

AN ANALYSIS OF THE CRITERIA USED TO EVALUATE AND AWARD PUBLIC TENDERS*

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1 INTRODUCTION

When organs of state in South Africa contract for or procure goods or services, they usually take into account not only the price offered by the different bidders, but also other criteria such as experience, quality, reliability, etc.¹ These non-price criteria are referred to as “functionality criteria” or more broadly as “quality criteria” and there has been a lot of controversy around their use in practice.² Prior to the current preferential procurement regime, functionality criteria could form part of the award stage of the procurement process and they played a decisive role in the determination of a winning bidder.³ Under the new preferential procurement regime,⁴ functionality criteria have been given a very specific role. In brief, an organ of state must determine whether functionality is relevant to the particular procurement and if so, it must provide for it during the qualification stage of the process. Bidders must be required to meet certain minimum scores for functionality and only those bidders who meet such scores must then qualify for further evaluation on the basis of price and preference during the award stage.⁵ The recent case of *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape*⁶ has, however, complicated matters in that the court held that functionality criteria must play a role also after the award of points for price and preference. The court in other words held that functionality criteria must serve as both qualification and

* The term “criteria” as used in this title refers specifically to (1) criteria that qualify as “objective criteria” for the award of a contract to a bidder other than the highest scoring one under South African public procurement law and (2) criteria that are referred to as “functionality criteria” in the public tender process.

¹ On South Africa’s public procurement system in general, see Bolton P “The Regulatory Framework for Public Procurement in South Africa” in Quinot G and Arrowsmith S *Public Procurement Regulation in Africa* (2013) 178; Bolton P *The Law of Government Procurement in South Africa* (2007); Penfold G and Reyburn P “Public Procurement” in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 2nd ed (2003) 25-i to 25-36; De la Harpe S “Public Procurement Law: A Comparative Analysis” (unpublished doctoral thesis, University of South Africa 2009) ch 5.

² In the international context, functionality criteria are sometimes referred to as selection criteria, qualification criteria, qualitative selection criteria, threshold criteria, short-listing criteria, or entry level requirements. For more on this, see the special issue in the *Public Procurement Law Review* (2009) 3.

³ On South Africa’s old preferential procurement regime, see Penfold G and Reyburn P 25-i to 25-36; Bolton *Government Procurement in South Africa* ch 10; Bolton P and Quinot G “Social Policies in Procurement and the Government Procurement Agreement: A Perspective from South Africa” in Arrowsmith S and Anderson RD (eds.) *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead* (2011).

⁴ See generally Bolton P “New Preferential Procurement Regulations Released” 13(3) *Local Government Bulletin* 7; Quinot G “Promotion of Social Policy through Public Procurement” in Quinot G and Arrowsmith S *Public Procurement Regulation in Africa* (2013) 393 – 401.

⁵ For more on the role and significance of these two stages, i.e. the qualification and award stage of the procurement process, see Arrowsmith S, Linarelli J and Wallace D *Regulating Public Procurement: National and International Perspectives* (2000) 689.

⁶ (21158/2012) [2013] ZAWCHC 3 (6 February 2013) – hereafter referred to as *Rainbow Civils*.

award criteria. The court held that even though the general rule is that a contract must, in terms of the legislation, be awarded to the highest scoring bidder on the basis of price and preference, functionality criteria may serve as “objective criteria” for the award of a contract to a bidder other than the highest scoring one.⁷

In this paper, it is argued that South Africa’s new preferential procurement regime does not provide scope for the use of functionality criteria after the allocation of points for price and preference. It is also argued that the “objective criteria” that may warrant the award of a contract to a bidder other than the highest scoring one is highly constrained, particularly in view of the new legislative regime. As background, an overview is provided of South Africa’s preferential procurement regime and particular attention is given to the preference points system that is used for the purposes of determining a winning bidder. The meaning to be afforded to section 2(1)(f) of the Preferential Procurement Policy Framework Act (Procurement Act)⁸ is also examined with specific reference to the award of a contract to a bidder other than the highest scoring one. Suggestions are then made on possible “objective criteria” that may justify the award of a contract to a bidder other than the highest scoring one. The paper then tracks the treatment of functionality criteria first under the old 2001 Preferential Procurement Regulations,⁹ and thereafter under the current 2011 Procurement Regulations.¹⁰ Specific attention is given to the detailed legislative provisions dealing with functionality criteria in the 2011 Procurement Regulations. The focus then shifts to the courts’ recent interpretation of section 2(1)(f) of the Procurement Act and the requirement of functionality in *Rainbow Civils* and guidance is offered on the use of functionality criteria in the South African context.

2 THE PREFERENTIAL PROCUREMENT REGULATORY REGIME

Government contracting is constitutionalised in South Africa.¹¹ Section 217 of the Constitution¹² provides that contracting by organs of state for goods or services must occur in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.¹³

⁷ The court relied specifically on s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000.

⁸ 5 of 2000.

⁹ Preferential Procurement Regulations GG No. 22549, 10 August 2001.

¹⁰ Preferential Procurement Regulations GG No. 34350 of 8 June 2011.

¹¹ For an in-depth analysis, see Bolton *Government Procurement in South Africa*. See also De la Harpe ch 5.

¹² Constitution of the Republic of South Africa, 1996.

¹³ The phrase “organs of state” in this sentence would include, for example, departments of state or administration; constitutional institutions like the Public Protector and the Independent Electoral Commission; major public entities like ESKOM and Telkom; national public entities like the Construction Industry Development Board; national government business enterprises like SA Rail Commuter Corporation Ltd; provincial public entities like the Eastern Cape Liquor Board; provincial government business enterprises like

Organs of state may, however, also implement procurement policies providing for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.¹⁴ The implementation of such preference policies must take place in accordance with a national legislative framework.¹⁵ The Procurement Act lays down the national framework for the giving of preference in contract awards. In principle, all suppliers are able to compete for government contracts and preference plays a role only during the award stage of the procurement process.¹⁶

The Procurement Act prescribes the use of a points system to evaluate bids during the award stage. In terms of the points system, points are allocated to suppliers for both price and preference. For high value contracts (at present above R1 million) 10 points out of 100 may be allocated for the attainment of specific goals and 90 points for price, and for lower value contracts (at present contracts equal to or above R30 000 and up to R1 million) 20 points out of 100 may be allocated for the attainment of specific goals and 80 points for price.¹⁷ The 2001 Regulations to the Act allowed organs of state to incorporate also functionality criteria in the price component of the points system, but as is discussed in greater detail below, the court in *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality*¹⁸ held that the provisions in the 2001 Regulations¹⁹ which allow for the incorporation of functionality criteria in the award stage of the procurement process are *ultra vires* the enabling legislation, i.e. the Procurement Act. The court held that functionality criteria should serve as “qualification criteria” and not as “award criteria”; more specifically, functionality criteria should not form part of the points system in terms of which points must be awarded only for price and preference criteria. The 2011 Regulations adopt a similar approach and reserve the 80/20 and 90/10 points system for the allocation of price and preference points. In terms of section 2(1)(d) of the Procurement Act, the “specific goals” for which preference points can be awarded may include:

- “(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

the East London Industrial Development Zone Corporation; municipalities; and municipal entities (see Bolton “The Regulatory Framework for Public Procurement” 187.

¹⁴ S 217(2).

¹⁵ S 217(3).

