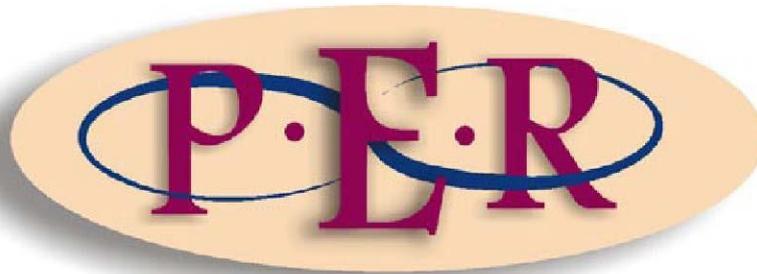


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THE ROLE OF QUALITY IN THE ADJUDICATION OF PUBLIC TENDERS

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1 Introduction

The quality, in public procurement regulation usually referred to as functionality,¹ of the goods or services that government procures is obviously a very important consideration in deciding which supplier should be awarded a particular public tender. It follows that in the regulation of public procurement particular attention should be given to the role of functionality in the adjudication of public tenders and the final award decision. In South African public procurement law, the role of functionality in public tender adjudication has been a fairly controversial issue that has resulted in a continuing interaction between courts and law-makers on how and when quality should be assessed and how it should impact on the final award decision within the framework for public procurement found in section 217 of the *Constitution*.²

In this contribution I track the development of the role of functionality in public tender adjudication as prescribed by public procurement regulation since the enactment of the *Preferential Procurement Policy Framework Act*,³ which spearheaded the development of contemporary public procurement regulation in South Africa. The analysis shows how the role of functionality has constantly changed since the enactment of the PPPFA and remains uncertain. This uncertainty

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¹ The terms "quality" and "functionality" are not necessarily synonymous, but in the present context they are treated as referring to the same broad notion of the substantive quality of the goods or services procured. Preference is given to the term "functionality" here, since that is the term mostly used in domestic procurement rules, as will become clear below.

² *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*). S 217(1) reads: "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

³ *Preferential Procurement Policy Framework Act* 5 of 2000 (hereafter the PPPFA).

relates to different interpretations of the constitutional requirements for public procurement primarily contained in section 217(1) of the *Constitution*.

Before we can engage in an analysis of how the law structures the role of functionality in procurement adjudication we need to have clarity on two conceptual issues. Firstly, we need to set out the basic notions of qualification and award criteria in the process of public tender adjudication and the distinction between them. As the subsequent analysis will show, these are the two competing roles assigned to functionality in South African public procurement regulation. Secondly, we need to develop an understanding of what functionality refers to in the context of public procurement adjudication.

2 Qualification and award criteria in public tender adjudication

In tender adjudication, the most basic distinction between qualification criteria⁴ and award criteria is based on the use to which a particular criterion is being put. Award criteria are used to compare bidders *inter se* and to arrive at a ranking between the competing tenders; they are thus used in a "relative" sense.⁵ Qualification criteria, on the other hand, are not used in this comparative or relative way, but rather to determine if an individual bidder will be able to successfully perform under the envisaged procurement contract.⁶ Qualification criteria are thus used in a "binary" way:⁷ bidders either qualify or they do not. Subject to this distinction in use, the same criteria (and evidence) could theoretically be used as qualification and/or award criteria.⁸ For example, the past experience of bidders may be a factor in both determining if a bidder is qualified to bid and in comparing bids to determine which bid is the best. Past experience, expressed as a minimum number of successfully completed contracts of a similar nature, may thus be stated as a qualification criterion for participation in a particular tender. As an award criterion, the quantity

⁴ Also sometimes referred to as selection criteria or in the US context, responsibility criteria.

⁵ Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 689.

⁶ Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 689.

⁷ Kruger 2009 *PPLR* 138-145, 138.

⁸ Whether a contracting authority may use such same measurement as qualification and award criteria would of course depend on the prescripts of the particular procurement regulatory regime.

and/or quality of successfully completed contracts of a similar nature can at the same time play a role in comparing bids.

Where there is a pre-qualification process, which might require qualified bidders to participate in certain types of contracts prior to the call of a particular tender,⁹ the distinction between qualification and award criteria is usually not problematic.¹⁰ However, where qualification to participate in a particular tender is determined in respect of that tender only, the distinction may become conceptually more difficult and create problems. In such a case the contracting authority must substantively assess both the qualification and the award criteria during the adjudication of the particular tender and arrive at distinct determinations on both counts. Such distinct assessments constitute different stages of the procurement process and may be subject to different rules. It is especially in cases of services (and related complex) procurement that the distinction between qualification and award criteria may become blurred.¹¹ In these cases criteria such as past experience and the profile of the supplier, including factors such as the qualifications and experience of personnel, management structures, capacity and resources, may be equally relevant to a particular bidder's ability to perform under the contract (as qualification criteria) and the merit of that bidder's bid compared to other bids (as award criteria).¹²

The notions of qualification (criteria) and award (criteria) are further complicated by the introduction of a third concept, namely that of responsiveness. A bid will be considered responsive if it complies in all material respects with the tender specifications.¹³ Responsiveness can be assessed in both formal and substantive terms, referring to the different aspects of the tender call that a bid must comply with. Formally it must contain all the information required and in the prescribed format. Substantive responsiveness refers to the compliance of the offer contained

⁹ This can for example be done by maintaining a database of suppliers from which bids are requested or by relying on industry registration systems.

