Applicant had complied because it provided a list of medical/pharmaceutical projects in its work history, some of which were listed as strengths in respect of the bidder’s experience.

[87] Similarly, the Applicant was penalised because its key personnel did not have the requisite medical or pharmaceutical experience although the tender bid only called for details of their experience in projects of a similar scope. The details required were the size, monetary value and magnitude of previous projects. There was no reference

to medical or pharmaceutical experience. Nevertheless the key personnel had included some medical projects as part of their experience. The second leg of the Applicant's complaint is that the First Respondent failed to obtain clarification which the evaluators had called for and this failure was unfair as it impacted adversely on its assessment of the functionality of the Applicant's bid on the methodology and work plan and program criteria.

[88] The First Respondent responded that the Applicant's contention that it was penalised because its key personnel were deemed not to have requisite medical or pharmaceutical experience was unfounded. The only member of the BEC who assessed the Applicant's bid as not measuring up on experience of key personnel and bidders experience was Evaluator 1 (Mr Gould). He did so because he assessed the resident engineer as not having sufficient building background, as noted on his evaluation sheet. All other evaluators, including T Hudson who noted the lack of medical or biopharmaceutical experience, assessed the Applicant's bid in respect of bidder's experience and key personnel as being *"good"* and scored the Applicant 4 out of 5. The evaluators scored the Applicant down because they assessed its bid as weak in relation to its proposed methodology and work plan.

[89] The Applicant's contention that the First Respondent ought to have granted it an opportunity to clarify its proposed methodology and work plan is predicated upon a misunderstanding of the comments made by the evaluator Ms M Govender who noted under its weakness in the Applicant's bid that:

'Bidders understanding of deliverables and efforts for Phase 1 to 3 and 4 to 6 to be clarified.'

However, Ms Govender had intended that the Applicant's clarification be called for only if the Applicant passed the functionality threshold. It was not a plea or request that other evaluators should consider affording the Applicant an opportunity to clarify its bid during the evaluation stage. Such a request would have been unfair to other bidders.

Argument

[90] Mr *Pillay* submitted that it is common cause that the tender, and specifically the scope of services in the tender bid document, did not call for bidders to demonstrate

medical related /biopharmaceutical or similar experience. Yet the Applicant was penalised for not disclosing such medical/biopharmaceutical experience. Accordingly the evaluation is on the basis of criterion outside of the parameter of the tender. As this is irregular and a material defect in the evaluation process, the tender award in Project 2 stands to be set aside and be remitted for re-determination. Mr *Pillay* pointed out that the Applicant did nevertheless, as the record of its sub-consultants' work indicated, have experience in medical/biopharmaceutical projects

[91] He submitted further that the failure of the First Respondent to seek clarification prior to the assessment of methodology and work plan and design program, resulted in the evaluators failure to understand the Applicant's program and to criticise its methodology incorrectly. As this offends against the need for fairness as stated in *Logbro Properties CC v Bedderson NO & others,*[46] Mr *Pillay* submitted that the award should be remitted for re-consideration alternatively that the tender ordered to commence afresh.

[92] Mr *Madonsela* contended that the applicant has grounded its call for review on two mistaken claims: -

(a) The first was that the Applicant was scored lower because it failed to demonstrate experience in medical/bio-pharmaceutical field, and therefore failed to meet the minimum threshold. This is not why the Applicant was disqualified.

(b) The second is that the Applicant should been requested to clarify its 'methodology' and 'work plan' because one of the evaluators (Ms Govender) requested clarification. A hearing for the purposes of clarification was not required merely because Ms Govender mentioned the word *"clarity"* in respect of project 2. The applicant misconstrued her comments. The evaluator subsequently explained what she meant. She, like the other evaluators, considered applicant's proposed methodology and work plan to be weak. Mr *Madonsela* emphasised that the First Respondent has in terms of the tender

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[46] *Logbro Properties CC v Bedderson NO & others* 2003 (2) SA 460 (SCA). See also *Kawari Wholesalers (Pty) Ltd v MEC: Department of Health, North West Province & others* (1807/07) [2008] ZANWHC 12 (6 March 2008) paras 10-12.

criteria a discretion to determine if clarification is required,[47] which is underscored by the decision in *Toll Collect.*

[93] Mr *Madonsela* contended further that there is also no evidence that the Applicant's failure to meet the functionality threshold for Project 2 could have been cured by further clarification or that there existed an obligation to invite such clarification. As authority he referred to the comment of Schippers AJ in *Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George & others*[48] that:

'A tenderer's "right" to be heard in relation to its failure to comply with tender conditions before a tender is awarded to a successful tenderer who does so comply is unheard of.'

[94] Mr *Madonsela* concluded that the Applicant simply failed to meet the 'functionality' threshold in Project 2. The evidence shows that the evaluators lawfully exercised their discretion while the Applicant's proposal that it should be rescored is arbitrary and impermissible. He submitted that the application for review should be dismissed or if the Applicant were successful in the review, then the matter should be remitted to the First Respondent for reconsideration.

