

**THE INDEPENDENT REVIEW COMMITTEE OF THE SWAZILAND
PUBLIC PROCUREMENT REGULATORY AGENCY**

In the matter between:

A G THOMAS (PTY) LTD

Applicant

And

MUNICIPAL COUNCIL OF MANZINI

1st Respondent

HEPTAGON CIVILS (PTY) LTD

2nd Respondent

IRC DECISION

For the Applicant:

Adv. D. Vettel (with him
Mr. J. Warring of
Warring and Associates)

For the First Respondent:

Adv. C. Bester (with him
Mr. Kenneth Motsa of
Robinson Bertram Attorneys);

For the Second Respondent:

Adv. M. Mabila (with him
Ms. Nontobeko Dlamini of
Mabila Attorneys in Association
with N. Ndlangamandla and S.
Jele).

DECISION:

Background

1. This matter concerns an application for the setting aside of an award by the First Respondent, The Municipal Council of the City of Manzini (the first respondent or "Council") of a certain tender for road works involving the rehabilitation of a road network in the Township of Zakhele entailing the

upgrade of the existing gravel surface to asphalt pavement and associated works. The tender was awarded to the Second Respondent on the 12th February 2015.

2. It is this award that is challenged by the Applicant in terms of Section 49 of the Procurement Act, 2011 on grounds of illegality or unlawfulness.
3. This matter has had a long and circuitous history and we briefly sketch here, if for fullness, the somewhat unusual course it has taken before coming before us. In first iteration the matter was initiated before the Chief Executive (Clerk) of the 1st Respondent in her capacity as the principal of the first respondent (the procurement entity) as envisaged in the redress procedures under section 47 of the Public Procurement Act.
4. Ultimately it came to be dealt with and heard by a duly appointed Independent Review Committee (our predecessors), which considered and delivered its decision on the 17th June 2015. That decision was however taken on review by the parties in terms of Section 54 of the High Court Act in an application and cross-application by the first respondent and applicant, respectively. In the outcome the High Court set aside the decision of the erstwhile IRC and ordered that the matter be remitted to a newly constituted Independent Review Committee to be heard afresh as it were. This is how the matter comes before us.
5. It must be said that at the outset, in the absence of established rules and procedural guidelines for the conduct of these applications, the committee sought to fashion out appropriate consensual procedures and a programme in terms of which the proceedings would be managed. This was done at the outset of the matter.
6. Among some of the procedural arrangements has been the management and taking of documents for evidential purposes given the substantial record in the form of submissions and other documents that had already been exchanged in the first incarnation of the matter before our predecessors.

7. It was agreed that although regard could be had of the original record and documents pertaining to the first application where absolutely necessary this would be done so selectively with consultation of the parties. The committee has favoured an approach, which, with the approval of the parties, re-constituted a new comprehensive (record or) suite of documents comprising of the parties' submissions and all pertinent documents to the tender under review.
8. Given the unique and technical nature of the proceedings the Committee
9. saw it fit to examine and enquire as broadly and as comprehensively as possible, all the formal documents issued and submitted in the course and conduct of the Tender No. 41 of 2014/15. This was done in furtherance of the powers conferred in terms of Section 51 of the Procurement Act. The intent was to open up and get a full exposition of the critical facts given the scope of the issues emerging from the parties' statements and the want of clarity in the surrounding factual circumstances. To appreciate the depth, we sketch the background facts of the process. These are largely common cause

The background facts

10. In the past the first respondent as a local authority has procured civil engineering works projects in terms of the tender provisions of the Financial Regulations under the Urban Government Act. This was no exception. Apart from these provisions there have been to date no elaborate procedural rules or guidelines in the form of procurement regulations to direct the detailed administration of the procurement process by the relevant organs of the Council.
11. The first respondent issued the tender under review in December 2014. The Notice for Tender No. 41 of 2014/15 was exclusively directed at civil engineering contractors registered under category 3 and 4 with the Ministry of Public Works & Transport to submit bids.

12. The Invitation to Tender document also clearly specified registration of all tenderers with the Ministry of Public Works and Transport and also with the Construction Industry Council as an essential requirement. The exact conditions and detail concerning the specifications and instructions are central to the issues in this application and shall be dealt with in due course.
13. Whilst at this point it is important to say by way of slight digression, that by the time of going to tender, Parliament had passed the Procurement Act¹ as the overarching regulatory legislation governing public procurement. That Act touches on the legal and institutional framework against which this review is to be located and considered.
14. In the Act Chapter V is dedicated to provisions of procurement principles, methods and rules. Section 38 of the Act requires that public procurement be conducted **'in a manner which promotes economy, efficiency, transparency, accountability, fairness, competition and value for money.'**
15. Under that chapter the Act also makes specific provisions to do with supplier eligibility and qualifications. In Section 40(2) it provides: ***"All invitation document shall state the eligibility requirements and specify any documentary evidence required as proof of eligibility"***
16. Then Section 41 deals with supplier qualification provisions. Of particular relevance herein are subsections (1) and (2) which state that;
- (1) procuring entity may require bidders to meet such qualification criteria as the procuring entity considers appropriate to a particular procurement requirement, to demonstrate that it has the capability and resources to effectively perform a contract¹ and;**
- (2) Invitation documents shall state any qualification requirements and specify the documentary evidence or information required to demonstrate the tenderers qualifications²**

¹ The Public Procurement Act No. 97 of 2011.

² Sections 41 (1) and (2) of the Procurement Act

17. Returning to the material facts it is also common cause that the Applicant omitted to submit the required documentary evidence to prove its registration with the Ministry of Public Works and Transport, in its tender package, although it did submit a certificate in regard to its registration with the Construction Industry Council; this being another specified requirement in the Invitation to qualify bids pertaining to Tender No. 41 of 2014/15.
18. In fact the tender document set out various other specified and distinct conditions pertaining to fulfilling of certain additional criteria for eligibility or qualification and stipulated the 28th of January 2015 as the closing date for submission of the tenders. These were to be submitted as a set of returnable documents comprising inter alia, a security bond, a valid trading licence, and a valid labour compliance certificate along with the documentary evidence to prove registration as a civil engineering construction contractor in the designated categories with the Ministry of Public Works & Transport as well as the Construction Industry Council.
19. There is much detail to which we return pertaining to the procedural steps followed in the process in the wake of the submission of the tenders. At this time it may be mentioned in summary that the 1st Respondent, in keeping with the norm in the procuring of complex engineering works, had engaged the services of consulting engineers, Messrs ED Simelane and Associates represented by Mr Ramford Zwane (the consulting engineer or engineer) who was the principal engineer responsible for leading the project, to prepare and draw the necessary tender documents and notices, conduct the examination and evaluation of the tenders, report thereon as well as make recommendations to the Finance Audit and Administration Committee (FAAC) of the 1st Respondent (the responsible authority) to approve the evaluation and place the evaluated tenders before the Council for adjudication.
20. The FAAC was ultimately responsible for the administration of the tender process and for considering and vetting the evaluation of tenders and for presentation of the best-evaluated tenders before Council. In a sense its role

was akin to that of an evaluation committee even though it delegated the actual conduct of the process to the engineer.

21. The engineers prepared a tender evaluation report for the 1st Respondent's consideration which report was adopted by FAAC and formed the basis of its own report that was duly tabled at a special meeting of the 1st Respondent's Council for the adjudication and award of the Tender No. 41 of 2014/15. In effect the engineers became a source of a recommendation by FAAC for the tender to be awarded to the Applicant as the **'lowest substantially responsive tender'**.
22. In fact, in the evaluation both the Applicant and the 2nd Respondent had been determined to have submitted **'compliant and substantially responsive tenders'** and were accordingly ranked first and second respectively in terms of price.
23. In the course of the proceedings of the special meeting of Council, it emerged that as a matter of fact the Applicant had not furnished documentary proof of registration with the Ministry of Public Works & Transport as required in the Invitation to Tender. This was upon representations made by two Councillors Mr Lukhele and Mr Kunene who had participated and witnessed proceedings during the opening of the tenders,
24. In the ensuing debate and deliberation of Council, the recommendation to award the tender to Applicant as the 'lowest substantially responsive tenderer' was rejected on the basis that the Applicant's bid should have been disqualified and instead Council awarded the tender to the 2nd Respondent. In the event the 1st Respondent awarded the contract for the works to the 2nd Respondent shortly thereafter.
25. It is common cause that the Applicant was not informed of the award of the tender to the 2nd Respondent and only became aware of the tender award after the contract had been awarded and concluded. This is another basis on which the 1st Respondent's decision is being challenged on various grounds.

26. It is in this context that the present application for the review and setting aside of the 1st Respondent's decision to award the tender to the 2nd Respondent has to be understood.

27. The Applicant's application for review is framed on the following contentions as amended-namely that:

27.1. *The decision of the first respondent to award the tender 41 of 2014/15 ("the tender") is unlawful in that the decision is:*

- a) *Vitiated by material mistake of fact and/or law, alternatively is reviewable on the ground of irrelevant considerations, in that:*
- b) *There does exist proof of registration with the Ministry of Public Works and Transport ("the Ministry") in the applicant's tender submission; alternatively*
- c) *The requirement for the submission of proof of registration with the Ministry is directory and not peremptory, and does not involve the automatic disqualification of a tenderer; alternatively*
- d) *The requirement for the submission of proof of registration is superfluous, alternatively a matter of public record, that its inclusion in the tender requirements and resultant use as a means of excluding a tenderer is unfair and in breach of section 38 of the Procurement Act, 2011; alternatively*
- e) *The disqualification of the applicant on the ground that it did not submit a newspaper tear sheet was in breach of section 38 of the Procurement Act, 2011.*

27.2 *Ultra vires the council's powers in that:*

- a) *The Finance, Auditing and Administration Committee ("the FAAC") is duly constituted and delegated with power to evaluate and recommend the award of tenders in terms of*

section 62(1) of the Urban Government Act, 8 of 1969 ("the Urban Act");

- b) The Council is empowered in terms of section 62(1) of the Urban Act to approve (or not approve) the recommendation; and is not empowered to recommend who the tender is to be awarded to for its own approval.*

27.3. The Award of the contract to the second respondent pursuant to the decision to award the tender to the second respondent is unlawful and in breach of section 45 of the Procurement Act 2011 ("the Procurement Act") and there is accordingly no impediment to the IRC declaring the contract to be so illegally concluded and annulling it, alternatively recommending that it be terminated in accordance with its remedial powers under section 52 of the Procurement Act.