¹⁶ A possible exception is provided for in the new 2011 Procurement Regulations where “only locally produced goods, services or works or locally manufactured goods, with a stipulated minimum threshold for local production and content will be considered” – see reg 9.

¹⁷ See s 2 of the Procurement Act.

¹⁸ (10878/2009) [2010] ZAKZPHC 23 (12 March 2010) – hereafter referred to as *Sizabonke Civils*.

¹⁹ In particular, regs 8(2) – 8(7).

- (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994.”

The Procurement Act further provides that “any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender”.²⁰ The new 2011 Procurement Regulations do not make reference to the attainment of “specific goals” as such. The award of preference points is tied to a supplier’s certified Broad Based Black Economic Empowerment (BBBEE) status in terms of the Broad Based Black Economic Empowerment Act (BBBEEA).²¹ The higher the BBBEE rating of a supplier, the higher the number of preference points awarded.²² The supplier who scores the highest total number of points out of 100 (for price and preference in the form of BBBEE) is then generally awarded the contract. The 2011 Regulations provide for a situation where two or more bidders score equal total points and stipulate that in such a case, the contract must be awarded to the bidder who scored the most preference points for BBBEE.²³ If, on the other hand, functionality forms part of the evaluation process and two or more bidders score equal points, including equal preference points for BBBEE, then the contract must be awarded to the bidder who scored the most points for functionality.²⁴ If two or more bidders score equal points in all respects, the award must be decided by the drawing of lots.²⁵ The Procurement Act also makes provision for the award of a contract to a bidder who does not score the highest points. Section 2(1)(f) is a very important provision for the purposes of this paper and provides that –

“the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.”

The 2011 Regulations to the Procurement Act similarly allow for the award of a contract to a supplier who did not score the highest total number of points, but “only in accordance with section 2(1)(f) of the (Procurement) Act”.²⁶ A similar provision was contained in Regulation 9

²⁰ S 2(1)(e).

²¹ 53 of 2003. After the enactment of the BBBEEA, it was realized that the approach to preferential procurement under the old 2001 Preferential Procurement Regulations had to be realigned to the general approach to black economic empowerment under the BBBEEA. Draft Regulations were first released for public comment in October 2004 and again in August 2009. The final Regulations were eventually enacted in June 2011 and these became fully effective in December 2012.

²² See regs 5 and 6 which contain grids for the award of preference points.

²³ Reg 11(5)(a).

²⁴ Reg 11(5)(b).

²⁵ Reg 11(5)(c).

²⁶ Reg 7(1).

of the 2001 Procurement Regulations which provided that “a contract may, on reasonable and justifiable grounds, be awarded to a tender[er] that did not score the highest number of points”. In view of the fact that the court in *Rainbow Civils* placed reliance on section 2(1)(f) of the Procurement Act as justification for incorporating functionality criteria in the procurement process (also) after the award of points for price and preference, it is necessary to conduct a closer examination of the conditions that should prevail for the award of a contract to a bidder who does not score the highest total number of points for price and preference.

3 SECTION 2(1)(f) OF THE PROCUREMENT ACT AND “OBJECTIVE CRITERIA” FOR THE AWARD OF A CONTRACT

3.1 Legal position and case law

Section 2(1)(f) of the Procurement Act has always been a controversial provision. A number of cases that have appeared before the courts have involved the interpretation to be afforded to section 2(1)(f) and the primary issue has been the meaning to be afforded to the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of section 2(1) of the Act.

In *Grinaker LTA Ltd v Tender Board (Mpumalanga)*,²⁷ the court held that section 2(1)(f) of the Procurement Act is cast in peremptory terms and involves a two stage enquiry. First, the procuring entity must determine which bidder scored the highest points on the basis of price and preference. Thereafter, the procuring entity must determine whether objective criteria exist which justify the award of the contract to a bidder who does not score the highest points.²⁸ The court then defined the meaning of the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” in section 2(1)(f) as referring to criteria “over and above”²⁹ or criteria “besides; as well as”³⁰ those contemplated in paragraphs (d) and (e) of section 2(1) of the Procurement Act.³¹ The court, however, failed to give an indication as to what would be regarded as such. The court simply held that the considerations of price and

²⁷ [2002] 3 All SA 336 (T).

²⁸ Ibid, para 40.

²⁹ Referring to Webster’s *Third New International Dictionary*.

³⁰ Referring to the *Collins English Dictionary*.

³¹ See also *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province and Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province and Star Asphalters/Kgotsoong Civils Joint Venture v MEC for the Department of Transport And Roads, North West Province* [2005] JDR 1033 (HC)) where the court said (para 34) that an objective criterion is one which “(a) is not listed in paras (d) and (e) of s 2(1) of the [Procurement Act]; (b) is objective in the sense that it can be ascertained objectively. Its existence or worth not [sic] does not depend on someone’s opinion; (c) bears some degree of rationality and relevance to the tender or project”.

“historically disadvantaged individual” / HDI factors taken into account by the tender board in justifying the award of the tender to the tenderer who did not score the highest points were not objective criteria within the meaning of section 2(1)(f). These criteria (considerations of price and HDI factors), the court held, had to be considered under sections 2(1)(d) and 2(1)(e) of the Procurement Act. The court in *RHI Joint Venture v Minister of Roads and Public Works*³² similarly held that “local labour, resources and affirmable business enterprises [ABEs]” did not amount to objective criteria in addition to those contemplated in sections 2(1)(d) and 2(1)(e) of the Procurement Act. As in the *Grinaker* case, these factors were provided for in the preference point system and were allocated due and proper weight in terms thereof. It was therefore improper to afford weight to these factors a second time.³³ Like the *Grinaker* case, however, the court did not give an indication as to what would be regarded as “objective criteria” for the purposes of section 2(1)(f).³⁴

Over the years, the courts have given examples of possible criteria that may amount to “objective criteria” under section 2(1)(f). There is, however, no unanimous view on this. A perusal of the cases moreover indicates a general disagreement among the High Courts on the question of whether the “objective criteria” for the award of a contract to a bidder who does not score the highest points must be disclosed to bidders in the tender documents.³⁵ In the recent case of *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality*,³⁶ decided after the enactment of the new 2011 Procurement Regulations, a contract was awarded to the second highest bidder on the grounds that (i) the highest scoring bidder had benefitted over the last five years on two major projects worth roughly R49.5 billion; and (ii) the municipal council had expressed the need to encourage the rotation of service providers who carry out work for the council.³⁷ The court found that these reasons were arbitrary.³⁸ It would appear that the main reason for this finding was the fact that neither the tender documents nor the legislative provisions made reference to the criteria. Also in

³² 2003 (5) BCLR 544 (Ck).

³³ *Ibid*, paras 32-33. See also *Shearwater Construction v City Tshwane Metropolitan Municipality* [2006] JOL 16809 (T) (applicant scored zero points for HDI goals in terms of 90/10 points system and in adjudication phase this was regarded as *reasonable and justifiable* grounds in terms of the 2001 Procurement Regulations for not awarding the tender to applicant; held that penalising applicant twice for same shortcomings amounts to gross irregularity; procuring entity did not apply mind to matter at hand – decision set aside and tender awarded to applicant).

³⁴ See also *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council* [2003] 2 All SA 340 (T) 347e-j where the court simply held that “[t]he award [of the tender] was contrary to the provisions of section 2(1)(f) of [the Procurement Act]...there were no possible ‘objective criteria’”.

³⁵ See also Quinot G “Public Procurement” 2013 (2) *Juta’s Quarterly Review* para 2.2.

