REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2018/26072

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

19 June 2020 .....

DATE MOKOSE SNI

In the matter between:

SERITI INSTITUTE NPC — Applicant

and

THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS — 1st Respondent

DIRECTOR-GENERAL: DEPARTMENT OF CO-OPERATIVE GOVERNANCE — 2nd Respondent

ACTING DEPUTY DIRECTOR-GENERAL: COMMUNITY WORK PROGRAMME, DEPARTMENT OF CO-OPERATIVE GOVERNANCE — 3rd Respondent

INSIKA FOUNDATION — 4th Respondent

THEMBALETHU DEVELOPMENT	5th Respondent
SEBOKA TRAINING AND SUPPORT NETWORK NPC	6th Respondent
BEULAH AFRICA DEVELOPMENT NPC	7th Respondent
NPO IKETSETSE ENTERPRISE NETWORK	8th Respondent
JOUBERT PARK YOUTH OUTREACH PROJECT	9th Respondent
BEULAH AFRICA DEVELOPMENT & FUTURE FAMILIES JOINT VENTURE	10th Respondent
OUT THE BOX FOUNDATION	11th Respondent
ICEMBE FOUNDATION	12th Respondent
SOUTH AFRICAN YOUTH MOVEMENT	13th Respondent
3L DEVELOPMENT	14th Respondent
AIDS FOUNDATION OF SOUTH AFRICA NPC	15th Respondent

JUDGMENT

MOKOSE J

Introduction

[1] This is an application for judicial review in terms of Section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA) and for a declaratory order in terms of Section 172(1)(a) and Section 172(1)(b)(ii) of the Constitution. The first, second, third respondents, being the State Respondents, opposed the application. The fourth, fifth, sixth, seventh and

tenth respondents, being NPO's also opposed the application. The twelfth respondent initially opposed the application but withdrew his opposition thereto. The eighth, ninth, eleventh, thirteenth, fourteenth and fifteenth respondents did not oppose the application.

[2] The applicant seeks the following relief:

(i) it to be declared that the procurement process conducted by the first, second and third respondents pursuant to the Request for Proposals ("RFP") published by the second and third respondent during January 2018 under reference CWP: RFP-2018-2021 ("the CWP process") is constitutionally invalid and unlawful and is reviewed and set aside;

(ii) it is declared that the appointments of the fourth to fifteenth respondents as implementing agents and the conclusion of service level agreements between the second respondent and fourth to fifteenth respondents pursuant to the CWP process, are constitutionally invalid and unlawful and they are reviewed and set aside;

(iii) the disqualification of the applicant's proposal for appointment as an implementing agent in terms of the CWP process is declared to be unlawful and is reviewed and set aside;

(iv) the issue of the CWP process is remitted to the first and second respondents for a full and new CWP process commencing with an RFP to be started and completed;

(v) the order as per paragraph 2 of the amended notice of motion be suspended until appointments of implementing agents has been made pursuant to a new CWP process as contemplated above or the lapse of a period of three months, whichever is the earlier;

(vi) the first, second and third respondents be ordered to pay the costs of this application, jointly and severally, on an appropriate punitive scale as to be determined by the court, including the costs of two counsel;

(vii) the fourth, fifth, sixth, tenth and twelfth respondents be ordered to pay the costs of this application, jointly and severally, including the costs of two counsel.

Relevant background

[3] During April 2018 the applicant had launched an urgent application wherein it sought urgent interdictory relief in Part A which was dismissed with costs. This court is now called upon to adjudicate Part B for final relief to review and set aside the decision of the first, second and third respondents ("the State Respondents") to appoint non-profit organisations being the fourth to fifteenth respondents ("the NPO Respondents") as implementing agents of the Cooperative Governance and Traditional Affairs ("COGTA") poverty alleviation programme known as the Community Works Programme ("CWP").

[4] The CWP programme is a poverty alleviation initiative to provide an employment safety net by providing participants with a predictable number of days of work per month. In this way it supplements their existing livelihood.

[5] On 24 November 2017 a Request for Proposal ("RFP") was advertised in the Government Gazette for the appointment of non-profit organisations for the implementation of the CWP for 2018 – 2021 with a closing date of 2 February 2018. Eighty-nine (89) proposals were received and a special evaluation panel was appointed.

[6] The evaluation committee requested the second respondent to provide clarity on how to proceed as it was found that there was 'some vagueness in the RFP. It was suggested that a re-submission of all documents from all NPO's who had responded to the RFP should be requested. Emails were then sent to 81 organisations of which 63 responded. 14 bidders were shortlisted and were requested to furnish some outstanding documents. An email was sent to an address which the department believed belonged to the applicant requesting it to submit proof of UIF registration and the Procurement Policy, which email address was incorrect.

[7] Of the 14 shortlisted bidders, 12 qualified on the minimum score and 2 were disqualified. They were informed in writing of their qualification and subsequently signed service level agreements with the department on 6 April 2018.

[8] The applicant submits that it had, in the period immediately preceding the publication of the RFP, been awarded CWP procurement implementing agent contracts exceeding R100 million. It submitted a bid for re-appointment as a CWP procurement implementing agent in respect of each of the various programmes in which it had been involved over the years. Every single one of its bids were rejected by the department and no reasons were proffered for this rejection by the Department.

[9] The applicant submits further that the department's officials, who were aware of the rejection of the applicant's bids, concealed this fact from the applicant until after the CWP procurement process had been concluded and the service level agreements signed with all the newly appointed CWP implementing agents. The effect of this error was that the applicant was not treated on the same basis as rival bidders. Furthermore, as a result of this error, four bidders who had initially been disqualified for their failure to provide certain documents as

required by the RFP were afforded a further opportunity to submit the said documents and were ultimately appointed as implementing agents by the department.

