IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal No. CACLB 056 of 2005
High Court Case No. MISCA 100 of 2004

In the matter between

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL BOARD	**APPELLANT**
AND	
RESEARCHED SOLUTIONS INTERGRATED (PTY) LIMITED	**1ST RESPONDENT**
THE ATTORNEY-GENERAL OF BOTSWANA (Acting for and on behalf of the Department of Immigration)	**2ND RESPONDENT**
IBS-IT (PTY) LIMITED	**3RD RESPONDENT**
INNOVATIVE BUSINESS SOLUTIONS (PTY) LIMITED	**4TH RESPONDENT**
CBS (PTY) LIMITED	**5TH RESPONDENT**

Lobatse, 20 and 27 January 2006

Mr. Peter Collins and Mr. John Peter for the appellant.
Mr. Redding and Mr. Vivian for the first Respondent
Mr. Modisane for the second respondent

J U D G M E N T

CORAM: TEBBUTT JP
McNALLY JA
LORD COULSFIELD JA

LORD COULSFIELD

1. The background to this dispute is, very briefly, that on 2 October 2002, the Department of Immigration of the Republic of

Botswana ("the Department") issued an invitation to tender for the computerisation of the country's border posts and passport issuing centres. As is required by the statutory provisions set out below, the tender invitation was approved by the appellant ("the Board"). Eight companies responded and an evaluation committee was set up to advise the Department. After various investigations, the committee recommended that the contract should be awarded to the first respondent, Researched Solutions Integrated (Pty) Ltd. The first respondent was formerly known as AST Botswana (Pty) Ltd and, notwithstanding the change of name, it is convenient to continue to refer to them as "AST". The committee's recommendation was, however, not approved by the Board, who, on 6 November 2003, instructed the Department to accept the tender of the third respondent, IBS-IT (Pty) Ltd ("IBS"). AST commenced these proceedings on 4 March 2004. There followed several applications and counter-applications to do with lodging and objecting to affidavits and other documents. These steps in the procedure have a bearing on the view which the judge took on one of the main issues in the case, but I shall examine them later. Certain further affidavits have been lodged since the decision of MARUMO J., and it will be necessary to make some reference to them in due course. The case finally came before MARUMO J. in the High Court. On 25 November 2005 he made an order by which he (1) set aside the decision of the Board to award the tender to the third respondent: (2) ordered the appellant to award the said tender to the first respondents: and (3) ordered the Board to pay the costs of the main application. The Board have appealed against these orders. The Attorney-General was represented at the hearing of the appeal, but took no active part in the proceedings: it had previously been intimated that the Attorney-General would abide by the decision of the court. IBS, despite their interest as successful tenderers, have never taken any part in the proceedings, nor have the fourth and fifth respondents, who were among the original tendering companies.

2. <u>The powers and functions of the Board.</u>

The Board was constituted under the Public Procurement and Asset Disposal Act 2001 ("the Act"). In terms of section 3, the Act applies to, among others, all entities of the central government which are involved in public procurement. For the purposes of this appeal, it is important to look in some detail at the powers and functions of the Board which are defined in Part V. Part V includes the following provisions:

> "26. Unless otherwise provided for in this Act or any other enactment, the Board shall ensure that all public procurement and asset disposal agencies, in making their decisions, take into account the principles of –
>
> (a) an open, competitive economy ....

(b) standardisation of procurement items in the interest of cost reduction, ease of maintenance and technological effectiveness;

(c) aggregation of procurement and disposal activities..... in order to benefit from economies of scale;

(d) competition among contractors by using the most efficient and competitive methods of procurement or disposal to achieve the best value for money;

(e) fair and equitable treatment of all contractors in the interest of efficiency and the maintenance of a level playing field;

(f) accountability and transparency in the management of public procurement and in the disposal of public assets in order to promote ownership of the system and minimise challenges thereto; and

(g) integrity, fairness of and public confidence in, the procurement and disposal process.

27. The Board shall ensure that all procuring and disposing entities comply fully with all provisions of the Act, irrespective of the means of procurement, disposal, or the assets to be procured or disposed of.

28. The Board shall advise procuring and disposing entities on all aspects of procurement and disposal management and particularly on the application and provisions of the Act."

3. There follow several sections which make more detailed provisions about some aspects of procurement. Section 29 directs the Board to prepare standardised bidding packages, to

be used by all procurement entities. Section 30 deals with national standards and section 31 permits the Board to make exceptions from sections 29 and 30 in certain circumstances. Section 32 provides:

> "32. (1) The Board shall examine instructions and the conditions of contract contained in each bidding package prior to the issuing of a Tender Notice, and more generally, review and assent to any specific part, or the whole of the bidding package, and obtain changes where these are deemed by the Board to be necessary before they are issued to bidders.
>
> (2) The Board shall ensure that the instructions and conditions of contract in bidding packages are congruent with the Act."

