

**HIGH COURT
(BISHO)**

CASE No: 769/02

In the matter between:

RHI JOINT VENTURE Applicant

and

**THE MINISTER OF ROADS AND PUBLIC
WORKS, EASTERN CAPE** First Respondent

THE PREMIER OF THE EASTERN CAPE Second Respondent

BASIL READ (PTY) LTD Third Respondent

**THE CHAIRMAN OF THE PROVINCIAL TENDER
BOARD FOR THE EASTERN CAPE** Fourth Respondent

JUDGMENT

EBRAHIM J:

Introduction

1. This is an application to review and set aside the decision taken by the fourth respondent on 7 November 2002 to award a tender to the third respondent. The applicant also seeks an order awarding the tender to the applicant. The first, third and fourth respondents oppose the application.

2. On 11 December 2002, in consequence of these proceedings having been brought as a matter of urgency, the respondents gave an undertaking, pending the hearing of this matter on 20 February 2003, not to take any further steps towards implementation of the contract arising from the awarding of the tender. This undertaking forms part of the terms of the order issued by consent by the Court on the same date.

The factual history

3. The tender, which is the focal point of these proceedings, requires the existing 43 kilometres of gravel road, starting at the N2 at Mooiplaas and ending at Kei Mouth, to be upgraded to a bituminous surfaced road. The tender also specifies that two bridges are to be constructed.
4. The tender documents were made available to tenderers from 26 July 2002 and the closing date for the submission of tenders was 22 August 2002. The Tender Rules, which formed part of the invitation to tender, specified that all tenders were subject to the provisions of the Provincial Tender Board Act 2 of 1994 (EC) ('the PTB Act') and the regulations promulgated thereunder. Further, the Tender Rules were to be read with the 'Specifications for the Implementation of Targeted Procurement, Targeting of Affirmable Business Enterprises and Targeting of Local Resources'.
5. The basis upon which tenders were to be adjudicated was detailed in the Tender Rules (Annexure 'D'). These rules, which informed tenderers of

the 'applicable documentation', the 'contractual goals' and the points system to be utilised in the adjudication process, read as follows:

25. ADJUDICATION OF TENDERS

25.1 Applicable documentation

- (a) These Tender Rules are to be read together with the Specifications for the Implementation of Targeted Procurement, TP1 (*APP1*) : Targeting of Affirmable Business Enterprises and (TP4 [*APP4*] : Targeting of Local Resources, included in the Annexure to Section 8.
- (b) Variations to the specifications TP1 (*APP1*) AND TP4 (*APP4*) are set out in Part D of the Project Specifications.

25.2 Definitions and Interpretations

Defined terms, which have capital letters, have the meanings given to them in the General Conditions of Contract or the Specification.

25.3 Contractual Goals

25.3.1 The minimum Contract Participation Goal, Local Resources Goal and Labour Percentage are set out in PART A: GENERAL of the Project Specifications.

25.3.2 Tenderers may, in support of an Affirmative Procurement Policy, increase their Contract Participation Local Resources Goal above the minimum. Should the tendered CPG however be less than the set minimum, the tender will not be regarded as responsive and will be rejected at the Employer's discretion.

25.3.3 Tenderers will qualify for tender adjudication points if their tendered Contract Participation and Local Resources Goals exceed the minimum set by the Employer. No further tender adjudication points will be awarded if the maximum set by the Employer is exceeded.

25.4 Adjudication of Tenders on a Points System

25.4.1 Examination of Tenders and Determination of Responsiveness

Prior to the detailed evaluation of tenders, the Employer will determine whether each tender:

- meets the requirements of the Tender Rules;
- has been properly signed;
- is responsive to the requirements of the contract documents;
- provides any clarification and/or substantiation that the Employer may require;
- complies with the tender submission requirements in all other respects; and
- meets the minimum contract participation goals as specified in this document -should a tenderer fail to meet these, such a tender will be considered non-responsive and will not be considered for adjudication.

A responsive tender is one which conforms to all the terms, conditions and specifications of the Contract without material deviation or qualification. A material deviation or qualification is one which, in the Employers opinion:

- could detrimentally affect the scope, quality or performance of the Works;
- changes the Employer's or the Contractor's risks and responsibilities under the Contract; or
- would affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.

If the tender does not meet the requirements or is not responsive, it will be rejected by the Employer, and may not subsequently be made acceptable to the Employer by correction or withdrawal of the non-conforming deviation or reservation.

25.4.2 Adjudication using a points system

Responsive tenders shall be adjudicated by the Employer using a system which awards points on the basis of:

- The tendered price (Np)
- The tendered Contract Participation Goal (Ng)
- The tendered Local Resources Goal (Nr)

The Employer will normally award the Contract to the tenderer obtaining the highest number of points, but will not bind itself to do so.

