THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 476/2015

In the matter between:

WESTINGHOUSE ELECTRIC BELGIUM

SOCIÉTÉ ANONYME **APPELLANT**

and

ESKOM HOLDINGS (SOC) LTD **FIRST RESPONDENT**

AREVA NP INCORPORATED IN FRANCE **SECOND RESPONDENT**

Neutral Citation: *Westinghouse v Eskom Holdings* (476/2015) [2015] ZASCA 208 (9 December 2015)

Coram: Lewis, Ponnan, Theron, Petse and Mathopo JJA

Heard: 23 November 2015

Delivered: 9 December 2015

Summary: Review of tender award: where an administrative body takes into account considerations that are extraneous to the tender evaluation criteria, as set out in the invitation to bid, its decision to make the award is unlawful and procedurally unfair. Award set aside and matter remitted to administrative body for reconsideration.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Carelse J sitting as court of first instance).

1 The appeal is upheld and the cross appeal is dismissed, in each instance with the costs of three counsel.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The application to review and set aside the decision of the Bid Tender Committee of 12 August 2014 succeeds with the costs of three counsel.

(b) The matter is remitted to Eskom Holdings (Soc) Ltd for reconsideration in terms of s 8(1)*(c)*(i) of the Promotion of Administrative Justice Act 3 of 2000.'

JUDGMENT

Lewis JA (Ponnan, Theron, Petse and Mathopo JJA concurring)

[1] The issue for determination in this appeal is the lawfulness of a tender process conducted by the first respondent, Eskom Holdings Soc Ltd (Eskom). Eskom is a public company, the entire share capital of which is owned by the State. It is thus an organ of state, as contemplated in the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The tender process involved two bidders, the appellant, Westinghouse Electric Belgium Société Anonyme (Westinghouse) and the second respondent, Areva NP Incorporated in France (Areva). The tender was in respect of the replacement of six steam generators at the Koeberg nuclear power station in the Western Cape. The replacement will cost some R5 billion. The tender was awarded to Areva on 12 August 2014.

[2] On 15 August 2014 Eskom advised Westinghouse that its bid had been unsuccessful. It immediately sought an urgent interdict in the Gauteng Local Division of the High Court, Johannesburg to stop Eskom and Areva from concluding a contract for the replacement of the steam generators. It withdrew the application for reasons that are not germane to this appeal. It then sought an urgent review of the decision to award the tender to Areva, in the same court, in September 2014. Both Eskom and Areva opposed the application, which was dismissed by Carelse J in March 2015. Westinghouse appeals against the substantive order and Areva cross-appeals against the order of the court a quo that the application be dismissed with the costs of only two counsel when it had employed three. The appeal by Westinghouse and cross-appeal by Areva lie to this court with the leave of the court a quo.

[3] The basis for the application, which lies at the heart of the appeal, is that the decision to award the tender to Areva was taken unlawfully. The reasons for the decision were said to be 'strategic considerations', and the existence of a 'float' (a buffer period of three months) in Areva's bid, which Eskom concedes were not part of the specified tender criteria. Areva, on the other hand, contended that these considerations were embodied in the tender criteria.

[4] If Westinghouse is correct that the award was unlawful, it asks that this court order that it be awarded the tender, since its bid was about R140 million cheaper than Areva's and, in addition, its supplier development and localisation contribution (SD & L), which was part of the tender criteria, was worth about R157 million more than Areva's. These figures are contested, but the respondents concede that the bids were evenly matched in all other respects. Thus Westinghouse argues that, had Eskom not taken into account strategic considerations, the award would have been made to it.

[5] The questions to be determined are accordingly whether the award followed an unlawful tender process, and if so, whether this court should substitute

Westinghouse for Areva as the successful bidder. Areva also contends that Westinghouse did not have locus standi to institute the application or pursue the appeal since, it argues, in fact the bid was made by an American company, Westinghouse Electric Company LLC (Westinghouse USA), for which it was acting as agent. Westinghouse denies that it is an agent, and maintains that it was the party that made the bid. And of course Areva's cross-appeal against the costs order should also be considered in the event that the appeal does not succeed.

[6] It should be noted that Eskom and Areva did in fact enter into the envisaged contract and the work is proceeding. Eskom maintains that the work must be completed by 2018, when there will be a planned shutdown of the Koeberg plant in stages, and the steam generators would then be replaced. None of the parties deny that the replacement of the generators is vital to the country's power grid and that the energy crisis that affects it will be greatly exacerbated if the work for which Westinghouse and Areva tendered is not done urgently. Some background is required.

The Koeberg power station

[7] Koeberg is the only nuclear power station in Africa. It comprises two units each of which has three steam generators. The equipment was first manufactured by Areva (formerly known as Framatone). The plans were designed by Westinghouse USA. There is a planned shutdown of Koeberg in 2018 – for some reason referred to as the 'X23' outage. Since at least 2010 Eskom has known of the need to replace the steam generators, which are prone to 'Inter Granular Stress Corrosion Cracking', and which necessitates their replacement. By the end of 2014, the one unit had been in operation for 30 years, and by the end of this year the second unit will also have been operating for 30 years. Eskom considered that by 2018 they would need to be replaced. It also regarded nuclear safety as a priority. It started a tender process for the replacement in 2010 but cancelled it.