27.4. The specific breaches of section 45 of the Procurement Act arise from the fact that a contract in terms of the tender was awarded by the first respondent to the second respondent on a date unknown to the applicant but in breach of sub sections 3 and 4 of section 45 of the Procurement Act in that: -

- a) No notice was sent to all tenderers as contemplated in section 45(3)(a);*
- b) No publication on the Government's Public Procurement website was made as contemplated in section 45(3)(b);*
- c) A period of 10 days was not allowed to elapse from the date of the dispatch of the notice and publication on the website before the contract was awarded to the second respondent.*

28. The First respondent opposes the application and has in rebuttal advanced argument to show that the decision of the 1st Respondent was a legitimate, fair and reasonable exercise of its statutory powers as a procuring entity. To a large measure, save in so far as it has launched independent and separate

points of law in attack of the application the 2nd respondent has sought to align itself with the 1st Respondent's case.

The Essential Emerging Facts

29. Before dealing with the various grounds and heads of contention in support thereof advanced by the Applicant, it is appropriate to throw into light the detailed circumstances that have emerged in the course of the proceedings during the examination of oral evidence and closer examination of the key tender documents concerned with the central issue in dispute; these pertain to the question whether the 1st Respondent acted lawfully in disregarding the recommendation before it of awarding the tender to the Applicant on the basis that it was non-compliant with mandatory requirements of the tender.
30. There are factual insights that were elicited from the testimonies of witnesses of fact called before the committee in particular the engineer responsible, Mr. Ramford Zwane. Also subpoenaed at the committee's instance were the Councilors Messrs. Lukhele and Kunene.
31. These facts have been usefully summarized by the Applicant in its submission; these being facts that to a large extent are not in dispute. The factual aspects are dealt with first and it is intended to return to the legal and institutional matrix before examining the merit or otherwise of the parties' respective contentions.
32. It must be stressed that said that these crucial circumstances largely emerged from the evidence of the witnesses of fact called before the committee. Reference was also had to the observed and recorded information in the material aspects of the tenders submitted by the Applicant and the other tenderers. The key facts relate to the circumstances of the opening, examination, verification and recording of the data; this being of critical importance in as much as it goes to the heart of the matter as it brings into sharp relief the status of the submitted tenders in relation to the prescribed conditions, the handling of the pertinent stages of the examination and evaluation proceedings.

33. A convenient juncture to begin is at the close of the period for submission of tenders and the ensuing procedures in the reception and opening of the tenders.
34. It is common cause that the closing date for submission of the tenders and also of opening of the tenders was the 28th January, 2015.
35. A tender opening committee was duly constituted in terms of Regulation 61 of the Urban Government Financial Regulations and witnessed the proceedings together with representatives of the bidders. This is documented in an attendance list prepared by the Engineers.
36. A comprehensive account of what transpired in the course of the proceedings including a description of the procedure followed at the opening was given in a lucid testimony of the engineer (Mr Ramford Zwane). In his testimony he described the sequence of the opening of the various bids in their order and numbering as was borne out by the numbers inscribed in the original bid packages as presented before the committee. His testimony ought to be regarded as the most credible on a balance of probabilities when compared with that of Councillors Kunene and Lukhele whose recollection of the detailed particulars of the proceedings was vague and contradictory at times.
37. Mr Zwane testified that a register in the form of a schedule or checklist was on hand to record key fields of information pertaining to each item of the requisite information or document read out or called as each tender was opened. The significance of this checklist is of singular importance among other critical records of the proceedings that emerged during the review of key tender documents; documents that were referred to during the proceedings in the examination and cross examination of the witnesses called.
38. Crucially the various items required to qualify or determine the eligibility of each tenderer were called to check the existence of a required document in turn and to record this fact in the register. This was the mode adopted for each and every tender. Of particular importance is the evidence heard in regard to the examination of the bids for recording the submission or otherwise of proof of registration of the tenderers as civil engineering contractors with the Ministry of Public Works & Transport.

39. The evidence is that the Afrotim Construction tender was the first to be opened and it was noted that it had submitted a letter as the form of documentary evidence of the registration status of the firm. The engineer noted however that the contents of the letter concerned certified the tenderers qualification in regard to building as opposed to civil engineering works. It is also significant that the tender did not include the required certificate of labour compliance.
40. In the Applicant, A G Thomas' tender there was no document submitted for the registration requirement for the Ministry of Public Works & Transport registration although there was a certificate included to show registration with the Construction Industry Council. To record the omission Mr Zwane testified that a mark with a cross was made in the appropriate space against the proof of works registration column in respect to the Applicant's tender.
41. Mr Zwane told the committee that it was when the 2nd Respondent's tender was opened and the item for registration with the Ministry of Public Works & Transport was pulled out and noted that it became apparent that Heptagon had also submitted its own document in the form of a Photostat copy of what seemed to be a notice in a tabular form or 'schedule' listing various construction firms. The Heptagon document was examined in the original tender package as furnished to the tribunal and was confirmed by Mr Zwane as the document that was extracted and looked at the opening meeting.
42. It was noted for the record that the submitted newspaper clipping in the original Heptagon bid was in fact barely legible in some respects and its title was inscrutable as it was a very poor reproduction. It was at this juncture that according to Mr Zwane he realised that in fact the tenderers had submitted disparate and not uniform documentary evidence that conformed to the expectation he had uppermost in his mind when he drew up the requirement for registration with Ministry of Public Works & Transport in preparing the Tender document. Simply put, upon the opening he found that none of the tenderers had furnished the required document.
43. He testified that in light of this observation a discussion ensued between him and those in attendance and most especially the representatives of the bidders in the course of which it became apparent that the Ministry of Public Works &

Transport had, unbeknown to the engineer, ceased to issue the standard certificate he had specified.

44. In this regard he told the Committee that in the past the required proof was issued in a form of a letter confirming the registration particulars and category or class in regard to which the contractor was registered bearing the validity period and signature of the authorised officer. Although he had conducted several similar bids of the kind, this was the first time he had specified this requirement as a qualifying criteria.
45. He viewed this problem as a complete surprise and it generated a dilemma and as a result there was a pause in the proceedings during which he engaged those present including the tenderers' representatives as to a possible solution.
46. According to Mr Zwane a consensus was struck on realisation that the required proof was unattainable and that barring the Afrotim tender almost all the tenderers had used one document-namely the most current schedule in the form of an annual schedule published by the Ministry of Public Works & Transport that incidentally listed all the civil engineering construction firms in a classified schedule bearing the various classes designated to each. As the names of all the participating tenderers were 'listed' in a clearer version of the clippings, he took the approach that by selecting that one for clipping as a specimen newspaper notice it could serve as an objective reference to verify or determine the registration so that the clipping stood *in lieu* of the required certificate. He told the Committee that those present also regarded this as a reasonable solution and a way out of the problem.
47. Thus when the Kukhanya tender was opened the schedule was again extracted from its package. The Committee heard that the Engineer in light of the 'compromise', had revisited the register and next to the cross mark made earlier against the A G Thomas' name in relation to the column and field on proof of registration with the Ministry of Public Works and Transport, and had cancelled the cross thereafter inserting a tick next to it to signify fulfilment. It must be said that all this emerged for the first time during the oral testimony of Mr Zwane.
48. Once the various tenders had been opened and the contents of each package had been checked and noted, the meeting was concluded whereupon the

councillors present and the responsible officers of the 1st Respondent signed the register and schedule or checklist.

49. The schedule and records of the Opening ceremony recorded the following bids by their order of call:

Afrotim Construction	E10, 226,144.17
A G Thomas	E 9,847,541.17
Heptagon	E 9,989,880.20
Kukhanya	E12, 910,918.61
Pots Construction	E10, 646,647.99
Inyatsi Construction	E10, 940,601.04

50. After the opening procedure Mr Zwane says he conducted a subsequent review in his office as the next stage in what he termed a preliminary examination procedure. In that process he determined whether upon verification, the documents submitted conformed to the requirements specified in the Invitation to tender. Those bids in regard to which the documents did not pass the verification check were accordingly disqualified and rejected and as such were not eligible for further detailed evaluation. He accordingly prepared an evaluation report setting out his findings at the conclusion of the evaluation process.

51. This is where the evaluation report and its contents become highly relevant and require consideration. In it he determines that the Applicant's tender passed the verification check and he declared it to be 'substantially compliant' although it was a known fact that the Applicant's bid had been incomplete having omitted to include the proof of registration with Ministry of Public Works & Transport.

52. The committee in considering the evaluation report noted the following remarks which, in light of the emerging facts and testimony by Mr Zwane, make the contents that much more remarkable:

- 52.1 Under Paragraph 3.0 and the heading 'Preliminary Examination of Tenders' the schedule or checklist is described as summary results bears the two marks "X" and '✓' being a cross that is defaced and a tick against the applicant's name in the

registration with Ministry of Public Works & Transport column despite the fact that it is now common cause such proof was never produced;

52.2 The schedule does however bear a cross against the Afrotim and Kukhanya rows in the 'Valid Labour Compliance' column;

52.3 In the narrative report in Paragraph 3.1 it is noted:

'Verification

Tender documents were checked for the following:

.....
.....