25.4.3 Points awarded for Price (Np)

A maximum of 90 points is allocated to Price on the following basis:

$$Np = 90 \left\{ 1 - \left(\frac{P - P_m}{P_m} \right) \right\}$$

Where Np = the number of tender adjudication points awarded for price
Pm = the price of the lowest responsive tender adjusted to a common base, if applicable

P = the price of the responsive tender under consideration adjusted to a common base, if applicable

25.4.3.1 Points Awarded for the Tendered Contract Participation Goal (Ng)

A maximum of 7.0 points may be awarded for the extent to which the tendered Contract Participation Goal exceeds the specified minimum. The basis of award is:

$$Ng = 7.0 \left(\frac{D - D_s}{X - D_s} \right)$$

Where Ng = the number of tender adjudication points awarded

D = the tendered Contract Participation Goal percentage

Ds = the specified minimum Contract Participation, Goal percentage, stated in the Project Specifications

X = the maximum Contract Participation Goal percentage stated in the Project Specification above which no further adjudication points are awarded

25.4.3.2 Points Awarded for the Contract Local Resources Goal (Nr)

A maximum of 3.0 points may be awarded for the extent to which the tendered Contract Local Resources Goal exceeds the specified minimum. The basis of award is:

$$Nr = 3.0 \left(\frac{D - D_s}{X - D_s} \right)$$

Where Nr = the number of tender adjudication points awarded

D_t	=	the tendered Contract Local Resource Participation Goal percentage
D_s	=	the specified minimum Contract Local Resource Goal percentage, stated in the above Project Specification above which no further adjudication points are awarded
X	=	the maximum Contract Participation Goal percentage stated in the Project Specification above which no further adjudication points are awarded

25.4.3.3 Total Tender Adjudication Points

The total number of tender adjudication points awarded (N), is the sum of:

$$N = N_p + N_g + N_r \text{ (not to exceed 100)}^1$$

6. It is common cause that, in addition to the PTB Act, the legislative scheme which governs the tender process and the award of the tender is the Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPF Act') and the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution').

7. Section 217 of the Constitution, from which the PPPF Act originates, states:

217. Procurement

1. When an organ of state in the national, provincial or local sphere of government, or any other institution 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 -
 - the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
 - National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.¹

8. The applicant and the third respondent were amongst five tenderers who

tendered for the contract. All the tenders were initially evaluated by the Standing Tender Committee, a sub-committee of the Provincial Tender Board of the Eastern Cape. As a result of these evaluations two of the five tenderers were determined to be 'non-responsive' and rejected as provided for in Tender Rule 25.4.1.

9. The Standing Tender Committee's Report (Annexure 'O') states that tenders were 'evaluated in accordance with the requirements of the Department of Roads and Public Works Targeted Procurement Policy', utilising the prescribed points system. The points system and the results produced through the application thereof has been summarised as follows:

7.2 Evaluation points Awarded to Tenders

7.2.1 Points Awarded for Price (Np)

A maximum of 90 points out of a possible 100 points is allocated to price. In accordance with the given formula the price of the lowest responsive tender would obtain 90 points while the balance of the Tenderers, depending on price, would progressively earn less points.

7.2.2 Points Awarded for Contract Participation Goal-CPG (Ng)

A maximum of 7 points may be awarded for the extent to which the tendered Contract Participation Goal exceeds the specified minimum. For the Contract Participation Goal:

- The Tender Document specified a minimum CPG = 15% and a maximum CPG = 40%
- Tenderers would earn up to a maximum of 7 points for the extent to which their tendered CPG exceeded the specified minimum;
- No points would be allocated for simply meeting the minimum requirement;

7.2.3 Points Awarded for Local Resource Goal - LRG (Nr)

A maximum of 3 points may be awarded for the extent to which the tendered Contract Local Resources Goal exceeds the specified minimum. Minimum local labour component included in Local Resources must be 10% for the LRG:

- The Tender Document specified a minimum LRG = 25% and a maximum LRG = 40%
- Tenderers would earn up to a maximum of 3 points for the extent to which their

tendered LRG exceeded the specified minimum

- No points would be allocated for simply meeting the minimum requirement;

7.3 Total Tender Evaluation Points (refer to Appendices B and C)

The total number of tender adjudication points awarded (N), is the sum of:

$$N = N_p + N_g + N_r \text{ (not to exceed 100)}$$

The number of points achieved for price and the two Targeted Procurement Goals (CPG and LRG), as well as the total number of points for each Tenderer are set out in Appendix C.