¹⁰ Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 598.

¹¹ Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 598; Treumer 2009b *PPLR* 146-154, 153; Petersen 2011 *PPLR* NA249.

¹² Treumer 2009a *PPLR* 107. Also see the examples in Andersson 2009 *PPLR* NA189-NA191; Comba 2009 *PPLR* 122-127; Kruger 2009 *PPLR* 142-144; Petersen 2011 *PPLR* NA248; Timmermans and Bruyninckx 2009 *PPLR* 128-137, 132-133; Treumer 2009b *PPLR* 149-150.

¹³ Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 650.

in the bid with the specifications of the goods or services requested in the tender call. In other words, substantive responsiveness refers to the question of whether or not the bidder offered what the contracting authority requested. The notion of responsiveness can thus be viewed as both distinct from and overlapping with that of qualification, in particular where the latter is done in relation to the specific tender rather than through a generalised pre-qualification process. Thus, where for example a tender call states that bidders must offer a particular service by personnel of a stated qualification, a bid by a bidder with personnel of lesser qualifications offering the same service will be non-responsive *and* that bidder will not meet the qualification criteria. In this example, the failure to meet the qualification criteria can be viewed as resulting in non-responsiveness.

While it is possible to describe the notion of responsiveness as referring to the compliance of the *bid* with the tender call as opposed to the notion of qualification, which refers to the compliance of the *bidder* with stated requirements in the tender call,¹⁴ the examples above illustrate that it is not always easy or possible to distinguish between these two notions. It is especially in cases of complex services procurement that the distinction between responsiveness and qualification seems to break down. As noted above, it is also in this context where the distinction between qualification and award criteria becomes blurred.¹⁵ It follows that in these types of procurement, the same criteria (or evidence) may be used to assess qualification, responsiveness and award in the broader tender adjudication process.

In the rest of this article qualification criteria will be viewed in the broader sense of referring to the substantive compliance of a bid with all aspects of the tender call, that is essentially substantive responsiveness. The reason for this approach, as will become clear below, is that the definition of "functionality" in South African public procurement regulation captures both the narrow concept of qualification (as referring only to the bidder's qualification) and that of substantive responsiveness (also capturing the bid's compliance with the tender call). In the legal debate about

¹⁴ Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 672.

¹⁵ Treumer 2009a *PPLR* 107.

whether functionality should be used as an award criterion or only a qualification criterion, the notion of substantive responsiveness is thus implicated in the latter.

3 The meaning of "functionality"

Before we can focus on the role of functionality in the award of public tenders it is necessary to have clarity on what exactly functionality means in this context. As noted above, in the public procurement context functionality is generally understood as referring to the quality of the goods or services procured. A complete analysis of what quality or functionality may mean in this context would require an article on its own and is not the purpose of this contribution.

For present purposes the definition of functionality, which is used as a synonym for quality here, in the Preferential Procurement Regulations, 2011,¹⁶ will suffice:

"functionality" means 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.

This definition captures the two main elements that may be viewed as constituting functionality, namely the quality of the actual goods or services procured, that is the substantive characteristics of the subject matter of the procurement, as well as characteristics of the tenderer to the extent that those relate to the subject matter of the procurement. As will become clear in the discussion below, this definition is also now the most authoritative one in public procurement regulation generally.

Subject to the *caveat* above that the meaning of functionality is not the topic of this contribution, a few remarks about the quoted definition of functionality are necessary. Firstly, the definition above seems anomalous in that it refers to the "quality, the reliability ..." etc of a "service" only, and not of goods. However, this should not be interpreted as meaning that the functionality of goods is not to be assessed with reference to the same factors as listed in the definition with reference

¹⁶ Reg 1(k), GN R502 in GG 34350 of 8 June 2011 (hereafter the Preferential Procurement Regulations, 2011), issued under the PPPFA.

to services. The omission of goods alongside services in this part of the definition is probably only an oversight¹⁷ and does not make any real difference since the definition refers to these factors only by way of example, as is made clear by the phrase "among other factors" preceding this part of the definition. A second remark is to emphasise that the definition clearly indicates that it is only the substantive quality of the goods or services procured that forms part of the concept of functionality. Thus, the characteristics of the supplier are relevant in this context only to the extent that they impact on the substantive quality of the goods or more likely the services at issue. Thus, at the danger of belabouring the point, characteristics of the tenderer that do not impact on the actual substantive quality of the goods or services procured in the particular contract are irrelevant for the purpose of determining functionality.¹⁸ Thus, the locality of the tenderer, for example, can form part of a functionality assessment only if it is truly relevant to the services procurement, such as in a case where personal services are procured and the actual presence of the supplier is required for such services to be rendered.

The definition above sets out only the basic legal parameters within which quality must be judged in a particular tender adjudication. As the definition contemplates, the actual norms that will determine the measurement of quality will be stated in the tender documents of a particular procurement. There are, however, a number of further guidelines issued under various statutory instruments that give additional content to the concept of functionality. In its guidelines on the implementation of supply chain management policies, National Treasury has advised that

¹⁷ The definition of "functionality" in the earlier *Instruction Note on the Amended Guidelines in Respect of Bids that Include Functionality as a Criterion for Evaluation* of September 2010 (National Treasury *Instruction Note*), issued by the National Treasury in terms of s 76(4)(c) of the *Public Finance Management Act 1 of 1999* (hereafter the PFMA), was virtually identical to the one now found in reg 1(k) quoted above, except that the word "commodity" follows "services" in the relevant part of the definition (preceding the words "and the technical"). The same definition, with the inclusion of the said words "or commodity", also appear in the draft Treasury Regulations published for comment under the PFMA, GN 1005 in GG 35939 of 30 November 2012, reg 20.1.

