THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case nos: 137/2023

156/2023

148/2023

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**FIRST APPELLANT**
ACTOM (PTY) LTD	**SECOND APPELLANT**
STEINMÜLLER AFRICA (PTY) LTD	**THIRD APPELLANT**

and

BABCOCK NTUTHUKO ENGINEERING (PTY) LTD	**RESPONDENT**

Neutral citation: *Eskom Holdings SOC Limited v Babcock Ntuthuko Engineering* (137/2023, 156/2023 and 148/2023) [2024] ZASCA 63 (29 April 2024)

Coram: MBATHA, MABINDLA-BOQWANA and WEINER JJA, SMITH and MBHELE AJJA

Heard: 25 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 29 April 2024.

Summary: Constitutional Law – s 217 of the Constitution – Preferential Procurement Framework Act 3 of 2000 – procurement of goods and services –

compliance with mandatory tender conditions ─ organ of state's discretion to condone non-compliance where the condition is not material ─ whether actual or substantial compliance is applicable – whether splitting of tenders between various bidders lawful.

ORDER

On appeal from: North Gauteng Division of the High Court, Pretoria (Millar J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel, where so employed.
2. The order of the high court is set aside and substituted with the following:

‘(a) The application is dismissed.

(b) The applicant is ordered to pay the respondents’ costs of the application including the costs of two counsel, where so employed.’

JUDGMENT

Smith AJA (Mbatha, Mabindla-Boqwana and Weiner JJA and Mbhele AJA concurring):

Introduction

[1] On 6 August 2018, the first appellant, Eskom Holdings Soc Limited (Eskom), published a Request for Proposals (RFP) inviting tenders for maintenance and outage repair services for boiler pressure parts and high outage repair services for pressure pipework, at fifteen of its coal-fired power stations.

[2] The respondent, Babcock Ntuthuko Engineering (Pty) Ltd (Babcock), submitted its proposal by the extended deadline, namely 24 October 2018, but was disqualified because it failed to submit a current ISO 3834 certificate (the ISO certificate). That certificate is issued by the relevant agency for a specified period and verifies that a company has the requisite resources, systems, and personnel to weld to a required quality and standard. Item 3.2 of the RFP listed ‘Certification to ISO 3834’ as a ‘mandatory returnable for evaluation’ and specified that failure to comply with that condition would result in disqualification at the tender evaluation stage.

[3] On 7 October 2021, Eskom awarded the tender jointly to the second and third appellants, Actom (Pty) Ltd (Actom) and Steinmüller Africa (Pty) Ltd) (Steinmüller), respectively. Actom was appointed to render maintenance and outage services at seven of the fifteen power stations and Steinmüller at eight.

[4] Aggrieved by its disqualification, Babcock launched an application in the North Gauteng High Court, Pretoria, seeking to review and set aside the tender awards. Babcock contended that the decisions to disqualify it at the evaluation stage and to split the tender award between Actom and Steinmüller were irrational, unlawful, and invalid.

[5] On 17 November 2022, the high court (per Millar J) delivered its judgment upholding Babcock's contentions in respect of its disqualification. It found that Babcock's interpretation of the tender condition was to be preferred, namely that, the condition did not require the submission of an ISO certificate but merely a statement by a bidder that it had been certified. The high court found, additionally, that the requirement regarding the ISO 'certification' was ambiguous and Eskom was thus obligated to allow disqualified bidders to comply by submitting the certificate after the deadline. Its failure to do so rendered Babcock's disqualification procedurally unfair in terms of s 6(2)(*e*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[6] The court consequently reviewed and set aside the tender awards. It further declared the contracts concluded pursuant thereto unlawful and ordered Eskom to conduct a fresh tender process within stipulated time frames. The court, however, suspended the order declaring the contracts entered into between Eskom, Actom and Steinmüller, invalid, subject to compliance with its directives regarding the finalisation of the fresh tender process.

[7] The appellants appeal against that judgment with the leave of the high court. Although they filed separate notices of appeal, Eskom and Steinmuller rely substantially on the same grounds of appeal, while Actom only assailed the basis on which the high court made the costs orders against it.