4. Sections 33 and 34 deal with amendment of a bid package and the legal status of correspondence. Sections 35 to 37 provide: -

> "35. (1) Procuring and disposing entities shall –
>
> (a) in all bid packages, provide for instructions, the criteria to be used in the evaluation process, the value and weights to be attached to each criterion, and the evaluation procedure or methodology to be followed in the conduct of the evaluation; and
>
> (b) establish which procurement methods and procedures shall apply in each case and class of bids, except in emergencies when either sole procurement or competitive negotiations methods and procedures may apply.

(2) Only substantially responsive bids shall be considered for comparison, evaluation, adjudication and award.

(3) The issuing of a bid or an invitation to tender for a procurement or disposal activity, which does not comply with the applicable procedures under the Act, shall be deemed to be invalid.

36. In the evaluation and adjudication of a bid, no factor outside those explicitly stated in the bidding package shall be taken into account by the evaluators or the adjudicators in arriving at a recommendation or making an award, unless there are extenuating reasons to use additionally an industry standard or best practice.

37. (1) The Board shall adjudicate bid recommendations submitted to the Board by competent bodies and award those bids.

(2) The Board may return bid recommendations for reconsideration, reject recommendations, appoint an independent evaluation team to re-evaluate bids and on its sole determination make an award to the most compliant bidder, detailing in such instances in its proceedings the precise grounds for the action it has taken."

5. Mention should also be made of section 41, which requires the prior written approval of the Board to certain alterations in the conditions of an awarded bid and of section 45, which provides -

"45. A procuring entity shall not invite bids for which funds are inadequate or not available or for which the Ministry has not issued a written confirmation that the required funds shall be made available in a timely manner and in the amount necessary."

6. Finally, the Act also contains provisions designed to assist in the resolution of disputes, including an important section, section 53, which requires the Board to act on complaints made to it. Part X contains provision for an independent complaints review committee, but that committee has not yet been set up.

7. <u>The Invitation to Tender.</u>

The Invitation to Tender ("ITT") bears the issue date 2 October 2002. Section 2 explains the scope of the project as -

> "the provision and implementation of:
>
> 1. A Border Control System and
> 2. A Passport Issuing System."

and further states:

> "In this regard, the DoI requires a lead supplier/Bidder to deliver and support the systems on a single contract basis. The supplier may decide to sub-contract some products and services from local or partner companies. Such supplier shall:
>
> 1 ...
>
> 4. Provide detailed financial and pricing responses (in Section 2) to the ITT documents.
>
> 5. Supply a definitive project implementation plan and time frames..."

The contract envisaged that the contractor would provide certain equipment and software, conveniently referred to as "the product element"; and also training, setting up and support, "the services element."

8. Paragraph 3 is headed "General Conditions" and includes the following:

> "3.1 The bidding authority which will also be the lead contractor to this ITT must be a fully registered company with sound financial backing and experience....
>
> 3.5 Notwithstanding that all bidders responses are valid for 270 days from submission date. ....The timetable for evaluation and contract negotiation will be drawn after receipt of the tenders since the number of tenders received will be a major determining factor.
>
> 3.8 The tenderers shall furnish, as part of the tender, a bid security for an amount of P75,000.00...The bid security shall be denominated in Pula and shall be either in the form of a bank guarantee shown at appendix 4 or confirmed irrevocable letter of credit...
>
> 3.10 The ITT has to be responded to in two (2) sections namely "Technical Solution" and "Financial Requirements and Commercial Terms" with a management summary."
>
> 3.11 Bidders should be able to supply all hardware and software items tendered for within the stipulated time in the project plan of the agreed contract upon receipt of order, and must be in a position to install and fully support each system in each location as per their proposed project management proposal."
>
> 3.16 Awarding Process

The Public Procurement and Asset Disposal Board will award this tender. Therefore they reserve the right to award all or part or none of this tender at its sole discretion.

1. The award will not necessarily be made to the respondent offering the lowest price.

2. Suppliers should note that the awarding of this tender is subject to an agreed contract. All services and deliverables, including a detailed implementation plan will be specified in the contract.

3. Any costs associated with the preparation and compilation of the supplier/bidder's response to this tender or subsequent contract negotiations will be for the supplier's account.

3.17 Qualification list of the Bidders Response

The following criteria must be met in order for a response to be accepted for further evaluation:

1. The response must meet all criteria defined in Section 1 (reference 3.10, 3.11 etc. of this document.
2. The response must meet all criteria defined in Statement of User Requirement (Section 3 of the tender).