¹⁸ This is not to say that such characteristics are irrelevant in the final award decision. They may play an important and even determinative role in the final award decision, but simply not as part of the functionality assessment. Quite a number of such characteristics are in fact brought into the award decision at other stages of tender adjudication, such as in the preferential points system under the PPPFA or the requirement that tenderers be tax compliant. The important point, however, is to note that these characteristics do not impact on the quality of the goods or services procured and can accordingly not be viewed as part of the functionality assessment.

"specifications should be based on relevant characteristics and/or performance requirements" and that "brand names, catalogue numbers, or similar classifications should be avoided" in formulating functionality measurements.¹⁹ In the construction context, the Construction Industry Development Board describes "functionality" as "the totality of features and characteristics of a product or service that bears on its ability to satisfy stated or implied needs" in its Standard for Uniformity in Construction Procurement.²⁰ The CIDB Standard continues to provide further guidelines on what functionality may and may not refer to, including that factors constituting quality in a given procurement "shall ... relate directly to the supplies, services or engineering and construction works that are being procured" and "shall not include ... social considerations".²¹

With this basic understanding of what functionality refers to in the procurement context, we can now turn to the role that public procurement regulation assigns to functionality in the public procurement adjudication process.

4 The first round: functionality as an award criterion

The first distinct role given to functionality in public tender adjudication following the introduction of the PPPFA was that of an award criterion along with price. The Preferential Procurement Regulations, 2001²² stipulated that contracting authorities may evaluate bids on both price and functionality in addition to the preferential procurement dimension.²³ Under such an approach, price and functionality combined would be accorded 80 out of a total of 100 points for contracts below R500 000 and 90 out of a total of 100 points for contracts above R500 000.²⁴ This meant that bids could be compared on the basis *inter alia* of functionality, which would subsequently

¹⁹ National Treasury *Supply Chain Management*.

²⁰ BN 9 of 2008 in GG 30692 of 1 February 2008 (hereafter the CIDB Standard), issued in terms of ss 4(f), 5(3)(c) and (4)(b) of the *Construction Industry Development Board Act 38 of 2000* (hereafter the CIDB Act).

²¹ The CIDB Standard. Further detailed guidelines on what should be included in quality assessment in construction procurement are given in the CIDB's *Procurement Best Practice Guideline A4*.

²² GN R725 in GG 22549 of 10 August 2001 (hereafter the Preferential Procurement Regulations, 2001), issued in terms of s 5 of the PPPFA.

²³ Preferential Procurement Regulations, 2001 reg 8.

²⁴ Preferential Procurement Regulations, 2001 reg 8(2) and (3).

also influence the final ranking of bids on the basis of which the tender would be awarded, ordinarily to the highest scoring bidder.²⁵

The problem with this approach to functionality was that the PPPFA stated clearly that 80 or 90 points (depending on the value of the contract) had to be accorded to price, with the remainder of the points constituting preference points for historically disadvantaged individuals or the realisation of RDP goals.²⁶ The Act thus did not contemplate the use of functionality as an award criterion.

In two notable High Court cases this inconsistency between the Act and regulations was raised. The first of these, *TBP Building & Civils (Pty) Ltd vs East London Industrial Development Zone (Pty) Ltd*,²⁷ was an application for interim relief pending a review application of a tender award. In this matter the respondent contracting authority indicated in the tender documents that "PPPFA principles" will apply in adjudicating the bids received and that evaluation of bids will be done on the following basis:

70 points for price;
20 points for functionality;
10 points for BBBEE.²⁸

This is a fairly typical illustration of the use of functionality alongside price as an award criterion under the Preferential Procurement Regulations, 2001 and in accordance with the CIDB Standard. The applicant challenged this approach *inter alia* on the basis that the PPPFA does not allow for functionality to be combined with price in the award stage of adjudication as the Preferential Procurement Regulations, 2001 and the current tender in reliance thereupon attempted to do. In principle Froneman J agreed that the PPPFA and the Preferential Procurement Regulations,

²⁵ PPPFA s 2(1)(f), which reads: "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".

²⁶ PPPFA s 2(1)(b).

²⁷ *TBP Building & Civils (Pty) Ltd vs East London Industrial Development Zone (Pty) Ltd* 2009 ZAECHC 7 (17 March 2009) (hereafter the *TBP Building & Civils* case).

²⁸ *TBP Building & Civils* case para 20.