Discussion

[95] In *Westinghouse v Eskom Holdings* the court confirmed in paragraph 50 that evaluation on the basis of criteria outside of the parameter of the tender is irregular. The first issue is whether the tender, and specifically the scope of services in the tender bid document, did not call for bidders to demonstrate medical /biopharmaceutical or similar experience.

[96] 'Scope of work' in the Standard for Uniformity in Construction Procurement dated July 2015, referred to by Mr *Pillay*, means 'the document that specifies and describes the good, services, or engineering and construction works which are to be provided and any other requirements and constraints relating to the manner in which the contract work is to be performed.' This is therefore the tender document in Project 2, in which the contract work is the 'engineering, design and supervision of construction of a pharmaceutical manufacturing facility.'

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[47] Volume 5, Annexure "B2, Clause F. 2.1.2 para 10.

[48] *Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George & others* [2005] JOL 13628 (C) para 31.

[97] This tender document calls for consultants for a pharmaceutical/bio-technology) manufacturing facility. It further requests under 'Bidder's experience' for experience in projects of *similar scope*' and under 'Experience of Key Personnel' calls for CVs showing the experience of key personnel 'in projects of a *similar nature*, size and monetary value.' (Emphasis added.)

[98] What is biotechnology? The Oxford language online dictionary defines 'biotechnology' as 'the exploitation of biological processes for industrial and other purposes…' Wikipedia states that biotechnology has application in four major industrial areas, one of which is healthcare (medical). Therefore the facility in Project 2 was both pharmaceutical and medical in nature. As the BEC must include three technical representatives with suitable expertise in terms of clause 8.7.6.3 of the First Respondent's SCM Policy,[49] the definition of biotechnology and its application would have been within the scope and knowledge of their expertise.

[99] The Applicant's claim that these were not criteria in terms of the Tender Data is therefore factually incorrect and unsustainable. The bidder for such a facility has an obligation to understand fully the nature of the project it is bidding for (per *Toll Collect*). The mandatory briefings are also intended to assist the bidder with the clarification of the Tender Data. This is not an instance where the bidder can claim that the shortcoming is in the clarity of the criteria, therefore rendering the award of the tender reviewable under PAJA. The BEC did not take into consideration irrelevant criteria, nor did the award involve a consideration that was not rationally connected to the purpose of the tender document as contemplated in s 6(2) of PAJA.

[100] It is also noteworthy that the Applicant finds no complaint with the fact that under the strengths of the Bidder's experience are included:[50]

'*medical* engineers….

Renovations *Health Science* building…

Alterations additions to existing *clinic* …

New *health services* facility…

[49] Volume 6 at 453.
[50] Record Volume 6 at 499.

Renovations to *dental facility* …' (emphasis added)

Under key personnel a strength is 30 years' experience (two hospitals). All these strengths are 'medical' in nature.

[101] Evaluator 1, Mr A Gould, who is an engineer, rated the Applicant at 3 for Bidder's experience because he considered such experience poor in relation to the nature of the work and there were no relevant letters of reference. He also scored the Applicant 3 for experience of key personnel because 'RE does not have building background' and the organogram was not clear about the duplicated roles of the personnel. Another evaluator, Timothy Hudson, who referred to medical experience as a consideration assessed the Applicant's bid as 'good' and accorded it 4 points. The rest of the BEC panel assessed the Applicant's bids as "good" and accorded a score 4 for its experience and experience of key personnel.

[102] However under Methodology and Work Plan the Applicant was consistently scored low because four of the evaluators considered its methodology as 'generic' and non-responsive. One evaluator considered it 'non-specific' and another found that it was 'not acceptable for a project of this nature'. Four scored the applicant at 2 and the other two at 3. Under clause 8.7.6.1 of the SCM policy, the BEC is obliged to evaluate each bidder's ability to execute the contract 'according to financial and technical ability'. It is therefore not unreasonable or indicative of a failure of the evaluators to apply their discretion in the evaluation, that a generic work plan would be considered non-responsive.

[103] No factual basis has been established for the Applicant's submission that Ms Govender failed to understand the proposed methodology and that the BEC should have called for clarification or afforded the Applicant a hearing before evaluating its bid. Ms Govender herself explained that she meant that clarification in respect of phases 4-6 of the bid should be obtained if the Applicant passed the functionality threshold, as recorded in the BEC minutes.

[104] In the premises I am not satisfied that the award by the First Respondent of the tender in Project 2 is irregular or susceptible to review. Consequently it is again not necessary to consider the BAC's ratification or the decision of the AA.

Costs

[105] There is no reason why costs should not follow the result. I am also satisfied that the briefing of two counsel by First Respondent was warranted, and their costs should be allowed.

Order

1. The application to review and set aside the award of the tenders by the First Respondent to the Second and Third Respondents under case number 7900/2016 is dismissed.

2. The *Rule Nisi* issued under case number 6301/2016 is discharged.

3. The Applicant is directed to pay the costs of the First Respondent, such costs to include all reserved costs, the costs of the interdict application under case number 6301/2016, and costs consequent upon the employment of two counsel.

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Moodley J

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Date of judgment	**: 16 April 2021**	
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