³⁶ (4139/2013) [2013] ZAKZDHC 16 (6 May 2013).

³⁷ Para 10.

³⁸ Para 12.

Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province,³⁹ decided under the old 2001 Procurement Regulations, Landman J agreed that a contract may be awarded to the second highest bidder if the highest scoring bidder is currently engaged in projects with the organ of state, but emphasised that the pre-disclosure of tender evaluation criteria is crucial. In this case the organ of state did not disclose in the tender documents that the tender may be awarded to another bidder if the highest scoring bidder was already engaged in a project with the organ of state.⁴⁰

At the same time, there are judgments where the courts have held that the Procurement Act does not require “objective criteria” within the meaning of section 2(1)(f) of the Procurement Act to be disclosed to bidders. All these cases were decided under the old 2001 Procurement Regulations and they include *Simunye Developers CC v Lovedale Public FET College*,⁴¹ *Lohan Civil - Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit*⁴² and *First Base Construction CC v Ukhahlamba District Municipality*.⁴³ In *Simunye Developers CC* the court referred to section 2(1)(f) of the Procurement Act and Regulation 9 of the 2001 Regulations and held that –

“[t]here is clearly no statutory obligation on an organ of state to stipulate in the tender documents which objective criteria it may consider in a decision not to award the contract to the tenderer who has scored the highest points. In fact it would often be impossible to provide a *numerous clausus* of such criteria.”⁴⁴

The court reasoned that criteria that would qualify as “objective criteria” for the purposes of section 2(1)(f) would relate to the ability of a supplier to perform the work in accordance with the tender specifications; the track record of a supplier in other related projects; as well as its infrastructure and available financial resources and equipment. In the *Lohan* case,⁴⁵ the court confirmed that “objective criteria” for the purposes of section 2(1)(f) of the Procurement Act must be criteria other than or additional to criteria relating to equity ownership by HDIs and whether or not a bidder was located in a particular province. Such other criteria, the court

³⁹ Cited as *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province and Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North West Province and Star Asphalters/Kgotsoong Civils Joint Venture v MEC for the Department of Transport and Roads, North West Province* [2005] JDR 1033 (HC).

⁴⁰ Paras 39-40.

⁴¹ (3059/2010) [2010] ZAECGHC 121 (9 December 2010).

⁴² (508/2009) [2009] ZAFSHC 21 (27 February 2009).

⁴³ [2006] JOL 16724 (E).

⁴⁴ Para 33.

⁴⁵ (508/2009) [2009] ZAFSHC 21 (27 February 2009).

held, could be found in “necessary skills, experience, good financial standing and capacity” to which ample reference had been made in the tender documents issued by the organ of state.⁴⁶ On the facts, however, the court found that no such reliance was intentionally placed on these factors by the organ of state and that they could accordingly not justify the award of the tender to a bidder other than the highest scoring bidder. In *First Base Construction* the court also held that experience and expertise may justify the award of a contract to a bidder other than the highest scoring one. The court made this decision irrespective of the fact that this criterion was not disclosed to bidders as a possible “objective criterion” within the meaning of section 2(1)(f). The court simply held that –

“reasonable and justifiable grounds’ [within the meaning of the 2001 Regulations] were present to permit the tender to be awarded to ‘a tenderer that did not score the highest number of points’; or, in the rather curious language of the [procuring entity’s] procurement policy, ‘extenuating circumstances’ were present to justify the award of the tender [to a bidder other than the highest scoring one].”⁴⁷

3.2 Comments and suggestions

Before proceeding to comment on the general disagreement among the High Courts on the question of whether the “objective criteria” for the award of a contract to a bidder who does not score the highest points must be disclosed to bidders, it should be noted that the courts correctly afforded section 2(1)(f) preemptory status.⁴⁸ Affording section 2(1)(f) preemptory status serves a number of important purposes. It ensures uniformity in tender procedures which, in turn, goes towards the integrity of the tendering process and the public’s confidence in tender procedures. It ensures that effect is given to the intention of the legislature in enacting the provision and ensures that there is general compliance with the purpose of the statute (the main purpose of the Procurement Act being to correct the imbalances caused due to South Africa’s history of unfair discriminatory policies and practices), whilst at the same time ensuring that the state does not pay more for contracts than is justified.⁴⁹

⁴⁶ Para 46.

⁴⁷ Para 30. For a contrary view on the qualification of experience as an “objective criterion”, see *Mamlambo Construction CC v Port St Johns Municipality* (1876/2008) [2010] ZAECMHC 21 (24 June 2010) – discussed further below.

⁴⁸ *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T) para 40; *RHI Joint Venture v Minister of Roads and Public Works* 2003 (5) BCLR 544 (Ck) para 25.

⁴⁹ See also *RHI Joint Venture v Minister of Roads and Public Works* 2003 (5) BCLR 544 (Ck) para 25 where the court noted that “[i]t is obvious that a special responsibility rests on a Tender Board to ensure that the tenders that it awards will, as far as possible, cost the Province the least” – referring to *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T) and *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (Ck).

On the question of whether the “objective criteria” for the award of a contract to a bidder who does not score the highest points must be disclosed to bidders in the tender documents, it is this author’s view that it may sometimes be difficult in practice for organs of state to disclose *all* the possible objective criteria that may result in the award of a contract to a bidder who does not score the highest points.⁵⁰ At the same time, however, there may well be instances when an organ of state knows beforehand which “objective criteria” it will apply to award a contract to a bidder other than the highest scoring one. In such a case, there should be an obligation on the organ of state to disclose the criteria in the tender documents. A good example is where the organ of state has a policy of rotating contracts among suppliers. As seen above, the courts in *WJ Building & Civil Engineering* and *Road Mac Surfacing* appear to favour such an approach with the proviso that this is disclosed to bidders in the tender documents. Pre-disclosure in this instance, of course ensures that bidders do not waste time and money competing for a contract that they do not stand a chance of winning.

The criteria which might justify the award of a contract to a bidder who does not score the highest points do however appear to be very limited. The legislature (through the Procurement Act) and the executive (through the Procurement Regulations) seem to afford a very limited discretion to organs of state with regard to the award of a contract to a bidder who does not score the highest points. Section 2(1)(f) of the Procurement Act is an exception to the general rule, i.e. the award of a contract to the highest scoring bidder, and a restrictive interpretation should be given to the phrase “objective criteria in addition to those contemplated in paragraphs (d) and (e)” of section 2(1) of the Procurement Act. The same reasoning can be applied in respect of the phrase “reasonable and justifiable grounds” in Regulation 9 of the 2001 Regulations; it should similarly be afforded a restrictive interpretation.⁵¹ The 2001 Regulations were also very detailed with regard to the goals that were to be achieved in the award of tenders which limited even further the discretion that organs of state had in relation to “objective criteria”.⁵² Under the 2001 Regulations, preference points could “primarily” be awarded for HDI and Reconstruction and Development Programme (RDP) goals. Insofar as the new 2011 Procurement Regulations are concerned, preference points are directly tied to

⁵⁰ See also *Grinaker LTA Ltd* where it was argued that “‘objective criteria’ for the purposes of s 2(1)(f) of the Procurement Act did not have to be specified in the invitation to tender ... if every single factor had to be specified in advance it would unduly stifle the discretion of the [procuring entity]”. The court accepted this argument, but held that factors that were taken into account for the award of preference points may not serve as “objective criteria” for the purposes of s 2(1)(f).

