



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A109/2013

Case No: A76/2013

In the matter between:

1.1.1.1. **CSC NECKARTAL DAM JOINT VENTURE**
APPLICANT

and

THE TENDER BOARD OF NAMIBIA	1ST RESPONDENT
THE MINISTER OF FINANCE	2ND RESPONDENT
THE MINISTER OF AGRICULTURE, WATER AND FORESTRY	3RD RESPONDENT
SALINI SpA	4TH RESPONDENT
VINCI CONSTRUCTION GRANDS PROJECTS & ORASCOM CONSTRUCTION JOINT VENTURE	5TH RESPONDENT

Neutral citation: CSC Neckartal Dam Joint Venture v The Tender Board of Namibia & Others (A 109/2013 and A 76/2013) [2013] NAHCMD 186 (4 July 2013)

Coram: DAMASEB, JP et SMUTS, J et UEITELE, J

Heard: 23 and 24 May 2013

Delivered: 4 July 2013

Flynote: Review of tender board decision – standing of applicant challenged – challenge discussed and dismissed – review grounds including material non-failure to apply the mind in the sense of discloses to Tender Board – the court finding that these non disclosures precluded the Tender Board from properly applying its mind to the tender

ORDER

- (a) The decision by the tender board to award the tender for the construction of the Neckartal Dam project and phase 1 of the bulk water supply project under Tender No F1/18/2-1/2012 to the fourth respondent is set aside.
- (b) The matter is referred back to the tender board for the purpose of determining the award of the tender.
- (c) The respondents are directed to pay the applicant's costs, jointly and severally the one paying the other to be absolved. These costs are to include those of two instructed counsel and one instructing counsel.

JUDGMENT

THE COURT

- (b) This is an application by an unsuccessful tenderer to review and set aside a tender award made to a competitor by the tender board of Namibia ,

created by s 2 of The Tender Board of Namibia Act¹ ('the Act'). The applicant prays that once the decision is reviewed and set aside, it be referred back to the tender board for consideration afresh, subject to any conditions which the court may impose. Section 7(1) of the Act empowers the board as follows:

'Unless otherwise provided in this Act or any other law, the board shall be responsible for the procurement of goods and services for the Government, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government, and for the disposal of Government property, and may for that purpose-

- (a) On behalf of the Government conclude an agreement with any person within or outside Namibia for the furnishing of goods or services to the Government or for the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government or for the disposal of Government property;
- (b) With a view to conclude an agreement contemplated in paragraph (a), invite tenders and determine the manner in which and the conditions subject to which such tenders shall be submitted;
- (c) . . .
- (d) Accept or reject any tender for the conclusion of an agreement contemplated in paragraph (a) ; . . .'

(c)

(d) Although the primary responsibility for the evaluation of tenders is that of the board, in terms of Regulation 19(1)², the tender board is required to submit tenders to the relevant ministry for 'its recommendation'. And in terms of sub-regulation (2):

'The relevant office, ministry or agency shall make its recommendation on the tenders received in terms of subparagraph (1).

(e) (3) The permanent secretary of the relevant office, ministry or agency shall sign the recommendation made in terms of subparagraph (2) and return the recommendation together with all the tenders to the Board.'

(f) On 14 March 2013 the board (first respondent) awarded a tender to the fourth respondent (Salini SpA) for the construction of the Neckartal Dam project and phase 1 of the bulk water supply ('the project'). The tender award was in a sum in excess of N\$2, 8 billion and is to date the largest tender award

¹16 of 1996.

made in Namibia.

(g)

(h) After a pre-qualification process, three tenderers qualified and tendered for the project. The two unsuccessful tenderers, CSC Neckartal Dam Joint Venture ('CSC') and Vinci Construction Grands Projects & Orascom Construction Joint Venture ('Vinci Orascom'), each launched separate review applications to set aside the tender award. These applications were consolidated and set down for hearing together.

(i) When the consolidated application was called, counsel for Vinci Orascom informed the court that his client withdrew its review application. Costs were not tendered. This issue was then argued and we proceeded to order that Vinci Orascom should pay the costs of opposition of the respondents cited in its application.

(j) Counsel for CSC, Mr Watt-Pringle (who appeared together with Ms Prinsloo) made it clear that its application (under case no A 109/2013) would proceed. The citation of that application thus appears in this judgment. We enquired from counsel as to the effect of matter contained in the Vinci Orascom application as a result of the withdrawal of that application. Counsel for first, second and third respondents, Mr Maleka SC assisted by Mr Oosthuizen SC and Dr Akweenda, as well as counsel for Salini, the successful tenderer, Mr Marais SC assisted by Ms van der Westhuizen, and CSC's counsel addressed us on the issue. But, as it subsequently emerged, nothing turns on this issue as CSC only relied upon and advanced argument on the review grounds and facts raised in its own application and did not rely upon matter contained in the Vinci Orascom application.

(k)

(l) In the application brought by Vinci Orascom, it was alleged that the tender board was not properly constituted on 14 March 2013 and lacked the requisite quorum. Although the point was also taken in the CSC application that the tender board was not properly constituted, Mr Watt-Pringle informed us that CSC would not rely upon that ground. It is accordingly not necessary for us to deal further with issues relating to the composition of the tender board and

whether it had a quorum on 14 March 2013.

Background

(m) The project is for the construction of the Neckartal dam on the Fish River approximately 40km west of Keetmanshoop. The structure of the dam wall is to be Roller-Compacted Concrete ('RCC') exceeding some 500 metres in length. When the dam is in full supply, an area of some 39 square kilometres would be covered. The project also includes phase 1 of the bulk water supply infrastructure.

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(o) As indicated, the tender process included a pre-qualification selection process. CSC, Salini and Vinci Orascom qualified, having satisfied the tender board that they possessed the necessary technical expertise and experience to execute the requisite works involved in the project.

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(q) The closing date for the tender was 22 January 2013. The tender board decided at its meeting on 14 March 2013 to award the tender to Salini. On 18 March 2013 the unsuccessful tenderers were informed that their tenders had been unsuccessful.

(r)

(s) Shortly afterwards, Vinci Orascom launched its review application, amongst others citing CSC as a respondent. Certain of the review grounds in the two applications overlap. Vinci Orascom however not only sought the setting aside of the tender, but also an order that the tender be awarded to it. CSC also seeks to review and set aside the Tender Board's award but asks that the matter be remitted to the tender board for determination.

(t)

(u) Shortly after launching its review application, Vinci Orascom brought an interlocutory application for the delivery of certain documents. This resulted in this court (Ueitele J) directing that the governmental respondents to deliver certain documents to the other parties. Vinci Orascom also caused a subpoena to be served on Knight Piesold Consulting (Pty) Ltd (KP) a firm of consulting engineers specialising in dam construction. It had been engaged by the Ministry

of Agriculture, Water and Forestry (“the ministry”) as its consultants in respect of the project. The subpoena concerned reports or documentation regarding the valuation of the tenders. Immediately thereafter, legal practitioners representing KP provided a document to the other parties dated 22 February 2013 and entitled ‘Neckartal Dam Project: Draft Tender Valuation Report’ signed by Mr Gawie Steyn and addressed to the ministry. After the record of the decision making was filed, both Vinci Orascom and CSC filed supplementary affidavits under Rule 53(4). The consolidation application was set down for 22 and 23 May 2013.