2001 "appear to be at odds with each other" in this respect.²⁹ However, since the respondent contracting authority was not directly bound by the PPPFA,³⁰ but the provisions of the Act and its regulations became relevant only through incorporation in the tender documents, Froneman J held that the problem of tension between the PPPFA and the adjudication method adopted in this case should not be judged as a matter of legality, but rather as a matter of fairness in the present instance.³¹ The judge accordingly held that because the method of adjudication was clearly stated in the tender documents there could be no uncertainty on the part of tenderers as to how their bids were to be adjudicated.³² Furthermore, the contracting authority had strictly adhered to this stated method. Froneman J thus held that there could be no complaint of unfairness in this case.³³ Particularly noteworthy, and a point we shall return to below, is Froneman J's assessment in terms of section 217(1) of the *Constitution* of the use of functionality both as a qualification criterion in a first stage of adjudication and as an award criterion in a second stage:

[T]here is in my judgment nothing offensive either in using quality or functional assessments as an initial threshold requirement, as well as then using them again as part of a second assessment amongst those who passed the initial threshold. The repetition is not unfair (the same scores are used); it does not affect equity requirements (those are met in the BBBEE points allocation); the process remains competitive (not only in relation to price), and effectiveness is enhanced (price *and* functionality count).³⁴

While this judgment thus cast some doubt on the legality of the use of functionality alongside price as an award criterion under the PPPFA, it did not hold such a practice to be invalid, primarily because the contracting authority involved in this case was not directly bound by the PPPFA.

In the second noteworthy judgment, *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality*,³⁵ the contracting authority involved was directly bound

²⁹ *TBP Building & Civils* case para 19.

³⁰ The respondent was not an organ of state as defined in the PPPFA.

³¹ *TBP Building & Civils* case para 24.

³² *TBP Building & Civils* case para 25.

³³ *TBP Building & Civils* case para 27.

³⁴ *TBP Building & Civils* case para 26.

³⁵ *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality* 2011 4 SA 406 (KZP) (hereafter the *Sizabonke Civils* case).

by the PPPFA.³⁶ In this matter the respondent contracting authority called for tenders and indicated in the tender documents that the award criteria would be HDI status and local presence (10 points), price (70 points) and functionality (20 points), which is an adjudication method virtually identical to that used in the *TBP Building & Civils* case above. The applicant, an unsuccessful bidder, subsequently challenged the tender award on the basis of the inconsistency between this adjudication method, based on the Preferential Procurement Regulations, 2001, and the PPPFA. It also sought an order declaring the regulations invalid to the extent of the inconsistency.

The court had no difficulty in holding that the Preferential Procurement Regulations, 2001 were inconsistent with the PPPFA to the extent that they purported to grant contracting authorities a discretion to use functionality as an award criterion alongside price, whereas the Act restricts award criteria to price and preference points.³⁷ Gorven J also held that "price" as used in the PPPFA could not be interpreted to include functionality as these "are entirely distinctive concepts".³⁸ The court thus held that the award of the tender on the basis of this adjudication method was contrary to the PPPFA and had to be set aside.³⁹ Likewise, the court held that the relevant provisions of the Preferential Procurement Regulations, 2001 that purported to introduce functionality as an award criterion were unlawful and thus invalid.⁴⁰

The *Sizabonke Civils* judgment thus effectively brought to an end the use of functionality as an award criterion.

National Treasury responded to this development by issuing an instruction note on how functionality had to be handled in tender adjudication in future.⁴¹ In terms of this instruction note functionality was, for the most part, restricted to a qualification criterion.

³⁶ Municipalities are expressly included in the definition of organ of state in s 1 of the PPPFA.

³⁷ *Sizabonke Civils* case para 11.

³⁸ *Sizabonke Civils* case para 10.

³⁹ *Sizabonke Civils* case para 24.

⁴⁰ *Sizabonke Civils* case para 34.

⁴¹ National Treasury *Instruction Note*.

5 Round two: functionality as a qualification criterion

National Treasury's 2010 response to the *Sizabonke Civils* ruling instructed national and provincial contracting authorities to adopt a two-stage approach to tender adjudication in procurement, where functionality forms part of the tender specifications.⁴² In the first stage the functionality of the goods or services offered must be assessed, using the pre-determined measurement criteria. Only bidders obtaining a set minimum score for functionality in this stage should consequently be ranked in stage two on the basis of price and preference points. In terms of this approach functionality thus becomes exclusively a qualification criterion and no ranking of bidders is done on the basis of functionality. The scores awarded to bidders for functionality are used only to determine whether they meet the minimum threshold on functionality required to proceed to the second round of adjudication.

While there was at the time of the 2010 instruction note no specific legal basis for the use of functionality as a qualification criterion, the power given to individual contracting authorities in terms of the PFMA to create their own supply chain management policies to regulate their procurement⁴³ subject to instructions and guidance from the National Treasury⁴⁴ was probably wide enough to allow for the adoption of the two-stage adjudication approach with functionality as a qualification criterion.

Somewhat more problematic was the statement in the 2010 instruction note that in construction procurement contracting authorities had to "adhere to the prescripts of the Construction Industry Development Board".⁴⁵ As a general statement and on its own there is nothing wrong with this instruction. The Treasury Regulations contain a similar instruction that contracting authorities should adhere to CIDB procurement standards⁴⁶ and the legal basis for the CIDB's role in issuing norms and standards for

⁴² National Treasury *Instruction Note*.

⁴³ Ss 38(1)(a)(iii) and 51(1)(a)(iii) of the PFMA, read with reg 16A of the Treasury Regulations issued in terms of the PFMA in GN R225 in GG 27388 of 15 March 2005 (hereafter the Treasury Regulations).

⁴⁴ Issued in terms of s 76(4)(c) of the PFMA.

⁴⁵ National Treasury *Instruction Note*.