⁵¹ In this regard, see Steyn LC (bygewerk deur Van Tonder, SIE Badenhorst, NP Volschenk, CH and Wepener, JN) *Die Uitleg van Wette* 5de uitgawe (1981) 80.

⁵² See reg 17.

the BBEE status level of contractors. As argued in more detail below, the manner in which the functionality provisions in the 2011 Regulations have been drafted also limit further the discretion afforded to organs of state with respect to the award of a contract to a bidder who does not score the highest points.

The 2010 case of *Mamlambo Construction CC v Port St Johns Municipality*⁵³ serves as a good example of how difficult it is in practice for organs of state to justify the award of a contract to a supplier who does not score the highest points. In this case, the court held that the award of the tender to the non-highest bidder was unreasonable because it lacked a rational basis and because relevant considerations were not taken into account. The applicant in this case scored the highest points, but was not awarded the tender. It was common cause, however, that the applicant's price was substantially less than the winning bidder; the applicant was as suitably qualified to do the work as the winning bidder; there were no fundamental reservations about the applicant's capacity to do the work in accordance with the tender specifications; and the winning bidder would take three months longer than the applicant to complete the work.⁵⁴ In the light of these factors, the court held that "compelling and cogent reasons" were needed to justify the non-award of the tender to the applicant, it being the highest scoring bidder.⁵⁵ The organ of state could not simply reason that the winning bidder had more experience in earthworks; that the applicant proposed a deviation from the tender conditions regarding the haulage and delivery of sand; that the time period for the completion of the contract was not "that essential"; that the extra three months allowed to the respondent had no cost implications for it; and that the winning bidder had more experience in works of the kind required by the tender despite the fact that the applicant had received affirmation of its abilities to do the work and on the organ of state's own account the applicant had vast experience in the construction industry.⁵⁶ The court set aside the award of the tender and referred the matter back to the organ of state for reconsideration.

It is submitted that even though section 2(1)(f) of the Procurement Act gives discretionary power to organs of state to award a contract to a bidder who does not score the highest points in terms of the prescribed preference points system, the exercise of this discretion is highly constrained. In addition to a policy of rotating contracts among suppliers, this author can think of two further examples when section 2(1)(f) may be put to effective use in practice. The first

⁵³ (1876/2008) [2010] ZAECMHC 21 (24 June 2010).

⁵⁴ Para 43.

⁵⁵ Para 44.

⁵⁶ Para 44.

one pertains to “the protection of the environment”. A procuring entity may, for example, call for tenders and lay down detailed functionality criteria that suppliers must meet in order to qualify for further evaluation. Suppliers who meet the minimum scores for such functionality criteria will then qualify for further evaluation on the basis of price and preference. After identifying the highest scoring bidder, the procuring entity will then be required, in terms of section 2(1)(f) of the Procurement Act, to determine whether there are “objective criteria” to award the contract to a bidder other than the highest scoring one. As noted in the *Grinaker* and *RHI Joint Venture* cases, preference criteria may not be looked at again and as argued by this author in greater detail below, *pre-disclosed* functionality criteria also do not qualify as “objective criteria” for the purposes of section 2(1)(f). It is submitted, however, that “the protection of the environment” may potentially serve as an “objective criterion”. The procuring entity may be able to argue that the contract should be awarded to a bidder other than the highest scoring one because doing so is beneficial to the environment. Given the significance attached to the notion of sustainable development in the South African context as well as internationally, it is submitted that this may well be one of the few instances when use can be made of the exception provided for in section 2(1)(f).

It must be stressed however that the procuring entity in the above scenario would still have to take into account the difference in points between the two bidders. In other words, the procuring entity would have to take into account the difference in price and preference points. It is submitted that the procuring entity would be able to make out a stronger case if there is an insignificant difference in points for price and preference between the two bidders. It is, in other words, not suggested that free discretion be afforded to procuring entities when using “the protection of the environment” as an objective criterion for the purposes of section 2(1)(f). Rather, the suggestion is a narrower discretionary power which is tied to the proximity of the price and preference scores of the bidders in question. It should further be stressed that if the “the protection of the environment” formed part of the “qualification” stage of the procurement process, i.e. it was a functionality criterion, the procuring entity should as a rule not be able to rely on it as an “objective criterion” for the purposes of section 2(1)(f). This argument is elaborated on further below when attention is given to the interpretation of the detailed functionality provisions in the 2011 Procurement Regulations. On the question of whether or not it would be necessary for the procuring entity to disclose to bidders in the tender documents “the protection of the environment” as a possible objective criterion for the purposes of section 2(1)(f), it would probably depend on the circumstances. The safer option, however, would of course always be for a procuring entity to disclose this criterion in the

tender documents as doing so would ensure compliance with the constitutional principles of transparency and fairness.

A second example of a possible “objective criterion” for the purposes of section 2(1)(f) may be the receipt of an “abnormally low tender”. This would be a tender that because of its favourable terms raises doubt that the supplier will not be able to perform according to the terms offered. In such cases, the supplier may either not deliver properly or it may seek extra payment (either for the agreed work or through excessive remuneration from later variations to the contract).⁵⁷ Under European Union (EU) procurement law an abnormally low tender may be rejected, but the supplier must be given a chance to justify the tender and to challenge any assessment that the tender presents a risk of non-performance.⁵⁸ South African procurement legislation does not make express provision for the treatment of “abnormally low tenders”. The preference points system in the Procurement Act and Regulations simply requires procuring entities to award points to suppliers for price and preference during the award stage. The highest scoring bidder must then be awarded the contract, subject to possible “objective criteria” that may justify the award of the contract to a bidder other than the highest scoring one.

A scenario has, however, presented itself in our courts where “too high and too low prices” were regarded as an “objective criterion” for the purposes of section 2(1)(f) of the Procurement Act. The case in point is *Black Top Surfaces (Pty) Ltd v Member of the Executive Council of Public Works & Roads Limpopo Province*.⁵⁹ In this case the procuring entity used a pre-disclosed “threshold principle” for evaluating tenders. In terms of the “threshold principle”, tenders were automatically excluded if the tender price was more than 10% below or more than 5% above the estimated price. An unsuccessful bidder argued that the threshold principle was in conflict with the prescribed evaluation procedure in the Procurement Act and 2001 Procurement Regulations. It argued that the threshold principle excluded from consideration tenders with the lowest prices instead of rewarding them with the allocation of the highest points for price. The court disagreed and held that –

⁵⁷ Arrowsmith *Public and Utilities Procurement* 531-532.

⁵⁸ On abnormally low tenders in EU procurement law, see generally Arrowsmith *Public and Utilities Procurement* 531-539; Trepte P *Public Procurement in the EU: A Practitioner’s Guide* (2007) 59-60 and 474-477; Ølykke *Anormally Low Tenders – With an Emphasis on Public Tenderers* (2010); Albert Sanchez Graells “Rejection of Abnormally Low and Non-compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions” forthcoming in *European Procurement Law Series* Volume 6 – electronic copy available at <http://ssrn.com/abstract=2248590> (accessed: 25 September 2013).

⁵⁹ [2006] JOL 17099 (T).

