



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: 1241/2022

In the matter between:

SITHATHU FUNDING (PTY)LTD

Applicant

and

THE ROAD ACCIDENT FUND

1st Respondent

SKG AFRIKA (PTY) LTD

2nd Respondent

GRAND SELECT 150 (PTY) LTD

3rd Respondent

FIDMRT(PT) LTD

4th Respondent

JUDGMENT

ZONO AJ:

Introduction

- [1] The applicant instituted these proceedings for a relief more fully set out in the notice of motion. The relief sought in the notice of motion is couched in the following terms:

- “1.1 That the first respondent’s decision to disqualify the applicant for the tender for rented office space for the East London Regional Office for a period of 5 (five) years, under tender number RAF/2021/00003(the tender) and to award the tender to the second respondent be reviewed and set aside.*
- 1.2 That any agreement entered into between the first and second respondent as a consequence of the award of the tender and relating to or associated with the award of the tender be reviewed and set aside.*
- 1.3 That the first respondent’s decision to award the tender to the second respondent be substituted in terms of section 8 (c)(ii) (aa) of the Promotion of Administration Justice Act 3 of 2000, with an order that the tender be awarded to the applicant.*
- 1.4 Alternative to paragraph 3 above, that the matter be referred back to the first respondent for the adjudication of the tender de novo.*
- 1.5. That the first respondent shall pay the costs of the review jointly and severally together with any other party which opposes the relief.*
- 1.6. Further and/or alternative relief.” (sic)*

[2] The application is opposed by the first and second respondents. Both respondents delivered their answering affidavits to which the applicant respectively replied. The matter came before court as a fully opposed matter.

[3] In support of its application the applicant contends that pursuant to an invitation to submit bids for the tender, the applicant, the second, third and fourth respondents submitted bids for the tender. The tender was for rented

office space for first respondent's East London Regional Office for a period of five (5) years and it was issued under tender number RAF/2021/00003. The tender was awarded to the second respondent.

[4] According to the applicant the evaluation process of bids would consist of five (5) phases, namely:

4.1 Phase 1: initial screening and bidders who comply with the screening process will be evaluated on the mandatory requirements.

4.2 Phase 2: mandatory evaluation where bidders who met the mandatory requirements will be further evaluated for technical functional criteria.

4.3 Phase 3: technical/ functional evaluation where bidders who score 60 or more points out of 100 points will be subjected to site visits.

4.4 Phase 4: site visits where bidders who comply with all requirements of the site visit will be further evaluated on price and B-BBEE.

4.5 Phase 5: price and B-BBEE evaluation of bids qualified as per the preferential point system specified in the tender.

[5] The mandatory requirements referred to in the evaluation phase were prescribed by and in the bid document. Twelve mandatory requirements prescribed by the bid document are the following:

5.1 A proposed lease agreement of five (5) years and full set of clear black and white floor plans must be submitted,

- 5.2 The bidder must confirm that the building will be available and ready for occupation within three (3) months of the bid award;
- 5.3 The bidder must confirm that the building offered is as per the South African Property Owners Association (SAPOA) - Grade A or B.
- 5.4 The bidder must indicate whether it is the owner/ landlord or an agent/broker and where the bidder is an agent or broker the bidder must provide proof of the mandate if acting on behalf of the owner or landlord;
- 5.5 Where a bidder is an agent or broker the bidder must confirm that they are registered with the Estate Agencies Affairs Board and in possession of a valid fidelity fund certificate and provide a certified copy of the EAAB registration and a certified copy of a valid Fidelity Fund certificate.
- 5.6 The building should have access for people with special needs/ disability or make provisions for such (e.g. Wheelchair ramp);
- 5.7 The bidder must confirm that the exterior and shop fronts signage and branding will be allowable;
- 5.8 The bidder must confirm the provision of a backup power supply (generator) which must have adequate capacity to service all sections of RAF rented space simultaneously during power outages.
- 5.9 The bidder must confirm that the building will make provision for goods and passengers lifts (approximately 4 metres squared) for easy access, where applicable. In case of a single storey building the bidder will automatically comply with this item;