Whether documents to assess post qualification have been submitted or not...

"Afrotim Construction and Kukhanya did not submit a valid Labour Compliance Certificate. For a tender bond, Afrotim Construction submitted their company cheque instead of a bank cheque. Kukhanya did not submit a rate for the crushed-stone base.

Afrotim Construction and Kukhanya did not pass the verification check whilst the rest of the contractors were found to have satisfied all the above requirements and therefore passed the verification check"

52.4 Factually the document does not disclose the non-submission by A G Thomas of the proof of registration document.

52.5 Then in Paragraph 3.2 under the title 'Eligibility' the evaluation report declares without any qualification that:

"All Tenderers are registered with the Swaziland Government Ministry of Public Works and Transport and the Swaziland Construction Industry Council".

52.6 Under the paragraph bearing the title "Completeness of Tender" the evaluation report records that:

'Afrotim Construction's and Kukhanya's tenders were found not to be complete. The rest of the tenders were found to be complete.' (Added underlining).

53. As a factual statement this finding is not correct. It is however not qualified in any way and is presented as bold unequivocal statement of fact.
54. Similarly Table 2, being a table presenting the findings in a grid format, is not qualified in any way and indicates full compliance in favour of the Applicant in contrast to negative remarks inserted against the Afrotim and Kukhanya fields of information on Labour Compliance Certificate and completeness of bid. It is important to observe as the committee did that there appears to be lack of consistency in the presentation of the data.
55. In the final analysis the Consultant in the course of the evaluation process made a determination in his evaluation by reference to the concept of 'substantial responsiveness' the effect of which was that the omission of A G Thomas' documentary proof of registration was not a major or material deviation as to warrant the exclusion of its bid in light of the 'consensus' and open discourse with the tenderers representatives permitting the use of the newspaper notice *in lieu* of the required proof.
56. The concept of 'substantial responsiveness' is neither explained nor properly grounded as a consideration in the evaluation report. Therefore, its relevance or what it signifies in the context of the data reported on in that document is not apparent on the face of the document. Its purpose and incidence is only explained by the engineer in his testimony and in light of his narration of the unfolding process. These are worth sketching.

57. It is common cause that in the process the engineer shortlisted the Appellant and the 2nd Respondent's bids for further (detailed) evaluation and disqualified the rest.

The Evaluation Procedures

58. The post tender opening process began when the opened tenders were taken by Mr Zwane, the Consulting Engineer for detailed evaluation. Apparently there are no detailed guidelines specified in the Urban Government Act, which provide guidance on how the tenderers should be evaluated. The only guidance available to the Engineer is therefore the criteria specified in the invitation document.
59. Section 45 (1) of the Procurement Act provides that the **'awarding of contract shall be recommended to the best evaluated tenderer, as determined by the evaluation methodology and criteria specified in the invitation document'**
60. A closer reading of the tender requirements indicates that **"proof of registration with Ministry of Public Works and Transport"** is a qualifying requirement. Supplying a certificate from the body responsible for the registration better proves registration. This then allows a tenderer to participate³.
61. The committee learned from Mr Zwane that it was in dealing with the question of "proof of registration with Ministry of Public Works and Transport", that he sought to apply the principle of substantial responsiveness. We reiterate that this principle was not articulated in the consulting engineer initial tender report to Manzini City Council, but was explained in a letter, which was submitted to City Council dated 16 February 2015. This happened well after the meeting of Council of the 12th February for adjudication.

³ The terms 'eligibility' and 'qualification' seems to be used interchangeably in the bid document and in the evaluation report.

62. Apparently the letter was meant to clarify how the consulting engineer arrived at his decision to recommend the lowest tenderer. It provides insight into the consideration that was brought to bear.

The consulting engineer was to explain his approach as follows:

"The tender evaluation is carried out in two phases which are preliminary examination and detailed examination. At the end of the preliminary examination, only tenders that are substantially responsive are accepted for detailed examination. Substantially non-responsive tenders are dropped at the end of the preliminary examination.

Therefore, a tender may be non-responsive in some aspect but not substantially to be rejected for detailed examination. The world bank guidelines for bid (tender) evaluation states that "the purpose of preliminary examination is to identify and reject bids that are incomplete, invalid or substantially non-responsive to the bidding, documents and therefore are not to be considered further".

63. Plausible and probably even reasonable as this explanation might sound its relevance in this instance is questionable as it is proffered outside of the evaluation report and was not brought to the attention of either the FAAC (as the client) or even alluded to in the tender documents. At best is an *ex post facto* explanation.
64. Even at the hearing the engineer could not furnish a record of the details pertaining to his observations and recorded data at the verification stage against each and every tender other than the Schedule 2 form he completed.
65. At best it seems the application of the test 'substantive responsiveness' along the World Bank guidelines was a subjective consideration the engineer brought into the equation.

The Legal Issues

66. In support of its submission that the 1st Respondent's Council's tender award decision was unlawful in that its approach to the issues was born out of a misconception on a matter of law in adopting a view that 'any non-conformity with the tender rules constituted grounds for an automatic disqualification.
67. In advancing its argument the Applicant contends that an invitation to tender does not constitute a contract- but also that it does not generate private-law obligations between the employer and tenderers but merely an invitation to treat. In a sense it asserts that the instructions to tenderers (ITT) and the rules constitute no more than a 'means to solicit responses from potentially capable responders and to standardise their offer.
68. As a corollary it was submitted that unless precluded by a statutory provision from accepting a non-compliant tender an administrative body such as the 1st Respondent has discretion in terms of which it at large 'to accept any tender that it concludes makes a satisfactory offer'.
69. It is common cause that in the instant case we do not have the benefit of statutory parameters detailing out the rules for evaluation of tenders, as would have been the case if there were specific regulations on the rules for evaluation and adjudication of tenders. However the question is what purpose do the tender rules in the bid package serve?

What is the legal status of the ITT and the rules of tender?

70. In WBHO the court describes tender rules and a tender document that accompany the Invitation to tender, duly issued by the procuring entity to tenderers, as a set of statements and standards intended, where applicable, to form the terms on which the tendering public can rely. The court went on to say that as such the employer cannot ignore these rules at will⁴. In a sense they form objective terms of engagement between the employer and prospective tenderers to which the latter are held to bear. The efficacy of the tendering document as a whole depends on the certainty of its terms.

⁴ Remarks of Nganunu CJ in WBHO v Public Procurement and Assets Disposal Board and Others 2006(2) BLR 361 (HC).

71. The applicant has argued by extension that the engineer was perfectly entitled to take the pragmatic decision at the tender opening of resolving the dilemma presented by the 'disparate' responses by the tenderers which fell short of the specifications in the tender for proof of registration, of waiving this requirement. This is premised on the contention that the 'tenderers submission was no more than an offer that fell to be accepted if the responder met the eligibility requirements and otherwise offered what was required at the best price'.
72. For the reasons explored elsewhere in this decision we do not agree that this was a fair and reasonable approach but purely a convenient evaluation measure, which may have been made from an altruistic motive. By this it is not intended cast any aspersions of moral turpitude on the engineer but is a matter of considerations of fairness in line with the rules of the tender as set out in the invitation to tender document and the principles involved.
73. The peculiar circumstances of this case and upon regard to Regulation 62(2) impel one to discern two elements of the decision of the Council of 1st Respondent. The first, which is implicit from a reading of the sub-regulation, being the rejection of the FAAC recommendation and NOT accepting the lowest evaluated bid. The second is the acceptance and award of the tender to a bid other than the recommended tender-that which the Council would have elected to accept instead in the proviso to the sub-regulation.
74. Council on being apprised of the anomalies in the opening meeting; in light of the gap in the reporting; had every reason to be apprehensive and on that basis reject the recommendation from FAAC and the engineer. It should have stopped there and not proceeded to award the tender without a properly considered adjudication. Its decision not to accept the recommendation in light of the representations before it (albeit credible and conceded representations) was in furtherance of its duty predicated on the highest public procurement principles, to ensure the integrity of the process and fairness to the bidders.

75. The Applicant also made a series of arguments (which may in fact be bundled into one for convenience) all being substantive grounds to demonstrate that its tender was actually substantially compliant as well as being the most eligible for award on the 'economic' or best value for money principle. We propose to deal with those in due course.
76. This position leads to one of the critical issues as to whether the consultant as and in its capacity and ultimately the 1st Respondent had a discretion to waive the requirement for the submission of proof of registration with the Ministry of Public Works & Transport, regard being had to the wording of the Invitation to Tender document, Allied to this question is the enquiry as to whether regard being had to the conditions of tender, the requirement for the submission of the requisite proof of registration was cast in merely directory as opposed to mandatory or peremptory language; which in the latter instance would require strict compliance and allow for no deviation.
77. The review jurisdiction of this committee is unique (*sui generis*) in light of its powers to take investigative licence to expand its enquiry beyond what may be contained in parties' submissions.
78. At the heart of this dispute is the exposition during the hearing of the fundamental flaw in the conduct of the evaluation of Tender No. 41 of 2014/15 when the employer through the engineer, introduced evaluation criteria without either disclosing it to the tenderers or incorporating any reference thereto in the Invitation to Tenderers and instructions.
79. In the *Westinghouse* case, the court in dealing with somewhat similar circumstances where novel subjective criteria beyond the parameters of the Invitation to Bidders were used without having brought the same to the attention of the tenderers was bad in law, constituted unlawful conduct and was fundamentally unfair⁵.
80. In the *Allpay*⁶ case the court emphasizing the importance of fairness and the integrity of the tender process in relation to the legal framework quoted the following statement by Schutz JA in *Firechem* when he said:

⁵ *Westinghouse v Eskom Holdings (SOC) Ltd and Ano.* 2016 All SA 483 (SCA)

⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*

"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 competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender.....That would deprive the public of the benefit of an open competitive process⁷"

81. Fairness, openness and equality of treatment of tenders was echoed in **Steenkamp NO v Provincial Tender Board Eastern Cape** when it was said:

'tender processes require strict and equal compliance by all competing tenderers on the closing date for submission of tenders'

82. That is the standard by which tenders are to be regarded. In the absence of elaborate regulations with detailed rules as to the evaluation criteria, it is to the terms of the Invitation to tender that we must look and those terms in the eyes of tenderers where imperative requirements are set out these must be strictly applied equally to all tenderers.