Tender evaluation

(v) After receipt of the tenders on 21 January 2013, the Tender Board referred the three tenders to the ministry under section 19 of the Act. In his answering affidavit to the application, the Permanent Secretary of the Ministry states that the top management of the ministry decided to appoint the Neckartal Steering Committee (‘NSC’) from the ranks of the ministry. This committee comprised five staff members with expertise in the area of water resources, water management and finance. Although nothing turns on it, it would appear that one of the members was on maternity leave during much of the evaluation process and did not participate in many of the sessions.

(w) The ministry also engaged its consultant, KP, to assist in the evaluation. The NSC and the experts from Knight Piesold were jointly charged to attend to the evaluation of the tenders, forming the evaluation committee. The findings of this evaluation committee were to be presented to the top management of the ministry so that it could make its recommendation to the tender board.

(x) In the appointment letters to members of the NSC, they were specifically charged to jointly conduct the evaluation of the tenders together with the experts from KP and to make recommendations to the ministry’s top management. This process commenced on 8 February 2013 and culminated in a meeting with the top management of the ministry on 27 February 2013.

(y)

(z) The evaluation process commenced with preparatory work on 8 February 2013. On that date, Mr Gawie Steyn, the KP's project manager and a dam engineer, confirmed the composition of the KP team which comprised seven engineers with different areas of expertise, headed by himself. It also included three dam engineers including one described as a dam design engineer, as well as a mechanical engineer, an electrical engineer and a junior engineer who would be the site assistant for construction. It was stated by Mr Steyn in an email on 8 February 2013 when receiving his mandate to evaluate the tenders that the KP's team of professionals would

(aa)

(bb) 'do the tender evaluation with each person concentrating on the aspects of the tender conforming his own field of expertise and experience.' (sic)

(cc)

(dd) He added that tenders were to be evaluated in accordance with the requirements stipulated in Volume 1 of the tender document and would concentrate on the technical, financial and social aspects as summarised in the different sheets of the attached spreadsheets which would be used to record the evaluation results of all the different aspects to be evaluated.

(ee)

(ff) Before the evaluation committee's work started, some of its members met on 8 February 2013 in preparation for the detailed evaluation, set to commence on 11 February 2013. They agreed at the meeting on 8 February 2013 that the team should reach full agreement on each rating so that no differences would be voiced later. They also agreed that the tenders would be evaluated in accordance with tender specifications in four categories with the following weightings: technical 60%, financial (price) 20%, social 10% and risk 10%. The minutes of that meeting reflect that there was some concern as to whether the financial weighting should not be higher. This aspect is further dealt with below. The meeting also agreed that the financial evaluation would include checking all calculations.

(gg)

(hh) The evaluation committee then met on every day during the week of

11 to 15 February 2013 to evaluate the tenders. At the outset, the manner of scoring and rating tenders was discussed.

(ii) At the conclusion of the week, on 15 February 2013, the evaluation committee finalised the verification of the respective bills of quantities and their proposed ratings and scores for the different factors listed in the tender documentation. These had been presented, discussed and then agreed upon by the evaluation committee, thus comprising the KP experts and members of the ministerial NSC. At the conclusion of that week's meetings, it was resolved that the consultants (KP) would prepare a draft summary of the findings of the evaluation committee and that tenderers should be invited for a meeting to give clarifications on unclear and missing points in their proposals and that the evaluation team would meet again to finalise the findings for discussion with the Permanent Secretary of the ministry. This would occur after clarification had occurred, as it could affect scores, as was pointed out by Mr Pesch of KP.

(jj) The KP experts then proceeded to prepare the draft tender evaluation report which was completed on 22 February 2013. It was sent to Mr Niipare, chairperson of the NSC within the ministry although formally addressed to the Permanent Secretary. Mr Steyn made an affidavit and explained that this report was 'the combined result of the evaluation committee who comprised mainly four employees of the ministry and seven from Knight Piesol'. He pointed out that one of the NSC members was not able to attend by reason of her advanced pregnancy at the time. Mr Steyn also pointed out that this report was not intended to be a final report.

(kk) A further meeting of the evaluation committee took place on 27 February 2013 for the purpose of finalising scores and for presentation of a report to the Permanent Secretary of the ministry and members of its top management.

(ll) A clarification meeting was however not held, despite the recommendation of the evaluation committee to do so. According to the answering affidavits, the ministry took the stance that it would not negotiate with

tenderers even though Mr Steyn said that he explained that clarification is not negotiation but merely clearing up uncertainties and obtaining missing or unclear information.

(mm) In the draft evaluation report prepared by the consultants, reflecting the deliberations of the meetings of 11 to 15 February 2013, scores for each of the tenderers in the different categories were set out, a discussion explained the strengths and weaknesses of the tenderers and a recommendation was made to award the tender to Vinci Orascom, which the evaluation committee considered to be technically superior. These portions are in the following terms:

4. DISCUSSION

4.1 Third Highest Scoring Tender

This tender by CSC Joint Venture is well planned and technically sound. CMC and CCC, who will be responsible for 72% of the joint venture composition, are experienced international dam contractors and thus CSC Joint Venture is capable of completing the Contract successfully. Their Tender Price is well balanced, the lowest of the three tenderers and 6,1% higher than the Ministry's cost estimate. They scored only 50, 8% for their Social Benefit offer, because they omitted the planned expenditure in Namibia, but this can be clarified during the clarification meeting. Their technical offer was penalized, because the proposed site agent has inferior site experience, but this can be mitigated by insisting that an alternative suitably experienced Site agent be nominated by CSC Joint Venture.

Their offer is N\$152 446 050, 91 lower than the highest scoring tender.

4.2 Second Highest Scoring Tender

This tender by *Salini SpA* is well planned and technically sound. *Salini SpA* is an experienced international dam contractor and is capable of completing the Contract successfully. Their Tender Price is balanced, the second lowest of the three tenderers and 11,9% higher than the Ministry's cost estimate. The plant offered is the minimum required by the specifications, resulting in the longest RCC placement times, which poses a risk to timeous contract completion, hence the lower score for

risk management.

Their price is N\$1 980 717, 60 lower than the highest scoring tender.

4.3 **Highest Scoring Tender**

This tender by *Vinci-Orascom Joint Venture* is very well planned and technically sound. *Vinci-Orascom Joint Venture* has sufficient international dam experience and is capable of completing the Contract successfully. Their tender price is balanced, the highest of the three tenderers and 12, 0% higher than the Ministry's cost estimate. Their technical offer was the best, but the senior site staff nominated for the Contract has insufficient experience, for which their technical offer was penalized. However, this can be mitigated by insisting that alternative suitably experienced site staff be made available for the Contract by *Vinci-Orascom Joint Venture*. The social benefit offered indicates a dedication to contribute to the improvement of the socio-economic conditions of the local Keetmanshoop community.

Their price is N\$2 876 871 194, 51.

5. **RECOMMENDATION**

It is recommended that Contract No. F1/18/2-1/2012, Construction of Neckartal Dam and Phase 1 Bulk Water Supply in the Karas Region be awarded to *Vinci-Orescom Joint Venture* on the condition that the three senior site positions of Site agent, Production manager concrete and RCC superintendant be filled by persons with suitable dam and especially RCC dam experience.

The contract amount is N\$2 876 871 194, 51 inclusive of 15% VAT, which is 12, 0% higher than the ministerial estimate.'