- 5.10 The bidder must confirm that the building will have ablution facilities, including facilities for the physically disabled on every level or make provision for such;
- 5.11 Proximity to public transport should be within public transport routes; and
- 5.12 A minimum of 60 secure onsite parking, of which six will cater for physically disabled people, must be available in accordance with municipal by-laws. Another 240 parking spaces must be located within a 1 km radius of the building on offer if not in the building premises and confirmation of that must be included in the proposal.

[6] It is of utmost importance that failure to comply with all the mandatory requirements shall lead to disqualification. It was expected that a bidder should comply with all the mandatory requirements to proceed to the next phase.

[7] The third phase, namely technical requirements were divided into three to wit, general building requirements, building services and site accessibility.

7.1 With regard to general building requirement there had to be a maximum of 60 secure onsite parking with 6 (six) to cater for disabled people; 240 parking spaces allocated within a 1km radius. The RAF should be given right of first refusal to any additional parking that becomes available to the landlord in the course of the five years and the accommodation must be made as a "*white shell*" or provisions be made.

7.2 Regarding the building services, the office accommodation must be fully air conditioned and ventilated; The spaces on offer must have its own electric distribution board. The accommodation must be OHS compliant and must have the following: fire

detection and prevention, fire escape route, assembly points, and signage and a double tier cable tray in ceiling voids or make allowance for these.

7.3 With regard to site accessibility, accommodation must be on consecutive floors from ground floor, the bidder will get full points. The building should allow for separate entrance / exit to and from the building by staff, clients and service providers. The building must make provision for access control and allow RAF to implement their own access control as per the RAF standards.

[8] The site visit would not be scored. However, the outcome of the assessment can influence the successful awarding of the bid. The site visit would be evaluated on site accessibility, building general requirements and building services.

[9] The scoring matrix on site accessibility was as follows:

9.1 Accommodation on consecutive floors from ground floor up, eg ground floor and floor 1-5 15 points.

9.2 Ground floor and accommodation from any consecutive floors and levels e.g. Ground floor and floor 27-3 9 points.

9.3 No consecutive floors 0 points.

[10] It is noteworthy that bidders evaluated on the technical criteria must score a minimum threshold of 60 out of 100 points to be considered for site visit to confirm the infrastructure and be further evaluated for price B-BBEE.

[11] Phase 5 entails price and B-BBEE evaluation of bids qualified as per preferential point system in the RFB document. The points for pricing and B-

BBEE were in terms of section 1 of Preferential Procurement Policy Framework Act 5 of 2000.

- [12] Applicant posits a case that it submitted two bids for two separate properties; one at Drury Lane, East London and the other at Reese Street, East London both in the total sum of **R31 688 872.00**. The applicant contends that it submitted compliant bids by the closing date on 31st March 2021. The second respondents bid was in the sum of **R38 288 883.83**; the third respondent in the sum of **R 42 759 116.08** and the fourth respondent in the sum of **R 107 632 953.00**.
- [13] The applicant prides itself for submitting the lowest bid. It was lower than the second respondent's bid by the sum of **R 6 600 011.83**.
- [14] The applicant was advised in terms of an email received from the first respondent that it had been shortlisted to be evaluated on-site inspections as per the advertised bid document. The applicant was simultaneously advised that the first respondent's five officials would be visiting applicant's premises based at 21 Drury Lane East London; and the site visit would take place on 04th May 2021. Applicant's availability on 04th May 2021 was confirmed. Indeed, site visit occurred and no material queries or questions were made by first respondent at the site visit or thereafter.
- [15] The applicant strongly submits that its bid was compliant in every respect as the site visit occurred at the property. The first respondent evaluated the applicant's bid and found it to be compliant during phase 1 (initial screening process) phase 2 (mandatory requirement evaluation) phase 3 technical /functional evaluation).
- [16] Notwithstanding the above, on 01st March 2022 the applicant received a correspondence from the first respondent advising that the applicant has not been successful in its bid. The correspondence was couched in the following terms: *"it is with regret to inform you that your company has not been successful in this bid."* (sic)