[10] This matter is not about the merits or otherwise of various mechanisms and policies developed by the State to regulate transfers of public funds to the CWP implementing agents after appointment. It is a case about the requirements of Section 217 of the Constitution which apply to the public procurement process which precedes the appointment of the CWP implementing agents, administrative fairness and procedural rationality and the principle of transparent and accountable government.

Issues

[11] The issues to be determined by this court are the following:

(i) Whether the disqualification of the applicant's proposal for appointment as a CWP implementation agent was unlawful and inconsistent with the Constitution.

(ii) Whether the selection and appointment of the CWP implementing agents constitutes a public procurement process which is subject to the requirements of Section 217 of the Constitution and Constitutional and statutory procurement prescripts i.e. The Procurement Policy Framework Act 5 of 2000 ("PPFA"), Section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999 ("PFMA"), applicable National Treasury Regulations and Circulars and the Department of Co-operative Governance and Traditional Affairs Supply Chain Management ("SCM") Policy.

(iii) Whether the process of evaluating, selecting and appointment of CWP implementing Agents was lawful and consistent with the constitutional and statutory procurement prescripts and the requirements of the RFP.

(iv) Whether the decision of the second respondent to approve the appointment of the fourth to fifteenth respondents as CWP implementing agents and to conclude the service level agreements was lawful and consistent with the constitutional and statutory procurement prescripts.

(v) What is the appropriate, just and equitable remedy in the event that the CWP process, appointment of the fourth to fifteenth respondents and conclusion of service level agreements is declared to be unlawful and constitutionally invalid.

(vi) Whether the State Respondents and/or the NPO Respondents should be ordered to pay the costs of this application, jointly and severally, on an appropriate punitive scale in respect of all, alternatively a portion of, the costs including the costs of two counsel.

Applicable Legal Framework

[12] Section 172 of the Constitution provides as follows:

"***Powers of Courts in Constitutional Matters***

(1) When deciding a Constitutional matter within its powers, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[13] Section 217 of the Constitution provides as follows:

"217(1) *When an organ of state in the national, provincial or local government 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 organ 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."

[14] The Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA") is legislation contemplated in Section 217(3) of the Constitution whose preamble explains its purpose as being:

"To give effect to Section 217 of the Constitution by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution."

[15] Section 2(1) provides that 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) ....provided that the lowest acceptable tender scores 90 points for price

(ii) ....provided that the lowest acceptable tender scores 80 points for price."

[16] The Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was enacted, *inter alia*, to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa in which everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[17] Section 6 of PAJA provides that:

> *"(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..."*

[18] Section 7(1) of PAJA states that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date of which any proceedings instituted in terms of internal remedies have been concluded or where not remedies exist and the person became aware of the action and the reasons for it.

[19] Section 7(2)(c) provides that a court may in exceptional circumstances and on application by a person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

[20] Section 8(1)(c)(ii) of PAJA states the following:

> *"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 setting aside the administrative action and in exceptional cases,*

substituting or varying the administrative action or correcting a defect……or directing the administrator or any other party to the proceedings to pay compensation."

[21] Section 38 of the Public Finances Management Act 1 of 1999 ("PFMA") provides as follows:

*"**Responsibilities of accounting officers (ss 38 – 43)***

38 General responsibilities of accounting officers

38(1) The accounting officer for a department, trading entity or constitutional institution –

(a) Must ensure that the department, trading entity or constitutional institution has and maintains-

.....

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective

.....

(j)before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems."

[22] Regulation 8.4 of the Treasury Regulations (March 2005) issued in terms of the PFMA provide as follows:

*"8.4 **Transfer and subsidies (excluding Division of Revenue grants and other allocations to municipalities) [Section 38(1)(j) of the PFMA]***

8.4.1 An accounting officer must maintain appropriate measures to ensure that transfers and subsidies to entities are applied for their intended purposes. Such measures may include-

(a) regular reporting procedures;

(b) internal and external audit requirements and, where appropriate, submission of audited statements;

(c) regular monitoring procedures;

(d) scheduled or unscheduled inspection visits or reviews of performance; and

(e) any other control measures deemed necessary.

8.4.2 An accounting officer may withhold transfers and subsidies to an entity if he or she is satisfied that-

(a) conditions attached to the transfer and subsidy have not been complied with;

(b) financial assistance is no longer required;

(c) the agreed objectives have not been attained; and

(d) the transfer and subsidy does not provide value for money in relation to its purpose or objectives.

[23] The Cooperative Governance and Traditional Affairs ("COGTA") department's Supply Chain Management ("SCM") Policy forms part of the SCM system of the department in accordance with the requirements of the PPPFA. The purpose of the policy is to provide for a uniform framework for an effective and efficient SCM system that promotes sound financial management and uniformity within the department. The SCM Policy spells out the three stage process by which the evaluation of bids must be conducted;

"Firstly, all submitted bids must be evaluated in terms of meeting all administrative requirements;

Secondly, the assessment of functionality must be done in terms of the evaluation criteria and the minimum threshold referred to in the paragraph 3.14.7.7. A bid must be disqualified if it fails to meet the minimum threshold for functionality as per bid evaluation criteria incorporated in the tender document issued to the market; and

Thirdly, only qualifying bids must be evaluated further in terms of the 80/20 or 91/10 preference points systems, where the 80 or 90 must be used to score price only and the 20 or 10 points for B-BBEE Contributor level."