83. The administration bodies evaluating and adjudicating tenders may only deviate from the procedures put in place as long as, and so the court stated in *Allpay*,

"when they depart from procedure the basis for doing so will have to be reasonable and justifiable, and the process of change be procedurally fair".

84. It was argued by Mr Bester on behalf of the 1st Respondent that the first respondent (implicitly this would also include the Consultant acting upon delegated authority to carry out a limited function) enjoys no discretion to relax

⁷ Premier, Free State and Others v Firechem Free State (Pty) Ltd (2000) ZASCA 28: 2000 (4) SA 413 (SCA) at 57 para 30.

the requirements to which all tender applicants are subjected. In support for this argument we were referred to some key decisions amongst which is the Allpay case from which the following passage is worth repeating:

"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 law prescribes a particular administrative process, it is subject to the norms of procedural fairness codified in PAJA. Deviations from procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put 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"

85. Although in the Allpay case the source for the pre-eminent principles of fairness and accountability, derives from the relevant constitutional and legislative provisions in the laws of South Africa, it is arguable that these self-same principles receive utmost expression in Section 38 of the Procurement Act and as such persuasive weight could be lent by the authority of that case and the quoted remarks of the court bear equal reference in the instant case.
86. That said we do not understand those remarks as advocating for slavish stickler to strict application of qualification or eligibility criteria without discretion on the part of an employer where in its assessment the deviation or departure, omission or shortcoming in a tender is non-material or minor.
87. It seems the key lies in the underlined words from the highlighted dictum in the Allpay case- namely that a departure from its own procedures or a waiver or relaxation of some conditions may be permitted in circumstances where

this would not result in procedural unfairness perhaps on account of inconsistency or unequal treatment.

88. The importation of the consideration of substantial responsiveness in the instance of what was then seen only as a singular A G Thomas' deviation, without a rational and fair basis is what may be called into question here given the strict application by the consultant of similarly worded condition in the Invitation to Tender in regard to the Afrotim and Kukhanya's tender deviations or omissions that resulted in their bids being disqualified.
89. It was argued on behalf of the Applicant that the 'non-compliance' by the Afrotim and Kukhanya bids were distinguishable from the 'non-compliance' in the A G Thomas bids rendering the Afrotim and Kukhanya bids to be treated differently and disqualified. Frankly we cannot see where the material distinction in the nature of deviation lies nor has it been cogently demonstrated in this matter. Certainly the distinction is not explained in the report. That this is so is no surprise as the report in any case only reports an omission on the part of the Kukhanya and Afrotim bids and not in the A G Thomas which was reportedly complete in all respects and recorded that the Applicant had effect furnished the required proof. The report does not say the Consultant 'deemed' the A G Thomas bid compliant.
90. Perhaps the fundamental issue arising in this case is whether it was competent for the consultant to determine (without consultation or referral for approval of the approach) the 'responsiveness' or otherwise of the tender without reporting or disclosing the full circumstances with the appropriate advice as to a remedy to Finance Audit and Administration Committee, and the Council. In so doing the engineer would have acknowledged the anomaly, which arose in the verification and assessment for compliance of all the bids on the 'proof of registration' requirement. Another question is whether the consultant had power to rectify a defect in the bids of any one or more of the bidders or to come to the 'rescue' of an errant tenderer and supply a remedy.
91. There is no questioning the rationale or employment of 'substantial responsiveness' as an evaluation methodology. It's a term of art that is well established in the lexicon of tender evaluations. However, there are a few

challenges that arise from how it is invoked or used and its appropriateness in this context by the consultant.

92. The first one of these is the factual background concerning the exact nature and extent of the deviation in the A G Thomas in light of the representations in the evaluations report as to its completeness that the consultant's report does not disclose upfront to the 1st Respondent. It remains an inarticulate premise to the application of the 'substantial responsiveness' method.
93. The second problem arises from the lack of a method statement or disclosure of evaluation guidelines or conditions in the Invitation to Tender for Tender No. 41 of 2014/15. To be specific nowhere in the document is there any reference as to the evaluation measures that the bids will be subjected to or as to the treatment of deviation or omissions from the tender specifications nor is any mention made of the resort to 'substantial responsiveness' as a method of evaluation let alone the circumstances warranting its application in the evaluation process.
94. The duty to set out an evaluation method statement in the Invitation to Tender is at the very least implied in the provision pertaining to tender invitations in the Urban Government Finance Regulations. This is in Regulation 59.

"Calling for tenders.

Whenever it is necessary to call for tenders in compliance with section 59 of the Act, it shall be the duty of the chief officer concerned to prepare documents giving sufficient detail to enable prospective tenderers to be aware of exactly what is required, before the notice calling for tenders is published."

95. It is specifically prescribed in Section 44 (h) of the Procurement Act dealing with general rules of public procurement as follows:

"Requesting and procuring entities shall-.....

(h) clearly state the methodology and criteria to be used in the evaluation of tenders and the determination of the best evaluated tender" (added emphasis)

96. Anyone be they the Council or the bidders, having not been placed on advance notice of the use of the considerations and conditions for the application of 'substantial responsiveness' of bids as an evaluation approach, would be justified in being circumspect when it is 'sprung' up to explain the determination of responsiveness as was done in this case especially because this is inconsistent with the recorded and observed data or findings made during the examination of bids.

97. Even more wary a person would be where the principle does not appear to apply uniformly or there being no explanation offered in the evaluation report as to the apparent inconsistent application of the method. For example the Council would be hard put to appreciate why during the evaluation of the Afrotim and Kukhanya bids the engineer disqualified the tenders on the basis that such bids were 'non-responsive and incomplete' in view of the apparent failure to produce a 'valid labour compliance certificates' bond security or deposit (in the required mode of a bank guarantee or bank cheque where the tenderers ordinary cheque was submitted). However the same report records quite curiously that the Applicant's tender was complete in the material respects even though it has emerged that clearly no proof of registration document was included in it.

98. A third problem relates to how this approach was employed by the consultant.

99. It should be noted that good practice in the evaluation of tenders should take into account only requirements that are included in tender document. Any deviation shall result in the rejection of the tender and such tenders should not be considered for any further detailed examination.

There is an allied issue that is perhaps a more fundamental question to this dispute. It has to do with the fairness of the evaluation process in the early stages of the procurement of Tender 41 of 2014/15.

What process was followed in the consideration and evaluation of the bids in the conduct of Tender 41 of 2014/15 and was it fair?

The whole process of evaluation and award of tenders must be equitable in order for the public procurement system to just be but also be seen to be fair and induce public trust in it.⁸ It becomes necessary to focus on the exact description of the procedures followed.

For this reason and at the risk of repetition of some detail, it is important to highlight the key elements of the process followed in the handling of the evaluation of the tenders. The relative facts as indicated earlier are now not in doubt. This is an exercise of focussing on the core themes. The standard procedure described by the engineer was as follows-

Bid Opening

100. It all began with the opening of the tenders on the 28th January 2015 where the bidders or their representatives were in attendance together with the bid opening committee constituted in terms of the Urban Government Financial Regulations.
101. It is noted that at the opening meeting the key data in the bids was read out and recorded as announced and at the close a list of those in attendance was prepared and a checklist in a tabular form as the served as the record maintained to capture key fields of information on each bid. That schedule or checklist was also signed and initialled by the designated officers including the Councillors representing the 1st Respondent's Council.
102. It must be also mentioned that the bid opening procedures were not stated in the ITT document. The engineer led and guided the process as it was conducted. The purpose of the bid-opening meeting was not to reject or eliminate any bids. So it was purely incidental that the meeting ended up dealing with the dilemma that was presented by the failure of the bids to produce the expected certificate of registration mentioned earlier in this decision.

⁸ Nganunu CJ in WBHO Construction v The Public Procurement and Asset Disposal Board and Others.....

103. Preliminary examination

The forms and bid packages were collected and retained by the engineer and immediately after the tender opening he carried a preliminary examination of the tenders. The purpose of the preliminary examination is to identify and reject bids that are either incomplete, invalid or substantially non-responsive to the bidding documents. Tenders which are found to be deficient and are not to be considered further. That much was canvassed in Zwane's testimony. It is clear from this passage that once you have determined that a tender is either invalid or incomplete there is no need for resort to the complex considerations of the materiality or otherwise of a deviation. 'Validity and completeness are self-sufficient tests in the examination of bids.