⁴⁶ Reg 16A6.3(a)(ii) of the Treasury Regulations.

public construction procurement is found in the CIDB Act.⁴⁷ In the present context, however, this statement is problematic. One adjudication method provided for in the CIDB Standard allows for functionality to be assessed alongside price and preference during the award stage; that is, for functionality to be used as an award criterion. This was in fact the method followed in the *TBP Building & Civils* case above. In that case Froneman J had already noted that such an approach is at odds with the PPPFA. In the *Sizabonke Civils* judgment the court held that a procurement following this method is invalid because it conflicts with the PPPFA. It follows that entities covered by the PPPFA cannot lawfully adopt an adjudication method in terms of which points will be awarded for functionality alongside price and preference during the award stage and leading to the ranking of bidders as the relevant CIDB standards aim to do. It was thus already necessary at this stage for the CIDB Standard to be read in conjunction with the outcome of the *Sizabonke Civils* judgment and the subsequent National Treasury instruction note limiting the use of functionality to a qualification criterion.

The role of functionality as a qualification criterion was formalised in the new Preferential Procurement Regulations, 2011,⁴⁸ which became fully effective in December 2012.⁴⁹ Regulation 4 of the 2011 regulations provides that functionality should be assessed as a qualification criterion in a first stage of adjudication with only bidders obtaining the minimum threshold score for functionality proceeding to the second round of adjudication, where only price and preference points will be taken into account in ranking bidders. This regulation thus effectively put in place the approach of National Treasury's instruction note of 2010. Regulation 4 also removes any doubt as to the legal basis for the two-stage adjudication approach and the use of functionality as a qualification criterion.-

It is worth noting that the Preferential Procurement Regulations, 2011 apply to a much broader range of contracting authorities than the Preferential Procurement

⁴⁷ CIDB Act ss 4(f), 5(3)(c) and (4).

⁴⁸ The Preferential Procurement Regulations, 2011, issued in terms of s 5 of the PPPFA.

⁴⁹ The Preferential Procurement Regulations came into effect on 7 December 2011 (GN R501 in GG 34350 of 8 June 2011), but an exemption was granted to a number of public entities to 7 December 2012 (GN R1027 in GG 34832 of 7 December 2011).

Regulations, 2001. Following the full implementation of the 2011 regulations in December 2012, all public entities are now subject to the PPPFA and its regulations.⁵⁰ It follows that the reasoning adopted in the *TBP Building & Civils* case above, allowing for alternative methods of adjudication in which functionality can play a role other than that of a qualification criterion, is no longer possible, given that that judgment turned on the limited scope of application of the PPPFA and the Preferential Procurement Regulations, 2001.

The Preferential Procurement Regulations, 2011 thus seemingly finally settled the role of functionality in tender adjudication and restricted it to a qualification criterion. Certainty in this regard was, however, to be short-lived.

6 Round three: functionality as qualification *and* award criteria

Within months of the Preferential Procurement Regulations, 2011 bringing all contracting authorities under the same set of rules on the use of functionality as a qualification criterion, the High Court resurrected the possibility of using functionality as an award criterion in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape*.⁵¹

6.1 The *Rainbow Civils* case

In this matter the respondent contracting authority called for bids for the management of building maintenance services. The tender specifications stated that bids would be evaluated for functionality, with bidders having to score a minimum threshold of 60 out of 100 points to proceed to the next round of adjudication during which a ranking of bids would be done. The tender documents also indicated that the standard tender conditions contained in the CIDB Standard would apply and that method 4 under the CIDB Standard would be used in adjudication, which involved awarding points in the second stage of adjudication for price, preference and quality, and awarding the contract to the tenderer scoring the highest number of points.

⁵⁰ See GN R501 in GG 34350 of 8 June 2011 and reg 2(1) of the Preferential Procurement Regulations.

⁵¹ *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* 2013 ZAWCHC 3 (6 February 2013) (hereafter the *Rainbow Civils* case).

However, in a separate part of the tender documents a different approach to adjudication was set out, in essence an approach following the PPPFA and Preferential Procurement Regulations, 2011. In terms of this latter approach functionality would be assessed as a qualification criterion with tenderers having to score 60 out of 100 points to proceed to the second stage of adjudication, during which only price and preference points would be calculated to arrive at a ranking of bids and on which basis the contract would be awarded.

The contracting authority followed the second adjudication approach: the one in which functionality constituted only a qualification criterion. Of the ten bids submitted only two scored above 60% in the functionality assessment. The applicant's bid scored 95% for functionality and the other qualifying bid, that of the third respondent, scored 64%.⁵² When these two bids were assessed for price and preference in the second round of adjudication, the third respondent's bid came out as the top scoring one by a very narrow margin. The decision-maker consequently awarded the contract to the third respondent. The applicant approached the High Court to review the award of the tender to the third respondent on a number of grounds.

Two grounds of review are of relevance for present purposes. Firstly, the applicant argued that the adjudication process was fundamentally flawed because of material inconsistencies and contradictions in the tender documents. The inconsistencies at issue here referred specifically to the different methods of adjudication set out in the tender documents, that is the CIDB method and the method based on the Preferential Procurement Regulations, 2011. The major difference between these two methods related to the role of functionality: as a qualification and award criterion in the former method versus only as a qualification criterion in the latter.⁵³ The court held that these methods were indeed contradictory and that since both appeared in the tender documents without an indication of how conflict between

⁵² There were some difficulties in the functionality assessment of the bids, resulting in the functionality score of the third respondent's bid varying between 58% and 64% during the course of the adjudication process. However, the final decision-maker accepted that the 64% assessment was accurate.

