

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: **15189/2022**

In the matter between:

FURIPOINT (PTY) LTD

Applicant

and

**MINISTER OF TRANSPORT AND PUBLIC WORKS,
WESTERN CAPE**

First Respondent

MINISTER OF EDUCATION, WESTERN CAPE

Second Respondent

H & I CIVIL AND BUILDING (PTY) LTD

Third Respondent

TENDIWANGA INVESTMENTS

Fourth Respondent

MARNOLDA

Fifth Respondent

RODPAUL CONSTRUCTION

Sixth Respondent

MMAKGOGE GROUP

Seventh Respondent

ENZA CONSTRUCTION

Eighth Respondent

ATUBA CONSTRUCTION

Ninth Respondent

THE CONSTRUCTION CO

Tenth Respondent

BAMBANA MANAGEMENT

Eleventh Respondent

BL WILLIAMS CONSTRUCTION

Twelfth Respondent

BOSHARD CONSTRUCTION

Thirteenth Respondent

MAZIYA GENERAL SERVICES

Fourteenth Respondent

HALIFAX GROUP

Fifteenth Respondent

This judgement is handed down electronically by transmission thereof to the parties' email.

JUDGMENT

Slingers, J

- [1] During October 2021 the Department of Transport and Public Works, Western Cape (**'the Department'**) issued a tender notice and invitation for tender (**'tender invite'**) for the construction of the new Manenberg School of Skills (**'the Project'**). The applicant duly submitted its bid in response thereto.
- [2] The applicant's bid was deemed responsive and scored more points than that of the third respondent. It was also lower in costs than that of the third respondent. However, the Department decided to pass over (reject) the applicant's bid and accepted that of the third respondent.
- [3] The applicant alleges that the decision to pass it over and to accept the bid of the third respondent was based on material factual errors and was procedurally and substantively unfair. Therefore, it seeks an order in the following terms:
- (i) reviewing and setting aside, and declaring invalid:
 - (a) the decisions taken by the Department to pass over the applicant's bid in relation to tender S054/21 and to accept the tender of the third respondent dated 18 November 2021;
 - (b) the contract concluded between the first and third respondents for the construction of the Project.
 - (ii) remitting the aforesaid decisions back to the Department for reconsideration; and
 - (iii) costs against those respondents who oppose the application, including the costs of Part A.
- [4] There are 5 grounds of review upon which the applicant relies. These are:

- (i) the Department acted in a procedurally unfair manner;
- (ii) the impugned decisions were based on wrong facts and in ignorance of certain material facts;
- (iii) the criteria used by the Department were vague and uncertain;
- (iv) the impugned decisions were irrational and taken in bad faith; and
- (v) the threshold requirements of section 217(1) of the Constitution were not satisfied.

[5] The applicant argued that it need only succeed with one ground of review to be successful and for the impugned decisions to be set aside and reviewed, causing the matter to be remitted to the decision maker for a fresh consideration.

[6] The Department stated that it passed over the applicant in favour of the third respondent because it had failed to demonstrate, to its satisfaction, that it (the applicant) had the necessary financial capacity (viability and sustainability to execute the tender. The Department, who was the only respondent who opposed the application stated that:

'34. This finding cannot be faulted. Certainly the facts upon which the finding was levelled are indisputable. Crisply –

34.1 Furipoint was not actively involved in any projects (and neither was GHP) for the period between November 2018 to February 2020 (that is pre Covid-19); and

34.2 Furipoint's financial statements showed no evidence that the applicant had the financial capacity to sustain the Project.'