104. What the engineer says in his testimony must be considered against the account given in the record of the process. The detail and the description of the procedure and findings as recorded in the evaluation report should speak for itself. To be exact the report says that the preliminary examination in terms of the report entailed checking tender docs to determine whether the:

- **Tender Forms had been signed or not**
- **Power of attorney for the authorised person had been submitted or not**
- **Documents to assess post qualification had been submitted or not⁹**

105. It then mentions that the Kukhanya and Afrotim tenders were deficient in some respects which were listed as follows:

- **Afrotim and Kukhanya found had not submitted valid Labour Compliance Certificate**
- **For a Tender bond, Afrotim Construction submitted their company cheque instead of a bank cheque-**
- **Kukhanya did not submit the rate for the crushed-stone base.**

⁹ These entries are contained in the brief evaluation report but slightly paraphrased herein.

106. It records further that on that basis Afrotim Construction and Kukhanya had not conformed to the verification requirements but that the rest of the tenders, including Applicant's, were found to satisfied all the above requirements-passed the verification check.

107. On the fact of this report it is clear that no reference is made to the Applicant's failure to supply the required proof of registration. On the contrary the record reflects that it had complied.

***Were the deficiencies in the Afrotim and Kukhanya tenders material?
Were they major or minor deviations?***

Much of the arguments on the materiality of the deviation in the Applicant's tender turn on how the conditions in the ITT are to be construed- The question as to whether the requirements are couched in mandatory or directory terms.

The instructions to tenderers.

108. Having examined the exact wording of the requirements and specifically the call for documentary proof of registration all the parties were in agreement at the very least that the language is 'imperative' in form. Elsewhere we have highlighted these instructions and there is no need to repeat them here.

109. Suffice it to say that the modal verb that recurs is 'must'. In its ordinary sense it is an unequivocal command and expresses the employer's expectation as to what is required to qualify the bidder for consideration. It is consistently used in regard to the so-called eligibility criteria.

110. On the balance our attention was also drawn to the general instructions to tenderers to ensure that all documents required are submitted at the risk of tender being disqualified¹⁰.

¹⁰ Clause No. 24 states that any tenderer who has not conformed to the tender instructions may be disqualified at the employer's discretion.

111. Use of 'may' might lead to a construction that suggests discretion on the employer's part on how to treat the deviation but does not in itself qualify the imperative effect of the instruction- you are either required to supply the detail or the document or not.
112. Even if the employer reserves the right to treat the assessment or verification with discretion- the approach and considerations followed must be standard even-handed and consistent. The process must be fair and balanced in the treatment of tenderers in keeping with the procurement principles articulated in Section 38 of the Procurement Act. That seems to us to be the essential issue that is fundamental to this application.
113. In the instant case it is not clear why there would be a differentiation between an omission to submit one document (for instance a valid labour compliance certificate, or 'bond security' in form of company cheque or 'crushed-stone rate') would constitute a major or material deviation and omission to furnish proof of registration with the Ministry as a contractor would generate a different outcome and not form the basis for elimination of a bid at the Preliminary stage considering the principles of evaluation that the consultant used as outlined in the Evaluation report.
114. This questions the rationale of the evaluation process and its credibility as an objective test.
115. In our view, although the consultant engineers meant well in proposing a solution to the anomalous situation that presented at the opening of tenders, in our view the approach taken to mitigate and salvage the 'non-compliance' of the bids in the form of the 'consensual' application of the 'newspaper schedule', the rectification of the checklist and the subsequent resort to substantive responsiveness as a method of determining compliance of the tenders without disclosing this either to the tenderers and or to the Council constituted serious procedural irregularities. The process followed was on that basis unfair, opaque and was tainted also by lack of consistency in the application of the tender rules as set out in the tender specifications.
116. The primacy of the procedural irregularities in the evaluation of the tenders essentially vitiates the entire conduct of the entire Tender No. 41 of 2014/15

process right from the start. Its effect fundamentally undermines and compromises the integrity of the procurement proceedings.

117. The applicant has advanced a number of substantive grounds on the basis of which it contends it was entitled to be awarded the tender and be adjudged the lowest responsive tenderer; this despite its conceded failure to submit one of the required articles to qualify.
118. To buttress its contention that the 1st Respondent's tender award decision was unlawful and unreasonable in that it was induced by a mistake both of fact and law, Applicant pursues a series of grounds. They are presented as separate and independent. They are set out as alternative grounds. In effect these are inter-related. We nonetheless consider each in turn.
119. The thrust of Applicant's case in this regard is that the 1st Respondent's decision was misconceived on account of Council either taking either irrelevant considerations or failing to heed relevant facts in the following respects:

That there existed objective proof of Applicant's registration with the Ministry of Public Works and Transport in the Applicant's tender submission

120. In this regard Applicant contends in essence that proof of registration with the Ministry of Public Works and Transport even where it might have been defective or omitted (and it is common cause that in the process none of the tenderers conformed) was inferable from submission of documentary proof of registration with the Construction Industry Council in the form of the certificate that the Applicant did submit in this instance. In support of this contention it argued upon facts that emerged during oral evidence led at the hearing, it was established that the system of registration with the Industry council was derived from or closely allied with that of the Ministry as was the categorisation schedules adopted.
121. The difficulty with this argument is that the criteria of registration with the Ministry of Public Works on the one hand and that of the Construction Industry Council are listed and itemised in the tender document as separate and independent criteria. Regardless of the turn of events and the actual

facts as they existed, the engineers as did the 1st Respondent in approving the Invitation to Tender document and the rules in it, all had in mind that these were indeed two independent qualifications.

122. There is no disputing that even at the time of the Meeting of the 12th February to consider and adjudicate the tenders, the assumption up to that point was that these were indeed separate basis requirements which at verification stage had to be assessed separately. It may well be that per circumstance even if the registration system at the Ministry was still in force it would have mimicked the Construction Industry Council registry in form.
123. The committee is not persuaded that the assumption on which this argument is premised makes for a reasonable conclusion that the CIC categorisation and therefore its certificate constituted or should be deemed as constituting proof of registration with the Ministry.
124. That these requirements could have been dealt with as one does not accord with a sensible and rational approach to evaluation of bids. It is a fact that these were presented to the tenderers as separate qualification criteria required of each and every tenderer and it is also common cause; a position emphasised by the Engineer's testimony, that this was indeed a vital 'threshold' qualification ranking together with that of the CIC when he went about drawing the terms of the tender.
125. Applicant's was the only instance where the bid omitted to include proof of registration with the Ministry of Public Works and Transport.

That the requirement of submission of proof of registration with the Ministry was directory and not peremptory; a requirement that the 1st Respondent could waive

126. As more fully discussed elsewhere in this decision, there is no doubt that the use of the imperative command 'must' in calling for compliance to the requirements and specificity of the criteria is standard throughout the document in regard to all the eligibility and qualification criteria. It is the same language used in regard to the requirements for the submission of tax clearance and labour compliance certificates. Applicant also conceded in its

arguments that it is clear that these requirements were regarded as important.

127. Most especially it must be stated that the engineer during cross-examination confirmed that the qualification requirement as 'ranked foremost' in the order of importance. This means they were intended to be 'threshold' requirement the omission of which rendered the bid liable for rejection at verification.

128. Objectively there would be no reasonable basis for distinguishing an omission to submit a labour compliance certificate from that of submitting the institutional 'proof of registration'. Were it not for the engineers innovative approach it would have an obvious result that upon preliminary examination the Applicant's tender would have been found to omit this important documentary proof and accordingly the record would and should have reflected as much. With the benefit of the emerging evidence we now know why the record and evaluation report systematically and consistently recorded that Applicant's tender was complete and compliant.

That the requirement for submission of proof of registration with the Ministry of Public Works and Transport was superfluous, alternatively a matter of public record; that its use as a qualification requirement and reliance on it to disqualify the Applicant's tender was in breach of Section 38

128. From the evidence heard by the Committee during the proceedings it is fair to conclude that the introduction of the registration qualification as a requirement was intended, in good faith, as an *ex-ante* criteria for screening potential contractors and was drawn up as a standard requirement to all tenderers. At the time it was intended to be an objective ascertainable status whose criteria was specified as it was. With hindsight it might well have been mistaken given the facts that were to subsequently emerge. It turns out it was not an attainable form of documentary evidence.

129. With hindsight it is easy to speculate that had the tender document included Instructions or options on part of potential bidders to seek clarifications on any aspect, they might have brought the matter of the difficulties in getting the required certificate to the attention of the consultants in good time. In

retrospect the engineer might also have taken a different approach upon observing the anomalous response at the tender opening. He might have opted to continue recording the data as is as each bid was opened and might have consulted the FAAC on the 'failure' of the registration requirement and proposed the solution that he says he adopted.

130. Another approach would have entailed processing of the bids in the preliminary examination and evaluation and in noting that none of the bids were compliant in so far as the 'proof of registration' requirement, he would have had to qualify his report and any recommendation for award to take into account the deviation of the bids.
131. Accountability along with the other values of fairness, economy, efficiency and value for money is one of the critical principles in public procurement. The emphasis on compliance with the retention and integrity of records and the doctrine that a tender 'must speak for itself' all underscore importance of openness in the conduct of the tender process.
132. The principle of value for money along with those of economy, efficiency fairness and transparency are important but as stated by Nganunu CJ in the WBHO case these are complimentary principles to be considered together as a coherent whole¹¹. The committee is inclined to agree with the argument by the 1ST Respondent that in the context of the exercise by the 1ST Respondent of setting and deciding the eligibility criteria it had a free hand and that there was nothing untoward or unfair in its insistence on proof of registration as an objective criteria that theoretically was objectively attainable and open equally to all qualifying tenderers. It was a matter of a qualifying or competence criteria

Was the decision of Council to make its own determination as to recommendation and approval of the tender award to 2nd Respondent ultra-vires the empowering Regulations 61 and 62 of the Urban Government Financial Regulations?