Table 7.1 below summarizes the total points for each tenderer.

TABLE 7.1: TENDER EVALUATION POINTS					
RANK	TENDERER	N _p	N _g	N _r	TOTAL POINTS
A	RHI JOINT VENTURE	90.0	2.9	2.7	95.6
B	WBHO CONSTRUCTION (PTY) LTD	85.6	2.0	0.3	87.90
C	BASIL READ (PTY) LTD	85.5	1.4 (7.0)	3.0 (3.0)	89.9 (95.5)
D	GROUP 5 CONSTRUCTION (PTY) LTD	81.9	0*	0*	81.9
E	SES'FIKILE CIVILS (PTY) LTD	49.4	7.0	3.0	59.4

As can be seen, the evaluation points affects the ranking of tenders. The tender submitted by Basil Read (Rank C) scores more total points that the second lowest priced tender previously ranked above it.

The tender marked with an asterisk (*) is awarded zero points for N_g and N_r as there was no calculation of the goals in their respective tenders.'

- On the basis of its overall evaluation of the tenders and the results produced through utilisation of the points system the Standing Tender Committee concluded that the tender should be awarded to the applicant. In its recommendation the Standing Tender Committee stated that the contract should be for R252 337 984.90 which it said was 'the arithmetically corrected total contract value'. This was due to the fact that it had corrected the applicant's tender price of R254 750 000.00 as the applicant had indicated in the tender that there would be a saving of R2 412 280.00 'on the

priced Schedule of Quantities’.

11. In the margin of the Standing Tender Committee’s Report (Annexure ‘O’) next to the paragraph headed ‘10. RECOMMENDATIONS’, is a handwritten note which reads: ‘Recommendation by Consultants with Departmental Procurement Committee concurring.’ The consultants, it appears, were engaged by the Department of Roads and Public Works.
12. The aforesaid report (Annexure ‘O’) was reviewed by the Director, Roads Construction, who signed it and added the comment ‘As recommended’. The report was signed by the chairperson of the Procurement Committee on 23 September 2002 and by the Permanent Secretary (now titled the Head of Department) of the Department of Roads and Public Works, Eastern Cape on 27 October 2002. The latter official approved the report but added the following rider, ‘Provided the tender is awarded to No. 2, BASIL READ PTY LTD’.
13. On 7 October 2002 (the same date on which he approved the report of the Standing Tender Committee with the aforesaid proviso) the Head of Department, Roads and Public Works addressed a letter (Annexure ‘S’) to the Tender Board enclosing the report (Annexure ‘O’). This letter motivated that the tender be awarded to the third respondent and stated, *inter alia*:

‘The tender submitted by RHI Joint Venture is the lowest on price and highest on points. However, it is not recommended for acceptance in this contract since the individual JV partners

(Rumdel Construction & Haw & Inglis) have been given a fair number of contracts in the past which they are still busy doing. For a fair distribution of work amongst contractors it is recommended that Basil Read (Pty) Ltd should be awarded this contract.'

14. In a further letter, also dated 7 October 2002, (Annexure 'T'), bearing the heading 'RATIONALE FOR VETOING DEPARTMENTAL PROCUREMENT COMMITTEE RECOMMENDATION: N2 TO KEI MOUTH: MR695/697 UPGRADE TO SURFACED STANDARD: PTB5-02/03-1691', the Head of Department set out a further motivation why the tender should be awarded to the third respondent. He stated that the tender of the third respondent 'does offer a decided advantage in terms of the amounts that will be spent in Resource Goals and Local Labour Goals'. In support of this further motivation he provided a comparison of the benefits that would or would not be derived from the tenders of the third respondent and the applicant. The comparative analysis indicated that in respect of the applicant's tender there would be a benefit of 'some R18 million' for the employment of local labour but in the case of the third respondent's tender the benefit would be 'some R25 million'. Further, local enterprises and suppliers would only benefit by 'some R50 million' from the applicant's tender whereas the benefit from the third respondent's tender would be 'some R78 million'. The Head of Department said that it was 'clear from the above that Basil Read offers a considerable advantage when it comes to the stimulation of the local economy in the region'.
15. In the letter (Annexure 'T') the Head of Department also provided superficial details of tender contracts that had been awarded to, and were then in the

process of being completed by, Rumdel Construction, Haw Iglis and Basil Read/Llima. In regard thereto he stated:

‘However, Basil Read did not tender as a partner in a joint venture and as such has never been awarded a contract as a sole contractor. The department has committed itself to spreading work as widely as possible in order to accelerate service delivery . Although the tender submitted by RHI Joint Venture was found to be compliant and met with the requirements of the tender, the tender submitted by Basil Read offered substantial benefits when it comes to Local Resource Goals (LRG). RHI JV offered a total LRG of R658 million whilst Basil Read offered R103.6 million-a difference of over R35 million. The department will however pay a premium of R12.5 million if Basil Read is awarded the tender.’