“[o]n a proper reading of section 2 of the [Procurement Act]...the threshold principle constitutes an *objective criterion* [emphasis added] as is envisaged in sub-section (2)(1)(f) [of the Procurement Act].”⁶⁰

The court held that there are sound reasons for the existence of the threshold principle. If a tender is more than 10% below the said estimate, such tenderer is considered a business risk as the project may not be profitable for the procuring entity and experience in the past had shown that projects are then abandoned and become a problem for the procuring entity in that huge costs had to be incurred to salvage the project. The court also held that time delays are an important factor. The 5% threshold further ensures that the procuring entity does not pay more than 5% of the market related price for any project and this aspect is important for the budgeting of the procuring entity.⁶¹

Of note is that the threshold principle used in *Black Top Surfaces* was disclosed to bidders in the tender documents. This ensured compliance with the constitutional principles of fairness and transparency which apply to government procurement processes. From the facts of the case, however, it would appear that the affected bidder was not given an opportunity to justify its tender. It is submitted that a similar approach should be adopted as in EU procurement law; affected bidders should be given a chance to justify their tenders and to challenge any assessment that their tenders present a risk of non-performance. A procuring entity should, in other words, comply with the requirement of procedural fairness as provided for in section 33 of the South African Constitution and as enumerated on in the Promotion of Administrative Justice Act.⁶² This was emphasised in the later case of *Kawari Wholesalers (Pty) Ltd v The MEC: Department of Health North West Province*.⁶³ In this case, the contract was awarded to the second highest bidder because the procuring entity reasoned that based on past experience, the bidder quoting the lowest price would after the implementation of the contract request a price adjustment arguing that it was not possible to perform based on its tendered price. The court in this case held that the procuring entity should have afforded the applicant (who was the highest scoring bidder) an opportunity to address the procuring entity’s fears regarding its ability to deliver on its quoted tender price.⁶⁴ The court held that the procuring entity’s

⁶⁰ Para 33.

⁶¹ Para 33.

⁶² 3 of 2000.

⁶³ (1807/07) [2008] ZANWHC 12 (6 March 2008).

⁶⁴ Para 10 – 12.

decision was not justifiable in relation to the reasons given for it and it was not procedurally fair.

It is therefore submitted that the criteria that may potentially serve as “objective criteria” for the purposes of section 2(1)(f) of the Procurement Act, and which should as far as possible be disclosed to bidders in the tender documents include (1) the rotation of contracts amongst suppliers; (2) the protection of the environment and (3) the receipt of an abnormally low tender, provided that the bidder in question is allowed an opportunity to justify its tender. The court in *Rainbow Civils* however held that functionality criteria as provided for under the 2011 Procurement Regulations also qualify as “objective criteria” for the purposes of section 2(1)(f).⁶⁵ In what follows, attention is given to the treatment of functionality criteria first under the 2001 Preferential Procurement Regulations and thereafter under the current 2011 Procurement Regulations. The focus then shifts to the court’s interpretation of section 2(1)(f) of the Procurement Act and the requirement of functionality in *Rainbow Civils*.

4 THE ROLE OF “FUNCTIONALITY CRITERIA” IN THE PROCUREMENT PROCESS

4.1 The position under the 2001 Regulations

Under the 2001 Procurement Regulations, which lasted from around 2001 to the end of 2011, functionality could for the most part be incorporated into the award stage of the procurement process. In the determination of a winning bidder, points could be awarded not only for price and certain preference criteria, but also for functionality criteria. More specifically, functionality was an award criterion along with price.⁶⁶ A case in point is *TBP Building &*

⁶⁵ This is of course in line with the decisions in *Simunye Developers*, *Lohan Civil* and *First Base Construction* discussed above where the courts similarly held that criteria that relate to the ability of a supplier to perform the work in accordance with the tender specifications; the track record of a supplier in other related projects; its infrastructure and available financial resources and equipment; and necessary skills, experience, good financial standing and capacity qualify as “objective criteria”.

⁶⁶ Reg 8 as a whole provided as follows: “(1) An organ of state must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price. (2) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value equal to, or below, R500 000, not exceed 80 points. (3) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500 000, not exceed 90 points. (4) When evaluating the tenders contemplated in this item, the points for functionality must be calculated for each individual tenderer. (5) The conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication. (6) The points for price, in respect of a tender which has scored the specified number of points contemplated in sub-regulation (5) must, subject to the application of the evaluation system for functionality and price contemplated in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4. (7) Preferences for being an HDI and / or subcontracting with an HDI and / or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price. (8) Only the tender with the highest number of points scored may be selected”.

*Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd*⁶⁷ where the procuring entity allocated award points as follows: 70 for price, 20 for functionality and 10 for preference. The court noted its reservations about the use of functionality criteria during the award stage, as opposed to the qualification stage,⁶⁸ but held that because the procuring entity in question was a public entity and not strictly bound by the framework of the Procurement Act and 2001 Regulations, it was permissible for it to incorporate functionality criteria in the award stage.⁶⁹ In the subsequent case of *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality*,⁷⁰ the procuring entity was directly bound by the Procurement Act and 2001 Regulations. It adopted the same point allocation as in the *TBP Building & Civils* case and the court held that functionality criteria should serve as “qualification criteria” and should not form part of the award stage when points must be allocated only for price and preference. In particular, the court declared Regulations 8(2)-8(7) of the 2001 Regulations invalid because they were in conflict with section 2(1)(b) of the Procurement Act which provides that the 80 or 90 points out of 100 must be awarded for price only with the remainder of the points constituting preference points for historically disadvantaged individuals (HDIs) or the realisation of Reconstruction and Development Programme (RDP) goals. The National Treasury responded to the *Sizabonke Civils* case by issuing an instruction note on the precise role that functionality should play in the public tender process.⁷¹ In terms of the note, functionality was essentially restricted to a qualification criterion. Of importance, however, is that the instruction note stipulated that in construction procurement, procuring authorities “had to adhere to the prescripts of the Construction Industry Development Board (CIDB)”. This is commented on in greater detail below.⁷²

4.2 The position under the 2011 Regulations

Under the 2011 Procurement Regulations, all public entities are brought under the ambit of the Procurement Act and Regulations.⁷³ The approach to functionality is further largely similar to the one expressed in *Sizabonke Civils* and the National Treasury instruction note.

⁶⁷ (230/09) [2009] ZAECGHC 7 (17 March 2009).

⁶⁸ Para 19.

⁶⁹ The procuring entity in this case was a major public entity / state-owned enterprise and at the time these entities were not bound by the strict framework of the Procurement Act and 2001 Regulations. They are however bound under the current regime. For more on this, see Bolton P “The Regulation of Preferential Procurement in State-owned enterprises” (2010) 1 *Journal of South African Law* 101.

⁷⁰ (10878/2009) [2010] ZAKZPHC 23 (12 March 2010).

⁷¹ “National Treasury Instruction Note on the Amended Guidelines in Respect of Bids that Include Functionality as a Criterion for Evaluation” 3 September 2010 – available at www.treasury.gov.za (accessed: 3 October 2013).

⁷² Para 5.

⁷³ The 2011 Regulations became effective in December 2011, but the new entities are only bound since December 2012.