(nn) The meeting held on 27 February 2013 to finalise the scoring and recommendation involved five members of the NSC and two representatives of KP, namely Messrs Steyn and Pesch. The minutes of that meeting, chaired by Mr Niipare, stated that certain numeric scores were slightly changed and 'the overall outcome remains that Vinci and CSC have too little relevant key staff especially in the construction of RCC dams in comparison with Salini'. The scoring under the heading 'Financial' was also changed. Instead of benchmarking the top score with the lowest offer as had been done during the

deliberations of 11 to 15 February 2013, the ministry budget estimate was taken as the 100% reference point. As far as a recommendation was concerned, the minutes state “after lengthy discussion and considering all factors, it was unanimously agreed to recommend the tender award to Salini based on best technical scoring and in particular experienced key personnel.” This meeting, according to the minutes, was held from 09h00 to 10h45 on 27 February 2013.

(oo) The scores set out in the Knight Piesold report dated 22 February 2013 are in tabulated form the following:

Table 1: Technical Evaluation score

Salina SpA	71.2%
Vinci-Orascom J/V	71.2%
CSC Neckertal Dam J/V	68.3%

Table 2: The financial evaluation score

Salina SpA	94.5%
Vinci-Orascom J/V	94.4%
CSC Neckertal Dam J/V	100%

Table 3: Social benefit score

Salina SpA	87.5%
Vinci-Orascom J/V	87.5%
CSC Neckertal Dam J/V	50.8%

Table 4: Risk management score'

Salina SpA	76.6%
Vinci-Orascom J/V	83.2%
CSC Neckertal Dam J/V	87.3%

(pp) At the meeting of 27 February 2013 of the evaluation committee, attended by all five members of the NSC and only two representatives of KP, certain scores were altered at the instance of Ministry personnel which resulted in the following effect:

Table 1: Technical evaluation score

Salina SpA	71.2%
Vinci-Orascom J/V	70.4%
CSC Neckertal Dam J/V	67.2%

Table 2: Financial evaluation score

Salina SpA	88.1%
Vinci-Orascom J/V	88.0%
CSC Neckertal Dam J/V	93.9%

Table 3: Social benefit score

Salina SpA	76.7%
Vinci-Orascom J/V	85.8%
CSC Neckertal Dam J/V	59.2%

Table 4: Risk management score'

Salina SpA	76.6%
Vinci-Orascom J/V	83.2%
CSC Neckertal Dam J/V	87.3%

(qq) Instead of Vinci Orascom being recommended as was contained in the KP draft, the minutes of that meeting contained the following recommendation as its 'decision':

'After a lengthy discussion and considering all factors it was unanimously agreed to recommend the tender award to Salini based on the best technical scoring and in particular experienced key personnel'

(rr) Mr Steyn in his affidavit points out that the minutes of that meeting do not properly reflect what was decided by the evaluation committee. He points

out that Salini was not the unanimous favourite. The KP representatives were still in favour of Vinci Orascom “due to the best ranking overall and objected to Salini being recommended”. The recommendation in the draft tender evaluation report prepared by KP was that Vinci Orascom be recommended on condition that the three senior site positions are filled by persons with suitable dam and especially RCC dam experience. At the 27 February 2013 meeting, that remained the stance of the KP representatives who proposed in the alternative that the tender be awarded to all three tenderers, given the fact that they met the technical requirements of the tender.

(ss) The meeting with the top management of the Ministry ensued straight after the final meeting of the evaluation committee on 27 February 2013 at 11h00. Following a presentation to the top management of the Ministry, including the Permanent Secretary, the ministry’s submission to the tender board was then prepared, which then served before the tender board for its consideration of the tender.

Ministerial submission to Tender board

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(uu) As tender board members acknowledged, they relied upon the evaluation of the tenders as set out in the submission by the ministry. The terms of that submission are thus of considerable importance to this matter. It first sets out the nature of the project and refers to the pre-qualification of the three tenderers after evaluation. It refers to the compulsory site meeting held on 23 October 2012 and the closing date of the tenders. As to the tender evaluation process, the following was stated:

(vv)

(ww) ‘1.7 The ministry appointed a Neckartal Steering Committee (“NSC”) consisting of five senior staff with technical expertise in the field of finance, water resources and water supply.

(xx)

1.8 The evaluation of the tender offers was jointly done by the NSC and expert of the appointed consultant, Messrs Knight Piesold Consulting (Pty) Ltd from 11 – 15 February 2013 and presented to the ministry’s top

management on 27 February 2013.’

(yy) The ministerial tender submission then proceeds to refer to the respective tender offers and stated they complied with the formal requirements of the tender. The submission further stated that the tenders were scrutinized for arithmetical accuracy and a small adjustment was made to Salini’s tender by reason of an arithmetic error.

(zz) Under the heading “evaluation”, it was stated that the evaluation was conducted in conformity with the terms, conditions and specifications as outlined in clause 5.5 of the evaluation of tenders in the tender document. The weightings (accorded to technical, financial, social and risk) were then referred to and explained. The scoring system was referred to and also explained. The submission then proceeded to refer to the respective scores in tabulated form as set out in paragraph 24 above and concluded with this summary of scores with Table 7 setting out a summary of overall evaluation as follows:

Company	Technical evaluation		Financial Evaluation		Social evaluation		Risk evaluation		Overall evaluation	
	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank
Vinci-Orascom Joint Venture	70.4%	2	88.0%	3	85.8%	1	83.2%	2	76.7%	1
Salini SpA	71.2%	1	88.1%	2	76.7%	2	76.6%	3	75.7%	2
CSC Joint Venture	67.2%	3	93.9%	1	59.2%	3	87.3%	1	73.8%	3

(aaa) A crucial component of the ministerial submission then proceeded under the heading of “discussion”. Given its importance to these proceedings, it is quoted in full.

(bbb) ‘4.1 All three tenderers were evaluated and considered to be able to carry

out the project, confirming the outcome of the pre-qualification. For full details refer to attached ANNEXURES 1-4.

- 4.2 Messrs Vinci-Orascom fared technically well with a score of 70.4%. However, it was observed that the four key senior staff in the tender offer have very little experience in construction of dams in general and of RCC dams in particular. They presented the best social plan in terms of training offered and were the second highest in risk evaluation. They are having the highest tender price.
- 4.3 Messrs Salini S.p.A. have the best technical evaluation with a score of 71.2% and very experienced key senior personnel staff. They scored the second highest for the social evaluation overall but they fared the best in terms of money to be spent in Namibia and use of Namibian Sub-contractors. They scored lowest for the risk evaluation. They are having the second lowest tender price.
- 4.4 Messrs CSC Joint Venture fared technically lowest with a score of 67.2%, the four key senior staff have little experience in construction of dams in general and RCC dams in particular. They were ranked the lowest for the social evaluation and were ranked best for the risk management factor due to the batch plant capacity and number of plant. However they are having the lowest tender price.
- 4.5 Messrs Vinci Orascom ranked highest in the overall evaluation, but because of inexperienced key personnel the Ministry cannot entrust them with the construction of a dam of this magnitude.
- 4.6 Messrs Salini S.p.A. possesses the best technical know-how and experienced key staff in dam construction as well as RCC dams.'

(ccc) Following the discussion as set out, the submission made the following recommendation:

(ddd)

(eee) 'It is recommended that Tender No. F1/18/2-1/2012 Construction of Neckartal Dam and Phase 1 Bulk Water Supply be awarded to Messrs Salini S.p.A for the total amount of N\$2 873 776 287, 76, inclusive of VAT.'

(fff)

(ggg) The ministerial submission was signed by the chairperson of the ministerial tender committee, Ms A Shiweda, Ms T Nankela who is referred to as a financial advisor and by the Permanent Secretary, Mr Iita.