The Provincial Tender Board’s deliberations and the reasons for its decision

16. Minutes of the Provincial Tender Board dated 24 October 2002 (Annexure ‘P’) reveal a decision could not be taken on the award of the tender to the third respondent as a sub-committee consisting of Messrs Jim, Mafu and Bovu had not yet met to discuss the matter. The sub-committee, which in fact consisted of Messrs I Jim, D Mafu and T Matunda with Mr Bovu being absent, submitted its report dated 31 October 2002 (Annexure ‘Q’) in which it stated, ‘[w]ith respect to the new recommendations the sub-committee is of the view that this recommendation is fair and reasonable and is recommended for acceptance by the committee in interest of delivery’. Two signatures appear on the report, both dated 7/11/2002, and a handwritten note which reads - *‘M/S Basil Read R264 850 980.00’*.
17. On 7 November 2002 the matter came before the Provincial Tender Board. The minutes of that meeting, which the fourth respondent filed pursuant to the provisions of Rule 53 (1)(b) of the Rules of Court, reveal that after

some discussion the following decision was taken:

‘The Tender Board resolves to accept the recommendation as presented by the Department of Public Works, to award the contract to Basil Read in the amount of R264 850 980.90. The following conditions apply:

- That Basil Read will comply with their joint venture pre-bid agreement, which states that BR Lima - Basil Read will enjoy 60% participation, BR Lima 20%, New Port 20%.
- Secondly, that the department will monitor that this agreement is adhered to and report to Tender Board in terms of how the money is being spent physically, audited and reported to the Tender Board on a quarterly basis.’

18. The fact that the applicant’s tender had not been successful was conveyed to the applicant in a letter dated 13 November 2002 written by Jeffares & Green (Pty) Ltd and FST Consulting Engineers and Community Developers (Annexure ‘H’), acting on behalf of the Department of Roads and Public Works, Eastern Cape. In consequence thereof the applicant’s attorneys wrote to the Tender Board on 14 November 2002 (Annexure ‘I’) requesting written reasons for its decision as well as the Tender Adjudication Report, the relevant minutes of the Tender Board and its committee, and certain additional information.

19. In response to the applicant’s request the Procurement Manager, Office of the Tender Board, replied on 2 December 2002 (Annexure ‘H’) detailing the reasons for the award in favour of the third respondent and enclosing the minutes and other documentation. This letter conveyed the following:

‘TENDER FOR THE UPGRADE OF N2 TO KEI MOUTH - MATTER OF RHI JOINT VENTURE

Pursuant to your request for reasons for the non-recommendation of the tender of Messrs RHI Joint Venture in the tender for the upgrade of the N2 to Kei Mouth Road MR695/697, to wit; Ptb5-2/03-1691, please be informed that:-

1. The tender submitted by Messrs RHI Joint Venture was the lowest on price and highest on points. It was however not recommended for acceptance in this particular tender because Messrs Rumdel Construction and Messrs Haw and Inglis have already been awarded a number of contracts by the Tender Board, on the recommendation of the Department of Public Works, and both companies or entities are still engaged with those contracts.
2. On the principle of fair distribution of work amongst the Provinces contractors, it was resolved that the Joint Venture partners had already been awarded a fair share of contracts with which they were still busy and therefore the recommendation should be made in favour of a qualifying contractor who had not been given work previously.
3. It was resolved therefore that, on the principle of fair distribution of work, Messrs Basil Read (Pty) Ltd, who has not been recommended and given any contract award previously, should be recommended for award, and be given the contract in question.
4. Tender Board approval for the award to Messrs Basil Read was therefore sought by the Department and subsequently granted accordingly.
5. Please be advised also that notwithstanding the recommendation that is made by the Consultants employed by the Department in a given project, the Department can deviate in their recommendation to the Tender Board on a broad spectrum of principles that are brought to bear in terms of Government policies in the tendering process in terms of empowerment considerations.
6. Please be informed further that awards of contracts to tenderers not scoring the highest number of points are an acceptable occurrence in the tendering process in terms of provisions as contained in paragraph 9 of the Regulations made in terms of Section 5 of the Preferential Procurement Policy Framework Act, No.5 of 2000.

As per your request in your communique dated 14 November 2002, please receive the following documents:-

- (i) The recommendation of the Consultants to the Department of Public Works.
- (ii) The recommendation of the Department of Public Works to the Provincial Tender Board.
- (iii) Minutes of the Sub-Committee of the Tender Board which considered the application and recommended to the Tender Board.
- (iv) Minutes of the Tender Board which pronounced on the recommendation and made the award.