The facts

[8] The following material facts are common cause. At the time of the publication of the RFP, Actom, Steinmüller, Babcock and other service providers had been servicing boilers at Eskom's power stations for extended periods, in some cases for more than 20 years. Those contracts expired on 31 September 2017.

[9] Eskom consequently undertook an open tender process (on National Treasury's instructions), resulting in the publication of the RFP in August 2018. It also drew up a strategy in terms of which it decided to award contracts to a minimum of three service providers in order to mitigate the risk of entrusting the maintenance of all its coal-fired power stations to one bidder. Those power stations generate the bulk of the country's electricity and Eskom could accordingly not risk having 'all its eggs in one basket'. It therefore had to ensure that it had alternative options in the event of a service provider becoming incapacitated.

[10] The RFP and related documents contained various stipulations regarding Eskom's intention to award contracts to more than one bidder. These were: (a) item 1.6 of the RFP which stipulates that '[t]he tender shall be for the whole/parts of the contract'; (b) item 1.6 of the Standard Tender Conditions which states that Eskom 'may accept or reject any variation, deviation or alternative tender and reserves the right to accept the whole or any part of the tender'; (c) the RFP provides that Eskom 'reserves the right to negotiate with preferred bidders after a competitive bidding process or price quotations; should the tendered prices not be deemed market-related'; (d) in the addendum to the RFP, issued prior to the closing date, Eskom stated that it would allow 'offers limited to few sites', allowing bidders with limited capacity to submit tenders in respect of selected sites only; and, in addition, (e) Eskom's Supply Chain Management Policy also makes provision for a tender to be awarded to multiple suppliers.

[11] It is also common cause that prospective bidders, including Babcock, were aware of Eskom's intention to divide the contract between several bidders. Apart from the fact that the power stations had historically always been serviced by at least three contractors, Babcock, in its founding affidavit acknowledged that it was 'always anticipated, because of the sheer volume of the work, that the scope of services would

be divided amongst at least three bidders'. It contended, however, that Eskom had failed to stipulate and apply objective criteria as it was required to do in terms of s 2(1)(*f*) of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA). That section provides that 'the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs *(d)* and *(e)* justify the award to another tenderer'.

[12] The RFP was equally unambiguous regarding the requirements in respect of mandatory documents or 'mandatory returnables' and the portended fate of tenders that did not include them. The RFP specified that the ISO Certification was a 'mandatory returnable for evaluation' and repeatedly cautioned bidders that they would be disqualified 'if mandatory returnables are not submitted on or before the stipulated deadlines'. The Standard Conditions of Tender also specified that mandatory returnables must be submitted by the stipulated deadline and that failure to do so would render the tender 'non-responsive'. And while allowing bidders to seek clarification regarding compulsory requirements, the tender conditions explicitly stated that the 'mandatory tender returnables will not be requested and may not be submitted after tender submission deadline.'

[13] The RFP also stated that a 'clarification meeting' with Eskom representatives would take place on 20 August 2018. At that meeting, clarification was provided regarding what exactly was meant by the term 'Certification to ISO 3834' mentioned in item 3.2 of the RFP, particularly whether bidders were required to submit a certificate or merely confirm that they had been duly certified. The minutes of the meeting show that bidders were told that they were required to submit an ISO 3834 certificate and were reminded that '[t]enderers who do not submit mandatory tender returnables as at stipulated deadlines will be disqualified'. A presentation regarding mandatory requirements stated the following:

'For mandatory requirements, the supplier needs to show:

No.2 – Valid certificate of ISO 3834

If not submitted by the tender submission deadline, the tenderer will be disqualified.'

It is common cause that Babcock was present at the meeting.

[14] Eskom's Supply Chain Management Policy similarly requires strict compliance with mandatory requirements. It provides for the disqualification of bids which do not include mandatory documents and does not permit Eskom to condone failure to comply with mandatory requirements.

[15] Babcock did not submit the ISO certificate by the stipulated closing date for submissions of tenders. It simply mentioned in its submission that it had ISO certification. However, in its founding affidavit, Babcock contended that Eskom's decision to disqualify it constituted unfair administrative action because at the material time Eskom had known that it was in possession of a valid ISO 3834 certificate and it had made the certificate available to Eskom after having lodged its bid after the deadline had passed. After receipt of the rule 53 record, Babcock filed a supplementary affidavit wherein it, inter alia, alleged that the RFP did not require bidders to submit a certificate but merely to 'address certification to ISO 3834, in the same way as the previous item in the list'. The latter was a reference to item 3.1 which required bidders to show a certain level of experience.