Proceedings before the Tender board

(hhh) In its minutes, the Tender Board under the heading of 'discussion with reference to tender' *inter alia* stated:

'The Board noted that the first and second companies' technical scores are in the same range although the second qualifying company Messrs Salini SpA is recommended. There is therefore need to verify the documents of Messrs Vinci Orascom to ensure that the best company is recommended. The board was informed that the technical competence carried the highest weight considering the consequences involved in recommending a less technically competent company.'

(iii) The tender board then proceeded to raise certain questions to members of the Ministry who were present. Certain of these related to the issue of the budget for the project. The minutes further reflected:

(jjj)

'The Secretariat read the information pertaining to key personnel of Messrs Vinci-Orascom, Messrs CSC Joint Venture and Messrs Salini S.p.A. It was confirmed from the documents that the latter was more experienced than the other two companies (Vinci- Orascom and CSC Joint Venture). The board was also referred to page 4 of the submission which clearly demonstrates the weighting of the scores as follows:

Technical	60%
Financial	20%
Social	10%
Risk	10%

The board was informed that in terms of technical scores, Messrs Salini S.p.A. scored 71.2%, Messrs Vinci-Orascom scored 70.4% and Messrs CSC Joint

venture scored 67.2%. In terms of job creation Salini will create 861; Vinci-Orascom will create 1052 jobs and CSC joint venture 568 jobs. It was noted that while Messrs Vinci Orascom will create more jobs, Messrs Salini scored the best in terms of money to be spent in Namibia as well as the use of Namibian subcontractors. Messrs Vinci Orascom and CSC Joint Venture key personnel possess inadequate experience in terms of dam construction especially RCC dams. The key personnel referred to are the Project Manager, Project Director, Site Agent Construction and Production Manager.'

(kkk) The minutes further stated:

'The board was also informed that Vinci Orascom is expected to spend N\$1, 1 billion. The board was informed that a cost benefit analysis versus retaining capital was done, and Messrs Salini had the best bid compared to Messrs Vinci Orascom. It was noted that although job creation is usually an important consideration, and Messrs Vinci Orascom offers the highest number of jobs, this requirement becomes secondary to technical competence in which they came second as Messrs Salini was ranked the best.

In addition, the members from the ministry referred the board to page 11 of the submission where it is clearly indicated that Messrs Vinci's Project Manager is at the same time the Project Director. The company only constructed two dams in total, one ordinary and the other an RCC dam. Their price is also the highest among the three pre-qualified bids. The board was informed that the final recommendation is based on total score with emphasis on the technical aspect, hence the recommendation of Messrs Salini SpA.'

(III) After referring in some detail to the leakage of confidential material from the tender board (to the media), the discussion was concluded in the following way:

'The board after satisfying itself with the submission and the documentation tabled before it, resolve to approve to Messrs Salini SpA as recommended by the Ministry of Agriculture, Water and Forestry.'

Review grounds

(mmm) The applicants in both applications made much of the fact that the scores and recommendations contained in the draft report prepared by KP differed from those contained in the ministry's submission to the tender board. They contended that ministerial officials had manipulated scores in an irrational and unreasonable manner. Both applicants were under the impression that the tender evaluation was in essence undertaken by KP and that its evaluation was subsequently manipulated by the ministry. These allegations were made prior to the answering affidavits of Mr Niipare and Mr Steyn in which they both made it clear that the evaluation committee comprised both KP representatives and members of the NSC. Since the applicant seeks final relief the correct approach to resolving genuine factual disputes is therefore that the version of the respondents must prevail. The version by both Messrs Steyn and Niipare on the disputed issue is therefore to be accepted on the established approach to disputed facts in motion proceedings.³

(nnn)

(ooo) When the matter was argued before us, the following review grounds were persisted with by the applicant (CSC), contending -

- The NSC had manipulated scores and recommendations as were contained in the ministerial submission which were irrational, unreasonable and unfair and intended to mislead the tender board and designed to achieve a predetermined outcome;
- The ministerial submission failed to disclose material and relevant facts and in particular the views of the independent experts from Knight Piesold were not disclosed to the tender board ; nor was the fact that they differed in material respects with the contents of the ministerial submission and recommendation;
- The tender board failed to properly apply its mind to all the relevant facts and took irrelevant facts into consideration when awarding the tender to

³*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623(A) referred to in *Woodlands Dairy (Pty) Ltd v Parmalat SA(Pty) Ltd* 2002 (2) SA 268 at 271I-J. See also *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21 G-I.

Salini;

- The award was not rational, was unreasonable and ignored relevant factors such as price and risk;
- The weightings attached to various components in the tender evaluation such as technical, financial, risk and social were inconsistent with the fundamental values of a fair, reasonable, competitive and cost effective tender process;
- The NSC attached too much weight to the technical component of the tender and too little weight to price;
- The evaluation of the tenderers' key personnel was unfair, arbitrary and irrational and was elevated to the decisive overriding factor in the award of the tender, which in turn became unfair, arbitrary and irrational. In advancing this ground, it was contended that the tender board should have considered the composition, experience and expertise of each tenderers' key personnel in their entirety and not merely arbitrarily have selected four persons to score for tender evaluation purposes;
- The tender board ought to have clarified the applicant's bid and afford it an opportunity to submit a summary of its proposed commitment to expenditure in Namibia. In support of this ground it pointed out that its failure to have specified this in its tender documentation, resulting in a zero score for expenditure in Namibia, should have been clarified as it would have been obvious that substantial expenditure would need to have been incurred in Namibia.

(ppp) Certain of these grounds overlap, especially with reference to the issue of price and the application of the mind. Before we discuss them, we first refer to the preliminary point taken by the governmental respondents that CSC lacked standing.

Challenge to CSC's standing

(qqq) The governmental respondents challenged CSC's standing on the basis that the joint venture terminated in terms of the joint venture agreement when the tender was awarded to Salini. This point was forcefully argued by Mr

Oosthuizen SC on behalf of the governmental respondents. He referred to the terms of the joint venture agreement of CSC. It expressly provided that it would terminate *inter alia* when the tender was awarded to a third party. Mr Oosthuizen argued that the tender award to Salini thus brought about an end to the joint venture and that it no longer existed and thus had no standing to institute these review proceedings.

(rrr) Mr Watt-Pringle countered that a proper interpretation of the joint venture agreement was that the termination would only be triggered in the event of a lawful award or where the joint venture partners elected not to challenge it. He submitted that there was nothing in the wording of the joint venture agreement to suggest that the joint venture parties precluded themselves from challenging the tender award if they were unsuccessful in the tender and that the purpose of the termination clause was to ensure that the joint venture agreement would only pertain to this specific project and to no other. In support of his argument, Mr Watt-Pringle also referred to the presumption with reference to a juristic act in a statute meaning that it would be lawfully performed.⁴ There is in our view much force in these arguments. We agree with the interpretation contended for by him.

(sss) Mr Watt-Pringle also argued out that the point was in any event moot by reason of the fact that the members of the joint venture had agreed to challenge the award. This contention would also in our view appear to be sound. The joint venture parties plainly extended their joint venture by agreement by resolving to challenge the award.

(ttt)

(uuu) But, in the course of the proceedings, the joint venture parties themselves applied to intervene to join the proceedings as applicants to address this point. That application was not opposed by any of the respondents, including the governmental respondents. We accordingly grant them intervention, not least in view of the important issues raised by the review.

⁴*Abbot v Commissioner for Inland Revenue* 1963(4) SA 552 (C) at 556 D-E approved in *Singer NO v Weiss and another* 1992(4) SA 362 (T) at 366 J – 367 B. See generally *S v Mapheele* 1963(2) SA 615 (A) at 655 D-E.

