IN THE HIGH COURT OF SOUTH AFRICA

CAPE OF GOOD HOPE PROVINCIAL DIVISION

Case No: 14788/07

In the matter between:

INYAMEKO TRADING 189 CC

T/A MASIYAKHE INDUSTRIES Applicant

and

THE MINISTER OF EDUCATION First Respondent

THE MEC FOR EDUCATION,

WESTERN CAPE PROVINCE Second Respondent

HENNIE AFRICA, N.O. Third Respondent
EDUCOMPASS COMMUNITY DEVELOPMENT

SERVICES & EDUCOMPASS TRAINING SERVICES Fourth Respondent

PENINSULA SCHOOL FEEDING ASSOCIATION Fifth Respondent
MANTELLA TRADING 188CC Sixth Respondent
LANDMARK LOGISTICS Seventh Respondent
MSAZ BUSINESS ENTERPRISES Eighth Respondent
N2 SOUTH CAPE RURAL DEVELOPMENT FORUM Ninth Respondent

JUDGMENT DELIVERED ON THIS 10th DAY OF DECEMBER 2007

VAN RIET, AJ:

RELIEF SOUGHT

[1] The Applicant herein ("Inyameko") applies for an Order:

1.1 Reviewing and setting aside the decision of the First Respondent alternatively the Second Respondent in awarding Bid Number B/WCED 923/07, to the Fourth to Ninth Respondents.

1.2 Remitting the decision for reconsideration by the First Respondent alternatively the Second Respondent.

1.3 Alternatively substituting the decision of the First Respondent alternatively the Second Respondent with its own decision to award the whole or certain parts of the 2007 bid to the Applicant.[1]

[2] Second Respondent opposes the application. All other Respondents abide the decision of this court.

[3] The application was initially brought in the form of an urgent application in terms of to which Inyameko sought the issue of a *rule nisi*. By agreement between the parties it was decided that the matter would be heard as an urgent review application, and a timetable for the filing of papers was agreed between the parties[2]. The Deputy Judge President – at the request of the

1 See Inyameko's Amended Notice of Motion
2 *Record 169 (a) to 169 (e)*

parties – allocated **Friday 23 November 2007** and, later **28 November 2007,** as the expedited date for the hearing of this application.

[4] For ease of reference the National School Nutrition programme shall be referred to as *"the Programme"*, the Western Cape Education Department as *"the Department"*, and the Fourth to Ninth Respondents as *"the successful bidders"*.[3]

BACKGROUND

[5] Much of the background to this application is common cause or not seriously disputed.

5.1 Inyameko is presently an active participant in – and a supplier to – the Programme in the area administered by the Department. The area in question extends up the West Coast, as also down the Garden Route and *inter alia* includes the George municipal area, that is throughout the Western Cape Province. The Department, in turn, falls under the auspices and control of the Second Respondent, the MEC for Education in the Western Cape Province.

5.2 The Programme operates throughout the country, and falls under the ultimate auspices and control of the First Respondent, the Minister of Education. Each province receives a grant from the

3 Consonant with the document in this application, I also refer interchangeably to *"the bid"* and *"the tender"*

national government and each provincial Programme falls under the auspices and control of the MEC for Education in that province.

5.3 The Programme divides the area covered by the Department into various districts. Inyameko is presently involved in providing services to the Department in respect of the Programme in six of these districts, and currently feeds some **56558** school children.

5.4 The Programme is aimed at providing school children with a nutritious meal to alleviate short-term hunger and enhance the active learning capacity of those school children. The Programme targets needy school children from disadvantaged or deprived communities.

5.5 Inyameko is a wholly black-owned and managed enterprise. Furthermore, all of Inyameko's employees are historically disadvantaged individuals ("HDIs"), making Inyameko a 100% BEE-company.

5.6 Inyameko was successful in its bid to provide feeding for over 56 000 school children in respect of the 2005 bid. The initial term of the 2005 bid was for two yeas until the end of the first school quarter in 2007.

5.7 Inyameko's involvement in the 2005 bid has been a success. Inyameko is seen as model for other participants in the Programme, and Inyameko is well-known within the Department for:

5.7.1 Exemplary service delivery.

5.7.2 Prompt attention to complaints.

5.7.3 Prompt attention to queries.

5.7.4 The fact that its member (Mr Mzinda) has personally visited each of the schools in the Programme situated in the districts in which Inyameko is a supplier in terms of the 2005 bid.