The tender process

[8] The process currently under review began in 2012. It lasted two years. Eskom, as an organ of state, is required to adopt a Supply Chain Management Procedure (SCM procedure). The one in place when the tender process began was adopted in September 2011. This requires Eskom to comply with various requirements that stem from s 217(1) of the Constitution, which provides that organs of state must, when procuring goods or services, follow 'a system that is fair, equitable, transparent, competitive and cost-effective'. Effect is given to s 217 of the Constitution by the Preferential Procurement Policy Framework Act 5 of 2000. (See s 217(3) of the Constitution.)

[9] Eskom's SCM procedure follows the prescripts of the Constitution and the Act. Relaxation of the SCM procedure is permissible only with specific authority and where deviations are required to obtain funding or technical benefits. And any deviation must still meet the constitutional imperatives. The policy is implemented through a variety of committees, the ones involved in this tender process being primarily the Executive Procurement Sub-Committee (EXCOPS) and the Board Tender Committee (BTC).

[10] The SCM procedure obliges Eskom to formulate tender criteria clearly and without ambiguity; to attach weightings to each criterion and to evaluate and rank bidders on the basis of their total points allocated in respect of each criterion. The tender criteria were not changed during the course of the tender process. At the start of the process, when Eskom invited expressions of interest in the tender, and when it issued documentation for the tender on 18 August 2012, the tender was divided into three lots. It was envisaged that different lots would be awarded to different bidders. The first lot was for the manufacture and delivery of replacement steam generators. The second was for their installation and associated work. The third was for engineering and safety analyses consequent on the replacement. Eskom required the replacement to take place during the planned outage commencing in June 2018.

[11] The process that ensued was exhaustive. The expressions of interest, following the invitation in June 2012, were audited by an independent consultant: this established a shortlist of suppliers who qualified. Only Westinghouse and Areva qualified to make bids.

[12] The invitations to tender that followed recorded that:

'The tender evaluation process will be based on evaluating the overall value to Eskom rather than the tendered prices only. Eskom reserves the right not to award this tender to the highest ranked or highest scoring tender, as it needs to leverage or align its procurement practices to driving Socio-economic development objectives that are enshrined in various government policies such as: BBBEE [broad based black economic empowerment], Plan Industrial Policy Action and the New Growth Path. Preference will be given to responses who score high in these areas.'

[13] The criteria for the evaluation of responsive tenders were:

- Supplier Development and Localisation [SD & L] 10 % for BBBEE and 20 % Localisation and development;
- Financial is 35 %; and
- 35 % Technical including SHE [safety health and environment]; Programme and Quality.'

[14] However, as both Westinghouse and Areva are foreign-owned entities the BBBEE requirement and evaluation fell away. And so the committee evaluating the tenders (the BTC) could take into account only SD & L, technical criteria and the cost. The deviation that allowed for special initiatives was not applicable. The invitation to tender also provided that Eskom reserved the right to conduct a further procurement process through negotiating with bidders, even after the evaluation process, provided that it had the permission of the Eskom Board of Directors or the relevant delegated authority.

[15] Both Westinghouse and Areva submitted bids in respect of all three lots. Eskom appointed a committee of 25 members with the requisite technical skills. Its role was to assess the bids with reference to the bid criteria and to make recommendations to the EXCOPS. The EXCOPS would then make recommendations to the BTC, which was the delegated authority charged with making the final determination. In December 2012 the technical committee recommended to the EXCOPS that Westinghouse be awarded the tenders in respect of Lots 1 and 3 and that Areva be awarded the tender for Lot 2. On 14 January 2013, the EXCOPS made the same recommendation to the BTC.

[16] In February 2013, the BTC, having considered the recommendations of the EXCOPS, concluded that it did not have the expertise to make a final determination in respect of the bids, and resolved to appoint a Swiss firm, AF-Consult Switzerland Limited (AF Consult), to advise it on technical matters. AF Consult is a consultant in the area of energy, environmental and nuclear technology. It was required to address a number of issues, including the timing of the replacement of the steam generators, the business case made out and whether the technical specifications were appropriately developed. It was, however, requested to concentrate on the technical aspects of the evaluation. On Eskom's version, there were two qualifying bids, both of which could meet Eskom's requirements: there was very little difference between the two.

[17] AF Consult produced a report in July 2013. It made three 'top' recommendations. These were that (a) Eskom should consider a more thorough evaluation of rejected technical options in Lots 1 and 3; that (b) it should consider whether all lots should be 'delivered by one supplier'; and that (c) Eskom should take into account previous experience for Koeberg and Eskom with the suppliers. Most significantly, AF Consult suggested that certain 'strategic considerations' should be taken into account by Eskom. As it expressly said in the main body of the report, one item not previously considered was Eskom's previous experience with bidders. Another was that the bidders should be asked to improve their localisation and development of skills applicable for work on nuclear power projects in South Africa.

Thirdly, Eskom should consider issues such as gaining experience with foreign suppliers. These matters were not part of the bid specifications.