- [7] The Department furnished 6 reasons for passing over the applicant. These were:
- (i) the financial statements received for an 8-month period indicate a total turnover of R1 260 000, a net cashflow for the period of R1 506 707 and a net profit of R909 161.00. The turnover, cashflow and profit values in the financial statements provided by the contractor was inadequate to sustain a project value similar to that of the Project;
 - (ii) it was previously known as Good Hope Plasterers CC t/a Good Hope Construction which went into business rescue in August 2021. For the period of November 2018 to February 2020 there is no evidence of any project activity;
 - (iii) there was no letter or evidence of confirmation of bank rating provided in their tender documentation or with documentation requested;
 - (iv) the applicant is approximately 2 years old;
 - (v) the references have reported the applicant's project management and contract administration as ranging from very poor to above average; and
 - (vi) the current projects listed under the applicant are 2, which are not similar in size, scope or value.
- [8] During the hearing of the matter the applicant addressed each reason provided by the Department to pass it over in favour of the third respondent to show that the impugned decision was based on material factual errors and was procedurally and substantively unfair. A similar approach will be adopted in this judgment.

The 8-month financial statements and financial viability

- [9] One of the reasons advanced for passing over the applicant was that its 8-month financial statements recorded a total turnover of R1 260 000, a nett cashflow for the period of R1 506 707 and a nett profit of R909 161.00. As a result hereof, the Department was of the view that the *'...turnover, cashflow and Profit values in the financial statements provided by the contractor is not adequate to sustain a project with a value similar to the [Project].'*¹
- [10] However, the Department erred in this regard. The amount of R1 260 000 reflected the monthly turnover for the 8-month period with R3 780 000 being the total turnover for that period.
- [11] The Department's counsel conceded that the Department had incorrectly accepted the monthly turnover as the total turnover. However, he unsuccessfully sought to convince the court that this error was not a material error and that it did not impact on the Department's final decision. The record did not support this argument.
- [12] The tender invite required all prospective bidders to be registered with the Construction Industry Development Board (**'CIDB'**) and to have a grading of 8 GB or higher before its bid would be considered.²
- [13] The CIDB was established by the CIDB Act, Act 38 of 2000 and is an agency of the National Department of Public Works and Infrastructure. It assesses the viability of construction companies and all companies wishing to tender for government construction work must be graded by the CIDB before it may so tender. Section 16(4) of Act 38 of 2000 obliges every organ of state, subject to

¹ See para 33.5 of the answering affidavit.

² See para 10.4 of the answering affidavit at page 302

its policy on procurement, to apply the register of contractors to its procurement process. The grading assigned by the CIDB determines the value of the contract a company is deemed capable of undertaking. As an example, a grading of 7 would mean that company would be deemed capable of undertaking a contract up to the value of R40 million, while a grading of 8 would mean that a company would be considered capable of undertaking a contract up to R130 million and a grading of 9, which is the highest grading, would mean that there is no limit to the monetary value which such a company would be deemed capable of undertaking.

- [14] On 6 May 2021, the CIDB issued the applicant with a grade 9 GB grading which is valid until 4 February 2024. At the time of submitting its bid, the applicant had a 9 GB grading from the CIDB.
- [15] The CIDB adheres to a rigorous process when grading the construction companies. Regulation 7 of the Construction Industry Development Regulations sets the requirements for a contractor applying for a CIDB grading.³ In accordance with regulation 7(4), an application for registration and grading must be accompanied by *inter alia*:
- (i) if applicable, complete financial statements of the contractor for the two financial years preceding the application;
 - (ii) if so requested by the CIDB, where the financial statements of a contractor are not audited, supporting evidence of that contractor's turnover as set out in the South African Revenue Services (**'SARS'**) Form Vat 201 and proof of payment of that value added tax;

³ Published in Government Notice 692 in Government Gazette 26427 dated 9 June 2004.

- (iii) an original tax clearance certificate issued to the contractor by the SARS;
and
- (iv) documentary proof by the employer or his or her representative of contracts completed as contemplated in regulation 11(2)(b) and 11(5)(c).
Completed means the stage when the construction works have been completed or when the construction works have reached a state of readiness for occupation, or use for the purposes intended, although some minor work may be outstanding.⁴

[16] Regulation 7(7) obliges the CIDB to take reasonable steps to verify the information submitted by an applicant company. This information is evaluated by an assessor with the relevant expertise who considers both the financial capability and works capability of the applicant company.⁵

[17] It is not apparent what weight, if any, was afforded to the applicant's CIDB rating of 9GB in the Department's finding that the applicant lacked the financial capacity to sustain the Project. It appears from the record that the Department only considered the incorrect monthly turnover, the cashflow and profit for the 8-month period in reaching its conclusion.