5.8 The 2005 bid was extended on at least three occasions, in order to facilitate the smooth running of the Programme.

5.9 The 2007 bid was preceded by Bid No B/WCED 862 ("bid 862") for the provision of substantially the same services as that constituting the 2007 bid. Bid 862 closed on 29 January 2007. Inyameko submitted a bid under bid 862 in substantially the same terms to its

bid under the 2007 bid.

5.10 On 17 May 2007 Inyameko was informed by way of letter that the Department had evaluated all of the bids submitted to it, but that none of the bids had complied with the bid requirements stipulated in the bid documentation. The letter went on to inform Inyameko that the bid would be re-advertised on revised specifications over a shortened period.

5.11 The closing date for the 2007 bid was 4 June 2007. Inyameko submitted its bid on time.

5.12 The area covered by the Programme is divided into twenty one districts. The bid submitted by Inyameko covered twenty of these districts, excluding only the district described as *"South Cape / Karoo 5"*. *"South Cape/Karoo 5"* which is the most remote of the districts and the most difficult district to serve.

5.13 On 5 October 2007, the Department addressed a letter to Inyameko advising it that its bid for the Programme in respect of the 2007 bid was not successful due to its failure to comply with the bid specifications. The reason is given as follows in the letter:

"You submitted an uncertified statement in respect of one month reflecting a balance of R431 712.54 and two months original statements, reflecting a final bank balance of R503 851.01 (end May 2007)."

5.14A comparison of the successful bids and those of Inyameko indicates that Inyameko's bids were lower in eleven of the twenty one districts. This is depicted the table below:

District	Masiyakhe	Successful Tenderer	Difference
E1	R 2,781,281.80	R 2,861,732.10	-R 80,450.30
E2	R 2,604,379.80	R 2,679,713.10	-R 75,333.30
E3	R 4,922,110.60	R 5,064,485.70	-R 142,375.10
F1	R 7,002,947.60	R 7,350,201.20	-R 347,253.60
F2	R 3,317,553.80	R 3,536,896.20	-R 219,342.40
F3	R 2,519,413.60	R 2,748,451.20	-R 229,037.60
F4	R 1,515,621.80	R 1,778,663.60	-R 263,041.80
G1	R 2,782,401.28	R 3,078,592.76	-R 296,191.48
G2	R 2,383,993.60	R 2,656,279.20	-R 272,285.60
G3	R 1,923,595.04	R 2,500,755.04	-R 577,160.00
G4	R 1,504,573.60	R 1,947,424.00	-R 442,850.40
TOTAL:	**R 33,257,872.52**	**R 36,203,194.10**	**-R 2,945,321.58**

5.14 In respect of these eleven districts, Inyameko's total bid is accordingly some **R2 945 321.58** lower than the total bids of the successful bidders in those eleven districts.

THE SECOND RESPONDENT'S OPPOSITION TO THE RELIEF SOUGHT IN THIS APPLICATION

[6] As appears from the answering affidavit of Mr Africa filed on behalf of the Second Respondent, the Second Respondent's opposition to the relief sought in this application is predicated upon the following:

6.1 The Evaluation Committee, whose function it was to qualitatively assess/evaluate the bids, concluded that Inyameko's bid was non-compliant inasmuch as it did not comply with the so-called *"critical criteria"* listed in paragraph 12 of the Bid Specification document.[4]

6.2 The Evaluation Committee completed a report which contained its findings and recommendation, and forwarded its report to the Bid Committee. The function of the Bid Committee was to consider and evaluate the bids with a view to making a recommendation to the delegated authority regarding the award of the tender.[5]

6.3 The recommendations of the Bid Committee were referred to the Chief Directorate: Legal Services to obtain legal advice on the recommendations of the Bid Committee.[6]

6.4 The legal advice received by the Bid Committee concurred with the reasons furnished by the Bid Committee as to why Inyameko's tender was considered non-compliant.[7]

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4 *Record 329,* read together with *Record 328*
5 *Record 328*
6 *Record 328*
7 *Record 329*

6.5 The Second Respondent accordingly contends that the present application essentially involves Inyameko's failure to comply with clause 12.1.6 of the Bid Specification document.