⁵³ *Rainbow Civils* case para 65.

them must be resolved the tender documents were materially uncertain. This, in the court's view, offended against the principles of fairness and transparency, since tenderers would not know with reasonable certainty on what basis their bids would be evaluated and decision-makers would not know with reasonable certainty which method to follow in adjudicating tenders.⁵⁴ The court thus found that the tender award offended against the principles of section 271(1) of the *Constitution* and accordingly the legality principle as well as the administrative-law rule against vagueness.⁵⁵ The award was accordingly reviewable on the basis of section 6(2)(i) of the *Promotion of Administrative Justice Act*.⁵⁶

This part of the judgment is important for present purposes, because it confirms the incompatibility of the CIDB adjudication methods in construction procurement that take functionality into account in the award stage alongside price and preference points to arrive at a final ranking of bids, on the one hand, and the adjudication approach prescribed by the PPPFA and Preferential Procurement Regulations, 2011, which now applies to all contracting authorities, on the other hand.⁵⁷ While the tender at issue in this case attempted to adopt both methods, which was the primary reason for the court's finding of invalidity in this regard, it would make little difference if in a future public construction tender the tender documents referred only to the CIDB adjudication method and not the PPPFA method. In such a scenario there would be no internal contradictions in the tender documents, as in the present case, but the method adopted in the tender documents would still contradict the PPPFA method to which all contracting authorities are bound and from which contracting authorities cannot escape by simply stating another adjudication method in their tender documents. It also makes no difference that the alternative method is based on the CIDB Standard. While those standards may trace their origins back to the CIDB Act, they are themselves at best equivalent to secondary legislation⁵⁸ and as such cannot trump the dictates of the PPPFA.

⁵⁴ *Rainbow Civils* case para 70, 72-74.

⁵⁵ *Rainbow Civils* case para 74.

⁵⁶ *Promotion of Administrative Justice Act* 3 of 2000 (hereafter PAJA).

⁵⁷ Also see Anthony *Construction Procurement* 180, 219.

⁵⁸ It is beyond the ambit of this paper to analyse the exact legal status of the CIDB Standard.

The second relevant ground of review in *Rainbow Civils* is the most relevant for present purposes. The applicant argued that the significant difference between its functionality score in the first stage (95%) and that of the eventually successful tenderer, the third respondent (64%), had to be taken into account when the final award decision was made. In the applicant's view functionality should in this manner be considered as an objective criterion that would justify the award of the tender to a bidder other than the highest scoring one in terms of section 2(1)(f) of the PPPFA.⁵⁹

The court agreed with this argument. Davis AJ held that it is a constitutional imperative under section 217(1) of the *Constitution*, particularly the cost-effectiveness principle, that functionality be taken into account in deciding which bid should be awarded the contract.⁶⁰ In this regard the court reasoned:

To my mind it is self-evident that it is not cost effective to award a tender to a party who ticks the right boxes as regards price and preference, but is unable to get the job done properly - whether through lack of experience, adequate personnel or financial resources.⁶¹

The court went further to express the view that the

... constitutional imperative that the procurement system be cost-effective, means that functionality must necessarily be taken into account in the adjudication of competing tenders and should not be relegated to a mere qualifying criterion.⁶²

Within the context of the PPPFA, section 2(1)(f) would be the mechanism to take functionality into account *after* the scoring of the bids on price and preference as an objective criterion that may determine the award. The court considered it an obligation of the administrator to take into account the difference in functionality between competing bidders before awarding the contract.⁶³

In the present matter the court held that since the administrator simply awarded the contract to the highest scoring bidder without taking into account the difference in functionality score between the bidders, the award had to be set aside in terms of

⁵⁹ See note 25 above.

⁶⁰ *Rainbow Civils* case para 109-110.

⁶¹ *Rainbow Civils* case para 109.

⁶² *Rainbow Civils* case para 110.

⁶³ *Rainbow Civils* case para 113.

section 6(2)(b) of PAJA as a failure to comply with mandatory procedures and conditions of the empowering provision (that is section 2(1)(f) of the PPPFA) and because of a failure to take relevant considerations into account in terms of section 6(2)(e)(iii) of PAJA.⁶⁴

6.2 Assessing the *Rainbow Civils* judgment

The judgment in *Rainbow Civils* represents a third stage in the development of the law on functionality in public procurement. The effect of this judgment is to introduce a possible three-stage approach to public tender adjudication in which functionality, on the same measurement, can both be a qualification and an award criterion. In the first stage, functionality will be assessed as a qualification criterion and only those bids reaching a particular score on functionality will proceed to the second stage. At the second stage, price and preference points will be calculated and a ranking of qualifying bids determined. Finally, in the third stage other objective criteria, which must again include functionality, will be considered in deciding on the final award of the contract. What is particularly noteworthy of the *Rainbow Civils* judgment is that this third stage is not an optional one, but a mandatory one flowing from the constitutional requirement that the procurement system must be cost-effective and the administrative-law obligation to take all relevant considerations into account.

A number of comments can be made on the judgment. The first set of comments relates to the alignment of functionality as both a qualification and award criterion with the constitutional principles of public procurement. The judgment expressly confirms this alignment. However, a number of questions can be raised in this respect, including questions of the practicality of such usage of functionality. Secondly it can be questioned whether the court's approach to functionality can be reconciled with the Preferential Procurement Regulations, 2011.

⁶⁴ *Rainbow Civils* case para 114.