3.21.3 Support Costs

Suppliers are to indicate future support costs for their proposed solution together with any licensing costs. For more detail please refer to section 3.25.6

3.25.3 Statement of Capability

Bidders shall include a statement of capability which will detail the level of resources available within the organisation to be committed to this project for the delivery of the solution requested, including all required products and services to the appropriate standards.

This statement of capability should include but not be limited to:

...

vii) Where responses are being submitted by a group of companies or a prime contractor and sub-contractors, the relevant details for each of the partners/collaborating companies or sub-contractors should also b e submitted.

viii) Number of trained personnel employed by the lead/Prime contractor and any sub-contractor.

3.25.6 Support

The supplier shall if requested provide both operational and technical on-site support until the end-user's support staff have acquired the necessary skills. The supplier shall also provide support for operational and technical problems as well as support for future enhancements.

The supplier shall provide hardware (passport printers, reader and central server) software and operational support for all items. This shall include problem solving, upgrades and enhancements for their systems. Suppliers shall give details on how they intend to provide this support, together with information on any emergency arrangements."

10. In addition, the tender invitation gave an example in appendix 4 of the degree of detail required in submitting a tender, including details of implementation and training costs.

11. Consideration of tenders.

Eight tenders were submitted in response to the invitation. There was then a first stage process of evaluation, designed to produce a short list of tenders for detailed study. In the event, AST and IBS were selected, along with three others. The five companies were invited to submit presentations and there were also site visits to customer sites of the tenderers. The evaluation was undertaken by a committee representing the parties described as stakeholders, including immigration and police officers. The chairman of the committee was Mr. B. A. Majola, Deputy Chief Immigration Officer in the Department. The site visits were made by a team of four officers, identified by the Department. Mr. Majola was chairman of the sub-committee and his colleagues on the site visits were Mr. Pandey, Ms. Mokgatle and Mr. Sesa. Mr. Pandey is an Information Technology Manager in the Department of Information Technology, and his role was to look after the project from the IT side. A number of issues concerning what took place during the proceedings of the committee and the site visits have been raised in the affidavits lodged in these proceedings. I do not, however, think that any of these matters have any real significance for the decision of this case. After the visits, the sub-committee met and decided what it should recommend, and

Mr. Pandey wrote a report setting out its conclusions. The result was that AST was rated first in regard to capability to implement the project and IBS was rated second. The decision to favour AST was made by a majority: Mr. Pandey preferred the IBS solution. The evaluation committee then met and prepared a report dated 23 October 2003. The report narrates the evaluation process. It shows that after the initial presentations, IBS was rated first of the five companies and AST was rated third. It then narrates that after the site visits, AST was rated first and IBS second. The report states:

> "We are also mindful of the fact that during the presentation IBS was rated number one and AST number three as shown above. During the site visits it was found that AST was more capable to implement the project than IBS."

12. The report also states that only the first two companies were considered capable of implementing the project and that if they turned down the offer, the project would require to be retendered. The report continues:

> "Further we would like to bring to your notice that the IBS is 100% citizen-owned company whereas AST Botswana is a subsidiary of AST South Africa and both companies are partnering with overseas companies to deliver the proposed solutions. The project cost of the respective companies are USD 6,163,812.53 (equivalent Pula 36,982,875.20) and P 75,8008,168.70 [*sic*].
>
> In view of the above, the site visits revealed that among the companies visited, AST Botswana has an edge over the others in terms of capacity to implement the proposed solutions and is

> recommended to implement the proposed solutions. IBS is as well recommended in case AST refuse or turn down the offer".

13. The report was sent to the Board under cover of a letter signed by Mr. Majola dated 24 October 2003. It is worth noting at this stage that the paragraphs last quoted above seem to be the only reference to the tender prices in the reports submitted at the stage of application for final approval. The package of papers submitted to the Board did include a number of score sheets recording the evaluation of 28 specified factors, one of which was "Price", but there was nothing in the reports to indicate whether, and if so how, the scores were taken into account in arriving at the recommendation in favour of AST. On 3 November 2003, Mrs. Nkata Seleka, an information technology manager with the Board, sent an e-mail to Mr. Pandey posing the following three questions:

> "What were the scores for the site visits (can we have the individual scores and summary of)?
>
> What about the cost? Was this component evaluated and included in the scores and at what stage?
>
> What's the Departments budget for this project?"

14. Mr. Pandey replied saying that he would like to discuss the questions with Mrs. Seleka. Mr. Pandey's affidavit does not say whether or not such a discussion took place, but, on 6

November 2003, Mr. Majola wrote to the Board with regard to Mrs. Seleka's e-mail. His letter said:

> "1. Scores for the site visits: We have prepared reports instead of scoring. The report which was attached to our submission was a summary report drawn from individual reports.
>
> 2. Cost: The cost was considered at the time of presentation as one of the criteria but was not included in the site visit reports. We know that the recommended supplier is above our budget but the members agreed to negotiate the cost and other factors with the preferred supplier at the time of contract negotiation.
>
> 3. Project Budget: The project budget is 52 Million Pula."