6.6 In the circumstances:

6.6.1 Inyameko's bid was non-compliant and consequently it was not considered necessary to assess the bid in its entirety.[8]

6.6.2 It was accordingly immaterial whether Inyameko's prices were lower than those tendered by the successful tenderers inasmuch as Inyameko's tender was disqualified on the basis that it was non-compliant with the critical criteria contained in Clause 12.1.6 of the Bid Specification document.[9]

THE BID SPECIFICATION AND BID RECOMMENDATION DOCUMENTS

[7] Clause 12.1.6 of the Bid Specification document reads – in its relevant part – as follows:

"12 CRITICAL REQUIREMENTS FOR SUBMISSION OF BIDS

12.1 All bidders must submit comprehensive details on an addendum to the bid, which include the following:

8 *Record 340*
9 *Record 341*

…

12.1.6 Details of:

Financial capacity to sustain the organisation financially for the initial period of one month until remuneration can be effected by the WCED, subsequent to the submission of the organisation's claim (Refer to paragraph 14.3) [10]

…

Certified copies of the latest 3 month's bank statements must be submitted to enable the WCED to evaluate the financial capacity."[11]

[8] The bid recommendation document – which contained recommendations from the Evaluation Committee and which was placed before the Bid Committee[12] - states the following at paragraph 4.2 thereof:

"The requirements regarding the financial capacity indicated under paragraphs 12.1.6 of the bid specifications, were considered to

10 Clause 14.3 of the Bid Specification document is at *Record 137* and reads as follows: *"Financial Standing: The successful bidder shall be financially self-sufficient to pay all costs including salaries for the first two months of the contract. The first payment will be made within 30 days of receipt of the claim from the service provider"*.

11 *Record 135 to 136*

12 The bid recommendation document is annexure **"SFA 1"** to Inyameko's supplementary founding affidavit (*Record 192* and following).

ascertain each compliant bidders financial capacity to render an effective and efficient service as it would be risky for the WCED to contract with service providers who would not be able to sustain themselves financially during the initial 30 days start-up period."

[9] In Inyameko's supplementary founding affidavit it is stated that it follows from the above that an analysis of the financial capacity of each bidder is required for the purpose – essentially – of ascertaining the successful bidders financial capacity to cover costs for a one month period until the successful bidder receives its first payment from the Department arising from the services rendered by it in terms of the 2007 bid.[13]

[10] This analysis is not disputed by Africa in his answering affidavit filed on behalf of the Second Respondent. Consonant with the Second Respondent's contention that Inyameko's bid was non-compliant, Africa states the following in response to this paragraph:

"I reiterate that the analysis of the financial capacity of the bidder only finds application once a bid is considered to be compliant."[14]

[11] Paragraph 4.4 (iv) of the bid recommendation report reads as follows:

"Existing service providers, who rendered the service successfully over the past two years, must also comply with the requirements that the latest three months bank statements are submitted which includes comprehensive details

13 *Record 175*
14 *Record 343*

as required in paragraph 12.1.6. However, given that they have rendered the services satisfactorily over a period of more than 2 years, there is sufficient proof that they have the capacity to render the services in the same districts that they are currently rendering services in. Any award of services over and above the total they are currently operating will be dependent upon proof of additional financial capacity."[15]

[12] It is common cause that Inyameko has been providing services in respect of the 2005 bid in the following six districts, namely E1, E2, E3, F1, F2 and F3.[16]

APPLICANT'S GROUNDS OF ATTACK

[13] It is convenient, at this juncture to summarise the main thrust of the parties' respective arguments. I do so by summarising the Applicant's grounds of attack on the decision by the bid-committee to exclude the Applicant's bid as non- compliant, and, in each case, summarise the Second Respondent's answer thereto.

FIRST GROUND

[14] It is argued that, by reason of what is submitted to be the clear wording of paragraph 4.4(iv) of the bid Recommendation's Report which, so it is said, makes it clear that the requirement of bank statements only arise when dealing with the award of tenders in respect of districts in excess of "*the total*

15 *Record 210*
16 *Record 177*

they are currently operating". For that reason, so it is argued, bank statements were not considered necessary as regards the applicant's bid for its existing six districts.