PROCUREMENT MANAGER

OFFICE OF THE TENDER BOARD'

20. It is evident from the letter dated 2 December 2002 (Annexure 'N') that the Tender Board's decision to award the tender to the third respondent was

motivated by what it termed 'the principle of fair distribution of work amongst the Province's Contractors'. This is also apparent from the minutes of the Tender Board meeting which was held on 7 November 2000. What is not readily apparent from these minutes, however, is that the Tender Board also based its decision on the increased benefits that would flow from the third respondent's tender in favour of local enterprises and suppliers and in respect of the employment local labour, as had been contended by the Head of Department. Despite the silence of the minutes of 7 November 2002 on this aspect, the inference is justified that the Tender Board took this factor into account in arriving at its decision. This is supported by the report (Annexure 'Q') of the sub-committee of the Tender Board which stated that the 'new recommendations' were 'fair and reasonable and were being recommended for acceptance by the committee in interest of delivery'.

21. Whether the third respondent's tender was to be considered as having been submitted by a 'joint venture company' (being one in which the third respondent was a shareholder with other businesses described as Affirmable Business Enterprises) was the subject of discussion at the meeting of the Tender Board, albeit only on a limited basis. It is clear that the Tender Board ultimately accepted that the tender of the third respondent was that of a 'joint venture company' and awarded the tender on that basis. This is evident from the two conditions that form part of the Tender Board's resolution and which is quoted in paragraph 14 above. The Standing Tender Committee did not, however, share this view. In its report (Annexure 'O') the Committee

recorded the conclusion it had reached on this issue in the following terms:

‘The Tenderer submitted by way of a covering letter and a “Prebid Joint Venture Agreement” their intention to enter into a Joint Venture Agreement should they be awarded the contract. However the tender was signed by Basil Read (Pty) Ltd and not as a JV tender (although the tender document clearly allows for this !) and therefore the tender will be evaluated as a Basil Read (Pty) Ltd tender and not as JV.’

22. It is upon receipt of the aforementioned letter (Annexure ‘N’) that the applicant launched these proceedings as a matter of urgency. Thereupon the order referred to in paragraph 2 of this judgment was issued by consent.

Are the factors which motivated the decision of the Provincial Tender Board objective criteria as specified in s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000?

23. It is common cause that the Tender Board’s decision to award the tender to the third respondent instead of to the applicant was motivated by both the considerations I have indicated above. It is also common cause that the Tender Board’s approach to these considerations was that they qualified as additional objective criteria as referred to in s 2(1)(f) of the PPPF Act. In their submissions the first, third and fourth respondents have supported the view that both the aforementioned considerations qualify as objective criteria. The submissions of the applicant, on the other hand, are to the contrary.

24. Section 2 of the PPPF Act prescribes the basis upon which an organ of state is to implement its preferential procurement policy:

‘2. **Framework for implementation of preferential procurement policy** -(1) An organ of

state must determine its preferential procurement policy and implement it within the following framework:

- (a) A preference point system must be followed:
 - (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
 - (ii)
 - (c) any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
 - (d) the specific goals may include -
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994;
 - (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
 - (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraph (d) and (e) justify the award to another tenderer; and
 - (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.
- (2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance.'

25. It is clear that the purpose of the foregoing provisions is to ensure that the preferential procurement policy of an organ of state is implemented in a defined manner. In addition, the value that has to be attached to the benefits that derive from a tender which meets the minimum requirements stipulated by such policy, has been quantified in order to facilitate the overall evaluation

of a tender. The major factor in deciding the award of a tender is manifestly the price since a maximum of 90 points are allocated to the tender which reflects the lowest price. On the other hand the specific goals referred to in s 2(1)(d) cannot be placed on the same level as the price since only a maximum of 10 points are awarded for these. Just how crucial it is that the tender price be the lowest is reflected by the fact that s 2(1)(f) stipulates that 'the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer'. It is obvious that a special responsibility rests on a Tender Board to ensure that the tenders it awards will, as far as possible, cost the Province the least. See *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and others* 2002 3 All SA 336 (T) and *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (Ck HC).

26. Counsel representing the first, third and fourth respondents submitted that it was not improper for the Tender Board, in arriving at its decision, to take into account that the tender of the third respondent held greater financial benefits for local 'affirmable business enterprises' and in respect of the use of local labour and resources.
27. Mr Kemp SC, who appeared for the applicant, submitted that the approach adopted by the Tender Board was incorrect. He pointed out that the fourth respondent, in his answering affidavit, confirmed that 'expenditure on local

labour and economy is taken into account when the points are for meeting (*sic*) the specific goals' and that the 'extent of the expenditure can then be considered as an objective criteria'. This, Mr Kemp contended, resulted in weight being given twice to the same factor since points had already been awarded for this under the point system. It could, therefore, not be considered again as an objective criterion.