[16] Having disqualified Babcock for failure to submit the ISO certificate, Eskom proceeded to evaluate the qualifying bids in accordance with the stipulated specifications, in particular relating to technical, financial and BEE requirements. Three bidders passed a physical assessment of their technical capabilities, namely Steinmüller, Actom and Alstom Power Services (Pty) Ltd (Alstom). They were thereafter evaluated for price, and Steinmüller scored the highest, namely 99 points, Alstom was second with 58.18 points, and Actom scored 28.61.

[17] In August 2019, Eskom's Cross Functional Team (CFT) responsible for tender evaluations sought a mandate from the Eskom board to negotiate with the preferred bidders. The CFT proposed that the contracts be split proportionally between them in the following ratios: eight power stations to Steinmüller; four to Actom and two to Alstom.

[18] The various Eskom committees involved in the tender process, including the Investment Finance Committee (IFC) were, however, not satisfied that the criteria for the proposed allocations had been clearly set out in the RFP. They were also

concerned about the significant price differences between the various bids and the financial soundness of some of the bids. The IFC therefore recommended to the board that the tender be cancelled.

[19] The Eskom board, however, did not adopt the IFC's recommendations and instructed management to proceed with the tender process. It requested Eskom's Assurance and Forensic Department to review the process and submit a report to it. It also requested the legal department to submit an opinion and recommendations for its consideration. Those entities in turn procured opinions from independent firms of attorneys and chartered accountants, which recommended cancellation of the tender. The Eskom board considered those recommendations at its meeting on 24 February 2021. It expressed its concern about the long delay in finalising the tender and the failure of management to implement the board resolution to bring the tender process to conclusion.

[20] The CFT thereafter negotiated with the two remaining bidders (Alstom had by that time withdrawn its bid), hoping to persuade them to reduce prices that were not market related. Since Steinmüller's pricing was already accepted as being market related, that process only yielded a reduction of Actom's prices to within 2.2% of Steinmüller's pricing. The CFT thereafter recommended that eight power stations be awarded to Steinmüller and seven to Actom.

[21] The board approved those recommendations on 7 November 2021. However, in what appears to have been a 'belt and braces approach', the board commissioned further probity reports. The first, aimed at identifying possible conflict of interests between Eskom officials and the two recommended companies, confirmed that there were none. The second report, prepared by a firm of attorneys, advised against cancellation of the tender and found no irregularities in the way the contracts had been split. The Eskom board, accordingly, on 12 November 2021, instructed management to award the contracts to Steinmüller and Actom in the stated proportions.

Proceedings in the high court

[22] It seems that Babcock's initial reaction upon realising that it had failed to submit the certificate was one of bewilderment. In its founding affidavit it asserted that it had

not been established for certain that it had failed to submit the certificate and that the omission could only be confirmed once the rule 53 record came to hand. It also asserted that Eskom could easily have established through an internet search or from the regulatory agency which issues such certificates whether it held such a certificate.

[23] Babcock asserted, in the alternative, that Eskom was in any event in possession of the ISO certificates that it had previously submitted and thus knew that Babcock had been duly certified. It contended that despite its failure to comply with that mandatory requirement, Eskom was required to consider whether it had complied with the RFP requirements 'viewed in the light of their purpose'. According to Babcock, that purpose was 'to ensure that a bidder has the necessary qualifications to perform welding services of the sort required by Eskom'.

[24] The high court found that the argument by Eskom that the terms 'certificate' and 'certification' are to be read as synonyms and interchangeably was without merit. The court reasoned that to do so would be 'redundant, irrational and out of place with the formulation of the RFP and its purpose', because other mandatory returnables refer specifically to the submission of a certificate. The high court thus upheld Babcock's interpretation of item 3.2, namely, that bidders were not required to submit a certificate but merely to state that they have ISO 3834 certification.