[24] The SCM Policy prescribes mandatory requirements for the appointment of committees to evaluate tenders for the procurement of goods and service. It also regulates the procedure for checking the tax compliance status of the bidders and the completion of standard bidding documents of bidders.

[25] The National Treasury has issued a circular, Circular 21, in which is described the difference between transactions involving the acquisition of goods and services on the one hand and the transfer and subsidies on the other hand. Where funds are transferred to another entity for the entity to further its operations in line with its mandate, the funds would be classified as transfers and subsidies. The department does not buy any item or pay for a service.

[26] Where a department is responsible for a transaction or an activity and requests another entity, whether government or private, to perform such transaction or activity for the department, the payment would be classified as goods and services and/or payment to capital assets by the department. The purpose of the procurement is therefore a determining factor.

[27] In determining whether Section 217(3) of the Constitution is applicable to the transfer payments process, one must bear in mind the tenets of interpretation as summarized in the matter of **Natal Joint Municipal Pension Fund v Endumeni Municipality**[1] where the court held as follows:

> *"The present state of the law can be expressed as follows:*
>
> *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 of 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. Tod do so in regard to a statute or statutory instrument is to cross the divide between 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."*

The RFP

[28] The RFP records in its introduction that the Department would *'assess the capacities of interested organisations against the requirements set out in the scope of work and the proposal evaluation system and will select organisations from the proposals submitted'.* The

[1] 2012 (4) SA 593 (SCA) at paragraph [18]

RFP further states that non-profit organisations would be appointed as implementing agents and would be expected to manage multiple sites within a province. Prospective applicants would be allowed to be appointed in a number of provinces, ranked in order of preference. However, the Director-General of the Department, as the Accounting Officer, would be entitled to make a final determination on the number of NPO's appointed per province.

[29] The RFP further set out minimum requirements for submission of proposals for appointment as implementing agents. It recorded that the NPO's applying for such appointment were, *inter alia,* required to submit audited financial statements, proof of having managed a turnover in excess of R5 million per annum and proof of having managed similar programmes in the last 5 years in the provinces they had applied for.

[30] Section 5.2 of the RFP deals with the evaluation of functionality in respect of the proposals in response to the RFP. It provides that the functionality would be evaluated by assessing three main elements which had to be reflected in proposals, being, work planning capabilities, the capacity and project team organogram and the service provider's proven relevant experience in managing large scale development projects.

[31] The evaluation system to be applied in the evaluation of proposals submitted was set out in Section 6 of the RFP. The scorecard for functionality consisted of specific functionality criteria, a scale of 1 to 5, a point allocation for each criterion and a highest possible score of 110 for functionality.

Disqualification procedurally unfair and irrational

[32] The first issue that the court needs to determine is whether the disqualification of the applicant's proposal for appointment as a CWP implementing agent was lawful and consistent with the Constitution.

[33] It is common cause that in its initial report dated 9 March 2018 the Pre-Qualification committee had disqualified 81 bidders, including the applicant, due to non-compliance with the requirements as listed in the RFP.

[34] On 13 March 2018 the Evaluation Committee decided to request all disqualified bidders to submit all outstanding documents as ascertained by the department during the pre-qualification phase. In accordance with this decision, Ms. Nkoana and Mr. March, departmental officials, emailed letters to 71 bidders requesting them to submit the outstanding documents on or before 19 March 2018. Such a letter was erroneously emailed to the applicant at *info@seriti.co.za*. whilst the correct email address was *info@seriti.org.za*. The applicant never received such notification resulting in its proposal being disqualified. The applicant avers that had it been given the same opportunity to submit the outstanding documents as those bidders who had initially been disqualified, it would easily have provided the said documents and cured any deficiencies in its proposal.

[35] There was no dispute between the parties that by sending correspondence addressed to the applicant to an incorrect email address, the department failed to provide the applicant with an opportunity to supplement its bid by providing missing documents, an opportunity which had been afforded other bidders. The applicant is of the view that the department's

failure to treat it equally with the other bidders was therefore procedurally unfair and as such, reviewable in terms of Section 6(2) of PAJA, alternatively in terms of the principle of legality.

[36] In view of the fact that there was a disparity of the treatment of the bidders, I am of the view that the disqualification of the applicant's proposal and the failure of the State Respondents to allow the applicant to furnish the outstanding documents to be unlawful and inconsistent with the tenets of the Constitution.

[37] The State Respondents further disqualified the applicant's proposal for the reason there was non-compliance of the RFP in that the applicant failed to attach a copy of the procurement policy and proof of compliance with UIF. The Pre-Qualification report cryptically recorded that the reasons for non-compliance in relation to the applicant's bid was that *'the UIF was not attached. Policy not signed.'* Accordingly, the State Respondents were of the view even though the email had been incorrectly addressed, that the applicant's proposal was fairly disqualified as the applicant had failed to comply with the mandatory requirements of the RFP in the response thereto. The applicant had failed to furnish the proof of payment of UIF and letter of good standing from the Department of Labour as well as the company's signed procurement policy.

[38] Clause 4.1.2(b) and Clause 4.1.2(f) of the RFP required the bidders to submit "*proof of registration with UIF and COID including a letter of good standing from the Department of Labour*" and *"an approved asset and procurement policy."* The Pre-Qualification Committee had disqualified the applicant and had noted in its report that the applicant had failed to comply with the RFP requirements. They noted *"UIF not attached. Policy not signed."*

[39] The applicant argues that it had complied with the requirements as set out in the RFP by attaching a copy of the company's procurement policy. Furthermore, the applicant avers that its response to the RFP it included a tax clearance certificate from The South African Revenue Services ("SARS") in which it was specifically confirmed that the applicant was in good standing in respect of income tax, VAT and PAYE.