- [17] The applicant contends that its bid was the cheapest and would accordingly have scored 80 points for price. For this contention the applicant relies on the provisions of Section 217 of the constitution which provide thus:

“When an organ 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 system which is fair, equitable, transparent, competitive and cost-effective.”

- [18] The applicant further relies on section 2(1)(f) of Preferential Procurement Policy Framework Act of 2000 (PPPFA) which provides thus:

“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.”

- [19] The applicant further contends that it is a level 1 B-BBEE contributor and would accordingly have scored 20 points for B-BBEE. Had the preferential point system prescribed in the PPPFA and its Regulations been applied, the applicant would have scored 100 points and obviously have qualified to be awarded the tender.

- [20] The applicant makes emphasis on the aspect of two lifts. The applicant states that the property offered has two lifts. The dimensions of the first lift are 1,139m x 1.529 m which calculate to 1.74 m². The dimensions of the second lift are 2m x 1,175m which calculate to 2,35m². Applicant's proposal contained this information. The applicant insisted that it complied with mandatory requirements. However, applicant's bid scored 92 out of 100 for the technical / functional evaluation, including parking and separate entrance/ exit to and from the building).

- [21] The applicant records the first respondent's summary of the site visit or inspection as follows:

“The lift is smaller than the required size. The building does not allow for separate entrance/ exit to and from the building by staff, clients and service providers as all these separate entrances lead to the same reception. The proposed off-site parking is two blocks away. The parkings are 100 in number and the rest of the parking bays are within 1 km radius and 1.3km away from the office. It will be impossible for employees to park their cars and walk for 1.3 km to get to the office. Spanning the entire distance to the off-site parking there are two taxi ranks, one local and one long distance -that start right in front of the main entrance of the building. This increases the chance of staff being mugged or robbed, especially after hours. The parking is not accessible because of the taxis that area stationed on the entrance full time.”

- [22] The applicant responds to the site inspection summary that it cannot be correct that the lift is smaller than the required size as the checklist required that it be reasonably sized. The applicant contends that the size of the lift offered (put together) is approximately the size stated in the checklist. The applicant also makes a point that the first respondent was clearly satisfied with the size of the lifts during the assessment of the mandatory requirements. The applicant questions the change from first respondent's position during the site visit.
- [23] The BEC comment that the building does not allow for separate entrance/ exit is wrong. In support of that the applicant contends that all four BEC members stated on their respective checklists that the applicant's bid complied with the requirement of a separate entrance/exit from the building. It is correct that the separate entrance leads to the entrance foyer, however the requirement was that separate entrances should be provided and not that they cannot run through a shared area. This aspect was a requirement in the functional evaluation/ assessment.

- [24] The applicant further contends that the checklist relating to parking required parking spaces within 1 km radius from the building on offer. The applicant offered in its bid the parking bays within a 1 km radius from the building on offer and that was accepted by the first respondent. The applicant criticises first respondent's focus to the issue relating to the taxi ranks and alleged risk to staff as that is not a requirement of a tender and it is outside the scope of paragraph 6.11 of mandatory requirement dealing with proximity to public transport which must be within public transport routes.
- [25] The applicant concludes by stating that the first respondent's decision relating to the tender falls to be reviewed in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The applicant takes stock on the provisions of section 6(2) (iii) and /or 6(2) (c) of PAJA in that the decision-maker disqualified the applicant's bid despite it complying with mandatory requirements and functionality. These two provisions provide for the review of Administrative decision if the decision-maker was bias or reasonably suspected of bias; and if the administrative action / decision was procedurally unfair.
- [26] The applicant contends that first respondent's decision was taken for ulterior purpose or motive¹; because irrelevant considerations were taken into account or relevant considerations were not considered²; because of unauthorised or unwarranted dictates of another person or body³; and that the decision was taken in bad faith.⁴ It is so, so the submission goes, because the site visit was to simply confirm the infrastructure of the applicant's bid, which infrastructure accorded with the applicant's bid and passed mandatory requirements of the tender.
- [27] The applicant further relies on the provisions of section 6(2)(f)(i) of PAJA which provide that an administrative action is reviewable if it contravenes the