[15] In response, Mr Duminy, on behalf of the Second Respondent, argued:

15.1 The report does not purport to rewrite the specifications, nor could it validly have done so, and

15.2 On a proper interpretation of the above quotation, bank statements were still considered necessary.

SECOND GROUND

[16] To the extent that the last two months' bank statements are properly certified (in the sense that they bear the bank's original stamp) and to the extent that the bank statements constitute a running "record", resulting in an overlap as between the first month's (unstamped) statement and the (stamped) statement in respect of the second month, there has, in any event, been due compliance with the certification proviso.

[17] Second Respondent, on the other hand, contends:

17.1 The bank stamp on the last two months' statements does not constitute a proper certification. This should have been effected by means of certification through a Commissioner of Oaths,

which condition was recognised by most other tenderers;

17.2 The last two months' statements were accepted by the bid committee, because they were regarded as originals;

17.3 In any event, the fact remains that the first month's statements were, to no extent, certified.

[18] Before continuing with a summary of the arguments, it is appropriate to refer to the legal principles relied upon by the Applicant. Those relied upon by the Second Respondent will, where necessary, be referred to as part of the discussion.

THE APPLICABLE LEGAL PRINCIPLES

[19] Section 217 (1) of the Constitution requires an organ of state – such as the Department – to contract for goods and services *"in accordance with a system which is fair, equitable, transparent, competitive and cost-effective"*.

[20] In its analysis of section 217 (1) of the Constitution the Supreme Court of Appeal in *Minister of Social Development v Phoenix Cash & Carry* [2007] SCA 26 (RSA) stated the following at paragraph [2] of the judgment[17]:

"[2] Without attempting a comprehensive survey of the circumstances which will offend against s 217(1) certain general

17 The quote is, unfortunately, a lengthy one, but is we submit important in the context of the relief sought by Inyameko in the present application.

observations are demonstrated as true by the facts of the present case-

(1) a tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenderers and is opposed to fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal;

(2) a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion.

> *In saying this I do not suggest that the tender board is not entitled to prescribe formalities which, if not complied with, will render the bid invalid, provided both the prescripts and the consequences are made clear. What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.*

It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is

best qualified by price.

[21] In addition, reliance was placed on the judgment of Scott, JA in *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics PTY (Ltd) and Others* 2005(4) All SA 487 SCA at para14 where it was held:

> "*The definition of '*acceptable tender*' in the Preferential Act must be construed against the background of the system envisaged by s217(1) of the Constitution, namely one which is '*Fair, equitable, transparent, competitive and effective*.' In other words, whether '*the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents*' must be judged against these values."* (My underlining)

[22] I now proceed with the arguments.

THIRD GROUND

[23] Relying on para 2(1) of the *Phoenix j*udgment, Mr Joubert, on behalf of the Applicant, contended that:

23.1 The certification requirement is an uncertain and ambiguous one, as it is not in any way stated:

(i) how the certification should take place;

(ii) whether the proof (by way of a certifying stamp) should be affixed to each page of the document, or whether,

particularly in the case of a “running” document, this may be affixed to the last page only;

23.2 Therefore, and having regard to the facts set out in para 17 above, coupled with the applicant’s evidence that it considered the certification to indeed be compliant to the specification, for the department to hold otherwise would render the process in conflict with the principle laid down in para 2(1) of the *Phoenix* judgment.

The argument in answer thereto is that the specification is entirely clear, that most tenderers knew exactly what to do, and that the facts demonstrate that the Applicant, itself, knew what was required, hence its attempt to certify the last two months’ bank statements. It simply made the (fatal) error of failing to certify the first month’s statement and/or to provide an original bank statement in respect of that period.

FOURTH GROUND

[24] Relying upon paragraph 2(2) of the *Phoenix* judgment – and this appears to be the main thrust of the Applicant’s argument – it is argued that , for the bid committee to, in the circumstances prevailing in this particular matter, exclude the applicant’s bid in respect of the eleven districts within which it was the most meritorious tender and in circumstances where its

financial ability has, largely, been demonstrated through its performance in the past, and where, for the rest, its financial ability is further well demonstrated by the bank statements that were submitted, any exclusion of its bid on such a (technical) ground would be to lay undue emphasis on form at the expense of substance. It would elevate a matter of subsidiary importance to a level which determines that fate of the tender.