[18] On 13 December 2013, and pursuant to AF Consult's recommendations, Eskom invited Westinghouse and Areva to submit composite bids for the three lots. The tender evaluation criteria were not changed. No new criteria were introduced. And on 14 January 2014 they both submitted composite bids.

[19] The technical committee met again to consider the new bids and then recommended to the EXCOPS that Lots 1 and 3 should be awarded to Westinghouse. The EXCOPS in turn recommended to the BTC that the award in respect of Lot 2 should be determined after a process of competitive negotiation with both bidders. The BTC was advised to approve a mandate to negotiate with suppliers, but not conclude any contract, in order to 'extract more value in terms of price and supplier development and localisation benefits'. The EXCOPS accepted the recommendation of the technical committee that the tenders in respect of Lots 1 and 3 be awarded to Westinghouse and so recommended to the BTC.

[20] However, the BTC did not accept the EXCOPS recommendations. It preferred to enter into a composite contract in respect of the three lots. Thus a further subcommittee (the Exco Task Team) was appointed by Eskom's 'interim chief executive officer' on 14 May 2014. It was mandated to consider the issue of a single composite contract. The Exco Task Team recommended that a composite contract should be concluded after parallel negotiations with both Westinghouse and Areva, which would be led by an independent person. The Koeberg team, it recommended, 'should consider all project risks and the implications of meeting the Outage 23 schedule with the appropriate risk mitigation actions'.

[21] On 2 June 2014 the BTC resolved to accept the recommendation of the Exco Task Team, and to embark upon the process of parallel negotiation that would

involve team members with Eskom specific plant knowledge or Eskom employees who were not part of the evaluation team. It required that negotiations were to be concluded 'so as not to delay Eskom's readiness for the 2018 outage and enable it to adhere to the Outage 23 Project [X23] Schedule.'

The parallel negotiations

[22] Westinghouse and Areva were invited to engage in parallel negotiations with Eskom on 13 June 2014. They were led by an independent consultant from Germany, Mr Ruediger Koenig. Prior to the commencement of the negotiations, Westinghouse, Areva, and AF Consult discussed the process telephonically. Eskom advised that, following the negotiations, they would be expected to make final offers which allowed only for cost adjustments on deviations, options or risks identified in the course of the negotiations. The conversations were recorded and minutes made. No mention was made about changing the bid criteria.

[23] Thus the original tender criteria, set out above, remained applicable. The deponent to Eskom's answering affidavit, Mr M M Koko, then the acting Group Executive for Technology and Commercial at Eskom, attached to the affidavit an unattested statement by Koenig describing the negotiations. In it, he confirmed that the original tender criteria were to apply. He said that the bidders were advised at the outset of the negotiations that Eskom would inform them if new criteria were to be added. None were in fact introduced. But late in the negotiations, Koenig did mention that 'high level decision factors' would be considered and that 'strategic considerations' might be taken into account.

[24] Koenig added in his statement:

'In the spirit of transparency, throughout the negotiations I made efforts to emphasise items to both bidders that in my observation were likely to be of special importance to Eskom. For instance, it became apparent to me that due to the delays already encountered in the procurement process, the ability to meet schedule would be a critical factor for the selection

of a bidder and implementation of the project. I can confirm that I therefore personally pressed the point with each of the bidders, that they should look at the entire schedule and demonstrate to Eskom the robustness of their schedule, and not just adherence by the letter to key dates.'

[25] Koko confirmed that on the last day of the parallel negotiations, Eskom advised Westinghouse and Areva that, in addition to the tender evaluation criteria, in making the final determination of the award it would have regard to strategic considerations. What they would be was not, however, disclosed. When Westinghouse made enquiries as to the nature of the strategic considerations, it was not told. Eskom representatives were simply unable to respond to requests for clarification.

[26] The final offers by Westinghouse and Areva were submitted before the deadline. Westinghouse, which submitted its final offer on 11 July 2014, accepted all of Eskom's contractual terms, which included the obligation to complete the installation of the replacement steam generators during the 2018 scheduled outage. On 28 July 2014, Koko, and Mr T Govender (the Eskom Group Executive, Generation), wrote a report to the BTC, which was tabled at its meeting on 31 July 2014, recommending that a contract be awarded to Westinghouse at a contract value of R4 215 682 094, with a contingency amount of R843 136 418. But they recommended, in the alternative, that the award be made to Areva. The Areva contract value would have been higher, as would the contingency amount.

[27] At its meeting on 31 July 2014, the BTC was not prepared to accept a recommendation in the alternative. It considered that the bids were comparable, but noted that Westinghouse's price was substantially lower: it 'translated into a lot of money'. The BTC discussed the buffer period of three months (the float) in Areva's bid, but agreed that '[t]he schedule risk was deemed to be equal by the Negotiation Team purely on a factual basis.' There was significant discussion of the float. There was also a discussion of strategic considerations. In the end, the BTC resolved that

the EXCOPS should meet urgently to consider a single recommendation to be placed before it. It agreed to meet again on 12 August 2014.

[28] Koko and Mr C Matjila, the acting chief executive officer, prepared a revised recommendation for the EXCOPS recommending that a contract be concluded with Areva. Govender refused to sign this submission. He wrote, in an email to Koko, Matjila and another Eskom employee, dated 4 August 2014, that he did not have a basis to change his mind and that all the decision making structures should have the opportunity to consider the alternative recommendations originally made to the BTC. He acknowledged, however, that the chief executive officer had the prerogative to make a different recommendation.