6.2.1 *Functionality and the constitutional principles of public procurement*

As a first comment on the *Rainbow Civils* judgment it can be noted that Davis AJ's ruling aligns with Froneman J's *obiter* comments in the *TBP Building & Civils* case⁶⁵ about the constitutional legitimacy of using functionality firstly as an award criterion *per se* and secondly of relying on the same measure of functionality as both qualification and award criteria. While Davis AJ only aligned functionality as award criterion with the constitutional principle of cost-effectiveness, Froneman J additionally noted that such a use of functionality is also compatible with the principles of fairness, equity, competitiveness and effectiveness. In other words, according to these two judgments, this approach to functionality aligns with all five constitutional principles of public procurement.

One can, however, also raise questions about the *Rainbow Civils* judgment. The first is if the five constitutional principles of procurement and in particular that of cost-effectiveness relied upon in the judgment necessary mean that functionality must (also) be an award criterion. As Froneman J noted in the *TBP Building & Civils* judgment in a somewhat different context, there are different ways in which the objectives of section 217 of the *Constitution* may be met in a given procurement, and it is not up to the court to prescribe which one is the best. Davis AJ's concerns in the *Rainbow Civils* judgment about a successful bidder ticking the right boxes on price and preference but failing to deliver on the quality of the goods or services procured⁶⁶ can certainly also be addressed by using functionality as a qualification criterion. In fact, if the risk that the judge refers to materialises in a procurement where functionality was used as a qualification criterion (as in the given case), it only shows that the minimum threshold set for functionality and/or the particular measurement for functionality was/were inadequate. The purpose of using functionality as a qualification criterion is precisely to ensure that only bidders that can effectively perform under the envisaged procurement contract be evaluated for price and preference and stand a chance to win the tender.

⁶⁵ See note 34 and the accompanying text above.

⁶⁶ *Rainbow Civils* case para 109; see note 61 and accompanying text above.

By insisting that functionality again be taken into account during the award stage to potentially play a determinative role in awarding the tender, after it has already been used as a qualification criterion, is to alter essentially the basis upon which public contracts are awarded in South Africa. The legislature (through the PPPFA) and the executive (through the Preferential Procurement Regulations, 2011) opted for a system in terms of which price and preference will be the determinative factors in deciding to whom to award public contracts.⁶⁷ In terms of this system, price is clearly the most important factor.⁶⁸ In other words, the law-makers have decided that the most important consideration in awarding public tenders in South Africa is not necessarily to get the best possible quality goods or services, but rather to pay the lowest possible price to meet the procurement needs, subject to the policy of preferential procurement. This policy choice is translated into law by allowing for functionality to be a qualification criterion, thereby ensuring that only goods or services that can meet the procurement needs are considered, and restricting award criteria to price and preference. In my view this approach cannot be labelled as non-compliant with the principles in section 217 of the *Constitution*.

6.2.2 The practicality of using functionality as both qualification and award criteria

If one accepts the court's statement that "the constitutional imperative that the procurement system be cost-effective, means that functionality must necessarily be taken into account in the adjudication of competing tenders and should not be relegated to a mere qualifying criterion",⁶⁹ a number of further practical questions emerge. The first is what exactly the role of functionality should be at this stage of the adjudication. Does the decision-maker have a free discretion to attempt some balance of functionality and price/preference at this stage? Or does superior functionality simply trump price and preference, presumably on condition that the price remains within the contracting authority's budget? Or does the obligation to

⁶⁷ See *Grinaker LTA v Tender Board (Mpumalanga)* 2002 All SA 336 (T) para 66-67. It is true that these two criteria are subject to other "objective criteria" in terms of s 2(1)(f) of the PPPFA, but the award of the contract based on these other criteria rather than price and preference is clearly an exception to the rule that tender awards should be done on the basis of the highest scoring bid based on price and preference points.

⁶⁸ This is made clear by the 80 or 90 points for price in the adjudication approach under the PPPFA.

⁶⁹ *Rainbow Civils* case para 110.

take functionality into account amount to a more bounded discretionary power, where functionality is for example only to play a determinative role where the other criteria result in scores that are very close (as in the present case)?⁷⁰

A further question is how functionality is to be assessed at this stage. Must functionality at the third stage be measured in the same way as in the first, in cases where functionality was used in the first stage of adjudication as a qualification criterion? In other words, must the functionality score of the first stage simply be used again, or can the decision-maker rely on other objective measurements of functionality? How should functionality be assessed at this stage in cases where functionality was not assessed as a qualification criterion? In this latter type of case there would be no convenient score for functionality available that a decision-maker can refer to when deciding whether functionality justifies a departure from the lowest price/preference score. Given that the decision-maker in the procurement context is quite often the accounting officer of a public entity as defined in the PFMA and *Local Government: Municipal Finance Management Act*,⁷¹ which means mostly the head of the relevant government department or entity, one must wonder to what extent that person will have the required expertise to assess the functionality of the relevant bids in the absence of functionality scoring by an expert body at an earlier stage of adjudication. Does this reality, read against the statements in *Rainbow Civils*, imply that functionality assessment will now have to be done in all cases prior to award? None of these questions can be definitively answered, a fact which creates significant challenges for procurement officials in knowing how to go about awarding public tenders.

6.2.3 Functionality as an award criterion and the Preferential Procurement Regulations, 2011

Finally, one must question the alignment between the use of functionality as an award criterion in a potential third stage of adjudication under *Rainbow Civils* and the wording of regulation 4 of the Preferential Procurement Regulations, 2011. As

⁷⁰ See *Simunye Developers CC v Lovedale Public FET College* 2010 ZAECHGHC 121 (9 December 2010) para 34.