[40] It is evident from the RFP that the requirement was not for an asset and procurement policy that had been signed off by the board or any other company official who had the authority to do so. The requirement was merely for a copy of the policy which was approved by the company. As such, I am of the view that the applicant had complied with the requirements as set out in clause 4.1.2(f) of the RFP in so far as the procurement policy is concerned.

[41] In respect of the requirement under clause 4.1.2(b) of the RFP, the applicant admitted that it did not submit proof of the UIF registration together with its proposal as it believed that the letter of good standing from the Department of Labour would suffice on its own. Furthermore, the applicant submitted as part of the RFP requirements a tax clearance certificate as proof of the fact that all its tax affairs were in order. It specifically indicates that its VAT, PAYE and income tax contributions were up to date. The applicant contends that this was in response to the RFP which had not stated with particularity what document was required in proof thereof.

[42] Whilst it is notable that the state respondents failed to dispute the averments that it was registered for UIF, the court may draw an inference of its failure to do so. Accordingly, I draw the inference that the documents which were submitted in respect of proof of UIF

registration being the letter of good standing from the Department of Labour and the tax clearance certificate were proof enough of UIF registration.

[43] I am satisfied that had the applicant received the email inviting it to submit further documents, it would have provided the said documents and cured any deficiencies in its proposal in response to the RFP. Furthermore, I am satisfied that the applicant had complied with the requirements as set out in clause 4.1.2(f) of the RFP as well as the requirements as set out in clause 4.1.2(b) of the RFP. Accordingly, I am of the view that the applicant's disqualification is constitutionally invalid and unlawful.

Selection, evaluation and appointment of agents constitutes public procurement process consistent with Constitution

[44] Another issue to be determined by this court is whether the selection and appointment of the CWP implementing agents constitutes a public procurement process which is subject to the requirements of Section 217 of the Constitution and all the constitutional and statutory procurement prescripts, namely the PPPFA, Section 38(1)(a)(iii) of the PFMA, applicable Treasury Regulations and circulars and COGTA's supply chain management policy.

[45] The applicant is of the view that the appointment of the fourth to fifteenth respondents as CWP implementing agents and the conclusion of the Service Level Agreements ("SLA") was effected pursuant to an unlawful procurement process which was irrational, procedurally unfair and inconsistent with the requirements of the RFP, the Constitution and the statutory precincts. As a result, the SLA's and the appointments of the CWP implementing agents are constitutionally invalid and unlawful and fall to be reviewed and set aside. In particular, the applicant is of the view that the State Respondent's approach to the appointments of the

fourth, ninth and fourteenth respondents, in particular, are unlawful and invalid in that the bidders had not complied with mandatory requirements of the RFP relating to audited financial statements and as such, should have been automatically disqualified.

[46] The applicant contended further that the CWP procurement process was unlawful and invalid and accordingly falls to be reviewed and set aside. The applicant pointed out that the process followed by the State Respondents to evaluate and select the CWP implementing agents did not comply with the requirements of the PPPFA and the regulations which require that an organ of state follows a preference point system in the evaluation of bids.

[47] The State Respondents on the other hand, were of the view that the applicant had conflated the CWP procurement process with the run of the mill commercial tender process in which the bidder with the lowest price for its services is likely to win. They explained that the process was rather a transfer process where the State allocates equal percentage of the budget to the non-profit organisations which submit tenders for their services. This process is governed by Section 38(1)(j) of the PFMA and not the PPPFA and was done in accordance with a procurement system which is fair, equitable, transparent, competitive and cost-effective as contemplated in Section 217(1) of the Constitution and Section 38(1)(a)(iii) of the PFMA.

[48] The State Respondents explained further that previously COGTA had used the normal SCM Tender process to procure NPO's for its CWP implementing process. However, it was found that the non-commercial nature of the CWP programme made certain aspects of the normal SCM process unsuitable. The reason is that the normal commercial tender process pricing and functionality are decisive in the award of the tender. This is not so with the CWP process. COGTA then reviewed is delivery methods for the CWP programme and with the

Treasury's assistance developed the Transfer Payment Method which was a workable alternative which led to the appointment of NPO's.

[49] Furthermore, the State Respondents brought to the court's attention Circular 21 which deals with the classification of transfers and subsidies and goods and services or capital assets. It is evident from the circular that the National Treasury envisaged that where a department procures goods or services for itself, through an agent or not, this would qualify as good or services. But in terms of Paragraph 6.2 where a department procures good or services but not as a beneficiary of the good or services, that would be classified as a transfer. Accordingly, the purpose of the procurement is a determining factor.

[50] The State Respondents do not deny that the purpose of Section 217(1) of the Constitution is for ensuring that contracting is fair, transparent, equitable and cost-effective and contend that the tenets of the Constitution have been satisfied by the RFP. Furthermore, they contend that the process was open and transparent with all the attributes of fairness. Sections 217(2) and (3) are not applicable as the tender was not a commercial one. Section 217(1) is triggered when an organ of state 'contracts' for goods and services.

[51] 'Contract' is not qualified in any way nor is it limited to any kind of goods or services and may apply to any type of goods and services. This section merely emphasizes that the process must be fair, transparent, equitable and cost-effective. Organs of state predominantly use the normal commercial tender process as a form of 'contracting'. This process is governed by the PPPFA and its regulations. Section 1 of the act obliges organs of state to determine its preferential policy and implement it within the prescribed framework. This is where price and functionality would play a decisive role.