[29] The EXCOPS held a special meeting on 6 August 2014, and discussed the question of the float and the cost differential again at length. It was noted that there was a risk in the Areva offer since it would be using a subcontractor, SENPEC (Shanghai Electric Nuclear Power Equipment Company Limited), which had worked in China only, and that the costs might be understated. It resolved that Eskom should conclude a contract with Westinghouse. But it again noted that the BTC might consider concluding a contract with Areva because of the importance of the work to be done on schedule.

[30] A recommendation was sent to the BTC on 7 August 2015 that strategic issues should be considered in making the final decision, but proposed that the contract should be concluded with Westinghouse at a total contract value of R4 215 682 094, and a contingency value of R843 136 418 (20 per cent of the total contract cost). The recommendation was signed by all the members of the EXCOPS. Despite the recommendation the BTC resolved, on 12 August 2014, that the contract be awarded to Areva.

The reasons for the BTC's decision

[31] The reasons for the volte-face emerge from a letter sent to the Minister of Public Enterprises by Mr Zola Tsotsi, the Chairman of the Eskom Board, and Ms Neo Lesela, the Chair of the BTC, dated 13 August 2014. They said, inter alia:

'Having due consideration of all the facts presented to the BTC, it became apparent that the management of Eskom's risk was the primary driver of decisions to be made. Key considerations then became certainty on the ability of the preferred supplier to manage adherence to the critical path of Eskom's project schedule and the ability to offer benefits for South Africa to meet its strategic supplier development and localization imperatives.'

[32] They then explained the processes that had led to the decision and stated that both bidders demonstrated compliance with Eskom's technical, commercial and SD & L requirements; that both were technically capable of performing the work; that both met the SD & L targets; and that both had committed to Eskom's milestones and contractual terms. The letter continued:

'Notwithstanding the fact that Westinghouse has emerged as the lowest price bidder with an NPV [Net Present Value] price difference of 0.99 % excluding SD & L (equivalent to R36 808 992), the following strategic considerations were made by the BTC:

- Areva (then Framatone) was involved as the nuclear constructor as part of a consortium and became the OEM [original equipment manufacturer] for the plant since the start of operations in 1985;
- While the original design for plants of this age is owned by Westinghouse, Areva is the . . . OEM for Koeberg and on-going support from it throughout the life of the plant would be beneficial to safe and reliable operations;
- Areva was the main engineering organization at construction and therefore has the in-depth information on the design and safety assumptions. These factors are relevant considerations for keeping the plant safe through technical problems and plant upgrades;
- over the last 15 or so years, Areva generally demonstrated better control of sub-suppliers and had a stronger overall "branding control". In other words, sub-suppliers generally acted in the Areva image and/or the Areva overall quality control process ensured quality of supply;

- Areva has, or has contracts for, approximately 36 SGR projects between 2005 and 2018, including 9 SGR projects planned between 2015 and 2018, while Westinghouse in the same period (2005-2018) has had 2 as prime contractor;
- Areva has offered to grant Eskom its intellectual property rights in respect of the nuclear power station equipment; and
- In addition to the . . . SD& L offer that both bidders made to Eskom, Areva offered during the negotiations to exchange some training activities with a study on the feasibility to manufacture nuclear valves in South Africa. This represents potential major benefit to South Africa in terms of localisation and job creation in the short to medium term. Valves have been designated by the Department of Trade and Industry . . . as a commodity for localisation.'

The letter advised that the decision had been taken by secret ballot and that there had been four votes in favour of the award to Areva and one against.

[33] As will be immediately apparent, these considerations were not expressly part of the bid evaluation criteria. Areva contended that they were implicit. Eskom conceded, as I have said earlier, that they were not part of the tender. Moreover, in Eskom's answering affidavit, Koko raised a further reason for the award to Areva: it had included in an updated schedule a global float – a three month buffer period (the float) which optimised meeting the target date. He said that Westinghouse had not submitted an updated schedule and so its advantage shifted when Areva showed that it was able to mitigate against the risk of delay. Again, Areva contended that the performance of the work timeously was an inherent requirement of the tender criteria. Yet Koko, in the answering affidavit to the application for the interdict, denied that the float played a role in the evaluation process.

Was the BTC entitled to take into account the strategic considerations?

[34] The answer to the question whether the BTC was entitled to take into account what it termed strategic considerations lies in the bid evaluation criteria. If they fell outside these criteria then it is clear that the BTC acted beyond its powers, and thus unlawfully. And if any one of the considerations was taken into

account when it should not have been, then that is sufficient to vitiate the decision.

[35] Carelse J in the court a quo considered that the strategic considerations 'were relevant considerations for the selection of the successful bidder. None of the six criteria applied can be said to be irrelevant considerations.' She held thus that the BTC's decision was not arbitrary or capricious, and that the tender process was procedurally fair. In this regard she relied on Lawrence Baxter *Administrative Law* (1984) at 446:

'Administrative action based on formal or procedural defects in not always invalid. Technicality in the law is not an end in itself. Legal validity is concerned not with technical but also with substantial correctness. Substance should not always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects. . . .'