See also *Kaluma en andere v Minister van Verdediging en andere* 1987(2) 833 (A) at 847 J.

(vvv)

(www) Once that has occurred, the point becomes entirely moot as the requisite parties forming the joint venture are thus before us and would themselves in those capacities have standing to challenge the tender award.

(xxx)

(yyy) Mr Oosthuizen SC however contended that the agreement had already come to an end and that the intervention of the joint venture parties could not resuscitate their agreement. Quite apart from our view that the termination would by implication arise only if an award was lawfully made and if there was no challenge to it, this point also overlooks the nature and effect of the contractual setting, namely that contracting parties are quite entitled to extend the life of their joint venture agreement. If they so agree, they would then in any event be entitled to challenge this award.

(zzz)

(aaaa) It follows that CSC in our view did have the requisite standing to bring the application but that this point in any event was addressed by the intervention and joinder of the joint venture parties as applicants in these proceedings.

Tender board

(bbbb) Before discussing the review grounds raised by CSC, it is apposite to briefly refer to the role of the tender board as decision maker in the awarding of tenders. The tender board is established by the tender board of Namibia Act, 16 of 1996 ('the Act').

(cccc)

(dddd) The tender board is responsible for the procurement of goods and services for the Government of Namibia. To that end, it has powers to conclude agreements on behalf of the Government for the furnishing of goods and services and to enforce them, to test, inspect or cause to be inspected goods and services, to accept or reject tenders and to exempt procurement from the provisions of the Act.

(eeee) Under s 15 of the Act the Board is authorised at any time to request a tenderer to clarify a tender in a manner to be determined by the Board in order

to assist the board in the examination, evaluation and comparison of tenders. The board is furthermore precluded from considering a tender unless it complies with all the characteristics, terms and conditions and other requirements set out in the title of the tender or where it does not comply, if the non-compliance is in the opinion of the board of a minor deviation that does not materially depart from the characteristics, terms, conditions or other requirements of a tender.⁵

Issues which emerge from review grounds

(ffff) As is apparent from the review grounds set out above, certain of them overlap or are interrelated. It would appear to us that certain issues have arisen from them for determination. These concern the question as to whether there should have been clarification, whether the weighting process was fatally flawed, whether the evaluation of key personnel was unfair, unreasonable or arbitrary, whether the tender board applied its mind and whether there was a manipulation of scoring. The second last question includes the issue as to whether the ministerial submission properly reflected the evaluation process. We deal with these in turn.

(gggg)

(hhhh) **Clarification**

(iiii) The applicant's counsel during argument placed on record that it no longer relies on legitimate expectation for the reliance on the right in this case to have been afforded the opportunity to clarify their tender in respect of key personnel and the schedule of money to be spent in Namibia. As we understand it, the argument goes that fairness dictated that such clarification should have been sought. Towards that end, it was submitted on behalf of CSC that the tender board should have clarified its bid with it and afforded it the opportunity to submit a summary of its proposed commitment to expenditure in Namibia. It had failed to do so in its tender submission and obtained a zero score for expenditure in Namibia. This despite the fact that it would have been obvious from its bid that there would be substantial expenditure in Namibia. It was submitted that the failure to have sought clarification was unfair.

⁵S 15(2).

(jjjj) When it was put to Mr Watt-Pringle in the course of oral argument that a tenderer could hardly contend for a right of clarification, he shifted emphasis by responding that the failure to do so when it was recommended by the expert consultants was unfair to CSC.

(kkkk) It is clearly incumbent upon tenderers to properly complete their tenders and make sure that their tenders are complete in the respects required by the tender documentation. The failure on the part of a tenderer to complete a portion of the information required by the tender documentation would not in our view result in a right on the part of that tenderer to clarification by the board so as to ensure that this omission can be rectified, particularly where that was not even sought by the tenderer. The right to clarification is that of the Board where it considers, in its discretion, to request clarification on items to assist it in the examination, evaluation and comparison of tenders.⁶ It is not the right of tenderers who do not comply with tender specifications. The authorities raised by Mr Watt-Pringle in support of his argument are in our view distinguishable.

(llll)

(mmmm) Mr Watt-Pringle is entirely correct in submitting that the clarification in question would not result in any alteration of a tender price. It would merely ensure that the expenditure in Namibia which would be apparent from other portions of the tender, would be collated and provided for evaluation. Whilst it could be fair and reasonable for the tender board to permit a party to correct an obvious mistake or ask for clarification on details required for the proper evaluation of a tender, should this have occurred, but this is entirely different from the facts of this matter. There was no request by any tenderer for clarification.⁷ The tender board was also not apprised of any need to seek clarification. We refer to that separately below. Had the tender board declined to request clarification in the face of advice from expert consultants on the need to do so, this may have then been another matter and may even have constituted unfairness not to do so. But we need not enter that enquiry as that

⁶S15(1) of the Act.

⁷*Metro Projects CC and another v Klerksdorp Local Municipality and others* 2004(1) SA 16 (SCA) at par 13.

did not occur.

(nnnn)

(oooo) In the absence of advice to that effect and being apprised that clarification may be necessary, it would not in our view be unfair or unreasonable for the tender board not to request clarification.

The weighting

(pppp) It was contended on behalf of CSC that the weightings attached to the components used for the tender evaluation (to technical, financial, risk and social) were inconsistent with fundamental values of a fair, reasonable and competitive cost effective tender process because too much weight was attached to the technical component and too little weight to price. In the founding and supplementary affidavits CSC contended that the error was compounded by adopting a sub-component of the technical evaluation relating to key personnel as the pretext to recommend the award of the tender to Salini instead of Vinci Orascom which had achieved the highest score.

(qqqq)

(rrrr) Mr Watt-Pringle argued in support of this review ground that once it had been established that all three bidders submitted competent technical bids, as was evident from the draft evaluation report prepared by KP, price ought to have been the primary and most weighty factor instead of being relegated to a mere 20% of the evaluation scoring. He further pointed out that this review ground is to be considered in the context not only of a competitive tender process, but also of the statement made on behalf of the governmental respondents at the compulsory site meeting on 23 October 2012 which preceded the submission of tenders. It was stated there that 'the tender price was 'very important', but other aspects will also be considered in the tender evaluation'. This statement is made by the deponent to CSC's supplementary affidavit. It is not directly denied in the answering affidavits.

(ssss) The court's power to interfere with the exercise of discretionary administrative power arises only where the administrative body or official acted unreasonably, i.e. if the decision is not rationally justified. The decision of the

administrative official must be 'rationally justified'. In *Trustco Ltd v Deeds Registries Regulation Board*⁸ the Supreme Court held that:

'What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interest involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

This court, applying the above test, in *Mobile Telecommunications Limited v Namibia Telecommunications Commission and Others*⁹ refused to set aside a decision of an administrative body as the reasons provided by it, within the context of its decision-making, demonstrated that a reasonable choice was made by that body exercising one of the reasonable options open to it. The court held that it was not for it to consider whether there may have been better options open to the decision-maker, particularly in the context of a decision of a specialist administrative body, as long as the decision taken represented a reasonable choice open to it.

(ttt)

(uuuu) The explanation given by Mr Niipare who attended that site meeting on behalf of the ministry, was that the difference in price became less significant for a complex and highly specialised tender contract such as the project. Mr Steyn goes further in his affidavit in disagreeing with the challenge to the

⁸2011 (2) NR 726(SC) at 736 para 41.

⁹2012 (2) NR 421.

weightings and expresses the view that a 60% allocation to technical was reasonable and rational and would be the most important and enduring weighting factor. In this context he emphasized the importance to be attached to the tenderers' respective key personnel.