[25] Babcock also contended that Eskom committed an irregularity by awarding the tender to more than one bidder without applying objective criteria in terms of s 2(1)(*f*) of the PPPFA. Although the high court found it unnecessary to decide this review ground, it commented that it was not open to Babcock 'to engage in a tender process well knowing the tender was going to be split, and to then after its disqualification, for other reasons, attempt to review the award on this basis'.

Submissions on appeal

[26] Before us, counsel for Eskom submitted that the RFP was unambiguous in its directive that bidders were required to submit an ISO 3834 certificate and that failure to comply would result in disqualification from the evaluation stage of the tender. Apart from the fact that item 3.2 of the RFP, properly construed, required bidders to file a

certificate and not merely to state that they had ISO certification, further clarification was provided at the subsequent tender clarification meeting.

[27] Counsel for Eskom further argued that the purpose of the condition was to ensure that bidders had the requisite skills and experience to perform the highly specialised services required by Eskom and that they are treated fairly and equally. In the circumstances a mere statement by a bidder that it had ISO certification could not constitute either actual or substantial compliance with the conditions. The tender conditions did not allow Eskom any discretion to condone non-compliance.

[28] Regarding the splitting of the tenders, counsel argued that Eskom had stated upfront that it intended to award contracts to more than one bidder. All the bidders, including Babcock, understood and accepted that the contract would be split between 'at least three bidders' and that there were compelling reasons for that strategy. The contracts were awarded to Steinmüller and Actom on a rational basis that accorded with the tender conditions and the provisions of the PPPFA.

[29] Counsel for Steinmüller supported Eskom's submissions and argued that Babcock was aware that the submission of an ISO 3834 certificate was a mandatory requirement. Babcock had only disputed the need to submit the certificate after receipt of the rule 53 record, which confirmed that it did not submit the certificate. According to Steinmuller, the certificate was manifestly crucial to enable Eskom to assess the disparate bidders' welding qualifications. Counsel also argued that the splitting of the tender was done properly in terms of s 2(1)(*f*) of the PPPFA since Eskom had stipulated the applicable objective criteria upfront and had duly applied them to the splitting of the tender.

[30] Counsel for Babcock, although defending the high court's finding in respect of its disqualification, understandably did not support the finding that item 3.2 of the RFP was ambiguous. He submitted that the RFP, properly construed, did not require Babcock to submit a certificate but merely to confirm that it had '[c]ertification to ISO 3834'. Babcock's statement in its tender documents that it is 'certified in terms of ISO 3834 since 2013/2014' therefore constituted proper compliance with the mandatory requirements of the RFP.

[31] He argued that the drafters of the RFP used the terms ‘certificate’ and ‘certification’ in different contexts, and where bidders were required to submit a certificate, it stated so in those terms. In this regard, he pointed to the fact that item 3 of the RFP refers to two mandatory returnables for evaluation, namely, item 3.1, which requires a tenderer to have relevant experience and item 3.2, which refers to the ISO certification. In his submission, item 3.1 manifestly does not envisage the submission of a document but merely requires confirmation that the tenderer has the relevant experience. Thus, read as a whole, item 3 requires tenderers to demonstrate that they have a particular level of experience, skills, or qualifications, rather than the provision of a particular document. In addition, under the title ‘mandatory returnables for quality’, tenderers were required to submit ‘a valid ISO Certificate of Quality Management System (QMS), by a recognised national and/or international accreditation certification company’. This provision, counsel argued, constitutes further proof that the RFP meant different things when referring to a ‘certificate’ as opposed to ‘certification’.

[32] Moreover, so he submitted, the purpose of item 3 of the RFP was to ensure that tenderers had the necessary level of skills and qualification to perform the highly specialised services required by Eskom. According to him, Babcock had demonstrated that it had complied with both requirements by submitting a letter stating that it had the requisite experience and that it had been certified in terms of ISO 3834 since 2013/2014. In any event, Eskom could also have called on Babcock to provide further proof of certification, even though it had known that Babcock was in possession of the ISO certificate since it had provided Eskom with such certificates in the past, when it previously tendered for work.