⁷¹ *Local Government: Municipal Finance Management Act* 56 of 2003.

noted above, this regulation expressly sets out the conditions under which functionality is to be assessed.

The first question that emerges is whether or not these rules also apply to functionality as an award criterion. The practical relevance of the answer to this question becomes clear when one notes that regulation 4(3) requires *inter alia* that the weight to be attached to each measurement criterion of functionality be specified in the tender documents.

Perhaps more problematic is regulation 4(1), which states that organs of state "must indicate in the invitation to submit a tender *if* that tender will be evaluated on functionality".⁷² Under the *Rainbow Civils* approach this regulation will become redundant since all tenders will have to be evaluated on functionality. An answer to this dilemma may be to argue that regulation 4 applies to functionality as a qualification criterion only, and not as an award criterion. However, this in turn raises the question of why fairly strict rules for the use of functionality as a qualification criterion are provided for, while the use of functionality as an award criterion is ostensibly completely open-ended.

Despite the questions that one may raise about the use of functionality as both a qualification and award criterion, as set out in the *Rainbow Civils* judgment, it seems that this is the direction that public procurement adjudication in South Africa is heading. In the draft Treasury Regulations,⁷³ intended to replace the current Treasury Regulations under the PFMA, regulation 30.7.3 states that in construction procurement

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

⁷² Emphasis added.

⁷³ GN 1005 in GG 35939 of 30 November 2012.

7 Conclusion

The precise role of quality, expressed as functionality, in public procurement adjudication in South African public procurement regulation remains unclear. The PPPFA regime employs price as the most important criterion on which public tenders are to be awarded⁷⁴ and envisages functionality as a qualification criterion; that is, as a criterion on which to select the suppliers that are considered for award of the public tender. The High Court in *Rainbow Civils* has, however, expressed a strong preference for the use of quality as an award criterion.⁷⁵ In that case the court suggested that quality *must* be considered at the award stage.

The difference between these two views has particular practical implications for both suppliers and contracting authorities. Under the former approach, with functionality only as a qualification criterion, bidders would have an incentive to offer goods and services meeting the minimum requirements set out in the tender call at the lowest possible price. On the latter view, with quality as a qualification and award criterion, suppliers would have an incentive to offer goods or services of a quality exceeding that stated in the tender call, even if it implies a higher price, in the hope that the contracting authority will opt to pay more for higher quality goods or services. In preparing a bid it is obviously of the utmost importance to know which of these two strategies to adopt. As the *Rainbow Civils* judgment shows, it is imperative for contracting authorities to know how and when to take quality into consideration in taking award decisions.

The answer to the question of whether quality should be used as a qualification criterion, award criterion or both unfortunately cannot be resolved with reference to section 217 of the *Constitution* alone, which requires public contracts to be awarded *inter alia* in terms of a cost-effective system. While the judge in *Rainbow Civils* is

⁷⁴ This is a strict or narrow conception of price as an award criterion, as is clear from the formula for calculating the points to be awarded to a bidder for price under the Preferential Procurement Regulations. The PPPFA regime's use of price as the primary award criterion thus does not allow for a broader notion of cost, such as full life-cycle cost or the economically most advantageous offer to be used to award public contracts. As is clear from European law, quality can easily form part of a broader assessment of the economically most advantageous offer in addition to the financial offer. See Timmermans and Bruyninckx 2009 *PPLR* 134; Treumer 2009b *PPLR* 149-152.

⁷⁵ *Rainbow Civils* case para 110.

certainly correct in stating that a cost-effective procurement system requires quality to be taken into account in awarding public tenders,⁷⁶ it does not in my mind follow necessarily that quality *must* be an award criterion to satisfy the cost-effectiveness requirement. A system that uses functionality exclusively as a qualification criterion and awards the tender to the supplier that can meet the requirements of the contracting authority at the lowest possible price is certainly also a cost-effective one, albeit without using functionality as an award criterion. It would thus seem that section 217 of the *Constitution* allows for both such systems.

The question that subsequently emerges regarding the appropriate role of quality in public tender adjudication under the *Constitution* is the familiar one in judicial review, namely, who gets to decide which of two seemingly equally possible interpretations of the *Constitution* (or legislation) should prevail. Since public procurement is a highly technical process which exists at the heart of public administration, it is in my view an excellent example of an area where courts should treat the design choices of the legislature and executive with respect and interfere with a procurement decision only where there is a clear illegality.⁷⁷ In my view the PPPFA regime points strongly to a design choice on the part of the legislature and executive to use functionality *only* as a qualification criterion and not also as an award criterion through the back door of section 2(1)(f) of the PPPFA.

⁷⁶ *Rainbow Civils* case para 110.

⁷⁷ See Quinot 2009 *TSAR* 436-449.

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LIST OF ABBREVIATIONS

BBBEE	Broad-based Black Economic Empowerment
CIDB	Construction Industry Development Board
HDI	Historically disadvantaged individual
PAJA	Promotion of Administrative Justice Act 3 of 2000
PFMA	Public Finance Management Act 1 of 1999
PPLR	Public Procurement Law Review

PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
RDP	Reconstruction and Development Programme
TSAR	Tydskrif vir die Suid-Afrikaanse Reg