[52] Accordingly, the State Respondents submit that Section 217(3) is not applicable to the Transfer Payment process employed in this matter and as such, the PPPFA is not applicable. Furthermore, the State Respondents are of the view that the SCM Policy developed from the PPPFA regulations as well as the Treasury Regulations flowing therefrom become inapplicable.

[53] The State respondents are also of the view that the applicant's attack of its 'non-compliance' of the CWP procurement process, premised on the applicability of Section 217 of the Constitution, the PPPFA and its regulations, COGTA's SCM policy and the relevant Treasury regulations is not applicable and reliance thereon is misplaced and that an organ of state has the leverage to impose such remedial measures as may be necessary to capacitate a bidder to reach the desired financial management levels. This view is supported by the nature and purpose of Transfer Payment Process bolstered by Sections 38(1)(j) of the PFMA which allows for the transfer of funds to an entity that does not give assurances that it implements *'effective, efficient and transparent financial management and control systems....subject to conditions and remedial measures requiring the entity to establish [such a system]'.*

[54] The NPO Respondents contend that the objective of the project was to specifically appoint NPO's to act as implementing agents. The process which was followed was conducted in a manner that, reasonably considered, meets with the criteria set both in Sections 217 and the various legislative and policy imperatives applicable to COGTA. They contend further that the fairness, lawfulness, transparency, equitability and cost-effectiveness of the CWP procurement process was hinged on the fact that the RFP was published openly, the scoring was mentioned and applied by the evaluation committee and that the reasons for permitting the reconsiderations of bids that were excluded for administrative reasons was done

after it had been explained by the evaluation committee including interpreting the vague terms of the RFP.

[55] Section 217(1) of the Constitution which deals with the general requirements for lawful procurement specifically states that when an organ of state in any of the three spheres of government contracts for goods and services, must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Fairness and equity in a procurement process require the process itself to be procedurally fair. All tenderers must be treated in a fair and equitable manner and they must all be given the same opportunity and information to enable them to compete on an equal footing.

[56] The Supreme Court of Appeal elaborated on these principles in the matter of **Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd**[2] where the court held:

"One of the requirements of such procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender."

[57] The constitutional and legislative procurement requirements set out above, together with the RFP are the legally binding and enforceable framework against which the proposals for the appointment of CWP implementing agents had to be submitted, evaluated and finally awarded. Compliance with the requirements of the RFP for a valid tender process is legally

[2] 2000 (4) SA 413 (SCA) at para 30

required. Deviance from the procedure must be assessed in terms of the norms of procedural fairness. Accordingly, administrators are obliged to exercise procedural fairness even where there is a deviation in the requirements of the tender. An unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficacy and optimality in the outcome; and (c) is serves as a guardian against a process that is skewed by corrupt influences.[3]

[58] The department's SCM policy as required by the PPPFA and its regulations requires a preference points system to be applied to the evaluation of tenders for the procurement of goods and services. The bid evaluation process was preceded by the Director-General appointing various departmental officials to an evaluation panel for the evaluation of the bids received in response to the RFP. The evaluation process consisted of three phases, the first being a pre-qualification phase, the second being an evaluation to shortlist the bidders and the third being a post-evaluation or pre-appointment verification stage.

[59] The scorecard for functionality in the RFP provides for the largest number of points, a total of 60 points, to be assessed in relation to the functionality criterion of '*approach and methodology which indicate applicants' understanding of the RFP, capacity of the service provider / NPO to deliver on the project and proven knowledge, skills and experience in project management. Capacity of the NPO based on the organogram and the proposed team.*'

[60] As stated above, Section 217(1) of the Constitution provides that when an organ of state in all three spheres of government or any other institution identified in national legislation

[3] Allpay Consolidated Investment Holdings (Pty) Ltd & Others v CEO of the South African Social Security Agency & Others 2014 (1) SA 604 (CC) at para 27

contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective[4]. It is noteworthy that the method of contracting is not prescribed in the section nor is it qualified or limited to any kind of goods or services.

[61] A form of "contracting' which is used vastly by State departments is the normal commercial tender process which is governed by the PPPFA and its regulations. The act places an obligation on an organ of state to determine a preferential policy within the prescribed framework.

[62] The State Respondents do not deny that the process followed by the department to evaluate and select the CWP implementing agents did not comply with the requirements of the PPPFA which requires that an organ of state follows a preference point system. It is also not disputed that the State Respondents were not granted an exemption in terms of Section 3 of the PPPFA. However, the State Respondents contend that National Treasury had approved the use of the transfer model as opposed to the SCM prescripts. Furthermore, the requirements of the PPPFA and its regulations were '*entirely irrelevant*' as the process which had been followed by the department '*was not a procurement or tender process*'. Different considerations come into play when the objective of contracting is non-commercial in its nature as also where price is not a factor. The PPPFA would in those circumstances not be applicable.

[63] The State respondents submit that Section 38(1)(j) of PFMA which expressly allows a transfer to an agency that may not be fully capacitated should be considered in the

[4] Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others [2008] 2 All SA 145 (SCA) at para 4

circumstances. Transfers to these NPO's would be subject to remedial action and specific conditions. Furthermore, the State respondents' rationale in respect of such appointments is to bring new players into the field and nature of the contracts as well as develop them. They aver that this is reasonable and is evidence of the fact that they considered the purpose of the envisaged transfer, took into account all relevant factors and imposed a probationary period in respect of the appointment of the fourth and fifth respondents who were appointed on a different basis. The appointments were also made in accordance with the Transfer Payment Policy which was based on the Treasury's Guidelines for Management of Transfers ("Treasury Guideline"). The department's policy had also been approved by the National Treasury.