¹¹ WBHO v Public Procurement and Asset Disposal Board,

133. The Applicant has advanced the contention that Council of the 1st Respondent has no power to recommend whom the tender is to be awarded to and also act on that recommendation. In elaboration the argument is that upon proper construction of Regulations 61 and 62 there is a formal and legal separation in terms of functions and powers between committee responsible for evaluating and recommending an award of tender to Council and Council's power to consider, deliberate and adjudicate the tender by either accepting it or not accepting it.
134. This raises an issue of what construction or interpretation is to be given to the provisions of the regulations in question. Simply put the 1st Respondent is that the literal or plain reading of the regulations governing the consideration of tenders by Council the powers conferred go beyond just the discretion to accept or not a tender but to also appoint any other tender subject to reasons for such a course being reflected in the minute to be made to the Treasurer.
135. There are legion principles and diverse approaches to statutory interpretation. One can however distil the enquiry to two propositions. To a strict wording and formalistic reading or construction within the four corners of the consideration of tender's provision or a contextual interpretation that does not only take into account the plain meaning of that provision but also locates it within the context and purpose of that provision and the scheme of the provisions around it in a holistic manner.¹²
136. Thus upon a plain and abstract reading of Regulation 62 (2) the power of Council goes beyond accepting or not accepting the lowest tender but includes the power to accept any other tender subject to recording the reason for so doing in the minutes of the adjudicative meeting.
137. In context when one considers the provisions of the preceding Regulation 62(1) one discerns a functional separation in the roles of FAAC and processes of the analysis, evaluation and recommendation for award of

¹² The Committee inclines to the approach cited and approved in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 ZASCA 13 in the remarks of Wallis JA in reference to a formulation attributed to Schreiner JA in *Jaga v Donges NO and another* 1950 (4) SA 653 (A) at 662-G-663A that from the outset one considers the context and the ordinary language together neither consideration dominating the other.

tenders in a *quasi*-evaluation committee function on the one hand and the deliberative and adjudicative power to decide and make an election by the Council on the other.

138. Regulations 62(1) and 62(2) makes it plain when it says:

“Consideration of tenders.

The schedule prepared in accordance with regulation 61(3) shall be submitted to the committee charged with the duty of considering the tenders together with the comments of the chief officer, or other competent person, and its recommendation thereon shall be submitted to the council for approval.”

In considering tenders, the council shall normally accept the lowest in the case of purchases or the highest in the case of sales. If any other tender is accepted the reason for so doing shall be recorded in the minutes and if after due enquiry the Auditor or an inspector considers the reason to be unsatisfactory, he shall report the matter to the Minister in accordance with section 106 of the Act.”

139. It would be absurd to suggest that the 1st Respondent enjoys an unfettered discretion to depart from an evaluation and recommendation by a dedicated committee duly mandated and conferred with statutory power to exercise that function and merely substitute its own preference to accept another tender without any rational evaluation or basis. This does not accord with a reading of the whole Regulation 62. One cannot just lift sub-regulation 2 and isolate it to confer absolute discretion to Council to depart from recommendations and select another tender at whim without a 'reasoned' and proper evaluation as to the suitability of that bid. In other words, its power is meant to be exercised advisedly.¹³

¹³ DDP Valuers v Machado Municipality 0924/2014 SA
J R de Ville in Judicial Review of Administrative Action in South Africa, Lexis Nexis, Butterworths, 2003, page 314 at page 315.

140. Clearly the provision in sub-regulation 2 adverts to the assumption that in considering the tenders the Council's discretion shall have regard to and be informed by full briefing as contained in a schedule prepared by the Treasurer giving full particulars of the tenders with comments and recommendations of the Chief Executive Officer or other competent person.
141. Indeed the powers conferred on Council go beyond mere acceptance of recommendations but rather that in extraordinary circumstances (shall normally) it may depart from a recommendation to accept the lowest tender with reasons in the instance of another tender being accepted. The exercise of such power 'with reasons' suggests a rational exercise of the discretion supported by proper and adequate considerations on a rational basis to take another course. This must mean that Council would have to have all the relevant facts and circumstances before making a decision to award the tender to Heptagon and not be motivated or consider irrelevant factors in the alternate award.
142. The concept of rationality in a context of a statutory requirement for an administrative body's decision to be backed by a reason is given normative content and is explained in at test proposed by the Court in **Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA)** in the following terms:
- "the reviewing Court will ask: Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?"***
143. That with respect is a sound proposition to how to treat a provision such as the one contained in Regulation 62 impelling Council to give reasons for awarding the tender to any other bidder than the one recommended by the evaluating authority.
144. It was argued on behalf of the 1st Respondent that once the recommendation to award the tender to the Applicant was rejected then the 1st Respondent was entitled to award the tender to the next lowest tender; being the second respondent. There are two difficulties with this assertion. It supposes that the Council as an adjudicative body in departing from the

recommendation of FAAC is at large to grant the award to a non-recommended bidder without regard to the rationality requirement in the sense of a deliberate decision-making process based on rational considerations and sufficient information before it.

145. In the context of the Urban Government Financial Regulations the foundational basis for Council's adjudicative function has to be the documentary material made by FAAC. That is the means provided for in the Regulations as the standard structured basis informing the adjudication of tenders. Where none exist it would have had to call for it either in the form of a second or supplementary (addendum) schedule and report proposing an alternative recommendation.
146. An administrative body is only most amenable and well placed to make a rational decision by virtue of, inter alia, 'access to sources of relevant information and expertise to make the right decision'¹⁴. The expertise and source for the Council in this context resides in the FAAC reports and recommendations for adjudication of bids.
147. In the absence of a supplementary or alternative opinion or recommendation before Council there is no objective basis for the decision to award the tender to 2nd Respondent. No evidence was called on behalf of the 1st Respondent to found the award to the 2nd Respondent.
148. On account of the positive obligation to furnish reasons and to adopt a specific procedure in the event of an award to a tender other than the once recommended arising from the operation of Regulation 62, the evidential burden is borne by the 1st Respondent in relation to the existence of rational objective basis for its decision. Such was the approach taken by the court in **DDP Valuers (Pty) Ltd v Machado Municipality and Others** and in the authorities cited with approval therein.¹⁵

¹⁴ Para 29 *Gauteng Gambling Board v Silver Star Development Ltd and Others* 2005 (4) SA 67 (SCA).

¹⁵ *DDP Valuers (Pty) Ltd v Machado Municipality* 0924/2014 SA

149. Of particular interest is the proposition that **“where a public authority fails to furnish reasons for a decision in circumstances that it is required to do so, the onus will be on the public authority to show that the decision was taken with ‘good reason’”**.¹⁶
150. In the instant matter, the very reason that led Council to reject the recommendations and findings of the Finance Audit and Administration Committee (by extension the report of the consultant) in the light of emerging evidence in effect throwing into question to the reliability of the evaluation report, should have put in on guard to enquire into and investigate how the evaluation process was handled. Of high relevance also to the Council would have been the need for clarity and an explanation of the determination made by the consultant to recommend an award to the Applicant as ‘lowest substantially responsive’ tenderer regard being had to the ‘new evidence’. Indeed such was the cautionary advice to ‘conduct a verification’ process to enquire into the full facts made by the Chief Executive Officer and the minority opinion within the Council.
151. There is nothing in the minute to suggest that Council allowed itself the opportunity to obtain the full information about the compliance aspect in the determination of eligibility of the shortlisted tenders. Had it done so it is clear, albeit with hindsight that it would have found that the whole process of verification of the tenders did not accord with the reported information in so far as it has become apparent that even the Heptagon bid did not meet the qualification or eligibility criteria in respect of its proof of registration with the Ministry of Public Works & Transport. Mr Zwane in his testimony told the tribunal that the Heptagon copy of the newspaper clipping was deficient in a number of respects that he pointed out. Its document did not serve as valid proof of registration.

¹⁶ J R de Ville in *Judicial Review of Administrative Action in South Africa*, Lexis Nexis, Butterworths, 2003, page 314 at page 315.

152. Put another way it cannot be said that Council had, by say fully immersing the adjudication to further and fuller investigation, availed itself all the relevant information, including the merit of the Heptagon tender, that was necessary for it to make a choice of the most compliant tender in awarding it to the 2nd Respondent.¹⁷
153. The haste with which the Council of the 1st Respondent rushed the decision to award the tender to the 2nd Respondent on the evidence was actuated by an urge to conclude the award of the tender due to external pressure to meet a funding deadline. The Committee is not persuaded that in the circumstances Council could not have adjourned the matter in a matter of hours to enable an addendum report to be obtained from the engineer.
154. It appears therefore that in reaching its decision to award the tender the Council of the 1st Respondent was actuated by irrelevant considerations.

Was the Decision to Award the Tender to 2nd Respondent Ultra Vires for want of Compliance with Section 45 of the Procurement Act?

155. One plank on which the Applicant is challenging the legality of the decision of the 1st Respondent in awarding the contract to the 2nd respondent is the alleged procedural irregularity of its actions in this regard. In support of this contention, the Applicant has invoked the provisions of Section 45 of the Procurement Act, which sets out the procedure for the award of contracts in procurement proceedings.
156. The relevant portions of the Act relied on provide as follows:

'Contract Award Procedures

¹⁷ Such an approach was suggested by the court in *WBHO Construction (Pty) Ltd v The Public Procurement and Asset Disposal Board and Others* 2006 (2) BLR 361 (HC) in a tender dispute not unlike the instant case.