[18] As it was a requirement of the tender invite that all prospective bidders must have a minimum CIDB grading of 8GB, together with the fact that the Department was statutorily obliged to apply the CIDB register of contractors to its procurement process, the applicant should have been informed of the reasons for the Department attaching little and/or no weight to its 9GB grading when

⁴ Given these requirements for a grading, the fact that the applicant received a grade 9 rating- if not satisfied- fairness that be given an opportunity to address.

⁵ See Regulation 11.

determining its financial capacity and afforded an opportunity to make representations in this regard.

- [19] On 23 November 2021, the Department advertised a tender for the Concordia Primary School (**'Concordia'**) situated in Knysna. The applicant submitted a responsive bid in the amount of R81 410 911.⁶ In considering the applicant's bid, the Bid Evaluation Committee stated the following:

'Having scrutinised the submission made by this tenderer and considered the references provided, the Assessors understand that the tenderer has previously successfully completed similar contracts for the WCG and their works have been of an acceptable standard.'

- [20] Thus, in a tender invite of a similar nature and scale, the Department accepted that the applicant was financially capable of carrying out the work and that it was a financially sound tenderer. Similarly, the applicant was not passed over for the tender in respect of Mfuleni High School, which was also similar in size and scope to the project.

- [21] The Department failed to satisfactorily explain why it decided to pass over the applicant for the Project on the basis that it purportedly lacked the financial capacity to sustain it, while at the same time it accepted that the applicant was financially capable of carrying out 2 different tenders of a similar scale and scope and value to that of the Project. The explanation furnished by the Department simply states that the tenders were evaluated by different professional teams who differed in their evaluation process and angle of investigation. This explanation is devoid of any details and fails to address why the same

⁶ This amount is very close in quantum to the quantum of the project.

Department required different evaluation processes and angles of investigations for projects of a similar size, scope and value.

[22] In the circumstances, the Department's statement that '*Furipoint's financial statements showed no evidence that the applicant had the financial capacity to sustain the Project*' is not borne out by the facts.

[23] Furthermore, the absence of a satisfactory explanation is indicative that the Department failed to use objective criteria in deciding to pass over the applicant for the Project in favour of the third respondent.

The applicant was not involved in any projects for the period between November 2018 to February 2020

[24] In paragraph 34.1 of its answering affidavit the Department, in defending its decision to pass over the applicant, states that the applicant was not actively involved in any projects for the period between November 2018 to February 2020. This is simply wrong.

[25] Schedule 6: Schedule of work experience which was submitted as part of the applicant's tender data records that the applicant was contracted to complete the construction of the New Delft High School (valued at R51 million) during 2019. The client in this contract was the Department. Furthermore, the applicant was involved in a project valued at R138 million which was scheduled to run from July 2018 to February 2025. The Department had this information when it incorrectly stated that the applicant was not involved in any project activity from November 2018 to February 2020.

- [26] During the hearing of the matter, the Department's counsel conceded that the record reflected that the applicant was involved in project activity during November 2018 and February 2020 and that it was factually incorrect to state that the applicant was not involved in any project activity between November 2018 and February 2020.
- [27] Therefore, incorrect facts pertaining to the applicant's financial capacity and its project activity were material to the Department's decision to pass over the applicant in favour of the third respondent.

Bank letter and age of the applicant

- [28] Another reason for the Department passing over the applicant was its alleged failure to furnish it with a bank rating letter. However, it was not a tender invite pre-requisite for bidders to furnish a bank rating letter. On the contrary, the tender invite requested bidders to submit a letter of good standing from its bank. This was reiterated by Motion Projects, the Department's project manager, in an email dated 14 January 2022 directed to the applicant.⁷
- [29] The applicant duly submitted a letter of good standing by its bank. This letter recorded that the applicant's account had been conducted satisfactorily with no adverse remarks. The bank further stated that it could only issue a bank rating letter after the account had 12 months of consistent turnover.