[64] I note that the State respondents' answer to Part B proceedings contradicts its case stated above which was made out in Part A of the proceedings. The third respondent contends in his affidavit, that the appointment of the CWP implementing agents *'was not a tender process'*. This was clearly not so in the answer to the Part A proceedings. In Part A of the proceedings the third respondent stated that *"....the NPO's earn fees for their services. There will therefore be hundreds of NPO's that will be interested in being appointed."*

[65] We are told that the two processes are governed by different Treasury Guidelines, regulations and practices. The tender process must adhere to the SCM of the department and the transfer process is governed by the State's policy for transfers. I am of the view that the department's Transfer Policy as well as the Treasury Guideline do not constitute legislation. They are policy determinations and/or guidelines. As such, they do not override legislation and must be consistent with the operative legislative framework.[5] The Treasury Transfer Guideline which is part of the documents before the court, is a draft which *'serves as a guideline to departments and constitutional institutions for the 217/18 financial year.'* The

[5] Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA) at para 7

intention of the Treasury is that this guideline be used to align the processes and systems and to provide feedback at a date to be determined to enable the Treasury to ascertain whether it is fit for purpose. The guideline was dated 22 December 2016 and there is no indication whether it is a binding norm and standard for management of transfers.

[66] The State respondent's reliance on the Treasury Guideline as well as the department's (COGTA) Transfer Policy is misplaced. So too is its reliance on the provisions of Section 38(1)(j) and (k) of the PFMA as there is no evidence of fairness in the CWP procurement process. Section 38(1)(j) of the PFMA is a regulatory mechanism governing the requirements and process for financial oversight of entities to whom state funds are transferred. It is not a process to procure service providers to whom such funds are to be transferred. The PFMA does not distinguish between services which are remunerated on a non-profit basis and those which are not. However, there is a requirement in terms of Section 38(1)(a)(iii) that the accounting officer is to ensure that the department maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

[68] The court is also asked to determine whether the evaluating, selecting and appointment of the CWP implementing agents was lawful and consistent with the Constitution and constitutional and statutory procurement prescripts and requirements of the RFP.

[69] The applicant was of the view that the disqualification of its bid was based on a material error of fact and that it was reviewable in terms of Section 6(2)(i) alternatively Section 6(2)(e)(iii) of PAJA. It was of the view further that it was disqualified because the department mistakenly believed that the applicant had not responded to correspondence requesting outstanding documentation, when in fact the correspondence never reached the applicant due to the department's own error. The applicant avers that the unlawful disqualification of the

applicant stripped the CWP procurement process of its competitiveness. It had deprived the department from considering a tender submission from a well-established service provider which had pioneered the implementation of the CWP over a number of years. This accordingly prevented the department from evaluating and scoring the widest pool of candidates from which to choose the most suitable candidate to be appointed. The applicant complained that in appointing the twelfth respondent in particular, the State respondents acted irrationally by failing to call for more information or further investigate its submissions.

[70] The applicant referred the court to the matter of **Pepcor Retirement Fund & Another v Financial Services Board & Another**[6] where the judge said:

"In my view, a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been made available for the decision to properly be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, inter alias, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefitted by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to made decisions in the public interest, should be exercised properly i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires."

[71] The State Respondents deny that they failed to consider relevant considerations and considered irrelevant considerations. The State Respondents were of the view that the degree of materiality of the requirement for audited financial statements in the Transfer Payment

[6] 2003 (6) SA 38 (SCA) at para [47]

Process for example, differs from its materiality in the SCM Policy which is supported by Section 38(1)(j) of the PFMA which allows for the transfer of funds to an entity that gives its assurance that it implements efficient and transparent financial management and control systems subject to such conditions and remedial measures requiring the entity to establish such system.

[72] The NPO Respondents, on the other hand, contend that the process that was followed by the State respondents was conducted in a manner that was reasonably considered, meets the criteria of both Section 217 of the Constitution and the various legislative and policy imperatives applicable. They contend further that the fact that they responded to the letter requesting them to augment their responses to the RFP sets them apart from the applicant and that their position should not be impugned as they had not only received the letters of enquiry but had also responded to them. This cannot be equated with an unlawful award having been made.

[73] The NPO Respondents referred the court to the **Allpay I** matter[7] where the court dealt with defects frequently found in RFP's and with reference to authority, clarified that the correct position is to accept that such do occur and that the test of rationality should be balanced with the fact that deviations from 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 into place or that deviations will necessarily result in procedural unfairness. This does mean that where administrators depart from procedures, the basis for so doing will have to be reasonable and justifiable and most of all, the process must be procedurally fair. The NPO respondents

[7] All Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others 2014 (1) SA 604 (CC)

however distinguished this case with the matter in *casu* as the vagueness in the RFP had led to a rectification of the process which had been clarified to 'all' bidders.

[74] The applicant brought to the court's attention that the eleventh and twelfth respondents were suspended as CWP implementing agents at the time of the hearing. It is noted that in the department's Verification Report it was concluded that the eleventh respondent was *'a small organization which appeared to be struggling to stay afloat'* with *'evident capacity challenges'*. The twelfth respondent *'did not have a functional governing body or board of trustees/directors to effect governance oversight to their operations.'* Neither of these entities had had any experience in government work nor a track record in implementing the CWP.