28. I am in agreement with Mr Kemp's submission. The argument advanced by Mr Beckerling SC, who appeared for the third respondent, that the greater financial benefits that the tender of the third respondent would provide for local labour and resources was an objective criterion and was rightly taken into account by the Tender Board, is not sustainable. This consideration is provided for in the preference point system and was allocated due and proper weight in terms thereof. It was manifestly improper, therefore, to afford weight to this factor for a second time, and on the basis that it qualified as an additional criterion which justified that the contract be awarded to the third respondent.
29. The preference point system outlined in the Tender Rules (Annexure 'D') specifically stipulates that a 'maximum of 7 points may be awarded for the extent to which the Tendered Contract Participation Goal exceeds the specified minimum'; and, that a 'maximum of 3 points may be awarded for the extent to which the tendered Contract Local Resources Goal exceeds the specified minimum'.

30. It is evident from the Standing Committee's Report (Annexure 'O') that the third respondent's tender, and that of the applicant and the other tenderers, were evaluated properly by this Committee in regard to both these requirements. In each instance the points awarded to the particular tender had been obtained through application of the prescribed formula in accordance with the Tender Rules. On this basis the third respondent was awarded 1.4 points, out of a maximum of 7 points, in comparison to the 2.9 points awarded to the applicant, 'for the extent to which the tendered Contract Participation Goal' exceeded the minimum specified in the Tender Document. Similarly, in respect of 'the extent to which the tendered Contract Local Resource Goal' exceeded the specified minimum the third respondent was awarded 3.0 points, which was the maximum, in comparison to the 2.7 points awarded to the applicant.
31. Mr van Rooyen SC, who appeared for the first respondent, submitted that the objective criteria referred to in s 2(1)(f) of the PPPF Act did not have to be specified in the invitation to tender. He contended further that if every single factor had to be specified in advance it would unduly stifle the discretion of the Tender Board. I accept the premise of his argument. However, this cannot be construed to mean that factors which have been quantified for assessment in terms of the preference point system (as specified by the PPPF Act and the Tender Rules) could nevertheless again be considered as objective criteria in those instances where the benefits exceeded the maximum for which points could be allocated. This is particularly so since the Tender Rules had clearly

stipulated that 'no further tender adjudication points will be awarded if the maximum set by the employer in respect of Contract Participation and Local Resource Goals is exceeded'. (See para 25.3.3 of the Tender Rules).

32. The provisions of s 2(1)(f) of the PPPF Act are clear. The objective criteria referred to therein must be additional criteria, in other words these must be criteria over and above those which have already received consideration as specific goals in terms of ss 2 (1)(d) and (e) of the PPPF Act. Since the specific goals cited in s 2(1)(d) are the same goals as those in respect of which a maximum of 10 points could be awarded, any further benefits deriving therefrom could not be considered as being additional criteria. See *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and Others (supra)*.
33. In my view, therefore, the Tender Board misdirected itself in accepting that the additional benefits, which third respondent's tender promised in regard to local labour, resources and affirmative business enterprises, could be considered as an objective criterion. It follows that this was not a factor which justified the award of the tender to the third respondent.
34. I now turn to the further consideration which motivated the Tender Board's decision. In the letter dated 2 December 2002 (Annexure 'N'), which set out the Tender Board's reasons for its decision, the Procurement Manager stated that it was 'on the principle of fair distribution of work amongst the Provinces'

contractors' that the tender had been awarded to the third respondent. This is confirmed by Mr Irvin Jim (the chairman of the Tender Board), who states in his affidavit that this was the policy of the Tender Board. Mr Bengt Johansson, in the third respondent's answering affidavit claims that 'it is common practice in various state departments and the department of the fourth respondent to spread work evenly amongst contractors'. In his affidavit the Head of Department, Roads and Public Works (Mr Dumisani Mafu) states that the 'spreading of work within the province is firm Government policy'. In his letter dated 7 October 2002 (Annexure 'S'), however, he only stated that '[f]or a fair distribution of work amongst the contractors it is recommended that Basil Read (Pty) Ltd should be awarded this contract'. Then, in his further letter of the same date (Annexure 'T') he stated:

'It is our contention that the awarding of tenders is also a tool that serves specific governmental objectives that underpin the spirit of the RDP and the equitable distribution of work. The spreading of work amongst contractors, where possible, is thus a necessity especially where there are decided advantages that government can derive from such an approach e.g, a significantly higher expenditure on Local Labour and Local Resources.'