[33] Counsel for Babcock further argued that statements in Babcock’s founding affidavit to the effect that it had omitted the certificate in error and references to attempts to cure the defect, do not take the matter any further. He argued that those statements do not constitute admissible evidence of how the parties had construed the term ‘certification’ since they were made by ‘a non-lawyer’ and, at best for Eskom, constituted a non-binding legal concession. And regarding the clarification provided at the ‘tender clarification meeting’, he argued that the argument was misplaced because

that meeting was not a compulsory tender briefing meeting and Eskom was therefore not entitled to amend the written requirements stipulated in the RFP.

[34] The appeal thus raises the following issues:
(a) Whether Babcock was properly disqualified at the evaluation stage of the tender; and
(b) Whether the decision to split the award between Actom and Steinmüller was lawful. These issues must be considered in the context of s 217 of the Constitution, which enjoins organs of state to procure goods and services in a transparent, fair, equitable, competitive, and cost-effective manner, and in terms of the principles underpinning the PPPFA.

Was Babcock properly disqualified?

[35] In my view, the high court's finding that item 3.2 of the RFP was ambiguous is unsustainable. At the tender clarification meeting, bidders were informed in no uncertain terms that: (a) the mandatory returnable mentioned in item 3.2 of the RFP referred to an 'ISO 3834 certificate', (b) they were required to submit the certificate before the deadline; and (c) failure to do so would result in disqualification from the evaluation phase. Whatever misconceptions bidders may have had regarding the meaning of the phrase 'Certification to ISO 3834', had therefore been firmly dispelled at that meeting. Babcock attended the meeting and could therefore not reasonably have been under the impression that a mere statement that it had ISO 3834 certification would constitute compliance with that mandatory requirement.

[36] To authenticate or corroborate that Babcock also understood that only submission of the certificate would suffice is evident from its reaction to the letter from Eskom advising it about its failure to include the certificate in its tender documents. It stated in its founding affidavit that 'copies of its current ISO 3834 certificates may have been excluded in error from the bid documents to Eskom' and repeatedly attempted to submit the certificate after the tender closing date. This reaction was hardly surprising since it would have been difficult for Babcock to contend that item 3.2 of the RFP was ambiguous in the light of the clarification provided at the tender clarification meeting.

[37] There can therefore be little doubt that item 3.2 required bidders to submit an ISO 3834 certificate and that a mere statement that they had 'ISO 3834 certification' did not constitute compliance with that condition. The RFP and related documents clearly stated that failure to comply with that condition would result in disqualification from the evaluation stage and that Eskom did not have any discretion to condone non-compliance.

[38] However, Babcock's counsel had another string to his bow. He raised an alternative argument that, in deciding whether Babcock had complied with the requirements of item 3.2, Eskom was obliged to have regard to the purpose of the requirement. For that submission, he relied on the following dictum in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* (*Allpay*):[1]

'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.'[2]

[39] Counsel for Babcock submitted that if Eskom had adopted this approach, as it was by law required to do, it would have concluded that Babcock had complied with the mandatory requirement since: (a) the purpose of the requirement was to ensure that bidders have the necessary qualifications and skills to perform the complex welding required by Eskom; (b) Babcock in fact had those qualifications; (c) Babcock had been performing services for Eskom under a previous contract since 2018 and

[1] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).
[2] Ibid para 30.

Eskom had known that Babcock had been issued with an ISO 3834 certificate; and (e) Babcock's failure to submit the certificate did not cause Eskom any prejudice.

[40] In *Allpay*, the RFP stipulated that bidders could submit proposals in respect of one or more provinces, but that the bids for each province had to be submitted separately. The South African Social Security Agency had reserved the right to disqualify any bidder who failed to submit all mandatory documents specified in the RFP. One of the bidders, Cash Paymaster Services, submitted bids for all nine provinces but did not submit separate sets of documents in respect of each province. In that regard the Constitutional Court was required to consider whether the non-compliance was material since the review ground was based on s 6(2)(*b*) of PAJA, namely 'that a mandatory and material procedure or condition prescribed by an empowering condition was not complied with'. In considering whether the irregularity was material, the Court found that:

'What one is left with is non-compliance with what the Request for Proposals regarded as mandatory. This means that a mandatory condition prescribed by an empowering provision was not complied with, which is a ground for review under section 6(2)(*b*) of PAJA. But the sub-section also requires that the non-compliance must be of a material nature. The purpose of separate bids for the provinces was surely to enable SASSA to assess whether the bidder would be able to provide the necessary services in each of the provinces for which it bid. This purpose was attained. The irregularity was not material. No ground for review under PAJA exists.'[3]

[41] In considering the contentions advanced on behalf of Babcock it will be instructive at this stage to reflect on the approach adopted by this Court regarding the condonation of non-compliance with peremptory tender requirements. In *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others*[4], the applicant's bid was disqualified because it had failed to sign a compulsory declaration of interest form. Having found that the applicable regulation empowered the tender board to accept tenders even if they fail to comply with tender requirements, this Court held that condonation of the applicant's failure to sign 'would

[3] Ibid para 62.
[4] *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA).

have served the public interest as it would have facilitated competition among the tenderers.' The Court found further that by condoning the failure 'the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217 of the Constitution' because the applicant's price was significantly cheaper than that of the successful tenderer. A factor that also appears to have weighed heavily with the court was the fact that the applicant had duly completed the declaration form and had initialled both pages but had 'innocently' omitted to sign the document. The non-compliance was therefore not material, and having regard to the purpose of the document, the Court found that the tender committee acted unreasonably in disqualifying the applicant.

[42] In *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others*[5] this Court was required to consider whether failure to furnish the requisite audited annual financial statements constituted a material deviation from the requirements of the Tender Data and Standard Conditions of Tender. Tenderers were required to submit annual financial statements for the last three years and the applicant had filed only two sets of financial statements and an interim account. The court found that in terms of a peremptory tender provision, a failure by the tenderer to submit any one of the compulsory documents would result in the tender offer being regarded as non-responsive. The Court distinguished *Allpay* on the following basis:

'In addition, the dictum in *Allpay* at para 28, that in determining whether a ground of review exists under the PAJA, the materiality of any deviance from legal requirements must be assessed by linking the question of compliance to the purpose of the provision, is distinguishable on the facts of this case, where a peremptory provision is in issue. In any event the purpose of the provision is to provide independent audited verification for three years, in order to provide assurance as to the financial viability and ability to perform the contract.'[6]

[43] Similarly, in *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd*[7] (*Overstrand Municipality*) this Court, in considering the issue of substantial compliance with a mandatory tender requirement, cautioned that:

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[5] *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* (392/2017) [2018] ZASCA 72 (30 May 2018).
[6] Ibid para 40.
[7] *Overstrand Municipality v Water and Sanitation Services South Africa* (Pty) Ltd [2018] ZASCA 50; [2018] 2 All SA 644 (SCA).

'One should also guard against invalidating a tender that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. In the present case the non-compliance is not of a trivial or minor nature. The tender by Veolia was not an 'acceptable' one in terms of the Procurement Act, in that it did not 'in all respects' comply with the specifications and conditions set out in the RFP. Thus, the challenge in terms of s 6(2)*(b)* of PAJA, namely that a "mandatory and material procedure or condition prescribed by an empowering provision, was not complied with".'[8]

[44] The materiality of Babcock's non-compliance with the compulsory tender requirements thus 'depends on the extent to which the purpose of the requirements is attained.'[9] It is necessary, however, to stress that this dictum should not be construed as in any manner detracting from the fundamental importance of holding bidders to peremptory and material tender conditions in order to achieve the constitutionally enjoined ideal of fair, equitable, transparent, competitive and cost-effective public procurement. On the contrary, the Constitutional Court cautioned that 'deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process' and said that the purpose of insistence on compliance with prescribed formalities is threefold, namely:

'(a) it ensures fairness to participants in the bid process; enhances the likelihood efficiency and optimality in the outcome; and serves as a guardian against a process skewed by corrupt influences.'[10]