[75] The applicant challenged the appointment of both the eleventh and twelfth respondents as implementing agents on the grounds that their appointment was irrational and unlawful in light of the Verification Report in which potential issues had been identified. The applicant contended that the second respondent acted irrationally by failing to call for more information or to investigate further and made the decision on the same day as the Verification Committee had made a recommendation to him. In so doing, the committee had failed to apply its mind properly.

[76] The State Respondents denied that the appointment of the eleventh and twelfth respondents was irrational and unlawful. They submitted that in view of the peculiar nature of contracting with NPO's and considering the project was a public benefit grant project, the procurement was not the usual tender and supply chain management process but one with a purpose of poverty alleviation. The committee had endeavoured to apply criteria meant to achieve equitability and provide for effectiveness. Furthermore, public interest was achieved in that the State's procurement principles had achieved wider public purposes.

[77] In response to a letter from the applicant enquiring about the status of the two CWP implementing agents, the third respondent, on behalf of the State Respondents, confirmed that they had indeed been suspended but did not proffer the reasons therefor.

[78] Having come to the conclusion that the State respondent's reliance on the Treasury Guideline as well as the department's (COGTA) Transfer Policy is misplaced as also its reliance on the provisions of Section 38(1)(j) and (k) of the PFMA, I am satisfied that there is no evidence of fairness in the CWP procurement process. Furthermore, the State Respondents failed to take note of the serious concerns of the lack of capacity of the eleventh and twelfth respondents. No explanation had been proffered by the State Respondents for the appointment of the two respondents despite the information which had been brought to their attention from the Verification Committee of a lack of capacity.

[79] Accordingly, I am of the view that the view that the evaluation of the process, the selection and appointment of the CWP implementing agents was unlawful and inconsistent with the constitutional and statutory prescripts and requirements of the RFP and that the process instituted did not constitute a public procurement process which is subject to the requirements of Section 217 of the Constitution.

Appropriate, just and equitable remedy

[80] The applicant was of the view that once the administrative action had been declared unlawful and constitutionally invalid, the court could then exercise its discretion to determine what just and equitable remedy in terms of Section 8 PAJA should be granted. The

discretionary choice of a just and equitable remedy follows from the finding of constitutional invalidity and does not precede it.[8]

[81] Section 172(1)(a) of the Constitution provides that when deciding a constitutional matter within its power, a court must declare that any law or conduct which is inconsistent with the Constitution is invalid to the extent of its inconsistency. Section 172(1)(b) allows a court to suspend a declaration of invalidity but may only do so if it is just and equitable and the purpose for which it can do so is limited.

[82] Madlanga J in **Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC & Others**[9] put the nature of the just and equitable remedy envisaged in Section 172(1)(b) of the Constitution in proper perspective and held the following:

"[68] There is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of Section 172(1) of the Constitution we may make any order that is just and equitable. The operative word "any" is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity...

[69] What must be paramount in the relief that a court grants is the vindication of the rule of law. The effect of that is the reversal of the consequences of the constitutionally invalid conduct."

[83] The applicant in its amended notice of motion sought the following orders:

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[8] Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others 2014 (1) SA 604 (CC) (Allpay 1) at para 25

[9] 2018 (2) SACR 442 (CC)

(i) in relation to the CWP procurement process, a declaratory order that the procedural process conducted by the State Respondents pursuant to a RFP is constitutionally invalid and unlawful and it is reviewed and set aside;

(ii) in relation to the appointment of CWP implementing agents, a declaratory order that the appointment of the NPO Respondents is constitutionally invalid and set aside;

(iii) in relation to the applicant's disqualification, a declaratory order that the CWP procurement process is unlawful and invalid and is reviewed and set aside;

(iv) in relation to remittal, the procure process is remitted to the first and second respondents for a full new CWP procurement process commencing with a RFP;

(v) in relation to the suspension of invalidity, the order in para 2 be suspended until appointments of implementing agents has been made pursuant to a new CWP procurement process as contemplated in paragraph (iv) above or on the lapse of a period of 3 months, whichever is the earlier.

[84] The applicant prays in its amended notice of motion, *inter alia*, that the CWP procurement process be set aside and remitted to the State Respondents for a full new CWP procurement process commencing with an RFP to be started and completed. The applicant accepts that substitutionary relief would not be appropriate in this matter but is of the view that it would be appropriate for the court to suspend the order of invalidity in prayer 2 of its amended notice of motion for a period of three months or until appointments of implementing agents have been made pursuant to the new CWP procurement process, whichever is the earlier.

[85] The applicant submits that the allegations by the State respondents that '*...the process may be thrown into disarray*' if the court orders a new procurement process and the allegations of the length of time it will take to effect a new procurement process are vague and unspecific. The applicant further submits that the allegations by both the State respondents and the NPO

respondents that the impugned decisions should be allowed to stand as setting them aside will lead to disruption and prejudice to the CWP beneficiaries is speculative at best.

[86] The applicant contends that an order by the court that the declarations of invalidity be suspended until the expiry of the current contracts as suggested by the State Respondents would not fulfill the purposes of a public law remedy as identified by the Constitutional Court in the matter of **Steenkamp N.O. v Provincial Tender Board, Eastern Cape**[10] where it was held that the purpose of a public law remedy is to afford the prejudiced party administrative justice, advance effective and efficient public administration and vindicate the rule of law.

[87] The State Respondents contend that the court in deciding this matter should take into account the effect of the reversal of the consequences of the invalid conduct if it should find that its conduct is unconstitutional. The court was referred to the matter of **Corruption Watch NPC & Others v The President of the Republic of South Africa & Others** (supra) that paragraph [69] would ordinarily be the legal position and paragraph [78] of the said judgment where the judge explains that the specific circumstances of a given matter may displace what should ordinarily be the position, resulting in the court making an order that is at odds with existing law. Accordingly, a declaration of unconstitutionality and invalidity as sought by the applicant is a sufficient vindication of the rule of law and in the circumstances of this case, the suspension of the declaration of invalidity would be warranted and it would not be necessary to visit everything that had been done pursuant to the impugned conduct with invalidity *ab initio*.