35. I did not understand Mr Beckerling or Mr Notshe to contend that the policy of a fair distribution of work had been formally adopted by the Tender Board, nor that it was understood by everyone to be the basis upon which tenders would be awarded. Although Mr van Rooyen, in his heads of argument, referred to government policy of spreading work between contractors, this reference was in the context that such a policy could be taken into account as an objective criterion since it fell outside the points system. I did not understand his

submission, however, to extend so far as to support the contention that the Tender Board had indeed adopted such a policy.

36. In my view, it is doubtful that such a policy existed or, if it did, that it was being implemented consistently. There is certainly no indication that the Standing Tender Committee was aware thereof or, if it were aware, that the policy had to be applied in the present instance. It is evident that this policy was not taken into account in their evaluation of the tenders, nor did it play a role in regard to their recommendation that the tender should be awarded to the applicant. As I have indicated it does not appear from either of the letters dated 7 October 2002 (Annexures 'S' and 'T'), which the Head of Department addressed to the Tender Board, that in view of this policy the applicant's tender could not be considered favourably. It is apparent though from Annexure 'T' that the Head of Department conveyed to the Tender Board that the tender should not be awarded to the applicant as the two companies, Rumdel Construction and Haw Iglis, that had constituted themselves as a 'joint venture', 'had been awarded contracts in excess of R100m at a time when they were still busy with other projects'. He conveyed further that '[i]t is our contention that the awarding of tenders is also a tool that serves specific governmental objectives that underpin the spirit of the RDP and the equitable distribution of work'.
37. The fact that tenders would be awarded on the basis of a policy that work would be fairly or equitably distributed amongst contractors, should have been

brought to the attention of prospective tenderers in the invitation to tender. Every tenderer was entitled to know, prior to tendering for the contract, that preference would be given to tenderers who had not been awarded a contract previously. From a practical and financial point of view the necessity for this to have been disclosed is obvious. Those contractors who had previously been successful would then have been able to decide whether or not the expense of preparing and submitting a tender was warranted.

38. A more important consideration that necessitated disclosure of this policy is the constitutional imperative in s 217 of the Constitution. This requires that an organ of a state contracts for goods or services 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. The failure to bring to the attention of potential tenderers the existence of the aforementioned policy, including the manner in which it would be implemented, offends against these requirements.
39. The argument that the policy of a fair distribution of work was an objective criterion can, in my view, not be sustained. Whether or not a particular tender had any prospect of succeeding could have been established prior to the merits of the respective tenders being evaluated. Certain tenders could already have been excluded at the outset without there being any need to evaluate them further. It was not a factor that would only have been revealed as a result of the evaluation process. It appears to me, moreover, that there is merit in Mr Kemp's contention that the manner in which such a policy was

implemented was arbitrary.

40. But, even if I accept that it was the policy of the Tender Board and the Department of Roads and Public Works that tenders should be awarded on the basis that contracts were spread fairly or equitably amongst contractors, it nevertheless cannot qualify as an objective criterion. The fact that it is a policy places it within the parameters of the preferential procurement policy determined by the particular department and it cannot then also qualify as an additional objective criterion in terms of s 2(1)(f) of the PPPF Act. On this aspect, too, I find that the Tender Board has misdirected itself.

41. Mr Notshe has correctly contended, in his heads of argument, that the decision of the Tender Board may only be set aside if it is shown that the Tender Board 'failed to apply [its] mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice'. See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152B where Corbett JA (as he was then) continued at 152C as follows:

'Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he failed to apply his mind to the matter in the manner aforestated'.

See also *Hira and Another v Booysen & Another* 1992 (4) SA 69 (A) at 93A-J.

42. Mr Kemp submitted that since the decision-making process was flawed the

Tender Board's decision had to be set aside. I agree. I am satisfied that the applicant has established that there are grounds which justify that the decision of the Tender Board be reviewed. On the basis of the admitted facts it is apparent that the members of the Tender Board took into account irrelevant considerations and ignored relevant ones. As stated in the *Johannesburg Stock Exchange* case (*supra*) they 'failed to apply [their] minds to the relevant issues in accordance with the behests of the statute and the tenets of natural justice'. In the circumstances the decision to award the tender to the third respondent cannot stand and falls to be set aside.

Should the matter be referred back to the Tender Board for reconsideration?