¹ Section 6(2)(e)(i) of PAJA.

² Section 6(2)(e) (iii) of PAJA.

³ Section 6(2) (e)(iv) of PAJA.

⁴ Section 6(2)(e) (v) of PAJA.

law or is not authorised by the empowering provision. The applicant further relies on the provisions of section 6(2)(ii) (aa), (ii)(bb), (ii)(cc) and (ii)(dd) of PAJA. The applicant contends that the first respondent's decision is unreasonable in that no reasonable person could have taken it⁵ and that the decision is unconstitutional and or unlawful⁶.

- [28] The applicant seeks a substitution order on the basis that the documents that are currently available to the applicant evidences that no purpose would be served in referring the matter back to the first respondent.
- [29] The first respondent opposed this application by filing its answering affidavit. First respondent's answering affidavit is deposed to by its Acting Chief Executive Officer. No confirmatory affidavits accompanying first respondent's papers were filed.
- [30] The first respondent is adamant that the applicant is not entitled to the relief it seeks. Firstly, the first respondent contends that the applicant did not comply with a mandatory lift requirement. The requirement was that the goods and passengers lifts (approximately 4m²) must be made available or provided by the bidder. Applicant's two lifts are respectively 1.54m² and 2.36m² in size. At site visit (phase 4) the sizes of the lifts were verified and the applicant could not proceed to the last phase, which is phase 5 entailing price and B-BBEE scoring.
- [31] The first respondent goes further to set out the purpose of the size of the requirement for the goods lift in its answering affidavit as follows:

"22. It is vital to mention that the size requirement for the goods lift was not imposed merely to embellish the tender document. The day-to-day operation of the RAF demands the handling, sorting, filing and archiving of enormous volumes of documents, boxes,

⁵ Section 6(2)(h) of PAJA.

⁶ Section 6(2)(i) of PAJA.

files and the like. The required lift size was imposed to easily move trolleys that re loaded with files, boxes and other goods. If the relevant lift is small, efficiency is compromised. On other words, it takes more time to accomplish the task of moving things". (sic)

The size requirement is a product of the experiences that the RAF had had from occupying other buildings, so the contention goes. The RAF tries to improve its requirements based on previous procurements. It is on this basis that applicant's bid failed and as such it could not be scored on price and B-BEE (phase 5).

- [32] The first respondent further contends that the findings made on compliance with the mandatory requirements before the site visit stage were provisional and not final. The information would be verified at the site visits stage (phase 4).
- [33] The abovementioned version represents the summary of first respondent's case. The second respondent has opposed this application too. The second respondent is the party in favour of whom the tender was awarded. In its opposition of the matter, the second respondent raises various issues to assail applicant's case.
- [34] The second respondent contends that the applicant intentionally delayed the institution or prosecution of the present review application. According to the second respondent the delay is for ten (10) months, and therefore undue and unreasonable. It contends that the delay is prejudicial to the second respondent.
- [35] An order interdicting implementation of the award was granted on urgent basis on 12th May 2022. The present application was heard on 21st April 2022, whereas the two-part record was delivered to the applicant on 21st June 2022 and 28th July 2022 respectively. The first respondent confirmed on 22nd August 2022 that it had submitted all the documents and it had nothing to add

to the record. Despite this, the applicant launched an application to compel. This application was heard on 15th June 2023. The second respondent contends that all of these were done to delay the hearing of the review application. According to the second respondent the delay would benefit the applicant as it would make profit out (rental) of the lease agreement it has with the first respondent.