[

[25] Mr Duminy's response thereto, in summary, was:

25.1 On a proper interpretation of the Preferential Procurement Policy Framework Act 5 of 2000, once the specification is clear and not complied with, the tender is excluded from further consideration, and these considerations do not come into play;

25.2 Competitiveness is the main aim of a tender process such as this, and, to accede to the Applicant's request at this stage, would be to give it an unfair advantage at the expense of other tenderers; and

25.3 There has to be rules which apply to a tender process and it cannot be expected of the bid committee to make ad hoc exceptions of this kind.

DISCUSSION

[26] As is apparent from the aforegoing, the four grounds relied upon by the

Applicant overlap, which, off course, is not surprising having regard thereto that they each found their origin in s217(1) of the Constitution.

[27] It is clear that, in order to insure proper administrative functioning in the award of tenders and also competitiveness as between the different tenderers, there has to be formalities with which tenders must comply, some of which are required to be peremptory. On the other hand, the constitutional imperatives provided for in s217(1) means, in my view, that any organ of state who contracts for goods and services should, on an ongoing basis, "test" its tender process as against these criteria. As pointed out by Conradie, JA in *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 SCA at para 13 the duty to act fairly is an ever-flexible one which must be decided on the circumstances of each case.

[28] To simply adopt the attitude, as the Second Respondent does, that the rules were made clear, and so was the penalty, is therefore an oversimplification. It may well be that the adoption of such an attitude may, in a given case, result in compliance with the criteria laid down in s217, but it also may not be the case. As stated, and demonstrated by the facts of this matter, it depends on the circumstances of each case.

[29] Whilst it would appear that the First and/or Second Respondents acted in a manner which they believed to be administratively correct (and fair), the process they adopted, in my view, failed to meet the criteria of fairness, competitiveness and cost effectiveness, because it, for no good reason, excluded a tender which would, in practical terms ultimately ensure the feeding of a greater number of school children. I have come to this

conclusion for the following reasons:

29.1 The past history in regard to the execution of the contract by the Applicant in 6 of the districts now tendered for over the last nearly three years, as more fully set out in para 6.7 above, clearly demonstrates the Applicant's capacity, both at an administrative and a financial level, to comply with the requirements of the contract, at least in respect of those districts.

29.2 Applying what, in my view, constitutes the sound reasoning adopted in para 4.4(iv) of the bid-committee's report, no further proof, either by way of bank statements, or otherwise, was required in order to demonstrate the financial ability of the Applicant to carry out the tenders in respect of these 6 districts. It does not matter whether the report formally amended or limited the specifications or not, the logic thereof is unassailable.

29.3 In my opinion, the Applicant's complaint in regard to the uncertainty of the criteria is well founded. The Applicant may accordingly be forgiven for its belief that it had complied with the specification by submitting the bank statements in the format it did. The exclusion of the Applicant's (most meritorious) tender (in respect of 11 of the districts) on the strength of a blind

adherence to the specification was, accordingly, in my view, opposed to fairness and, certainly, not cost effective.

29.4 I am also of the view that the submission of the bank statements by the Applicant, if not entirely and technically in compliance with the contract specification, came very close indeed to doing so. Having regard to the purpose of their submission (proof of financial stability) and having regard to the continuing (and overlapping) nature of the statements, it seems to me that there is much to be said for the argument that the veracity of the first month's bank statements are proved by the incorporation of the last number of transactions listed thereon, including the closing balance, into the next month's (acceptable) statement. In this latter regard it is irrelevant whether the last two months' statements were acceptable as being originals or as being properly certified. The contents of the three months statements are also very similar and depict the same type of income and expenditure and closing balance.

[30] In my opinion, the elevation of the non-certification of the first month's bank statement to a level which determined the fate of the tender was, in these circumstances, to adopt a process which lay undue emphasis on form at the expense of substance.