(vvvv) Mr Watt-Pringle argued that a mere 20% for price compared to 60% for technical resulted in little significance being attached to price and that this was both irrational in the context of a reasonable and fair tender process but also in the context of the specific project where it was not denied that tenderers were informed that the tender sum was 'very important'.

(wwwww)

(xxxx) Whilst there is much in this submission to commend itself with regard to tenders in general, Mr Maleka on the other hand argued with reference to the statements made by both Mr Steyn and Niipare that the project was highly technical and that it would not be unreasonable for the evaluation committee in this context to accord importance to the best technical capacity of a tenderer and that it would not in any event be for this court to determine what weight should be attached to the various items. Mr Marais on behalf of the fourth respondent in essence supported the approach of Mr Maleka in this regard.

(yyyy)

(zzzz) Given the highly technical nature of the project, it is clear that the technical ability of tenderers would be a crucial factor. The external consultants with expertise in dam construction accorded a weighting of 60% to it. We enquired from Mr Watt-Pringle in argument quite how a court would be in a position to determine what the respective weightings should be. He accepted that this may not be within the expertise of the court, but that a court would nevertheless be in a position to find that a 20% weighting to price was unreasonable in the context of the statement made concerning price and a fair and competitive tender process generally.

(aaaaa) It is correct that the Act in our view accords particular importance to price. It does so in s 15(6) by requiring that where the tender board does not accept the lowest tender, it is then required to keep the reasons for not accepting the lowest tender on record. This plainly underpins the notion that

price is of importance in securing the most beneficial deal for the fiscus by requiring that where the lowest bidder is not accepted it would require justification. This is further supported by clause 19(4) of the Code of Procedure of the tender board which requires an office of the ministry, where not recommending the lowest tender, to certify that its recommendation is made in the best interest of Government and that the recommendation represents the best value to Government. Mr Watt-Pringle referred us to the case of *United Africa Group (Pty) Ltd v Chairperson of the Tender Board of Namibia and Others*¹⁰ where Unengu AJ approved the principles expressed in the case of *Cash Paymaster Services (Pty) Ltd*.¹¹

(bbbb) In that case (i.e. *Cash Paymaster Services (Pty) Ltd*), the importance of price in a competitive tender process was stressed by a full court in South Africa which emphasized that the primary task in the procurement of services of tenderers would be at the least possible cost to the State in the public interest¹². We wish to point out that the principles expressed in the *Cash Paymaster Services (Pty) Ltd* case, are stated in a different constitutional, statutory and factual context and would at best have limited application in our context.

(cccc) But as was accepted by all parties in this matter, the project was highly technical and a particular weighting would need to be accorded to that factor. It was also stressed that the project would bring employment opportunities to the region where the dam is to be built and that the Government also accorded importance to that factor as a policy consideration reflected in the weighting entitled 'social'.

(ddd) (ddddd)

(eeee) The weighting of the various factors, particularly in a project of this nature where technical considerations would be primary and where other considerations such as social benefit to a specific region would also be of importance to the policy makers, is one where a court is not proficient and ill

¹⁰ An unreported judgment of the High Court of Namibia Case Number A 346/2010 [2011] NAHC 171 delivered on 17 June 2011.

¹¹ *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1991(1) SA 324 (CsK) at paragraphs 21-23.

¹² At 357, & 359 I -360 A.

equipped and where due deference is appropriate to the executive branch and those with expertise advising it.¹³ What weighs heavily with us, is the view of the expert consulting firm in this regard. It does not consider the weighting of 60% for technical to be unreasonable and irrational in the circumstances and given the nature of the project. Whilst price should in our view always remain an important consideration in a competitive tender process, we do not consider ourselves to be in a position to assess the precise weighting it and the other factors should have received and thus not in a position to find that the weighting of the factors decided upon by the evaluation committee was unfair or unreasonable in the circumstances. In our view this review ground should fail.

Failure to apply the mind

(fffff) In terms of the Act, the decision to award a tender must be that of the tender board. In executing its mandate to do so, the tender board may in terms of s 18(2) of the Act require a staff member of any ministry office or agency to assist the board in evaluating tenders or to make a recommendation in connection with a tender. In terms of regulation 2(2) of the regulations promulgated under the Act, the tender board may also obtain expert and technical advice as it may deem necessary. The Act thus authorises and contemplates that the board may, particularly in complex procurement matters, enlist expert assistance in evaluating, assessing and comparing competing bids as long as it retains its decision making capacity and exercises it.

(ggggg) The tender board in this instance referred the tenders to the ministry for its recommendation as it is required to do under s19 of the Act. But it is clear from the Act that the tender board is not obliged to act upon a recommendation received from the ministry upon a tender. It remains obliged throughout to apply its own mind independently and exercise its discretion fairly and impartially in respect of each tender serving before it without abdicating its responsibility in favour of the recommending ministry.¹⁴

¹³*Waterberg Big Game Hunting Lodge v Minister of Environment* 2010(1) NR 1 (SC) at 33 C-D (per Shivute, CJ) and the authorities collected there.

¹⁴*Hofmeyr v Minister of Justice and another* 1992(3) SA 108 (C) at 117 F-H.

Wlotzskabaken Home Owners Association v Erongo Regional Council 2007(2) NR 799 (HC) at

(hhhhh) Where the tender board, as occurred in this instance, relied upon the evaluation by the Ministry which, so the board was informed, was prepared with the assistance of expert consultants specialising in dam construction, it is clear to us that the evaluation which then served before the tender board and upon which it acts must accurately and fairly reflect the evaluations and the tenders themselves. The question arises as to whether this occurred in this instance.

(iiii) The tender board, by the nature of its composition, does not consist of persons with technical expertise concerning dam construction. Plainly it would be reasonable for it to seek such expertise and rely upon it in evaluating the tenders in question. When it does so, the tender board would not be obliged to follow the recommendation provided to it and would be at liberty to make its own decision on a fair and rational basis.¹⁵ But where the board seeks and relies upon a summary of the advice of a technical nature, that summary of a technical assessment provided to it must accurately and fairly reflect the views of those who gave it. In this instance, the tender board did not exercise its powers under regulation 2(2) to engage and appoint a separate technical committee to assist it with the evaluation of the tenders. The evaluation was performed at the instance of the ministry with the assistance of expert consultants in dam construction.

(jjjj) The failure to disclose material components or the selective presentation of the expert technical evaluation to the tender board which relies upon such technical expertise in taking its decision would in all likelihood vitiate a board's decision. With these principles in mind, we turn to the facts of this matter.

(kkkk) We have referred in some detail to the ministerial submission which served before the tender board and upon which the tender board acted in approving its recommendation. CSC submits that there were material

810, par 32.

See generally Wade & Forsyth *Administrative Law* (7th ed, 1994) at 358-360.

¹⁵*Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999(1) SA 324 (Csk) at p 352

omissions from that submission. It pointed to the following issues which were not disclosed in the ministerial submission to the tender board:

- The expert consultants, KP had recommended that tenders be clarified before (completing the scoring) and a final decision was to be made;
- KP opposed the recommendation of Salini put forward by the ministry as the preferred bidder, based upon the tender evaluation process;
- KP in fact recommended Vinci Orascom as a preferred bidder provided that its personnel be changed;
- KP recommended in the alternative that all three bidders be recommended for the award of the tender because all three could technically and competently execute the tender.

(lllll) Not one of these facts was properly disclosed in the ministerial submission. The first three were not even alluded to. The last was presented in clearly different terms from the draft report prepared by the experts.