Unlike the 2001 Regulations, the 2011 Regulations also define the term “functionality” and lay down detailed provisions for its role in the procurement process. For starters, functionality is defined as:

“the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer.”⁷⁴

This definition is still relatively vague.⁷⁵ It is submitted, however, that in light of the fact that the phrase “among other factors” is included in the definition, functionality criteria for the purposes of the definition are likely to include criteria relating to the following:

- the nature, quality, reliability, viability and durability of the product or service offered⁷⁶ – goods or services of a poor quality clearly carry the risk of additional costs being incurred in future;
- the experience and track record of the supplier⁷⁷ – a supplier with little or no experience may be unable to render satisfactory performance;
- the possession of appropriate licenses and permits;⁷⁸
- the ability of the supplier to comply with the delivery schedule;⁷⁹
- the supplier’s record of business ethics and integrity (because the organ of state must be able to rely upon the supplier’s agreement);⁸⁰
- the technical knowledge and capacity of the supplier⁸¹ – inadequate technical knowledge or capacity on the part of a supplier may result in only partial completion of a contract resulting in extra costs to ensure full completion;
- the availability of tools or equipment for the supplier’s use;⁸²
- the financial and economic standing of the supplier⁸³ – this may require an organ of state to require of suppliers to submit statements from banks and / or balance sheets;

⁷⁴ Reg 1(k).

⁷⁵ For comments on the definition, see the draft article of Quinot G “The Role of Quality in the Adjudication of Public Tenders” submitted for review and publication in the Potchefstroom Electronic Law Journal (on file with the author).

⁷⁶ See Trepte P *Public Procurement in the EC* (1993) 162.

⁷⁷ *Ibid.*

⁷⁸ Schooner SL “The Paper Tiger Stirs: Rethinking Suspension and Debarment” (2004) 5 *Public Procurement Law Review* 211, 213.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ See Cirell SD and Bennett J *Compulsory Competitive Tendering: Law and Practice* (1991) para 13.8-3.12. See also Bright C *Public Procurement Handbook* (1994) 27.

⁸² Trepte P *Public Procurement in the EC* (1993) 162.

the aim being to determine the solvency of a supplier, whether it is in financial difficulty and how well resourced it is;

- the “good standing” of the supplier with the government – this will generally relate to its payment of taxes, levies and service charges to the government;
- possible qualifications or conditions to a supplier’s tender;
- commitments with regard to spare parts and after-sales service⁸⁴ – the unavailability of spare parts may lead to extra costs if parts have to be procured from another supplier, a poor after-sales service has similar consequences;
- the qualifications and competence of the personnel of the supplier⁸⁵ – if the personnel of a supplier lacks the necessary qualifications and competence in the field required this is likely to affect proper performance under the contract and may lead to loss suffered by an organ of state;
- compliance with labour and environmental laws; and
- the number of staff employed by the supplier.⁸⁶

Regulation 4 spells out the role of functionality criteria in the procurement process and stipulates that an organ of state must make clear in its tender invitation if bids will be evaluated on the basis of functionality.⁸⁷ The evaluation criteria for measuring functionality must be objective⁸⁸ and when evaluating tenders on functionality, the bid invitation must indicate the following: (1) the evaluation criteria for measuring functionality; (2) the weight of each criterion; (3) the applicable values; and (4) the minimum qualifying score for functionality.⁸⁹ A tender must be regarded as acceptable only if it meets the minimum qualifying score for functionality⁹⁰ and tenders that have achieved the minimum qualifying score for functionality must be evaluated further in terms of the 80/20 or 90/10 points system.⁹¹

⁸³ Bright C *Public Procurement Handbook* (1994) 27; Cirell SD and Bennett J *Compulsory Competitive Tendering: Law and Practice* (1991) para 13.13.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, 54. Functionality criteria can strictly speaking be distinguished from factors relating to so-called “responsiveness” / “administrative responsiveness”. The latter two terms would usually refer to whether or not a particular supplier’s bid complies with the tender specifications. In practice, however, functionality criteria and criteria to determine responsiveness may overlap. Functionality, for the purposes of this article, is therefore used in a broad sense, i.e. to include also responsiveness criteria.

⁸⁷ Reg 4(1).

⁸⁸ Reg 4(2).

⁸⁹ Reg 4(3).

⁹⁰ Reg 4(4).

⁹¹ Reg 4(5).

The National Treasury, through its Implementation Guide: Preferential Procurement Regulations 2011 (hereafter “the Guide”),⁹² provides further clarity on the role of functionality in the contracting process. Firstly, the Guide stipulates that not all bids should be invited on the basis of functionality. Whether or not functionality should play a role in the contracting process must be determined by the nature of the required commodity or service taking into account factors such as quality, reliability, viability and durability of the service and the bidders’ technical capacity and ability to execute the contract.⁹³ The evaluation criteria for functionality, which must be specified in the bid documents, may include relevant experience, qualifications of key personnel, transfer of knowledge, etc.⁹⁴ The weight to be allocated to each criterion must not be generic, but determined with reference to each bid on a case by case basis.⁹⁵ The scoring for each criterion should also be objective. For example, the following values may be used: 1 may mean poor, 2 average, 3 good, 4 very good, and 5 may mean excellent.⁹⁶ The minimum qualifying score for functionality to qualify for further evaluation must not be generic, but determined separately with reference to each bid. The minimum qualifying score must also not be so low that quality is jeopardised. At the same time, it must not be too high to ensure fair treatment of bidders.⁹⁷

The Guide further makes clear that if functionality is relevant to the particular procurement, bids must be evaluated in two stages.⁹⁸ During the first stage, an organ of state must assess functionality in accordance with the stated criteria. There must be no amendments of the functionality criteria, weightings etc. after the closure of bids to ensure fairness, and bids must only be considered further if the minimum qualifying score for functionality is achieved. Any bids that do not meet the minimum qualifying score must be disqualified. Organs of state must use score sheets to evaluate bids and such score sheets should contain all the criteria and weight for each functionality criterion and the values applied for evaluation as stated in the bid documents. Each member on the bid committee / panel should after thorough evaluation independently award his / her own value to each functionality criterion. The score sheets should further be signed by the bid committee members and if necessary, written motivations may be requested from members if vast discrepancies in values are awarded for each criterion.

⁹² Implementation Guide: Preferential Procurement Regulations 2011, Pertaining to the Implementation of the Preferential Procurement Policy Framework Act, Act No 5 of 2000 (1 December 2011) – available at www.treasury.gov.za (accessed: 6 September 2013).

⁹³ Para 6.1.

⁹⁴ Para 6.2(a).

⁹⁵ Para 6.2(b).

⁹⁶ Para 6(2)(c).

⁹⁷ Para 6(2)(d).

⁹⁸ See para 11.

The Guide also provides a formula for the calculation of functionality criteria. The percentage of each member should be added and divided by the number of members to determine the average percentage by each bidder for functionality. During the second stage, only the bids that achieved the minimum qualifying score for functionality must be evaluated further in terms of the 80/20 or 90/10 points system prescribed in the Procurement Act.

In terms of the 2011 Procurement Regulations therefore and also the National Treasury's Implementation Guide, the functionality of bids must be determined prior to the adjudication of tenders on the basis of price and preference. A two stage process must be followed in terms of which functionality must be assessed. Only those bids that meet the minimum criteria for functionality then qualify for consideration during the second stage when points are awarded only on the basis of price and preference. The Regulations also make clear that if an organ of state intends to evaluate bids on the basis of functionality, it must lay down clear criteria for such evaluation to enable bidders to submit responsive bids. A failure to disclose such clear and unambiguous criteria will affect the validity of the entire procurement process. This was confirmed in *Toll Collect Consortium v South African National Road Agency Ltd*⁹⁹ and also in the more recent case of *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality*.¹⁰⁰ The Guide further emphasises and reinforces the approach followed in the 2011 Regulations on the evaluation of bids that score equal points.¹⁰¹ Most importantly, it stipulates that if functionality forms part of the evaluation process and two or more bids score equal points, including equal preference points for BBBEE, then the contract must be awarded to the bidder who scores the highest points for functionality.