[10] 2007 (3) SA 121 (CC) at para 29

[88] They are also of the view that public interest is fundamental to an enquiry on a just and equitable remedy. They referred the court to the matter of **Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others (Allpay 2)**[11] where it was held:

"[33] The primacy of the public interest in procurement and social security matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. That means that the enquiry cannot be one dimensional. It must have a broader range."

[89] The NPO Respondents, on the other hand, are of the view that in the event that this court sets aside the decision on the basis as alleged, it would be necessary to evaluate what remedy should be put in place. The NPO Respondents referred the court to the matter of **Steenkamp N.O. v Provincial Tender Board, Eastern Cape (supra)** in which Moseneke DJP, writing for the majority of the Constitutional Court advised how the process of evaluating a remedy should be approached. He wrote:

"[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances, the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose for a public remedy is to afford the prejudiced party administrative justice to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

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[11] 2014 (4) SA 179 (CC) at para [33]

[90] The NPO Respondents submit further that it is necessary to take into consideration factors such as the uniqueness of the transfer process, the risks posed to the CWP project and its beneficiaries, the financial and contractual commitments already made by the NPO respondents, the public interest in the matter and the principle of legality. Further, if the court finds that it has insufficient facts to determine what could in the circumstances be a just and equitable remedy, it was suggested that the court make a decision such as that in the **Allpay 2 (supra)** matter where an order was made by the court that contained directions requiring further submissions and a hearing on the issue of a just and equitable remedy before a final decision is made. The NPO Respondents also note that there is no reference in the applicant's affidavit to any particular facts justifying the three months' proposal. However, they would support a longer suspension period of 6 months as suggested by the State respondents alternatively, suspending the invalidity until 2021.

[91] As stated above, Section 172(1) of the Constitution obligates this court to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) authorises a court to suspend the declaration of invalidity but only where it is just and equitable to so do.

[92] I have taken the views of all the parties into account in determining what is the most appropriate remedy in the circumstances. I am aware that unlawful tender awards have been set aside even where they had a few more months to run.[12] The effort of re-issuing and processing a new RFP is a singularly expensive exercise which could take several months. Setting it aside could lead to disruption and prejudice to the beneficiaries. Having declared the

[12] Eskom Holdings Ltd & Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA)

conduct of the department inconsistent with the Constitution, I am of the view that the validity be suspended until the end of the current contract.

Costs

[93] The applicant seeks a costs order against the State Respondents and the NPO Respondents who have opposed this application, save for the fourteenth respondent, jointly and severally such costs to include the costs of two counsel. The applicant has brought to the court's attention the State Respondent's dilatory conduct with regard to the filing of the Rule 53 record and their answering affidavits. Although this conduct has been prejudicial to them they do not ask for punitive costs.

[94] The State Respondents aver that their conduct was not egregious. After they had been advised, they promptly attended to the necessary and delivered certain parts of the record as and when they were requested by the applicant. Furthermore, no case had been advanced by the applicants for a costs order on an attorney and client scale.

[95] The NPO Respondents aver that they have placed before this court, facts that support the contention that their appointment was evaluated on the criteria of fairness and rationality. They acted in these proceedings in order to ensure that their interest and that of the beneficiaries continued to be taken into account that the CWP process not disrupted. Furthermore and on the basis of the Biowatch principles,[13] which apply to every constitutional case which involves organs of state and on the finding of impugnation, costs should be laid at the door of the State Respondents and not against the NPO Respondents.

[13] Biowatch Trustees v Registrar Genetic Resources & Others 2009 (6) SA 232 (CC)

[96] The award of costs is a matter which is in the discretion of the court. It is a discretion that must be exercised judicially having regard to all the relevant considerations. The normal rule pertaining to an award of costs is that costs should follow the result. The court may, in certain circumstances award punitive costs to show its displeasure for the way the litigation was conducted. The case before the court is one that involves an organ of state. It is also a case that has been directed against the State Respondents' conduct or decision. I do not find any circumstances which justify a departure from the rule. As such, the principles of the Biowatch case (supra) are applied. Accordingly, I am of the view that the State Respondents shall pay the costs of this application.

Order

[97] The following order is granted:

(i) The procurement process conducted by the first, second and third respondents pursuant to the Request for Proposals ("RFP") from Non-Profit Organisations for the Implementation of Community Work Programme 2018-2021 published by the second and third respondents during January 2018 under reference CWP: RFP-2018-2021 ("the CWP procurement process") is constitutionally invalid and unlawful and it is reviewed and set aside;

(ii) It is declared that the appointments of the fourth to fifteenth respondents as implementing agents and the conclusion of service level agreements between the second respondent and the fourth to fifteenth respondents pursuant to the CWP implementing process, are constitutionally invalid and unlawful, and they are reviewed and set aside;

(iii) The disqualification of the applicant's proposal as implementing agent in terms of the CWP procurement process is declared to be unlawful and invalid, and is reviewed and set aside;

(iv) the order in paragraph (ii) above is suspended until the end of the current contract;

(v) the first, second and third respondents are ordered to pay the costs of this application, jointly and severally, and on a scale as between attorney and attorney, including the cost of two counsel.

MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

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Date of Judgement handed down electronically: 19 June 2020