⁷ See page 335 of the record. See also para 16 of the answering affidavit on page 305 of the record.

- [30] The Department incorrectly states that the applicant did not provide a letter of good standing from its bank.⁸
- [31] In addition to the letter of good standing by its bank, the applicant furnished the Department with a letter by its accountants who stated that they have reviewed the applicant's financial standing and that, based on the current contracts in progress, it would be able to manage the contract to the value of R83 186.971 because it has available cash at bank and other financial resources on hand to facilitate the contract over the contract period. The Department made no inquiries pertaining to the financial resources available to the applicant.
- [32] No satisfactory reasons have been furnished by the Department why it insisted on a bank rating letter when its tender invite requested a bank letter of good standing. It bears mentioning that the inability to provide a bank rating letter did not disqualify the applicant from the Concordia tender and that in that instance the bank letter of good standing was accepted.
- [33] The Department further stated that it decided to pass over the applicant as it was only approximately 2 years old. No reason has been furnished why the Department took this factor into consideration as there was no prohibition or tender invite requirement that bidders had to be a certain age. This was conceded by the Department's counsel.
- [34] The insistence of a bank rating letter and the implicit requirement that a company must be older than 2 years' old before it could successfully bid in response to the tender invite amounts to gatekeeping the construction industry against entry by emerging companies and undermines the transformation thereof which is

⁸ Paragraph 18 of the answering affidavit on page 306 of the record.

contrary to the objectives of the CIDB. It also favours the established construction companies at the expense of emerging construction companies. I reiterate that neither the requirement of a bank rating letter nor that the company be older than 2 years old were requirements of the tender invite.

- [35] Therefore, the Department took irrelevant factors into consideration when determining to pass over the applicant.

The applicant's references

- [36] The Department stated that the applicant's references reported that its project management and contract administration ranged from very poor to above average. This was also a reason furnished for passing over the applicant.

- [37] This reason is based on the tender evaluation report recommending that the tender be awarded to the third respondent. This report recorded the feedback on the applicant's technical competency as ranging from good/very good to average to poor. I quote from the tender evaluation report:

'Feedback received varies quite substantially on competency and the finished product. Some have mentioned that on-site labour is not well trained, while others mentioned good levels of experience and general know-how on site. Some references mentioned substantial latent defects that had to be remedied – "It was a struggle to get a satisfactory end product as the quality of work need to be well monitored and continually checked."

One reference that worked with Furipoint (Good Hope Construction) on three schools has mentioned that "their general on-site skills was average at best, and

that the contractor needs to be monitored very closely in order to get the desired results.” Hence, poor project management.

A few references mentioned that the choice of subcontractors can be very questionable at times, which resulted in unnecessary problems and delays. One reference on a current project at UCT, was very satisfied with the process and dealings with Furipoint, however, final completion, has not yet been reached on this project.’

[38] As seen the feedback purported to include *poor* project management on the part of the applicant. However, in providing reasons to pass over the applicant, the report cites *very poor* project management, without disclosing the source and/or reason for citing *very poor* project management instead of *poor* project management.⁹

[39] Dr Magqwaka was the designated principal agent on the 3 school projects of the applicant’. The applicant denies that Dr Magqwaka provided negative feedback in respect of its project management and provided an email trail to this effect, but no confirmatory affidavit from Dr Magqwaka. The Department remained insistent of the negative feedback but similarly provided no confirmatory affidavit.

[40] In its answering affidavit, the Department stated that:

‘Mr van Niekerk shall file a confirmatory affidavit in which he confirms that:

107.1.1 The feedback from Dr Magqwaka was indeed varied. Mr van Niekerk specifically recalls that he mentioned that he would be “hesitant to work with them again.” The date of this telephone call

⁹ In its answering affidavit, the Department states that the note of *very poor* is indicated in the full evaluation report. Reference is then made to the Rule 53 record which was not placed before the court.

with Dr Magqwaka was 11 February 2022 at 15:34 on his cellphone. The call was 13:27 long. I attach marked “AA15” a copy of this telephone record.’