It is clear therefore that the functionality provisions in the 2011 Regulations are very precise – no discretion appears to be afforded to organs of state on the manner in which they want to incorporate functionality criteria in the procurement process. Once they determine that functionality is relevant to the particular procurement, the procedures for including functionality in the procurement process are clearly spelled out in the Regulations and further elaborated on in the Implementation Guide to the Regulations. The recent case of *Rainbow Civils* however throws a spanner in the works and creates renewed uncertainty around the precise role of functionality criteria in the procurement process. In what follows, attention is

⁹⁹ (8422/2011) [2012] ZAKZDHC 43 (27 July 2012).

¹⁰⁰ (641/2012) [2013] ZAECGHC 76 (1 August 2013).

¹⁰¹ See para 14.

given to the courts' interpretation of section 2(1)(f) of the Procurement Act and the requirement of functionality.

4.3 The decision in *Rainbow Civils*

In this case, the procuring entity called for tenders for the management of building maintenance services and a two-stage process was followed for the evaluation of tenders. In the first stage, bidders were allocated scores for pre-disclosed functionality criteria. Only those bidders who met the minimum qualifying score of 60 out of 100 were then evaluated during a second stage where points were awarded for the price and preference components of their bids. The price and preference points of the bidders were then added up and the contract was awarded to the highest scoring bidder in terms of section 2(1)(f) of the Procurement Act. The applicant in this case was an unsuccessful bidder and argued, *inter alia*, that the contract should have been awarded to it on the ground that there was a significant difference between its functionality score (95%) and that of the winning bidder (64%). The applicant argued that the significant difference in functionality scores should have been considered by the procuring entity. More importantly, the applicant argued that functionality in this case was an "objective criterion" within the meaning of section 2(1)(f) of the Procurement Act that would justify the award of the contract to itself even though it did not score the highest points.

The court agreed and held that it is a "constitutional imperative" that the public procurement system be cost-effective and that functionality play a role in the determination of a winning bidder.¹⁰² The court reasoned that it is not cost effective to award a contract to a bidder "who ticks the right boxes as regards price and preference", but who is unable to properly perform the contract "whether through lack of experience, adequate personnel or financial resources".¹⁰³ Functionality, the court held, must be taken into account in the adjudication of tenders and "should not be relegated to a mere qualifying criterion".¹⁰⁴ The court reasoned that "functionality should not be ignored in the final adjudication between competing tenders, and should be taken into account within the parameters of the Procurement Act".¹⁰⁵ The court then placed reliance on section 2(1)(f) of the Procurement Act and confirmed its preemptory nature. It held that section 2(1)(f) –

"posits a two-stage enquiry: the first step is to determine who scored the highest points in terms of the 90/10 points system; the next stage is to determine whether objective

¹⁰² Para 109-110.

¹⁰³ Para 109.

¹⁰⁴ Para 110.

¹⁰⁵ Para 110.

criteria exist, in addition to or over and above those referred to in sections 2(d) and (e), which justify the award of the tender to a lower scoring tenderer.”¹⁰⁶

The court then held that “functionality or capacity is a relevant consideration and an objective criterion for the purposes of section 2(1)(f) of the Procurement Act”.¹⁰⁷ Functionality or capacity should play a role when a procuring entity decides whether or not a tender should be awarded to a bidder other than the highest scoring one.¹⁰⁸ The court then found that the procuring entity in the present case awarded the contract to the highest scoring bidder and had no regard to the difference in functionality scores between the bidders. This, the court held, warranted the setting aside of the award because there was a failure on the part of the procuring entity to comply with the mandatory procedures and conditions of the empowering provision (i.e. section 2(1)(f) of the Procurement Act) in terms of section 6(2)(b) of the Promotion of Administrative Justice Act (PAJA),¹⁰⁹ and there was a failure to take relevant considerations into account in terms of section 6(2)(e)(iii) of PAJA.¹¹⁰

The court in *Rainbow Civils* therefore laid down a three-stage process for the award of tenders. During the first stage, tenders are evaluated on the basis of pre-disclosed functionality criteria. Only bidders who comply with the minimum criteria for functionality are then evaluated further during the second stage on the basis of price and preference with the aim of identifying the highest scoring bidder. Thereafter, a procuring entity must during the third stage of evaluations determine whether there are other objective criteria, including functionality criteria, which justify the award of the contract to a bidder other than the highest scoring one. The court therefore held that functionality criteria must serve as pre-qualification and award criteria. More specifically, the court held that functionality must serve as a possible “objective criterion” within the meaning of section 2(1)(f) of the Procurement Act for the award of a contract to a bidder who does not score the highest points. In what follows, comments are made on the decision in *Rainbow Civils* and guidance is offered on the role of functionality criteria in the South African context.

¹⁰⁶ Para 111 – referring to *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T) para 40 – 41.

¹⁰⁷ Para 110.

¹⁰⁸ Para 110.

¹⁰⁹ 3 of 2000.

¹¹⁰ Para 114.

5 COMMENTS ON THE DECISION IN *RAINBOW CIVILS* AND GUIDANCE ON THE USE OF FUNCTIONALITY CRITERIA IN THE SOUTH AFRICAN CONTEXT

The decision in *Rainbow Civils* can be commended for confirming the peremptory nature of section 2(1)(f) of the Procurement Act and the two-stage enquiry that must take place. As argued above, however,¹¹¹ it is this author's view that even though section 2(1)(f) is cast in peremptory terms and lays down a two-stage enquiry, the objective criteria that may justify the award of a contract to a bidder who does not score the highest points is highly constrained. This is particularly so in the context of functionality criteria. As noted above, the new 2011 Procurement Regulations lay down very specific procedures for the incorporation of functionality criteria in the procurement process. In essence, functionality criteria are provided for as qualification / entry level requirements. It would be curious for an organ of state to lay down minimum functionality criteria that bidders must comply with in order to qualify for further consideration if such functionality criteria will in any event "have the last say" after the award of points for price and preference. Expecting bidders to meet certain minimum functionality criteria must surely serve some purpose. It is submitted that the purpose of laying down minimum criteria should be to ensure that all bidders who meet them *qualify* for the award of the contract, i.e. they are, subject to meeting (additional) "administrative responsiveness" criteria,¹¹² *capable* bidders with the necessary skills and capacity to render performance under the contract.

Allowing a third compulsory evaluation stage which *re-introduces* functionality in the evaluation process has tremendous repercussions. If "objective criteria" in the form of pre-disclosed functionality criteria can in each and every procurement process determine the final outcome, the use of the 80/20 and 90/10 points system as prescribed in the Procurement Act and Regulations is effectively circumvented. The award of contracts would fall purely within the discretion of organs of state, which is precisely what the Procurement Act and the 2011 Regulations aim to avoid. The award of contracts by organs of state in South Africa is in general very strictly regulated and is not discretion based. In fact, most academics, practitioners and government officials would agree that the procurement function of the state

¹¹¹ Para 3.2.