[36] That is doubtless still good law. In *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2013 (4) SA 557 (SCA) (*Allpay SCA*) para 96 this court said:

'There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinized intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal.'

It is, of course, only immaterial flaws (termed 'inconsequential' by that court) that may be overlooked. The judgment in *Allpay SCA* was reversed on appeal to the Constitutional Court (the principles formulated by that court are discussed below) but, as I understand it, that principle was not attacked.

[37] But the learned judge in the court a quo appeared to overlook the principle that in assessing the lawfulness of the tender process a court must

consider only whether the bids have been properly evaluated against the tender criteria. Other considerations are not relevant.

Unfairness in the process

[38] It is appropriate at this stage to consider the law as to unlawfulness in the tender process, both as to the award taken for the wrong reasons and as to unfairness in the process. There are many decisions of this court that have held that immaterial irregularities in a tender process do not necessarily vitiate a tender award. *Allpay SCA* is one. I do not propose to deal with them comprehensively. It is trite that fairness in the procurement process is a value in itself. In *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 9 this court said:

'[F]airness is inherent in the tender procedure. Its very essence is to ensure that before government, national or provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in s 217 [of the Constitution] permeate the procedure for awarding or refusing tenders.'

[39] Proper compliance with the procurement process is necessary for the process to be lawful. Strict rules of compliance have been laid down by the Constitutional Court. In *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* [2013] ZACC 42; 2014 (1) SA 604 (CC) para 39 the court approved the dictum of this court in *Premier, Free State & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413; [2000] ZASCA 28 (SCA) para 30, where Schutz JA said:

'One of the requirements . . . 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 the tender. . . . that would deprive the public of the benefit of an open and competitive process.' (My emphasis.)

[40] The Constitutional Court said in *Allpay* (para 40):

'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 [the tender awarding body] may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by PAJA. Deviations from the 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 in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.' (Footnotes omitted.)

[41] See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121; [2006] ZACC 16 (CC) para 60, where the Constitutional Court said that strict compliance with tender procedures by both bidders and adjudicators is of central importance in public procurement tenders. In *Allpay* the court said also (para 92) that 'the purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive'.

[42] The gravamen of the Constitutional Court judgment in *Allpay* is that in order to ensure a fair outcome in a tender award, the process itself must be fair. If the process is compromised it cannot be known what course it would have taken if the procedural requirements had been properly observed (para 24).

[43] The tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions (*Allpay* para 38).

Taking a decision for a reason that is irrelevant or bad

[44] It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated. In *Patel v Witbank Town Council* 1931 TPD 284 Tindall J said (at 290);

'[W]hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision . . . . This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it.'

[45] This passage was approved by this court in *Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 34 where Cameron JA said: 'This dimension of rationality in decision-making predates its constitutional formulation.' Once a bad reason plays a significant role in the outcome it is not possible to say that the reasons given for it provide a rational connection to it. (The decision of this court was reversed by the Constitutional Court but this principle was not questioned: *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24; [2007] ZACC 22 (CC)).

[46] The taking of a decision for a reason that is assailable – one, in this case, that falls outside the parameters of the bid criteria – clearly vitiates the decision itself. Section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides:

'**6 Judicial review of administrative action**

(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 if–

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered; . . . .' (My emphasis.)

Unfair process

[47] Westinghouse argues that the whole process of the award of the tender was unlawful because there was not proper compliance with the tender requirements by the BTC. Thus there was no fairness; an efficient process was not ensured; and there was no safeguard against corruption. In *Allpay* Froneman J said (para 27):

'[D]eviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, 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 efficiency and optimality in the outcome; and *(c)* it serves as a guardian against a process skewed by corrupt influences.'

[48] The very fact that the BTC resorted to strategic considerations without making these known to either Westinghouse or Areva, and without making them part of the bid evaluation criteria, appears to me to be fundamentally unfair. And the fact that Eskom added to these in its answering affidavit by stating that the BTC had also had regard to the float added injury to insult. No mention was made of this consideration in the letter to the Minister and of course Westinghouse was not given the opportunity to point out where, in its schedule, it had built in buffer periods to avoid delay in the completion of the work.

[49] Westinghouse does not complain about the resort to the negotiations: it complains that after the negotiations had ended, Eskom still took into account factors other than those found in the bid criteria. As I have pointed out earlier, it is common cause that these were not changed after the invitation to tender was made. Areva argues that these considerations were to be found in the invitation to bid.

Were the strategic considerations part of the bid evaluation criteria?

[50] Westinghouse argues that each of the strategic considerations that materially influenced the decision to award the tender to Areva was not relevant because the respective bids had to be evaluated only against the published bid criteria: these were the financial, technical and the SD & L. Eskom does not contend that the strategic considerations were bid criteria. It concedes that they were not. But Areva argues that all of them are to be found in the tender documents. I do not propose to analyse its contentions in any depth. If any of the

considerations that caused the BTC to award the tender to Areva is outside the parameters of the bid criteria the decision is bad in law. In considering each of the strategic considerations and the float, it must be borne in mind, as Schutz JA said in *Firechem* above, that the tender must speak for itself.