- [36] The second respondent contends that the applicant orchestrated all the delays knowing fully well that a review application can take months if not years to finalize and that is not even considering possible appeals. By persisting with the application to compel knowing that there was nothing to gain the applicant extended the time with which the RAF is forced to stay in its tendered property even more.
- [37] With regard to the merits of the case, the second respondent denies that applicant's bid was compliant as it failed to comply with certain mandatory requirements. Although the applicant was responsive regarding phase 1, phase 2 and phase 3, it did not comply with the requirements of phase 4, being the site inspection. There is a difference between being responsive on paper i.e. what is said in a bid and being compliant. The second respondent supports first respondent's version that applicant's non-compliance with phase 4 of the evaluation was fatal to its bid. Second respondent contends that there are three mandatory requirements applicant failed to comply with.
- [38] With regard to entrance requirement the second respondent contends that comments of the BEC members demonstrate that applicant's bid did not comply, notwithstanding that the BEC members ticked the yes box on the checklist. The cited comments are the following:

“All entrances leading to the same [foyer] where the lifts are. Large goods [furniture etc.] delivered at front door- public & [street] entrance. All separate entrances lead to one central point which is to [reception] single entrance to the building.

All 3 separate entrances lead/ converge to 1 foyer[at] reception area that serve [as] the only entrance at the building.”

- [39] The same logic and procedure occurred when dealing with parking requirement. BEC members ticked the yes box next to the parking requirements. However, their comments demonstrated that the applicant did not comply with the parking requirements. It would be irrational to ignore the comments made by the BEC members.
- [40] Second respondent contends that the applicant offered 240 parking bays to be located within one km from the proposed building. At least 120 of the required 240 off-site parking bays are situated on the premises known as Deals House which is owned by East London Property One (ELPO). Second respondent's holding company, Ship Knot Investment 777 (Pty) Ltd is the 100% shareholder of ELPO since July 2021. Based on the aforesaid, the second respondent confirms that the parking bays situated at Deals House and which forms a substantial part of applicant's offer are not available for use by RAF as offered by applicant.
- [41] Quite apart from the Deals House parking bays offered by applicant, it appears that the applicant offered parking bays situated on Buffalo City Local Municipality Property. There is no evidence that the applicant obtained consent from the Municipality for use thereof. Lease agreement seem to exist between the applicant and the Municipality.
- [42] Regarding the lift requirements, members of BEC ticked the no box in this respect and added their comments that are unfavourable to the applicant's bid. The first respondent conducted the evaluation process regularly. It was the responsibility of the first respondent to determine what entails the reasonable size of the lift. If the bid does not meet the requirements, then the bid does not comply.
- [43] The second respondent makes a point that applicant's bid was correctly excluded from evaluation before the final scoring because it did not comply

with mandatory requirements. Bidders were required to pass phases one to four before they could be evaluated on price and B-BBEE. The legal position does not provide that the cheapest bid must be accepted notwithstanding its non-compliance with the tender requirements. Given that the applicant failed to comply with a requirement of a site visit the applicant could not advance to the final phase of the evaluation process, phase 5. The applicant was disqualified and could not be awarded the tender. The second respondent contends that the deviations by the applicant are material.

[44] There are other mandatory requirements that were not complied with by the applicant. Tender invitation required that a bidder must indicate whether it is the owner/ landlord or an agent / broker, and where the bidder is an agent or broker, the bidder must provide proof of mandate if acting on behalf of the owner/landlord. The applicant indicated that it is a landlord but in the same vain the applicant's bid demonstrated that applicant is not the owner. As a corollary the applicant could not be a landlord if it is not the owner of the property. At best the applicant was an agent acting on behalf of the owner/ landlord, so the contention goes. There was accordingly no mandate from the owner of the relevant property authorising the applicant to represent it in the tender process.