- a) The awarding of contract shall be recommended to the best-evaluated tenderer, as determined by the evaluation methodology and criteria specified in the invitation document.
- b) The contract award decision shall be taken by the appropriate approvals authority, but the award decision does not constitute a contract.
- c) Following the contract award decision, the procuring entity shall prepare a notice indicating the name of the best evaluated tenderer, the value of the proposed contract and any evaluation scores. The notice shall be-
 - i) Sent directly to all tenderers who submitted tenders by letter and, where appropriate, by fax or e-mail; and,
 - ii) Published on the Government's public procurement website.
- d) A procuring entity shall allow a period of at least ten working days to elapse from the date of despatch and publication of the notice in accordance with subsection (3) before a contract is awarded.'

157. The applicant's case is that the 1st Respondent's award of the contract was unlawful on grounds of irregularity for want of compliance with the mandatory procedures set out in Section 45(3) and (4) in that it failed to issue a notice of the contract award decision to all tenderers as prescribed in the section and did not publish such notice in the Government's Public Procurement website. Having failed to publish the notice, it is alleged, 1st Respondent consequently did not allow the mandatory 10- day cooling off period before awarding the contract to the Heptagon.

158. The rationale for these measures appears quite clear. Once the decision to award the tender has been made, the interested tenderers would then be put

on notice of this fact via the prescribed methods of publication to enable them in the time frame allowed to consider and make representations or even intervene to challenge such a decision 'before' a contract is entered into. It is in keeping with the spirit of openness and enable due redress.

159. The 1ST Respondent does not contest the assertion that the contract provisions in the Procurement Act were not followed in this case but seeks to avoid this instance by contending that the 1st Respondent 'acted in terms of the Urban Government Act'. Be that as it may it has not been suggested nor did the 1st Respondent advance the proposition that the quoted aspects of the Procurement Act are incompatible or in conflict with the Urban Government Act in any specific respects.
160. There is no doubt that there may exist areas of misalignment in the institutional, procedural and legal arrangements between the Urban Government Act and the Procurement Act regimes; these being matters requiring policy refinement to achieve harmony in the law and practice of public procurement from local to central government. That is nonetheless another matter altogether.
161. What is abundantly clear in this case is even if the Council was remotely aware of the existence of the procedural provisions of the Public Procurement Act, and it is certainly not suggested it was wilfully oblivious of these procedures, it had one abiding pre-occupation playing on the majority of Councillors minds when they sat to consider Tender No. 41 of 2014/15. This was the utmost haste to meet a looming deadline to close off the award of the tender as is reflected in the minute. As the majority of the Councillors would have it there was no or scope to even reflect on any procedural considerations let alone even room to refer the anomalous questions concerning the evaluation for further investigation as proposed by the Chief Executive Officer.
162. It has not been suggested that the expedience of rushing the award of the contract and the 'urgency' of the moment warranted a departure from the provisions of Section 45 but rather it is contended on the 1st Respondent's behalf that **'it has no bearing on the decision to award the tender to the second respondent'**. This, we understand is one way of saying abiding by

the procedural directives of Section 45 would not have altered the course of the contract award. We have difficulty in following the merit of this argument.

163. In our view this is an independent and separate ground on which the contract award is being assailed. The Procurement Act has, since its promulgation into law, become the principal legislation governing the regulation and control of public procurement practices, save where it is specifically excepted. In its fold it embraces all public procurement entities, which are defined in Section 2 of that act as including local government authorities¹⁸. Its scope of application is covered in terms of Section 4(1) which states that:

“This Act shall apply to all public procurement conducted by or for requesting or procuring entities, except as provided in sub-section 4(2) and section 5.”

164. Again there has been no suggestion that the 1st Respondent is exempt from the provisions of the Act regarding the contract award rules or that this tender falls to be dealt with within the circumstances excepted under the section. On this basis we therefore find that the award of the contract to Heptagon was irregular and is liable to be set aside on that basis.

We now turn to the 2nd Respondent's special points of law

165. **THE 2nd RESPONDENT'S POINTS OF LAW**

Towards the close of the hearing of the Parties' oral (final) submissions Mr Mabila advanced what in essence were specific and independent points of law the likes of whose effect, if successful would be dispositive of the Application before the IRC. In that sense but for the timing of the arguments these points could very well have been regarded as preliminary or *in limine* submissions.

166. In view of the sequence and timing, these contentions were advanced as if supplementary or alternative to the second Respondent's stance to the substantive (main) application. In general, the 2nd Respondent has elected to

¹⁸ Section 2 of the Procurement Act in the definition of 'procuring entity'.

associate itself with the 1st Respondent's contestation of the present application.

167. We propose to deal with these points of law at this juncture and it is per circumstance that we have not done so first and to determine whether in light of the arguments put up the application could still have been entertained. The order in which these are being dealt is of no moment and should not detract from their importance to this Committee.

That in terms of the Public Procurement Regulations Of 2008 the Application is Irregular in that it has been brought prematurely.

168. In summary the nub of the 2nd Respondent's first legal submission *in limine* is that there are certain conditions- precedent arising by operation of the statutory provisions as set out in Regulation 115 of the Public Procurement Regulations as read with Section 45 (5) of the Procurement Act. This point is premised on the proposition that the Public Procurement Regulations of 2008 relied on in this point are applicable to this case in the absence of new regulations promulgated in terms of Section 65 of the Procurement Act.

The Procurement Act section (Section 45 (5) reads:

"The provisions of subsection (3) and (4) shall not apply-

- (a) Where the value of the procurement does not exceed the threshold specified in public procurement regulations; or**
- (b) In any other circumstances specified in public procurement regulations"**

169. With respect firstly we had degree of difficulty in appreciating the basis for the proposition that the Public Procurement Regulations of 2008 are applicable despite the promulgation of the Procurement Act of 2011 and its definition of regulations in the interpretation section of that Act which defines 'public

procurement regulations' as meaning '**regulations issued in terms of Section 65**'.

170. Without going into the intricate construction of the various regulations on which the 2nd Respondent relies for the secondary arguments founded on the invoked Public Procurement regulations, it is necessary to first test the proposition that the 2008 regulations are applicable.
171. Given the fact that in the plain language of the Act the reference to regulations envisaged in the section are regulations made in exercise of the powers conferred by Section 65 the point becomes untenable in that it is common cause that no new regulations have as yet been promulgated under the section in question. It goes without saying that there appears no basis for the importation of the regulations referred to under the 2008 regulations.
172. We are therefore not persuaded that there is any merit in the point raised by the 2nd Respondent herein.
173. Secondly the scope of operation of the regulations that are referred to notwithstanding the legal niceties as to whether the said regulations are still valid, is self evident in Regulation 3 which provides as follows:

"The purpose of these regulations shall be to regulate the procurement of goods, works and services by government Ministries and Departments"

174. Even if 2nd Respondent's arguments in this regard would beguile us, the proceedings under review concern procurement of works by a local authority and not a Ministry or Department of Central government and for these reasons it is difficult to see how relevant the public procurement regulations of 2008 are let alone the question whether the regulations are still in operation or apply.
175. On this basis alone we determine the 2nd Respondent's contentions that the present application has been prematurely brought lacks merit and is accordingly dismissed.

That the Applicant is prohibited by operation of Section 28 of the Construction Industry Council Act of 2013 from undertaking the construction work in respect of which Tender No. 41 of 2014/15 was issued.

176. The 2nd Respondent's second point of law is that the Applicant was disqualified by operation of section 28 of the Construction Industry Council of 2013. This argument is founded on the basis that the Applicant submitted a certificate issued by the Construction Industry Council as part of its bid to Tender No. 41 of 2014/15 in terms of which it is registered as a category 3 construction entity. The certificate appears at page 100 in Bundle C as part of the A G Thomas bid.
177. In support of this notion, it was contended by Mr Mabila that the reason the Applicant was precluded is that on account of the Applicant's registration as a category 3 contractor it is thus prohibited to 'do work below the sum of E20 million as the tender in question was for a lesser value of E10.5 million. It is further argued this is so because 'only category 4 contractors were eligible and/or allowed to participate in the same'.
178. We could find no support for this proposition either in the conditions of tender contained in the Invitation to Tender document or in the quoted section of the Act itself on which the assertion for the prohibition alleged by the 2nd Responded could be founded.
179. After the conclusion of the hearing of oral evidence from the witnesses of fact that gave evidence before this IRC, the 2nd Respondent sought to introduce a document being a letter dated the 22nd January, 2016 whose author is the Chief Executive Officer of the Construction Industry Council. This letter was accompanied by an affidavit submitted subsequently by the Chief Executive Officer the purpose of which was simply to verify its authenticity and confirm its source.
180. The point of the letter in question appear to be paragraphs 2 and 3 of its contents as follows:

"We confirm that in September 2014 the Construction Industry Council of Swaziland held a meeting with all its stakeholders

(including contractors) in the construction industry and the contractors were informed that as of the 1st October 2014 all contractors in the industry will have to be registered and categorised.”

It goes on to say:

“At the commencement of the categorization process the minimum and maximum contract values for work which a contractor in the respective categories could carry out work was as follows:

Category 3: minimum value of E20 Million and above

Category 4: minimum value of E5Million with a maximum value of 20 Million”

181. It must be said this argument presents logical difficulties in light of the facts of this matter. Foremost it is difficult to understand how the section of the Construction Industry Council Act relied on is relevant to this application or the Tender under review. However even if it were, the Notice to Tenderers and Invitation to Tender document is clear in that it invites tenders from 'both' category 3 and 4 construction companies.
182. The second difficulty with this 2nd Respondent's point lies in the fact that other than the letter from the Chief Executive Officer that it has sought to introduce in the manner it has done, the 2nd Respondent has not led any evidence nor laid the factual foundation for the contention that it seeks to make with this point of law.
183. During the hearing the Applicant through Mr Vettel, objected to the 2nd Respondent application for leave to introduce this letter if its purpose was an attempt at including new evidential matter via the said letter. The IRC has taken a flexible approach in the discovery and disclosure of documents throughout these proceedings whilst mindful of any specific objections that may arise. To this end we have tended towards a liberal and not overly restrictive approach to the reception of documents. In this regard we allowed

the production of the letter on the basis that its relevance and admissibility would still have to be established before its contents would be taken into account.