(mmmmm)

(nnnnn) In addition to these omissions or non-disclosures, Mr Watt-Pringle contended that the ministerial submission created the impression or represented to the tender board that there was consensus between members of the tender evaluation team on the scores and recommendations which were then supported by the top management of the ministry (and presented to the board). He referred us to paragraph 1.8 of the submission where it was stated:

‘The evaluation of the tender offers was jointly done by the NSC and expert staff of the appointed consultant, Messrs Knight Piesold Consulting (Pty) Ltd from 11-15 February 2013 and presented to the ministry’s top management on 27 February 2013.’

(ooooo) Mr Watt-Pringle also referred us to what was stated by the deputy chairperson of the tender board Mr Amagulu who acted as chairperson at the meeting of 14 March 2013, when referring to the role of KP:

(ppppp)

(qqqqq) ‘The consultant of the Government of Namibia was part of the

team of the officials of the Ministry of Agriculture, Water and Forestry. The consultant did not prepare separate recommendations. Thus, the recommendations submitted to the tender board are those of the Ministry of Agriculture, Water and Forestry together with the consultants as they acted jointly at all times.'

(rrrrr) Not only was the representation made that the evaluation presented to the board reflected the joint views of the expert consultants and ministerial officials, but the evidence shows that this was also how Board members understood it.

(sssss) Mr Steyn observed that there was nothing inherently wrong with the ministry recommending a tender who had not scored the highest overall, as long as it could justify it. This is a correct approach but we only wish to add that the ministry's recommendation should, in that event, be rationally justified and if not, it may well fall foul of the requirement of reasonable administrative action.

(ttttt) A key pillar of the respondents' defence in opposition to the review is that it is a misconception to suggest that the consultants assumed some role independent of the NSC or that their input to the evaluation process must be treated in its own right. We agree with the respondents that the consultants were indeed part of the NSC. But it does not follow that for that reason it was open to the ministry to represent to the board that the extent that the consultants' considered expert opinion on a particular issue did not prevail it counted for nothing or that such view had ceased to exist. That such divergent view existed was an important fact about which the tender board should have been aware in order to evaluate the rationality of the ministry's decision not to follow it. The expert opinion of consultants engaged at taxpayers' expense cannot count for nothing and ought to have been disclosed to the tender board as a relevant factor in its adjudication of the tender. We are unable to find that, had it been disclosed to the tender board, it might not have come to a different decision to the one it did.

(uuuuu)

(vvvvv) The evaluation and recommendations were thus represented to the

tender board as those jointly arrived at by the ministry and the team of experts with specialised knowledge in that specific highly technical field of endeavour. But the ministerial submission did not disclose to the tender board that its own recommendation was entirely different to that of the external expert consultants. This is in our view material and should have been disclosed, together with the reasoning of the expert consultants and those put forward by the ministry. It should also have been disclosed that there were some differences as to the scoring and possibly at what stage these had arisen. The underlying principle is that where it asks a ministry to make a recommendation, the tender board must be given as complete a picture of the evaluation process undertaken and the range of choices open to it as emerge from that evaluation process. That assumes even greater significance where, as here, all three competitors are all sufficiently technically competent to undertake the project and the choice of a particular tenderer is not determined by its demonstrably superior bid compared to the other competitors.

(wwwww)

(xxxxx) The tender board should also have been alerted to the fact that the evaluation committee which included members of the NSC had proposed that there should be clarification of tenders with the tenderers as regards key personnel. As we have pointed out, the board has the power in terms of s 15(1) of the Act to clarify a tender in a manner determined by it to assist the board in the examination, evaluation and comparison of tenders. Whether or not it would have exercised that power is neither here nor there: The power lay with it to exercise if it chose to - and the unique circumstances of this case merited that it should have been afforded that opportunity, through full disclosure, to do so. The expert consultants had with the early concurrence of the NSC, specifically proposed that aspects of this technical tender should be clarified before a final decision is made (and even the scoring finalised). Ministerial officials later entirely incorrectly equated clarification, which is entirely permissible on the part of the board, with negotiation on its own part which would not have been permissible.

(yyyyy)

(zzzzz) The board, being the repository of the power to request clarification, particularly in a tender of this magnitude and complexity, should have been

apprised of the fact that the expert consultants in that specialised field deemed it necessary to do so and that this could have had an impact on the ratings as was spelt out by Mr Pesch. The failure on the part of the ministry to have informed the Board of this fact is also in our view material and amounts to a material non-disclosure. The board was deprived of the opportunity to consider whether it should or should not request clarification by reason of the fact that the expert consultants had urged that this should be done.

(aaaaaa) The tender evaluation committee, charged to act jointly, was however split between the views of the NSC comprising ministerial officials and those of the expert consultants. That split was in respect of the most material issue, namely which bid was to be recommended and why. Only the view of the ministerial grouping within the evaluation committee however found its way to the tender board. The opposing views of the expert consultants as to who should be recommended and why, were not disclosed to the tender board. This in our view also amounts to a material non-disclosure.

(bbbbbb)

(ccccc) There were also differences between the draft expert report prepared by the consultants and the ministerial submission. The ministerial submission merely noted that all three tenderers were evaluated and were considered to be capable of carrying out the project, confirming the outcome of prequalification. The views expressed in the consultant's draft report went further and stated that all three tenderers had well planned and technically sound tenders and that they were all experienced international dam contractors and all capable of completing the contract successfully. This distinct difference in emphasis is significant. Mr Steyn of KP also stressed that the statement in the ministerial submission that Vinci Orascom had 'insufficient experience' was not subscribed to by him. It would indicate that the tenderer was not qualified which was clearly not the case. He and his team had rather referred to Vinci Orascom as having 'very little experience in construction of dams in general and RCC dams in particular'.

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(eeeeee) By failing to disclose each of the first three material facts referred to above considered on their own in the context of the nature of the tender to the tender board, amounted to an irregularity on the part of the ministry, which

meant that the tender board was not able to properly apply its mind to the enquiry by reason of the fact that matter material to that enquiry had been withheld from it or not disclosed to it by the ministry upon whom the Board had relied. The failure to disclose a matter of a material nature would not in our view amount to a mere internal irregularity in the preceding process which can be overlooked as not affecting the validity of the ultimate decision. The cumulative effect of the failure to disclose those first three facts is in our view devastating to the legality of the decision making and deprived the tender board from being able to apply its mind properly to the enquiry before it.

Key personnel requirement

(fffff) The tender documentation required each tenderer to complete a return with the heading 'key personnel'. Seventeen designations are listed in this schedule with two key personnel indicated as being at a tenderer's head office and the other fifteen at its site office. Tenderers are required to complete that schedule by position including a first nominee and the second choice or alternate together with their qualifications, experience, positions held, their nationalities and linguistic ability. The first nominee or alternate with similar qualification and experience are required to be available for site duty and may not be changed without the prior approval of the employer and would be regarded as contractually binding upon a tenderer.

(gggggg)

(hhhhh) It is also indicated in the schedule that titles of the designations listed may be altered to suit a tenderer's organisational structures. Of the seventeen listed positions, tenderers were furthermore required to provide a curriculum vitae in the form in Part 2 of that schedule in respect of each 14 of the positions who are also required to be able to communicate freely in English. The tender submission did not further narrow the fourteen positions requiring CVs to which of those would be viewed as core positions.