- [41] “AA15” is a computer printer out which records the date, time and duration of the call. It does not set out reflect the contents of the conversation. However, annexure “AA 16” which is attached to the answering affidavit reflects handwritten notes by Nicolette Cronje which captures feedback on the applicant’s contract and management performance. The answering affidavit incorrectly refers to the handwritten notes as being that of Mr van Niekerk.¹⁰
- [42] Mr van Nierkerk deposed to a basic confirmatory affidavit wherein he simply confirmed the contents of the main answering affidavit, insofar as it referred to him. This confirmation included confirming that the incorrect allegation in the answering affidavit it was his handwritten notes when it was in truth that of Ms Cronje. No affidavit was filed by Ms Cronje. Consequently, the reliance on Mr van Niekerk to show that Dr Magqwaka provided negative feedback is misplaced as no evidentiary weight can be attached thereto.¹¹
- [43] The tender evaluation report recorded that the *poor* feedback was received in respect of the New Community Day Centre, Themba lethu, George. The project architect on the New Community Day Centre, Themba lethu, George was Brian Stokes (**‘Stokes’**). Stokes furnished the applicant with a reference in respect of its bid and described the applicant’s service/ work as meeting the requirements.

¹⁰ At the commencement of the hearing, the court was informed that the handwritten notes were by Nicolette Cronje and not by van Niekerk.

¹¹ *Drift Supersand (Pty) Limited v Mogale City Local Municipality* 2017 JDR 1611 (SCA) at para 31; *Special Investigation Unit and Another v Engineered Systems Solutions (Pty) Ltd* 2022 (5) SA 416 (SCA) at para 36

Stokes denied that he or anyone from his office was contacted for feedback pertaining to the applicant's project and contract management abilities.

- [44] The contents of the tender evaluation report pertaining to the *poor* rating was contradictory to the documents submitted as part of the applicant's bid. It appears that no steps were taken to address and/or interrogate this contradiction.

Discussion

- [45] As stated above, counsel for the Department conceded that it had erred in (i) regarding the applicant's monthly turnover as its turnover for an 8-month period and (ii) accepting that it had no project activity during November 2018 to February 2020.

- [46] Both errors were material to the Department's decision to pass over the applicant in favour of the third respondent. As the Department's decision was based on incorrect facts, it cannot be a rational decision.¹² On the contrary, the Department's decision to pass over the applicant was irrational.¹³ On this basis alone, the applicant is entitled to the relief it seeks.

- [47] It is not disputed that the applicant was the only black-owned female construction company in the Western Cape to tender for the construction of the Project.

- [48] Section 2(1)(f) of the Preferential Procurement Policy Framework Act, Act 5 of 2000 (**'PPPFA**) provides that a contract must be awarded to the tenderer who

¹² *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA) at para 40; *Scalabrini Centre v Minister of Home Affairs* 2018 (4) SA 125 (SCA) at para 59

¹³ *Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC) at para 121; *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* 2016 (3) SA 1 (SCA) at paras 44-46; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* 2007 (1) SA 576 (SCA) at para 34

scores the highest points, unless objective criteria justify awarding the tender to another tenderer. Regulation 11(1) reaffirms that a contract may be awarded to a tenderer who did not score the highest points only in accordance with section 2(1)(f) of the PPPFA and regulation 11(2) states that if an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the PPPFA, that organ of state must stipulate the criteria in the tender documents.

- [49] Section 2(1)(f) of the PPPFA is couched in peremptory language. In terms hereof, if a tenderer scores the highest points, it must be awarded the tender unless there are objective criteria which justify not granting the tender to that person. In such circumstances, it is for the administrator to show that the criteria used were objective, justifiable and in exceptional circumstances.¹⁴
- [50] It is common cause that the applicant scored higher points than the third respondent. Therefore, the Department must have relied upon objective, justifiable criteria in determining to pass over the applicant which were set out in the tender documents.
- [51] The Department cited the applicant's age of approximate 2 years and its failure to provide a bank rating letter. Neither of these factors are objective nor justifiable and were not contained in the tender invite. On the contrary these factors undermine the objectives of the CIDB act to transform the construction industry and to open it up to emerging companies.
- [52] Consequently, the decision to pass over the applicant and to award the tender to the third respondent was contrary to the provisions of section 2(1)(f) of the PPPFA.