[45] The same property was offered by a company called Milestone Properties in another tender (Tender No: SCM U5-21/22-0086). The second respondent participated in this tender. The tender related to the office accommodation for the Department of Sport Recreation, Arts & Culture in East London. In addition to the issue of mandate and authorisation the second respondent takes an issue relating to the availability of the space to house both the RAF and the Department of Sport, Recreation, Arts and Culture in East London.

Analysis and Discussion

[46] This matter relates to the procurements processes and procedures. In this regard Section 217 of the Constitution provides thus:

“1. When an organ of state in the National Provincial or local sphere of government 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.”

[47] With a view to achieving this constitutional purpose, the first respondent advertised an invitation to bid for the tender. The applicant and the second respondent were part of the bidders who responded to the invitation and ultimately participated in the bid process. Twelve mandatory requirements were prescribed in the bid invitation. In what follows I set out twelve mandatory requirements implicated herein. They are contained in Clause 6.9 and 6.12 the bid document respectively.

[48] Clause 6.9 of the bid document is worded as follows:

“Mandatory

6.9 The bidder confirms that the building will make provision for goods and passengers lifts (approximately 4m²) for easy access, where applicable. In case of a single story building, the bidder will automatically comply on this item.” Elsewhere in the same tender document it is provided that *“The goods lift where possible to be reasonable sized (approximately 4m²)”*.

[49] Anent to this mandatory requirement applicant’s proposal is worded thus:

“6.1.9 Goods and Passenger lifts

The bidder confirms that the building will make provision for a goods and passengers lifts for easy access, where applicable.

The bidder confirms that the building is multi-story and that in light of the aforementioned, the bidder’s compliance with this requirement is evident from the above.

There are no specifically designated goods lift, as two passenger lifts, at a centralized position, in the building are capable of being used

interchangeably for both passengers and goods. The dimensions of the lifts are as follows:

“Lift 1: 1.139 x 1.529 by 2.4m high

Lift 2: 1.175 by 2.35m high

With a weight bearing capacity of 630 kg and 1050 kg respectively. The bidder attached hereto invoices, attached as ANNEXURE “23” to substantiate the current lifts in the building. The ongoing maintenance of same and the condition of said lifts.” (sic)

- [50] The point of departure should be interpretation of Clause 6.9 of the first respondent’s mandatory requirements attached to the bid or tender invitation. Wallis JA in the *Endumeni Municipality*⁷ made the following observation:

“18. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) Para 18.

interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[51] Below Clause 6 of the bid or tender document the following words are apparent:

“Note: Failure to comply with all the mandatory requirements shall lead to disqualification”

Clause 2.4 thereof provides:

“Bidders who do not comply with the mandatory requirements will not be considered.”

Ordinary grammatical meaning of the words used must be adhered to and can only be departed from if that leads to an absurd result.⁸ It is not far to seek that Clause 6 contains peremptory provisions. It is plain from the plain meaning of the Caveat in Clause 6 that the requirements are peremptory. Infact the words “*mandatory requirements*” denote that the requirements are mandatory or peremptory. It is therefore impliedly provided that all the mandatory requirements must be complied with. It is expressly provided that failure to comply with all the mandatory requirements shall lead to disqualification. It flows from this that all mandatory requirements are material.