(iiiiii)

(jjjjj) In the evaluation process, the tender evaluation committee selected four designations from the list of key personnel for evaluation purposes. It was explained on behalf of the respondents that this was done because of time

constraints during the week of intensive evaluation (of 11 to 15 February 2013). The four designations chosen by the evaluation committee were not necessarily specifically reflected in the tender schedule. The schedule after all did not specifically list the designation of 'site agents / construction manager' utilised by the evaluation team. The four designations thus selected were not explained except with reference to time not permitting all of the key personnel to be evaluated.

(kkkkkk)

(lllll) The complaint on behalf of CSC was that it was unfair to unilaterally identify only four persons for tender evaluation purposes and then to do so arbitrarily which then rendered the comparisons unreasonable. Examples were cited in argument. But the complaint did not end there.

(mmmmm) Tenderers were not put on notice as to which were regarded as the four core key personnel.

(nnnnn) As we have already pointed out, the expert consultants considered that a clarification meeting would be important before the final scoring had occurred. This was stressed by Mr Pesch, a dam engineer and KP's deputy project engineer for construction. He stressed that the purpose of a clarification meeting was to clear up uncertainties and to get an agreement that unacceptable key personnel will be replaced with personnel acceptable to the evaluation team and that these meetings could have an influence on ratings. Mr Maleka argued that even if the choice of the four key personnel were irrational, this would not have materially affected CSC's points scored as key personnel represented only 14.7% of the scoring in the technical component. He pointed out with reference to the scores achieved by CSC that it would still have lost out even if there were a favourable adjustment to its score in this segment. But Mr Watt-Pringle countered that if CSC had scored the same as Salini in this segment, given the importance accorded to this component of the scoring by the ministry, it would have had significant impact.

(ooooo)

(ppppp) Seeing that this single factor became decisive for the ministry and thereafter for the tender board, it would seem to us that either the entire team

should have been evaluated, given the fact that the schedule itself stated that designations may be altered to suit a tenderer's organisational structure or the tender board should have been apprised of the possibility to provide the tenderers the opportunity to identify its four core key personnel during clarification. The tender board, if apprised of the need for clarification, might have exercised its discretion in favour of affording the tenderers an opportunity to identify the four core key personal. The ministry's failure to thus apprise the tender board denied it the opportunity to exercise a discretion one way or the other, as we have already stressed.

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(rrrrrr) Seeing that only four core positions were identified for the purpose of the evaluation while one of the designations thus identified was not even specifically listed in that way in the schedule, the manner of evaluation of key personnel was not in our view fair and reasonable. It may have been fair and reasonable for the board to have decided to have had a clarification meeting with a view to identifying those four core key personnel in respect of each tenderer in the absence of the evaluation of all fourteen key personnel in respect of whom CVs were to be provided. The failure for either to have occurred in the circumstances of this project, given the importance attached to key personnel by the evaluating team, the ministry in its evaluation of this aspect as reflected in its submission was in our view unfair and unreasonable, as was the tender board by adopting the ministry's evaluation and assessment.

Manipulation of scores by the ministry?

(ssssss) The evidence of Mr Steyn was that there was an agreement in respect of each score arrived at in the evaluation process during 11 to 15 February 2013 and that these scores were then reflected in the KP draft report. That necessarily meant that the NSC members (from the ministry) who were in attendance during that period had agreed to those scores.

(tttttt) At the meeting of 27 February 2013 the evaluation team convened to finalise these scores and the recommendation to the top management of the

ministry, the previously agreed scores were altered at the instance of ministry officials. These altered scores served to edge Salini slightly ahead of Vinci Orascom in its technical score. The ministry officials then insisted that Salini be the preferred tenderer instead of Vinci Orascom which had previously been recommended on the basis of having the best score.

(uuuuuu)

(vvvvv) The evaluation committee had agreed upon the manner of scoring and applied it to each item with each score having been agreed upon as set out in the KP draft report. It was not explained by Mr Niipare or by any other members of the NSC why their own scoring system which had been agreed upon at the outset needed to be altered in this way. In the absence of an explanation for this, Mr Watt-Pringle submitted that the inference was inescapable that scoring was altered by ministry personnel to suit a specific tenderer, Salini, which then emerged as the recommended tenderer as against the tenderer which had prior to the alteration been the top scorer and the recommended tenderer on that basis.

(wwwwww)

(xxxxxx) Mr Watt-Pringle argued that the award should be set aside because the ministry officials had manipulated the scores to achieve a predetermined outcome on the basis of the inference which he submits arises in the circumstances. In view of the conclusion we have reached in respect of other review grounds, it is not necessary for us to reach a finding on this one.

(yyyyyy)

(zzzzzz) Mr Watt-Pringle stressed that this aspect which was not only relevant as a review ground raised by CSC, but could also be of some importance with regard to the remedy in the event of a successful application for review. Mr Watt-Pringle submitted that the tender board should in the event of the decision being referred back, be directed to secure independent expert advice of its own choice to assist it in the evaluation of the tenders or at the very least direct the board to engage in a clarification exercise involving the expert consultants concerning the issues of the social spend on the part of CSC and the identification of core key personnel or alternatively direct that all 14 key personnel, whose CVs were required should be evaluated and assessed.

(aaaaaaa)

(bbbbbbb) Whilst it is clear to us that the court is not in a position to make its own award in respect of a tender of this nature, particularly because of its technical nature, it would seem to us that the usual relief in these instances should follow in the sense of the matter being referred back to the decision maker being the tender board.

(ccccccc)

(ddddddd) Whilst the ministry is required to make its own recommendation to the Tender Board in terms of s19 the Act, the board itself is not obliged to accept it. It is authorised to obtain technical advice and assistance in the evaluating of tenders. The tender board has its powers and it is for the tender board to determine its own procedure and how it will evaluate the tenders within the powers conferred upon it under the Act¹⁶ as long as it is fair and reasonable in doing so, and then make its award. We accordingly decline to make the directions sought save that the determination of the award should be in a manner not inconsistent with this judgment. We thus caution that the reasoning emerging from our judgment ought to provide guidance to the tender board in the performance of its statutory function.

Conclusion

It follows that the application to review the tender award should succeed and that the decision of the tender board to allocate the tender for the project to Salini, the fourth respondent, should be set aside with costs. It further follows that the matter should be referred back to the tender board. Given the magnitude of this matter and the issues raised in it, it is clear to us that the services of two instructed counsel were warranted. In fact, all the parties were represented by more than one instructed counsel.

(eeeeeee)

(ffffff)

(ggggggg) We accordingly make the following order:

- (a) The decision by the tender board to award the tender for the

¹⁶See *Davies v Chairman of the JSE* 1991(4) SA 43(W) at 48 B-D and the authorities collected there.

construction of the Neckartal Dam project and phase 1 of the bulk water supply project under Tender No F1/18/2-1/2012 to the fourth respondent is set aside.

- (b) The matter is referred back to the tender board for the purpose of determining the award of the tender in a manner not inconsistent with this judgment.
- (c) The respondents are directed to pay the applicant's costs, jointly and severally the one paying the other to be absolved. These costs are to include those of two instructed counsel and one instructing counsel.

PT Damaseb, JP

DF Smuts, J

SFI Ueitele, J

APPEARANCES

APPLICANT: CE Watt-Pringle SC (with him TD Prinsloo)
Instructed by Engling, Stritter & Partners

FIRST, SECOND AND
THIRDRESPONDENTS: V Maleka, SC (with him H Oosthuizen, SC and
S. Akweenda)
Instructed by Government Attorney

FOURTH RESPONDENT: J Marais, SC (with him C. Van der Westhuizen)
Instructed by LorentzAngula Inc.