¹⁴ 2016 JDR 1230 at para 27.1

- [53] In determining whether an administrator acted in a procedurally fair manner, regard must be had to the circumstances of each case.¹⁵
- [54] These circumstances include the Department's failure to explain why it decided to pass over the applicant for the Project, while at the same time deeming it financially capable of carrying out the Concordia and Mfuleni projects. This failure also supports the applicant's argument that the criteria used by the Department were vague and uncertain and that it lacked objectivity.
- [55] The claim to procedural fairness becomes stronger when it is claimed later in the administrative process and when, as in this case, a preferred bidder is rejected.¹⁶ If the bid was rejected for reasons and/or information that is extraneous to the tender documents (such as the bank rating letter and the age of the applicant), then the unsuccessful bidder should be given an opportunity to address those reasons and/or information. Similarly, in cases where the administrator enquires from third parties as to the bidder's competence to carry out the work and that third party provides a negative report, casting doubt on the bidder's ability and competence to carry out the work, the bidder should be heard on the alleged basis for rejecting its bid.¹⁷
- [56] The circumstances of this case includes the following:
- (i) during January 2022, Motion Projects prepared a first tender evaluation report. This report stated that the applicant has completed quite a number of projects similar in size and scope to that of the Project;

¹⁵ *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) at para 13

¹⁶ Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* third edition, at page 517

¹⁷ *Ibid*, page 519

- (ii) the applicant received a 9GB grading from the CIDB;
- (iii) the negative feedback pertaining to its contractual performance and management was disputed;
- (iv) the negative feedback pertaining to the applicant's project management and contract administration was irreconcilable with the references supplied as part of the bid documents;
- (v) the first tender evaluation report identified no risk of claims in respect of the applicant;
- (vi) the first tender evaluation report found that the applicant had completed a number of projects similar in size and scope;
- (vii) the Department deemed it financially capable of completing projects of a similar scope, size and value (Concordia and Mfuleni);
and
- (viii) the decision to pass over the applicant was taken only after a second tender evaluation report was compiled and the applicant was identified as one of the top three bidders.

[57] Consequently, in the circumstances of this matter, fairness required that the applicant should have been afforded an opportunity to respond to the allegations that it did not have the financial capacity to carry out the contract. Furthermore, the applicant should have been afforded an opportunity to respond to the reports of its poor project management and contract administration before it was passed over. The failure to provide the applicant such opportunities was, in the circumstances of this case, procedurally unfair.

[58] Section 217(1) of the Constitution provides that:

'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost- effective.'

[59] In the circumstances, the Department's decision to pass over the applicant is not in accordance with section 217(1) of the Constitution.

[60] The applicant seeks condonation for the late filing of the supplementary founding affidavit, the replying affidavit and its heads of argument. Given the extent of the delay, the explanation furnished and the need to have this matter finalised, condonation is accordingly granted for the later filing of the applicant's supplementary founding affidavit, the replying affidavit and its heads of argument.

[61] As the decision to pass over the applicant was:

- (i) determined in a procedurally unfair manner;
- (ii) was based on incorrect facts;
- (iii) inconsistent with the threshold requirements of section 217(1) of the Constitution; and
- (iv) arrived at by the Department using vague and uncertain criteria,

I make an order in the following terms:

- 1.a the Department's decision to pass over the applicant's bid in relation to tender S054/21 and to accept the tender of the third respondent dated 18 November 2021; and

- 1.b the Department's decision to conclude the contract with the third respondents for the construction of the new Manenberg School of Skills

are declared invalid and are accordingly reviewed and set aside;

2. The aforesaid decisions set out in paragraph 1 are remitted back to the Department for reconsideration.
3. The costs of the application, including the costs of Part A of this application, shall be borne by the first respondent (the Department).



Slingers, J

9 March 2023