The original equipment manufacturer

[51] In its letter to the Minister, Eskom listed as the first strategic consideration that Areva was the manufacturer of the Koeberg plant. Westinghouse also lays claim to having been involved in that a Westinghouse USA design was used. In my view that is irrelevant. But in any event, the evaluation in respect of Lot 3 had already taken into account the fact that Areva was the original equipment manufacturer (OEM) when assessing the respective experience of the bidders. In Eskom's technical assessment it expressly stated that in this section no preference should be given to the OEM as it would amount to bias in favour of Areva. It said that Westinghouse had already been penalized for not being the OEM in the section evaluating 'management of the input data'.

[52] It was accordingly not open to the BTC to take the decision based on this consideration in addition to having evaluated it when considering experience. OEM status was not ever part of the tender criteria. Koko admitted in Eskom's answering affidavit that it was not a specific requirement that the bidder be the OEM, but said the fact that Areva was such 'provides an increased comfort' to Eskom. It provided more certainty that the work would not be delayed.

[53] The BTC thus took into account an irrelevant consideration that was not part of the tender criteria. For this reason alone Westinghouse is justified in arguing that the award was reviewable under s 6(2)*(e)*(iii) of the PAJA.

Control over subcontractors and 'branding control'

[54] The second strategic consideration that tipped the balance in favour of Areva was that it had previously 'generally demonstrated better control of sub-suppliers and had a stronger overall "branding control"'. What exactly this meant is unclear. In any event this also lay outside the tender award criteria. And it was not discussed during the negotiating process. No foundation was laid for the consideration as a matter of fact. But worst of all, Eskom did not give Westinghouse the opportunity to defend its record. And, as a matter of fact, Areva would have used a subcontractor, SENPEC, that had never worked outside of China. There is nothing to suggest that its previous record gave it, for this award, the edge in this respect. Indeed, in the Commercial Report on the bids to the BTC, Eskom officials said to the BTC that the use of SENPEC 'requires specific risk mitigation measures such as increased oversight quality assurance activities which Eskom would need to perform'.

[55] Nonetheless Koko, for Eskom, explained that although neither bidder was penalized for prior incidents involving subcontractors, he also said that this consideration tipped the balance between quality and costs where the two bidders were equally competent to perform the work. A decision based on this consideration as a reason for the award to Areva is also reviewable under s 6(2)*(e)*(iii) of the PAJA.

Experience

[56] The BTC advised the Minister that the third strategic consideration for the award to Areva was that it had more planned contracts for steam generator replacement, in the period between 2005 and 2018, than did Westinghouse – some 36 – whereas Westinghouse had but two. This, according to Westinghouse was a bad reason first because, as a matter of fact, Westinghouse's primary subcontractor, Bechtel, has considerable experience. This was recognized by Eskom when it responded to a criticism made by AF Consult:

'The scoring assigned to Westinghouse in the individual Lot evaluation includes the Bechtel experience since, as documented in the initial bid document, Westinghouse has a lengthy record of performing SGRs. Bechtel has been included as a Westinghouse sub-supplier. This has not changed for the composite bid.'

[57] Secondly, the consideration was bad because it had already been taken into account, as illustrated above. To regard it as tipping the balance when both bidders had scored well for experience is plainly absurd. In fact, Areva had scored 100 per cent, on Eskom's version. This too renders the decision reviewable.

Intellectual Property Rights

[58] The fourth strategic consideration was said by the BTC to be that Areva had offered to grant its intellectual property rights in respect of Koeberg to Eskom. Again, this was not a criterion of assessment. Although Eskom does not rely on it now, saying the factor is neutral, the letter to the Minister states that it was a reason for the award to Eskom. It cannot have it both ways. It was not a reason relevant to the award, and since the BTC said it had taken it into account, it took the decision for an irrelevant reason. That too is a ground for review.

Areva's SD & L offering

[59] The fifth reason advanced to the Minister for the BTC's decision was that, in addition to what Areva had included in its tender, in the negotiation process it had offered to exchange certain training activities for a study on the feasibility of manufacturing nuclear valves in South Africa. As Westinghouse argues, this offer is not quantifiable. Moreover, the SCM procedure states that the compliance matrix 'contains the evaluation framework and methodology and will be used as the basis for the evaluation of SD & L as a criterion'. It continues to state that the compliance matrix, with adjustments for each tender, must be included as a mandatory tender returnable for completion by suppliers.' Thus,

argues Westinghouse, the additional offer by Areva was not part of the compliance matrix and should not have been taken into account.

[60] Moreover, Areva's SD & L had to be compared with that of Westinghouse. As I have already indicated Westinghouse's supplier, development and localization offer, made in its bid, was worth substantially more than that originally offered by Areva. Koko denied, in the answering affidavit, that Eskom had taken the additional offer by Areva into account. He said that it was an attractive offer, but that it would be investigated only after the award was made to Areva. Yet that is not what the BTC said to the Minister: either Koko was wrong or the BTC was misleading the Minister when it said that in addition to the SD & L offers in their bids, Areva had offered training activities related to nuclear generator valves, and that this was a strategic consideration. The decision is reviewable for this reason too. In *Metro Projects CC & another v Klerksdorp Municipality & others* 2004 (1) SA 16 (SCA) para 14, this court said that to allow a bidder to 'augment its tender so that it might have a better chance of acceptance by the decision-maker' is unfair.