[31] In all the circumstances, I am accordingly of the view that the exclusion of the Applicant's tender constituted the (over technical) adoption of a process which was neither fair nor equitable nor competitive nor cost effective, and, accordingly, fell foul of the provisions of s217(1) of the Constitution and should be corrected.

[32] Since dictation of the above portion of the judgement, it came to my attention that, on the same day this matter was heard, (29 November 2007), a judgment in a (similar) matter was handed down by the SCA in *Millennium Waste Management (Pty) Ltd v The Chairperson of the Tender Board: Limpopo Province and Others*. That matter concerned the disqualification of a tender as being non-compliant on the basis that the Appellant's representative had failed to sign a form titled "*Declaration of Interest*". The SCA held that the Appellant's tender should not have been disqualified for this failure, despite the fact that it was a peremptory requirement. In my view, the conclusions to which I have come, as set out above, are fortified by the ratio in that judgment in that:

32.1 The relevant state department and the tender board in that matter argued, as the Second Respondent does here, that the terms of the tender documents relating to administrative compliance were couched in peremptory language which expressly stated that non-compliance would result in

disqualification. It was therefore not procedurally unfair for the tender committee to disqualify the tender on the basis of the Appellant's failure to sign, because it was forewarned that such failure would lead to disqualification. Reliance was also placed on the definition of acceptable tender in the Preferential Procurement Policy Framework Act 5 of 2000.

32.2 In dismissing these arguments, the SCA held, *inter alia* that:

32.2.1 As per the judgment of Scott, J in the *Sapela* matter referred to above, an acceptable tender in terms of the Preferential Act must be judged against the s217(1) Constitutional values.

32.2.2 In para 19 the following was said:

"*The defect relied upon by the tender committee in his case is the Appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight. In determining whether the non-compliance rendered the Appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question.*"

32.2.3 At para 21 the following was held:

"*By insisting on disqualifying the Appellant's tender for an innocent omission, the tender committee acted unreasonably*."

These considerations, in my view, apply with equal force to the present case.

32.3 The SCA then went on to hold that the tender committee's decision to disqualify the tender on such basis was therefore based on an error (of law) as to the import of the definition of acceptable tender in the Preferential Act and accordingly fell foul of s6(2)(d) of PAJA. Non compliance with the provisions of PAJA was not specifically raised as a ground of the review herein, but the same reasoning would, in my view, apply to and mean that the decision falls foul of s217(1) of the Constitution, as is demonstrated by the *Phoenix* judgment.

IN THE ABSENCE OF AN APPLICATION SET ASIDE THE TENDER CONTRACTS, THE RELIEF SOUGHT IS ACADAMIC AND SHOULD BE REFUSED

[33] Towards the end of his argument Mr Duminy, relying on the unreported judgment in *Magne Flo Developments (Edms) Bpk v Minister van Begroting en Ondersteuningsdienste: Raad van Verteenwoordigers en Andere* Case No

A742/88, and the judgment in *Manong and Associates v Director General – Department of Public Works* 2004 (1) ALL SALR 673(C), argued that, because it is quite possible that the post tender contracts concluded with Fourth to Ninth Respondents may remain valid despite a successful attack on the tender process, the relief now sought (the setting aside (only) of the decision to award the tender) is academic and should not be entertained.

[34] As the Applicant was taken by surprise by these arguments, leave was given to it to reconsider its position.

[35] Pursuant thereto and on Friday before last, the Applicant:

35.1 Applied for leave to amend its Notice of Motion to allow for a further prayer to the effect that the contracts awarded to Fourth to Ninth Respondents indeed be set aside; and

35.2 put forward written argument in support of its submissions that:

35.2.1 such amendment is not necessary in the circumstances; and

35.2.2 alternatively should be granted, and so should the relief sought in terms thereof.

35.3 On Monday last, a further affidavit was submitted by the Applicants, saying that, at a meeting held with the Department last Friday, attended by representatives of the Applicant and some of the successful bidders, the Department indicated that

they had, at an earlier meeting with the successful tenderers on 23/10/07, made it clear to them that, in the event of this application being successful, their contracts could be cancelled, and that the Department may have to re-advertise the tender.