¹¹² See footnote 86 above.

is at present overregulated; very little if any discretion is left to organs of state when exercising their procurement power.¹¹³

It is this author's view that where minimum functionality criteria were laid down in the tender documents, which was the case in the *Rainbow Civils* case, bidders who meet the prescribed minimum requirements are entitled to be evaluated further only on the basis of price and preference. As provided for in the 2011 Regulations, the scores obtained for functionality criteria should be looked at again (only) where two or more bidders score the same number of points for both price and preference.¹¹⁴ Only in such a scenario, and where functionality formed part of the evaluation process, should the higher functionality score determine the final outcome of the award.

It can, moreover, be argued that it is possible for the five principles in section 217(1) of the Constitution to be met irrespective whether functionality is a qualification criterion, an award criterion or both.¹¹⁵ The argument in *Rainbow Civils* on the link between functionality as an award criterion and the attainment of cost-effectiveness in the tender process is not a sound one. Compliance with functionality criteria is obviously a very important consideration for the determination of value for money. This does not, however, mean that functionality criteria must serve as award criteria. An organ of state must simply make sure that the threshold scores that it lays down for the respective functionality criteria reflect the attainment of value for money.

One may ask what the "verdict" would be if functionality criteria did *not* form part of the evaluation process, i.e. the procuring entity did not, as was done in the *Rainbow Civils* case, lay down minimum functionality criteria that bidders were required to meet in order to qualify for further evaluation. Could a procuring entity in such a case rely on functionality as an "objective criterion" to justify the award of a contract to a bidder who does not score the highest points for price and preference? It is submitted that this scenario is open to abuse – procuring entities could intentionally decide to exclude functionality criteria from the formal qualification process with the aim of using them as "objective criteria" to justify the award of a contract to a bidder who does not score the highest points. It is this author's view that where

¹¹³ See also Quinot G "Die reg se oënskynlike overmoë om korrupsie in staatskontraktering in Suid-Afrika hok te slaan" *LitNet Akademies Jaargang* 10(1) ISSN 1995-5928 (29 March 2013) who writes on the fragmented nature of the procurement regulatory regime.

¹¹⁴ See reg 11(5)(b).

¹¹⁵ See also the draft article of Quinot 18.

a procuring entity resorts to using undisclosed functionality criteria as justification for awarding a contract to a bidder other than the highest scoring one, the onus should be on the procuring entity to justify why such functionality criteria were not disclosed to bidders as qualification criteria in the tender documents. This is particularly so in light of the fact that Regulation 4(1) of the 2011 Procurement Regulations stipulates in no uncertain terms that an organ of state “must” make clear in its tender invitation “if” bids will be evaluated on the basis of functionality. An argument can also be made that if undisclosed functionality criteria are considered significant enough by a procuring entity to justify the award of a contract to a bidder other than the highest scoring one, then such criteria should have been considered important enough in the evaluation process to warrant pre-disclosure in the tender documents.

A further question that needs attention is whether functionality criteria should serve a different purpose in the context of construction procurement, bearing in mind that the contract in *Rainbow Civils*, in particular, involved a construction contract.¹¹⁶ The Draft Treasury Regulations to the Public Finance Management Act¹¹⁷ moreover provide in Regulation 30.7.3 that in construction procurement –

“quality may be evaluated in tender offers together with [the] preference points system as other objective criteria in terms of section 2(1)(f) of the [Procurement Act] in accordance with the provisions of the Standard for Uniformity in Construction Procurement issued in terms of the Construction Industry Development Board Act.”

A similar approach was of course adopted in the earlier instruction note issued by the National Treasury in response to the decision in *Sizabonke Civils*.¹¹⁸ It would appear therefore that irrespective of the clear controversy that surrounds the use of functionality criteria as award criteria as argued above, and more specifically as an “objective criterion” for the purposes of section 2(1)(f) of the Procurement Act, public procurement adjudication in South Africa appear to be heading in the direction where functionality criteria will serve as both “qualification criteria” and as “award criteria” via the backdoor of section 2(1)(f) of the Procurement Act.¹¹⁹

It is this author’s view that there is no sound basis for functionality criteria to serve a different purpose in the context of construction procurement. Construction procurement is, moreover,

¹¹⁶ The contract in *TBP Building & Civils* was also a construction contract.

¹¹⁷ 1 of 1999.

¹¹⁸ See para 4.1 *supra*.

¹¹⁹ See also the draft article of Quinot 18-20.

not excluded from the scope of the compulsory framework of the Procurement Act and 2011 Regulations. Her argument would accordingly be the same: if an organ of state procuring a construction contract sees fit to specify minimum qualifying criteria for functionality, it should as a rule not be able to take into account such functionality criteria also after the award of points for price and preference. If certain functionality criteria are vital for the implementation and performance of a particular contract, the bar should simply be set higher for such criteria during the qualification phase.¹²⁰ A procuring entity should also, as a rule, not be able to rely on *undisclosed* functionality criteria as an “objective criterion” for the award of a construction contract to a bidder who does not score the highest points. The same arguments made above would apply here.

It seems important to briefly explain why the earlier decisions of *Simunye Developers*, *Lohan Civil* and *First Base Construction* discussed above¹²¹ are less problematic than the decision in *Rainbow Civils*. It will be recalled that these cases were decided under the 2001 Regulations and the courts in these cases held that criteria that relate to the ability of a supplier to perform the work in accordance with the tender specifications; the track record of a supplier in other related projects; its infrastructure and available financial resources and equipment; and necessary skills, experience, good financial standing and capacity would qualify as “objective criteria” for the purposes of section 2(1)(f). It must be stressed, however, that functionality criteria played a very different role under the 2001 Regulations. At the time when these cases were decided, functionality criteria could serve as qualification criteria and as award criteria. More specifically, they could be incorporated into the price component of the preference points system. The role of functionality criteria under the 2011 Regulations differs remarkably; they are provided for only as qualification criteria and may not form part of the preference points system.

6 CONCLUSION

When organs of state evaluate tender offers, they more often than not consider not only the price of the respective suppliers, but also other criteria such as experience and track record, qualifications of the respective suppliers’ staff, and the quality of the products offered, etc. The rules that apply to the consideration of these “functionality” criteria have undergone significant changes in South African law. As noted, functionality criteria could under South

¹²⁰ See also Anthony A “The Legal Regulation of Construction Procurement in South Africa” (unpublished LLM thesis, Stellenbosch University) 180.

¹²¹ Para 3.1.

Africa's old 2001 Procurement Regulations be included in the preference points system and could form part of the "price component". The decision in *Sizabonke Civils* however changed this and the new 2011 Procurement Regulations provide in no uncertain terms that functionality criteria are "qualification criteria". As such, they may no longer be incorporated into the price component of the preference points system. The recent decision in *Rainbow Civils*, however, raises the question whether functionality criteria qualify as an "objective criterion" for the purposes of section 2(1)(f) of the Procurement Act, and as such can play a role *after* the application of the preference points system. It has been argued in this paper that even though section 2(1)(f) provides for the award of a contract to a bidder other than the highest scoring one, the "objective criteria" that may justify such an award is highly constrained. Both the 2001 and 2011 Regulations are very precise on the award of points for preference. The manner in which functionality criteria has further been provided for in the 2011 Procurement Regulations do not qualify them as "objective criteria" for the purposes of section 2(1)(f). Possible examples of criteria that may qualify as "objective criteria" for the purposes of section 2(1)(f), and which should as far as possible be disclosed to bidders in the tender documents include (1) the rotation of contracts amongst suppliers; (2) the protection of the environment and (3) the receipt of an abnormally low tender, provided that the bidder in question is allowed an opportunity to justify its tender.