The schedule float

[61] As I have said, Eskom added a sixth additional reason for the decision in its answering affidavit. Areva had built in a period of three months in its schedule to avert delay. No mention of this was made to the Minister. Moreover, in its answering affidavit in the urgent application for an interdict, Eskom had denied that the float was a consideration taken into account. So Eskom's position is contradictory.

[62] Areva argues that the time schedule was always a crucial factor. The steam generators had to be replaced during the X23 outage. A buffer period was thus essential and always known to both bidders. A float was in fact discussed at the BTC meeting of 31 July 2014, where one member had asked if the float was

a tender requirement. The member also asked whether Westinghouse had been advised that the float carried weight in the adjudication process. But the minutes record that the schedule risk was deemed to be equal by the negotiation team.

[63] In addition, the EXCOPS report (dated 5 August 2014) to the BTC stated that if Westinghouse were to 'slip' by one month its cost advantage would be negated. But that is because it calculated its bid value as R36 million less than that of Areva, whereas the actual figure was some R140 million, excluding SD & L benefits.

[64] Westinghouse argues thus that the reliance on the float as a reason for the award was irrational. The BTC failed also to take into account that Westinghouse had unconditionally committed to Eskom's requirement that the replacement steam generators had to be installed in the 2018 outage. It did so under pain of a penalty of R5 million for each day by which it was late. Westinghouse maintained that as a matter of fact it had built in 41 days as a contingency, and had offered to work seven days a week (instead of six) that would have given it a 'cushion' of 104 days in addition. There is no need to determine whether that is in fact so. Until the BTC took its decision on 12 August 2014, Westinghouse had not been asked to demonstrate where the float lay in its schedule. But it would have appeared from the schedule and the bid had Eskom been specifically concerned with a buffer period. Thus this reason too, advanced by Eskom for the first time in its answering affidavit, was bad and rendered the decision reviewable.

The BTC's decision was unlawful

[65] In my view, when the BTC took into account each of the strategic considerations, and the consideration of the float, and thus decided to award the tender to Areva, it made the decision unlawfully in terms of s 6(2)*(e)*(iii) of the PAJA. And the failure, if these reasons were decisive, to refer them to the bidders

and give them the opportunity to clarify their bids, or to reopen the process and amend the tender criteria to include the factors, made the whole process irrational and unlawful. The award must thus be set aside.

Did Westinghouse have locus standi to institute proceedings?

[66] The argument raised by Areva in this regard is that various letters sent to Eskom reveal that it was acting not for itself but for its associated American company, Westinghouse USA. Evidence of this is to be gleaned from several letters. These include one dated 21 July 2014, intended to clarify issues raised by Eskom, written on the letterhead of Westinghouse Electric Belgium SA, and signed by Mr L van Hulle, the Vice President for Marketing, Europe, Middle East and Africa (Van Hulle was the deponent to Westinghouse's founding affidavit); Mr F Wolvaardt, the Eskom Customer Account Manager; and Mr F Poncelet, the Westinghouse Marketing Manager Major Projects Europe, Middle East and Africa. In the letter they wrote: 'Our offer, these clarifications and any subsequent communications relating to this offer are the property of, and contain information which is proprietary and confidential to, Westinghouse Electric Company LLC, and may be used only for purposes of offer evaluation.'

[67] In Areva's answering affidavit, Mr Y-M Pacé, referring to this statement, pleaded that: 'From this, it must be deduced, I contend, that the true tenderer was not Westinghouse, but rather Westinghouse USA. This would mean that the applicant has no locus standi in these proceedings.' Areva relies on other letters too. There is no need to dwell on them. Areva complains also that the court a quo did not admit one of them for the wrong reason. Most of the documents on which Areva relies to show that Westinghouse is only an agent, and as such has no standing, are to similar effect: for example, in its final offer to Eskom made in July 2014, Westinghouse wrote to Eskom stating that 'Westinghouse Electric Belgium on behalf of Westinghouse Electric Company is pleased to submit the present offer to ESKOM'.

[68] Other documents suggesting that Westinghouse USA is the true tenderer are a part of the Westinghouse bid that deals with the use of Bechtel as a sub-supplier, and in which it is said that the proposal is a joint effort of Westinghouse USA and Bechtel Power Corporation (Bechtel); and a memorandum (signed only on behalf of Bechtel) dealing with the proposed contract between Westinghouse and Bechtel which refers also to Westinghouse USA.

[69] Westinghouse argues, on the other hand, that it was always the bidder. Eskom understood it to be such. If the tender had been awarded to it, the award would have been not to Westinghouse USA but to it, the company that had in fact submitted the bid. And it was Westinghouse that had participated in the negotiations. Areva relies on *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & another* 2009 (1) SA 317 (SCA) in arguing that Westinghouse has no standing. There Cameron JA said (para 19):

'The applicant must establish the legal lineage between itself and the rights-acquiring entity the resolution mentions. That it has not done. While in a sense this is technical, and procedural, it also goes to the substance of the applicant's entitlement to come to court.'