[52] The Constitutional Court in *All Pay Consolidated Investment Holdings*⁹

⁸ **Cool Ideas 1186 CC v Hubbard and another** 2014 (4) SA 474 (CC), 2014 (8) BCLR 869 (CC) Para 28

⁹ **All Pay Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Security Agency and others** 2014 (1) SA 604 (CC) Para 30

“30. Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose”. This is not the same as asking whether compliance with the provisions will lead to a different result.” (my emphasis)

[53] As a general rule non-compliance with a peremptory results in a nullity¹⁰. A requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequence and any purposed compliance falling short of that is a nullity¹¹. There is no ambiguity that a failure to comply with the prescribed requirements could result in a tender being disqualified. A tender that fails to comply with the mandatory requirements equally fails to comply with the definition of “*an acceptable tender.*” A tender is not an acceptable tender if it fails to comply with all mandatory requirements of a tender.

[54] Preferential Procurement Policy Framework Act No 5 of 2000 (PPPFA) was enacted to give effect to the provisions of Section 217 (3) of the Constitution. PPPFA defines “*acceptable tender*” to mean “*any tender which, in all respects,*

¹⁰ LAWSA Vol 25 Page 399, Para 366

¹¹ ***Shalala v Klerksdorp Town Council and another*** 1969 (1) SA 582 (T) at 587 A-C

complies with the specifications and conditions of tender as set out in the tender document". The converse of this is that, a tender that does not comply with specifications and conditions of the tender as set out in the tender document is an unacceptable tender.

- [55] A precondition for an acceptable tender is compliance with specifications and conditions of a tender as set out in the tender document. Preconditions or conditions precedent are referred to as jurisdictional facts. Under common law, necessary preconditions that must exist before an administrative power can be exercised, are referred to as jurisdictional facts. In the absence of such preconditions or jurisdictional facts, the administrative authority effectively has no power to act at all¹². These facts are jurisdictional because the exercise of power depends on their existence or observance as the case may be.¹³ Compliance with mandatory requirements is a condition without which a tender cannot be awarded. Satisfaction of all Mandatory requirements is a jurisdictional requirement for the award of a tender to a particular compliant tenderer.
- [56] Preferential Procurement Regulations (Procurement Regulations) define a tender as a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals¹⁴. Applicant's tender complied with the definition of a tender. However, it is doubtful that applicant's tender was an acceptable tender.
- [57] The mandatory requirements of an invitation to tender relating to lifts required that *"the bidder confirms that the building will make provision for goods and passenger lifts"*. The approximate size of the lifts is 4m². The purpose of the lift is for easy access.

¹² ***Kimberly Junior School and another v Head of the Northern Cape Education Department and others*** 2010 (1) SA 217 (SCA); 2009(4) ALL SA 135 (SCA) Para 11.

¹³ Cora Hoexter: Administrative Law in South Africa, 2nd Edition, Page 290.

¹⁴ ***All Pay Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Security Agency and others*** 2014 (1) SA 604 (CC); 2014 (1) BCLR (1)(CC) Para 34; Regulation 1 of Preferential Procurement Regulation.

- [58] The use of the plural “*lifts*” imply that there must be separate lifts for passengers and goods. Each of the lifts must be approximately 4m². It appears that the applicant offered “*two passenger lifts*” which are capable of being used interchangeably for both passengers and goods. The following words are demonstrably clear in the applicant’s tender:

“There is no specifically designated goods lift, as two passenger lifts, at a centralized position, in the building are capable of being used interchangeably for both passengers and goods”.

- [59] Reference to the size of approximately 4m² is contemplated to be the size of each lift. It is important to note that the requirement is further qualified in the tender invitation or document as follows:

“The goods lift where possible to be reasonably sized (approximately 4m²)”.

It is plain that a reasonably sized lift that must be approximately 4m² was intended only for goods lift. It goes without saying that a separate equal size was required for a passenger’s lift.

- [60] The applicant unequivocally offered the following dimensions of the lifts:

*“Lift 1 : 1.39 x 1.529 by 2.4m high
Lift 2 : 2 x 1.175 by 2.35m high”.*

These dimensions are diametrically smaller than the size contemplated in the mandatory requirement relating to the lifts requirement. These are plainly not compliant. The lift dimensions’ simply do not meet the mandatory requirements of the invitation.