[45] In my view, the facts of this matter are distinguishable from those in *Allpay and Millenium Waste*. In *Allpay*, the disqualified bidder had submitted tenders in respect of all the provinces but had merely omitted to file them separately, as was required in terms of the compulsory tender conditions. And in *Millenium Waste* the aggrieved tenderer had duly completed and initialled the compulsory declaration of interest form but had inadvertently omitted to sign it. Those instances of non-compliance were thus manifestly of the 'trivial or minor' kind referred to in *Overstrand Municipality* and they were understandably declared to be so. In contradistinction, the mandatory returnables specified in item 3 of the RFP, namely, proof of the relevant experience and submission of an ISO 3834 certificate, were manifestly material and probably two

[8] Ibid para 50.
[9] *Allpay* fn 4 supra para 22.
[10] Ibid para 27.

of the most important tender conditions. As mentioned, the ISO certificate was required to satisfy Eskom that a bidder had the necessary resources and skills to provide welding services to the required standard. It is also common cause that an ISO certificate is only valid for a specified period. It was thus crucial that Eskom had to be furnished with a valid and current certificate, instead of a mere statement by a bidder that it had ISO 3834 certification. This requirement was pertinently and repeatedly stated to be mandatory and bidders were warned that non-compliance would result in disqualification. The condition was also intended to ensure consistency and fairness in the evaluation and award of tenders. Compliance with the tender conditions was legally required and could not simply be disregarded at whim.[11]

[46] In addition, it is common cause that at least two other bidders were disqualified because they also failed to submit ISO 3834 certificates. Babcock contends that it should have been treated differently because it was an incumbent contractor and had previously submitted ISO 3834 certificates to Eskom. Such an approach would have resulted in unfair treatment of bidders and there can be little doubt that it would not withstand judicial scrutiny.

[47] In conclusion then, I find that: (a) the RFP required bidders to submit an ISO 3834 certificate instead of merely stating that they had ISO 3834 certification; (b) this was a compulsory and material term of the tender conditions; (c) Eskom did not have a discretion to condone non-compliance with the condition; and (e) having regard to the purpose of the condition, the mere statement by a bidder that it had ISO 3834 certification did not constitute either actual or substantial compliance with the condition. It follows that Babcock's disqualification was lawful.

[48] Then what remains for consideration is the issue relating to the lawfulness of Eskom's decision to split the award between Actom and Steinmüller. Counsel for the appellants correctly conceded that the finding in their favour regarding the lawfulness

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[11] See *Allpay* para 40, where the Constitutional Court said that:
'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.'

of Babcock's disqualification, did not preclude the latter from raising the aforementioned issue.

The decision to split the tender award

[49] Babcock contended that Eskom's decision to split the tender was irregular and inimical to the provisions of s 2(1)(*f*) of the PPPFA. According to Babcock, Eskom has made no attempt to show that it had regard to objective criteria in deciding to split the award and had in fact not applied any objective criteria because, on its interpretation, the section did not require it to have regard to such criteria.

[50] Babcock argued further that Eskom's assertion that it had split the award 'to mitigate the risk of over-reliance on a single tenderer' means that it had regard to criteria which were not stipulated in the RFP. It was contended by Babcock that Eskom's concession in its answering affidavit that the RFP did not set out principles applicable to the allocation of contracts between preferred bidders is thus fatal to its case.

[51] Counsel for Eskom argued that, properly construed, s 2(1)(*f*) of the PPPFA permits an organ of state to depart from the ordinary rule that a tender should be awarded to the highest scoring bidder, and, in exceptional cases where objective criteria so dictate, award the tender to another lower scoring bidder. In this case Eskom's upfront strategy was to award the tender to more than one bidder in order to mitigate the risk of entrusting all its power stations to one bidder. Eskom was thus entitled to award contracts to both Actom and Steinmüller without invoking objective criteria within the meaning of s 2(1)(*f*). He submitted, in the alternative, that even if Eskom's strategy qualified as objective criteria, there was no need to 'brand' it as such since it had been made clear to bidders that the tender would be awarded to more than one bidder and the criteria on which that would be done were also stipulated upfront.

[52] Counsel for Steinmüller supported Eskom's alternative argument and submitted that the rule 53 record clearly shows that Eskom had stipulated objective criteria upfront and that the awards to Actom and Steinmüller were made in accordance with those criteria. He submitted further that it is therefore unnecessary for the Court to

pronounce on the disparate contentions regarding the proper interpretation of s 2(1)(*f*) of the PPPFA because Eskom's decision to split the tender manifestly passes muster on either construction.