184. Having said this, it is unclear what the purpose of the CIC letter is herein nor has the probative value of its contents been established. At best it can be said to be evidence of the policy discourse within the CIC and its members on regulatory matters. Other than the contents of this letter, the legal standing of the categorisation or schedule of registration of contractors and what limits in value of contracts that are sought to be introduced is open to question and has not been established in the course of these proceedings. The 2nd Respondent has not established the legal import or status of the Chief Executive's letter demonstrating the existence of the ranges and limits of any categorisation of contractors.
185. We agree with the Applicant that the factual foundation for the legal contentions made by the 2nd Respondent on this point has not been properly raised nor laid down. Most importantly there appears to be no legal basis for the relevance or interpretation given to Section 28 of the Construction Industry Council Act in support of the 2nd Respondent's argument in this instance. We therefore also find this point to be without merit and dismiss it accordingly.

What Considerations should be applied as to the appropriate remedy?

186. Concerning the remedies, this committee although substantially has upheld the review application in part, it is not inclined to substitute its own decision for the 1st Respondent's even if the circumstances were appropriate. They are not. Not only is this Committee not well placed either technically or in terms of the material resources pertaining to the submitted tenders, to presume to adjudicate the matter, in light of the peculiar circumstances and the findings on the seminal source of the procedural difficulties in conduct of the process overall, the most appropriate and fair remedy would be to remit the matter subject to specific directives.
187. In the Westinghouse case the court did take this third way particularly because in that matter, the court was of the view that it would not be

equitable to 'substitute' its own award for the Eskom (the procurement entity) given the nature of the irregularities which vitiated the process and inclined towards remitting the matter to Eskom to start the process again¹⁹. In the instant case the committee prefers this approach as the most just, equitable and pragmatic.

188. The remarks in **Livestock**²⁰ case ring truer than the classical guidelines in the **Johannesburg City Council** decision. Fairness to all sides and a remedial intervention that addresses the root of the troubles besetting the process would serve in this matter. The Committee is in debt to Counsel for the Parties for the authorities and the legal insights furnished in this regard.
189. There are considerations in light of the institutional and regulatory reforms as to reconstituting the adjudicative structures of the 1st Respondent to designate a Tender Board as envisaged in the Procurement Act and ancillary regulatory arrangements. At this time any remittance of this matter would be for reconsideration of the 1st Respondent as a procurement entity to consider and implement the remedial aspects of this decision effectively.
190. The procurement framework comprising chiefly the Procurement Act, the Urban Government Act and Urban Government Financial Regulation and what internal tender rules that the 1st Respondent has hitherto utilised are in need of re-alignment into a coherent standard. Most importantly there is need for appropriate regulations to be fashioned as envisaged in Section 65 of the Procurement Act. We would recommend that these measures are put in place in good time. In the absence of elaborate regulations it does mean that the tender rules need to be developed sufficiently to cover with clarity the evaluation criteria, rules and scoring mechanism to better inform tenderers of the methodology to be used in handling their tenders.
191. We now set out the Committee's findings and outcome on the matter.

¹⁹ Westinghouse v Eskom Holdings 2016 All ZASCA 483 at page 28 para 74.

²⁰ See remarks in Livestock and Meat Industries Control Board v Garda 1961 (1) SA 342 (A) at 349G. Johannesburg City Council v Administrator, Transvaal, and Another 1969 (2) SA 72 (T).

192. **CONCLUSION AND FINDINGS**

On the basis of the foregoing factual matrix and legal considerations the Committee makes and records the following findings:

That the conduct of the procurement of Tender No. 41 of 2014/15 was from inception beset with fundamental procedural irregularities by reason of the facts that:

- a) The tender documents issued by the 1st Respondent, in particular the instructions to tenderers were imprecise in so far as it failed to meet the obligatory standards set out in Section 44 (h) and Regulation 61 specifying mandatory and material conditions that procurement entities must comply with as to the content of tender documents. It was also flawed in stipulating qualification criteria that were impossible to fulfill in regard to the requirement seeking proof of registration of tenderers with the Ministry of Public Works and Transport.
- b) The procedures and method adopted by the evaluation consultant evaluation were neither transparent nor fair by reason of the fact that
- c) The process was opaque in that, contrary to the provisions of Section 44(h) and 45 (1), these methodology and criteria intended to be used in the evaluation were not stated in invitation document; and
- d) There were patent inconsistencies in the conduct of the screening of tenders against the eligibility and qualification criteria and in the disqualification or acceptance of tenders for detailed evaluation.
- e) The 1st Respondent's Finance Audit and Administration Committee failed to abide by the mandatory provisions of Section 44 (a) of the Public Procurement Act. As the 1st Respondents evaluation body (collectively responsible with the engineer as the consultant retained to lead the process) failed to maintain full records of all the stages of the procurement proceedings as specifically required under the section.

- f) Most insidiously FAAC did not make full disclosure to Council of the factual circumstances and determination by the engineer of Applicant's bid to be 'the lowest substantially responsive' tender. The record conceals the material conditions that led to the application or use of the 'substantially responsiveness' test to qualify the Applicant- in particular that the Applicant's bid had not been complete as a deviation whose materiality was germane in the inclusion of the Applicant's bid. These material only emerged after the tabling of the Tender before the Council for adjudication.
- g) On account of the non-disclosure of the material foundational facts to the recommendation for award in favour of the Applicant, the process was tainted with irregularity for want of transparency and accountability and on that basis offended against the principles set out in Section 38 or the Procurement Act;
- h) In the circumstances the Committee finds that the decision of the Council of the 1st Respondent rejecting FAAC's award recommendation of Applicant as the 'lowest substantially responsive' tender and therefore not awarding the tender to the Applicant was neither unreasonable nor *ultra vires* the enabling provisions of Reg. 61 of the Urban Government Financial Regulations.
- i) We find that to this extent the 1st Respondent's Council's decision was a proper, legitimate and reasonable exercise of its function within the powers conferred by Regulation 62 in light of the representations made before it and the emerging facts concerning the events surrounding the conduct of the tender opening proceedings; which facts are common cause. Thus far it was within its province. It could go no further without proper and rational basis to presume to 'award' the tender without making a deliberative and informed adjudication having subjected the matter to a rigorous and critical scrutiny in light of the conflicting representations before it.

- j) The Committee finds however that the Council acted ultra vires its powers in that it took into account irrelevant facts and failed to take into account relevant considerations in making the decision to award Tender No. 41 of 2014/15 to the Second Respondent and on that basis acted unreasonable and unlawfully;
- k) The Committee finds further that the award of the contract to the 2nd Respondent by the 1st Respondent pursuant to the contract award decision of Council did not follow or comply with the mandatory procedural provisions in terms of Section 45 of the Procurement Act in particular subsections 3 and 4 of that section in the following material respects:
 - i) The 1st Respondent failed to send notice to all tenderers of the contract award decision or to publish the same in the Government's public procurement gazette as per section 45(3) (a) and (b); and consequently
 - ii) The stipulated obligatory cooling off period contemplated by Section 45 (4) before the contract award was not observed.
 - iii) In light of the extent of the procedural and substantive irregularities attendant on the handling of process from its inception and the circumstances of this case especially the submissions by the Parties concerning the transitional institutional arrangements under way since this matter was first instituted, the Committee finds it would be impractical to remit the matter to the Council at adjudication but find the most appropriate remedy to be its remission to the 1st Respondent as the procuring entity with specific directives as shall be set out in the remedial section of this decision.

193. **REMEDIES**

Having heard the parties and considered the matter and regard being had to the reasons above, it is the decision of the Committee that:

- i. The application to review and set aside the decision of the 1st Respondent rejecting the recommendation of the Applicant's bid as the 'lowest evaluated tender and not accepting the Applicant's tender is dismissed;
- ii. The award of tender 41 of 2014/15 made by to the 2nd Respondent is hereby reviewed and set aside and is declared to be unlawful and unfair; and consequently
- iii. The award of the contract to the 2nd Respondent is also reviewed and set aside and is hereby declared to be procedurally irregular, unlawful and in breach of Section 45 of the Procurement Act;
- iv. It is recommended that the 1st Respondent terminates and rescinds the contract entered into with the 2nd Respondent pursuant to the contract award referred to above and all attendant transactions and desist from executing the same,
- v. The procurement of the Tender is hereby remitted to the 1st Respondent as the procurement entity through its responsible authority or bodies to re-issue and institute the Tender process afresh including:
- vi. Drawing up and issuing a new Invitation to Tender Document and relevant notices clearly setting out the necessary and instructions to tenderers to the requirements and needs of the

employer, the standards set out in the Procurement Act and Urban Government Financial Regulations or any appropriate regulations in place; setting out the technical and formal requirements of the tender with sufficient details of the evaluation procedures, criteria and principles including scoring of tenders;

- vii. Preparing a full and comprehensive evaluation report with recommendations to the adjudicating authorities including detailed information on the proceedings through the various stages, the evaluation of tenders and recommendations.
- viii. The 2nd Respondent's cross application or points in limine seeking the dismissal of the application on the grounds advanced as points of law is hereby dismissed.

SIGNED AND HANDED DOWN AT MBABANE THIS 21ST DAY OF MARCH, 2016.



C. S MAPHANGA (CHAIRMAN)



O. THINDWA (MEMBER)



A. NGWENYA (MEMBER)