- [61] Sight must not be lost of the fact that the lifts were intended for staff, client and service providers of the first respondent. It is not unimaginable that an

institution or organ of state of first respondent's magnitude has a huge staff compliment. In the light of the fact the first respondent, though it is a regional office, but it serves the whole Eastern Cape Province, its client base is reasonably huge. Its magnitude should quintessentially equal its needs for services of its service providers, who from time to time would need conveyance by reasonably sized lifts.

[62] It is reasonably and possibly correct that the first respondent used its previous experiences and procurements when formulating its mandatory requirements. It surely knew what it wants and what it does not want. It is a common cause that the first respondent is presently occupying applicant's premises.

[63] In *All Pay Consolidated Investment Holdings(Pty) Ltd*¹⁵

“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. Because of the uncertainty caused by the wording of the Request for Proposals and Bidders Notice 2, that purpose was not achieved in this case.” (my emphasis).

The best solution sought to be elicited inherently includes considerations of previous experiences and procurements.

[64] In *Norland Construction*¹⁶ Govindjee J held that:

“13. Importantly, it is for the department, as employer or institution inviting the tender, to decide the prerequisites for a valid tender. A failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender

¹⁵ *All Pay Consolidated Investment Holdings (Pty) Ltd and others v CEO SASSA* 2014 (1) SA 604 (CC) Para 92.

¹⁶ *Norland Construction (Pty) Ltd v Chris Development Agency (SOC) Limited and Another* (18/2022) [2024] ZAECKMC 10 (23 January 2024) Para 13.

under the PPPFA, unless those conditions were immaterial, unreasonable or unconstitutional. Put differently, a tender should not easily be invalidated on the basis that it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. Whether or not a deviation or qualification is material is a question to be determined by the BEC in its discretion, taking into account the set eligibility criteria". (emphasis added)

[65] Consistently with the observation foreshadowed in *Norland Construction* above, the tender invitation¹⁷ provides thus:

"2.4 Bidders who do not comply with the mandatory requirements will not be considered."

I, therefore, find that applicant's tender or bid failed to comply with the mandatory requirements of the tender and the first respondent was justified in disqualifying applicant's tender as unacceptable tender. Mandatory requirements are a determining factor and have an intrinsic value to the tender process. Once there is a non-compliance therewith, the court should look no further, but to find no fault in the tender process and ultimately dismiss the application with costs. Accordingly, this application must fail only on this ground with costs. It is therefore unnecessary to deal with other grounds as I find this ground dispositive of the matter.

[66] Having found that the application cannot succeed, the remaining issue is that of costs. The general rule is that costs should follow the result. I see no reason for deviation from the general rule. Accordingly, costs should follow the result. The applicant is liable to pay first and second respondent's costs.

¹⁷ Clause 2.4 of tender invitation.

[67] A further remaining issue is the one of the scale of costs. Complexity of the matter, the amount involved or the monetary value of the tender and the voluminousness of the court documents and accompanying documents are relevant factors necessary to be taken into account for determination of the applicable and relevant scale.

[68] This matter satisfies all the factors mentioned above. The matter is clearly complex and the competing tenders range between **R31 688 872.00** to **R 38 288 833.83**. Third and Fourth respondents respectively submitted tenders in the respective sums of **R42 759 116.08** and **R 107 632 953.00**. This is clearly a serious matter, which contained no less than five (5) lever arch files. The seriousness of the matter is evidenced by the employment of Senior Counsel and Senior Juniors. Certainly Scale C is warranted in the circumstances.

[69] In the result I would make the following order:

69.1 **The application is dismissed.**

69.2 **The applicant is ordered to pay costs of this application on scale C such costs to include costs of two Counsel where employed.**

A.S ZONO
ACTING JUDGE OF THE HIGH COURT

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Matter heard on :

10 October 2024

Judgment delivered on :

15 April 2025