[53] In considering the soundness of Steinmüller's submission, I shall assume on behalf of Babcock that s 2(1)(*f*) was applicable in this instance. However, for reasons which I explain below, Babcock does not come home on this score either. As I have demonstrated above, the RFP clearly stated that Eskom intended to split the award between bidders. It is common cause that all the bidders, including Babcock, were aware of this strategy. It is also not in dispute that there were compelling considerations which caused Eskom to adopt that strategy. Eskom was understandably concerned about the dangers of limiting the award to one service provider, with the attendant risk if that service provider becomes incapacitated for some reason. The fifteen power stations that formed the subject of the bidding process generate the bulk of the country's electricity and the justified objective was therefore that Eskom should be able to rely on an alternative service provider in such an event.

[54] The tender conditions provided the regulatory framework for the achievement of that objective in unambiguous terms. In this regard item 3.19 of the RFP stipulated the following objective criteria:

'The following objective criteria apply:

- SHEQ [Safety, Health, Environment and Quality] requirements
- SD & L [Supplier Development and Localisation]
- Financial Analysis
- Please note:-
- "Eskom reserves the right to award the tender to a supplier who may not be the highest scoring/highest ranked tenderer, in line with Section (2)(1)(f) of the PPPFA; subject to the right to negotiate on the objective criteria with the three highest ranked tenderers respectively before award is made.
- Tenders will not be disqualified if they do not comply with the objective criteria
- Functionality and any element of the B-BBEE scorecard may not be used as objective criteria.'

[55] The document prepared by Eskom's Chief Procurement Officer and titled 'NEGOTIATION STATEGY', reflects that the tenders were evaluated in accordance with the stated objective criteria. Under the heading: 'Stage 5: Objective Criteria', the following is stated:

'The objective criteria applied consisted of (a) SHEQ, (b) Supplier Development and Localisation (SD&L) and (c) Financial Analysis.'

[56] The evaluation of the bids based on SHEQ, SD&L and financial considerations, resulted in the following findings: (a) Actom was the only bidder who did not meet the SHEQ criteria and Eskom allowed it an opportunity to address the shortcomings; (b) a target of 240 candidates for skills development would be negotiated with both Steinmüller and Actom; and (c) both Steinmüller and Actom were found to be financially sound for awards in the stated amounts (actual amounts were redacted).

[57] Following that exercise, Eskom negotiated with Steinmüller and Actom to ensure that their prices were market-related. There was nothing irregular about that process since the RFP clearly stated that Eskom reserved the right to negotiate with preferred bidders. They were thereafter awarded contracts in the mentioned proportions.

[58] Thus, even on Babcock's construction of s 2(1)(*f*) of the PPPFA, the decision to split the tender between Actom and Steinmüller was rational, lawful, and based on objective criteria stated in the RFP, namely SHEQ, SD&L and financial considerations. The contracts were therefore properly awarded in compliance with the provisions of s 217 of the Constitution and the principles underpinning the PPPFA. This review ground must therefore also fail. In my view there is no reason why costs, both in the high court and on appeal, should not follow the result.

Order

[59] In the result I make the following order:

1. The appeal is upheld with costs, including the costs of two counsel, where so employed.
2. The order of the high court is set aside and substituted with the following:

'(a) The application is dismissed.

(b) The applicant is ordered to pay the respondents' costs of the application including the costs of two counsel, where so employed.'

J E SMITH
ACTING JUDGE OF APPEAL

Appearances:

For the First Appellant	AE Franklin SC with P Smith
Instructed by	Cheadle Thompson & Haysom Inc, Johannesburg
	McIntyre Van der Post, Bloemfontein
For the Second Appellant	J Babamia SC with KD Iles
Instructed by	Pinsent Masons South Africa Inc, Johannesburg
	Lovius Block, Bloemfontein
For the Third Appellant	AC Botha SC with H Martin
Instructed by	Werksmans Attorneys, Johannesburg
	Webbers Attorneys, Bloemfontein.
For the Respondent	A Cockrell SC with A Friedman
Instructed by	Bowman Gilfillan, Pretoria
	Honey Attorneys, Bloemfontein.