43. Mr Kemp urged upon us not to refer this matter back to the Tender Board for its reconsideration. He recognised that courts were in general reluctant to substitute their decisions for those of administrative tribunals. This was particularly so when the taking of a decision involved considerations of which the court was not aware. However, where it was expedient and would result in time and money being saved or it would prevent another improper decision being taken, the court could make the necessary decision itself.
44. Mr Beckerling was opposed to this Court substituting its decision for that of the Tender Board. He submitted that this was particularly so since the parties were not *ad idem* that the points awarded to the respective tenders by the Standing Tender Committee were correct. It was accordingly necessary for the points to be recalculated. Once this had been done the award of the

tender would be made in terms of the recalculated points together with such other objective criteria as the Tender Board might take into account.

45. I do not find Mr Beckerling's argument persuasive. It is so that both applicant and the third respondent have indicated that are unhappy with the points awarded to their tenders in respect of 'the Tendered Contract Participation Goal (Ng) and 'the Contract Local Resource Goal (Nr)'. But, neither the applicant nor the third respondent have sought an order correcting and/or setting aside the calculation of those points. In any event, a proper case has not been made out which enables the inference to be drawn, without more, that the calculations are incorrect. Although fresh calculations, which purport to demonstrate that the calculations of the Standing Tender Committee were incorrect, were handed in by Mr Beckerling from the Bar during the course of argument I am not persuaded that these should be accepted in preference to those of the Committee. A fresh set of calculations, without any additional evidence to properly substantiate same, does not warrant the conclusion that the Committee's calculations are flawed and that a recalculation is necessary before a decision may be made in regard to the award of the tender.
46. It is clear that the only reason for the Tender Board deviating from the recommendation of the Standing Committee was that it concluded that the two 'objective criteria' justified the award to the third respondent instead of the applicant. If these 'criteria' had not been relied on the tender would have been awarded to the applicant.

47. It is common cause that the award of a tender by the Tender Board is an administrative act. Section 8 of the Promotion of Administrative Justice Act 3 of 2000 ('the PAJ Act') provides, *inter alia*:

- '(1) The court or tribunal, in proceedings for judicial review in terms of section (6) (1), may grant any order that is just and equitable, including orders -
- (a)
 - (i)
 - (ii)
 - (b)
 - (c) setting aside the administrative action and -
 - (i)
 - (ii) in exceptional cases -
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;'

48. The approach which courts have adopted in terms of the common law are consistent with the provisions of s 8(1) of the PAJ Act. See *Inkosinathi Property Developers (Pty) Ltd and Another v Minister of Local Government and Land Tenure* 1991 (4) SA 637 (Tk GD); *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others (supra)*; *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and others (supra)*; *Douglas Hoërskool en 'n Ander v Premier, Noord-Kaap en Andere* 1999 (4) SA 1131 (NCD); and *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1986 (2) 663 (A).

49. In my view, on the basis of the information that was before it, and had the Tender Board applied the provisions of the PPPF Act in a proper manner, it was obliged to award the tender to the applicant. I can see no purpose,

therefore, in referring this matter back to the Tender Board for reconsideration. The need for finalisation of the award as expeditiously as possible, and bearing in mind the escalation in costs that could result from a further delay, I consider it fair to those concerned and appropriate that this Court make the decision to award the tender to the applicant.

Costs

50. In regard to costs, I see no reason why the applicant should not be entitled to its costs and that same should be borne by the respondents jointly and severally. The reason for the first respondent's opposition to the application, so Mr van Rooyen submitted, was that it had an interest on the basis of the policy that applied to the award of tenders. That may be so, but I fail to see why that necessitated that the application be opposed. The first respondent cannot escape liability for the applicant's costs. The third respondent elected to oppose the application. It has failed in its opposition and it is, accordingly, liable for the applicant's costs. The fourth respondent has mounted a vigorous opposition. In my view there was no justifiable reason for doing so since the rights of the fourth respondent were not directly affected by the application. The fourth respondent could have elected to abide the decision of the Court. In the circumstances the fourth respondent is similarly liable for the applicant's costs.

Order

51. In the result the order that I make is the following:

- (a) The decision of the Provincial Tender Board to award Contract No. PTB5-02/03-1691 (Eastern Cape Department of Roads) to the third respondent is hereby set aside.
- (b) The said Contract No. PTB5-02/03-1691 (Eastern Cape Department of Roads) is hereby awarded to the applicant, namely, RHI Joint Venture.
- (c) The first, third and fourth respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.


JUDGE Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO

18 MARCH 2003

I concur


JUDGE C S WHITE
ACTING JUDGE PRESIDENT OF THE HIGH COURT, BISHO

18 MARCH 2003

Heard on : 20 February 2003
Judgment delivered on : 18 March 2003
Counsel for the applicant : Adv K J Kemp SC
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