I consider that Westinghouse has established its legal lineage.

[70] Moreover, Areva did not deny that Westinghouse had submitted its first bid in October 2012 and a revised offer in 2014. The references to acting on behalf of Westinghouse USA are mere surplusage and must be disregarded. Areva's argument on Westinghouse's standing must thus fail, as it did in the court a quo.

Substitution and the appropriate relief

[71] Westinghouse asks that it be substituted for Areva: Eskom should be ordered to conclude the contract for the replacement of the steam generators to

Westinghouse. This is permissible in terms of s 8(1) of the PAJA which provides that a reviewing court may grant any order that is just and equitable. Section 8(1)*(c)*(i) allows for the matter to be remitted for reconsideration by the administrator, and 8(1)*(c)*(ii) provides that in exceptional circumstances a court may substitute or vary the administrative action.

[72] In *Gauteng Gambling Board v Silverstar Development & others* 2005 (4) SA 67 (SCA) para 29, Heher JA said:

'An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. . . . That is why remittal is almost always the prudent and proper course.'

He relied in this regard on, inter alia, the Constitutional Court decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490; [2004] ZACC 15 (CC) paras 46-49. The court in *Gauteng Gambling* nonetheless considered that there were exceptional circumstances in that matter and because of the inevitability of the outcome, accepted that remittal was not necessary and substitution was appropriate.

[73] The question is essentially one of fairness. In *Commissioner, Competition Commission v General Council of the Bar of South Africa & others* 2002 (6) SA 606 (SCA) Hefer AP said (para 14):

'[T]he remark in *Johannesburg City Council v Administrator, Transvaal & another* [1969 (2) SA 72 (T) at 76D-E] that "the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will be no remittal to the administrative authority where such a step will operate procedurally unfairly to both parties.'

[74] Most recently, the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa & another* 2015 (5) SA 245; [2015] ZACC 22 (CC) reversed a decision of this court which had ordered remittal to a bid evaluation committee: the committee had wrongly concluded that one of two bids was non-responsive. The Constitutional Court held, however, that substitution was the appropriate remedy. Khampepe J said (para 47):

'To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of the administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.' (Footnote omitted.)

The court said further that the first enquiry is whether it is in as good a position to make the decision as the administrator was. Second, it must determine whether a substituted award is a foregone conclusion.

[75] Westinghouse argues that this court is in as good a position as the BTC was to award the bid to it and that Eskom should be ordered to conclude a contract with it, even though a contract has already been concluded with Areva and work commenced in September 2014. Further, it contends, it is a foregone conclusion that Eskom would have awarded the tender to Westinghouse had the BTC not taken irrelevant considerations into account.

[76] In my view, however, it would not be equitable for this court to substitute Westinghouse for Areva. First, Eskom, albeit at the last minute, decided that various criteria, not part of the bid specification, were decisive. These were strategic considerations that gave Areva the advantage, despite Westinghouse's considerably less costly bid. Thus the administrator, Eskom,

itself relied on considerations that it regarded as vital but which it had not placed in the bid criteria. Eskom should accordingly start the tender process again and if it still considers that the criteria it wrongly took into account, or to which it attributed double weighting, are vital it should include these amongst the bid evaluation criteria.

[77] Second, Areva has already started the work. This court does not know what the consequences of substitution will be. And the 2018 deadline is looming.

[78] Westinghouse argues that it is a foregone conclusion that it would have been the successful bidder had irrelevant considerations not been taken into account. Areva argues to the contrary. It is true that the EXCOPS recommended that Westinghouse be awarded the contract. But it also recommended, in the alternative, that the award should go to Areva despite its bid being more costly. We do not know that it is a foregone conclusion that Westinghouse will succeed, especially if the strategic considerations are properly taken into account. Accordingly the matter must be remitted to Eskom for reconsideration.

The cross-appeal

[79] Areva has cross-appealed against the order of Carelse J awarding it only the costs of two counsel in the court a quo. There is no merit in the cross-appeal. In any event it is of no consequence since Westinhhouse's appeal succeeds.

Order

[80] 1 The appeal is upheld and the cross-appeal is dismissed, in each instance with the costs of three counsel.

2 The order of the court a quo is set aside and replaced with the following:

‘(a) The application to review and set aside the decision of the Bid Tender Committee of 12 August 2014 succeeds with the costs of three counsel.

(b) The matter is remitted to Eskom Holdings (Soc) Ltd for reconsideration in terms of s 8(1)*(c)*(i) of the Promotion of Administrative Justice Act 3 of 2000.’

_____

C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	J J Gauntlett SC (with him D Borgström and L Kelly)
Instructed by:	Webber Wentzel, Johannesburg Honey Attorneys, Bloemfontein
For First Respondent:	I V Maleka SC (with him H Rajah)
Instructed by:	Mchunu Attorneys, Johannesburg Bokwa Attorneys, Bloemfontein
For Second Respondent:	P B Hodes SC (with him D Goldberg and D Simonsz)
Instructed by:	Dentons Incorporated as Kapditwala, Cape Town Van der Merwe & Sorour Attorneys, Bloemfontein