[36] The Second Respondent, in response, does not oppose the amendment itself, but opposes the granting of the relief based thereon. It also filed an affidavit, on Thursday last, wherein the facts in 36.3 are not (materially) disputed.

[37] In my view, the *Magne Flow* and *Manong* judgments do not assist the Second Respondent for the following reasons:

37.1 As appears from the judgment in *Magne Flow*, it was specifically founded thereon that the fact that the award of a tender may have been invalid because of a lack of (delegated) authority, does not necessarily mean that the principal cannot remain contractually liable to a third party with which a contract had been concluded pursuant to the award of the tender.

It was held that issues such as ostensible authority, estopple and ratification may well come into play and save the contract from invalidity. In the process, the matter of *Shidiack v Union Government* 1912 AD 642 (relied upon by the Applicant) was specifically distinguished because that matter concerned a

situation where a personal discretion had specifically been awarded to a minister (only), and it was clear, once the minister did not, himself, exercise such discretion, that no contractual liability could ever arise from the unlawful award of the tender. By implication, it was recognised that issues of ostensible authority etc, could not arise in such circumstances.

In my view, the present situation is factually quite different from that in *Magne Flow*. Having regard to the grounds for the setting aside of the decision, it is difficult to see how issues such as those mentioned in that case could be relied upon to save a contract based on an invalid tender-allocation from consequential invalidity.

37.2 In any event section 217 of the Constitution enjoins an organ of state to contract for goods or services in accordance with a system that is fair … (etc), which I have found was not the case.

37.3 That the setting aside of a decision to award a tender of this kind inevitably leads to the demise of the contracts concluded on the strength thereof, appears to have been recognised by the SCA in the *Millennium* matter (para 23), as it seems to have been at p.495(d-e) of *Sapela.*

[38] The Fourth to Ninth Respondents clearly had been forewarned that their contracts are in jeopardy, both (indirectly) in the Notice of Motion and by the Department.

[39] It follows that, in my view, it is not necessary for an amendment to be made as is now requested by the Applicant, as the relief presently sought is not in any way academic. It is also in accordance with the order granted in *Phoenix.*

[40] I point out that it seems clear that, because the contracts are only due to take effect on 16 January next year, they have not to any extent been executed.

[41] It follows that the application must succeed. Counsel agreed that, having regard to the "domino" effect, the setting aside of the bid in respect of the six tenders currently "held" by the Applicants, may have on the allocation of the other tenders, that it would be appropriate, in this event, to set aside the allocation of all the tenders so that the allocations may be made afresh. It is appropriate to, for such purpose, lay down what I consider to be appropriate guidelines for the award of such tenders which, in my view, follows from what has been said above:

41.1 Generally speaking, and whilst it is important that specifications/

criteria be laid down with which the submission of tenders are to comply, all reasonable steps should nevertheless be taken in each case so as to ensure:

(i) that these conditions are framed clearly and unambiguously; and

(ii) that a flexible approach, having regard to the circumstances of each case, be adopted in order to ensure that the tender process comply with the requisites of s217 of the Constitution.

41.2 It would appear that Applicant was, by some margin, the most meritorious tender in respect of the eleven districts listed in the table in para 6.14 above.

41.3 As stated, the facts demonstrate that the Applicant is clearly possessed of the necessary financial resources to, at least, perform the programmes in respect of the six districts currently executed by it.

41.4 As regards the further five districts in respect of which the Applicant was the best tender, its ability to execute same should be tested as against the information emanating from its bank

statements already submitted, in particular the fact that the average of the Applicant's monthly start up capital amounts to approximately R460 000-00.

41.5 The remaining tenders should be awarded, in each case, to the most meritorious tender (points wise, as established by the process) but, also, having regard to the financial ability of the tenderers to execute the said contracts, accumulatively evaluated.

[42] The application accordingly succeeds and the following order is made:

42.1 The decision of the First Respondent, alternatively the Second Respondent, in awarding bid no B/WCED923/07 to the Fourth to Ninth Respondents, is set aside;

42.2 The First and Second Respondents are ordered to reconsider the award of the tenders, based on those already accepted by it as compliant, but including that of the Applicant;

42.3 The Second Respondent is ordered to pay the Applicant's costs for this application, including the costs for two counsel.

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VAN RIET, AJ