15. In the Record, there follows a document apparently prepared for submission to the Board by Mrs. Seleka. It summarises, briefly but in the main accurately, the contents of the documents submitted by the Department, including the bid prices and the contents of Mr. Majola's letter, and notes that the difference between the tender prices is P38, 825,293.50. Under the heading "Decision" it states -

> "Instructing the Department to go back and score will not be of any use as they will just go back and justify their decision. However, they are prepared to do it."

Up to this point, the document is in typescript. There is appended a manuscript note which states:

> "Reject award to AST Botswana and award to IBS in the amount of P36, 952,875.20".

Two signatures and the date 6/11/03 are added. It does not appear to be established who the signatories were. On 6 November 2003, Mrs. Seleka on behalf of the Board wrote to the Department stating that the request to engage AST was rejected and requesting the Department to award to IBS-IT. On 12 November 2003, the Department wrote to IBS intimating that they had been selected.

16. <u>Mr.Sesa's Report</u>

As mentioned earlier, one of the members of the evaluation committee and the sub-committee which made the site visits was Mr. B.W. Sesa. Mr. Sesa was apparently concerned about a number of aspects of the evaluation process and on 11 November 2003 he submitted a report to his superior in the Department, Mr. Lebopo W. Thekiso. In the earlier proceedings in this case there was some controversy about the status of this report and the extent to which AST should be allowed to rely on it. However, an affidavit by Mr. Sesa dated 6 September 2005 has now been filed. It states that the report was written and submitted by him on the date which it bears. Mr. Majola has given an affidavit in which he expresses doubt as to whether the report could have been prepared and submitted as Mr. Sesa alleges because it is not in the form which he would have expected for an official report and has no reference number.

There is, however, no direct contradiction of Mr. Sesa and no affidavit by Mr. Thekiso has been submitted. It seems to me to be quite proper to consider what is said in Mr. Sesa's report. It was that report which gave rise to the questions which have been asked in this case. What is now important is not how the report was prepared or how it came to the knowledge of AST, but whether there is substance in the points raised in it.

17. In the report (which was originally produced as annex FG to an affidavit by Mr. Richard Miles, a Director of AST) Mr. Sesa criticised the reports of the sub-committee and the evaluation committee on a number of grounds. He regarded the statements as to the capacity of AST and IBS respectively to implement the project as contradictory and confusing. It is obvious that Mr. Sesa thought that the sub-committee report, which was written by Mr. Pandey, gave undue prominence to Mr. Pandey's preference as opposed to that of the majority of the sub-committee, and he went so far as to suggest that something sinister might be taking place. I should say at this point that, on the materials before us, I do not think that anything has emerged which would justify Mr. Sesa's suspicions. This is an issue which is not easy to judge on affidavit evidence only, without the opportunity to question witnesses about the precise terms of the report. It seems to me, however, that, on a fair reading, the document reflects the deliberations of the sub-

committee quite accurately and fairly. It is true that it explains that Mr. Pandey preferred the IDS bid, but Mr. Pandey had been perfectly open about his preference and had given reasons for it, and the report was agreed to by the sub-committee and was open for discussion when the evaluation committee met. I should add that Mr. Sesa's report also suggests that Mr. Majola had been misled into agreeing to the evaluation report, but there is nothing in the documents to support that suggestion and Mr. Majola and Mr. Pandey both deny, in their affidavits, that anything of the kind occurred.

18. So far, thereafter, there is nothing to justify the suggestions made by Mr. Sesa. There remains, however, another important part of the report FG:

> "On the issue of pricing, it is surprising that the author of the recommendation report raised the issue and with biasness (*sic*). Well the price stand as they are in the report but there was an issue, which was raised during the site visits concerning some irregularities in the IBS pricing schedule. In our invitation to tender (ITT) for this project section two (2) (Financial requirements and commercial terms) Page 3 of 7 item 1.1 (pricing approach) sub item (i) we are asking for line by line costing for all products and services. The company costed only the products but left out the services, which are much more important because that entails project management, training etc.
>
> This issue was discussed by the team and it was agreed that the issue of pricing can only be raised during the contract negotiations. Hence I am puzzled how it was raised at this early stage and I doubt if it was done in good faith. I think the company, which costed high but meeting all the

> requirements is better than the one which omitted other requirements, whether deliberate or not.
>
> In any case, I fail to understand whether the omission of this irregularity was deliberate or what. One wonders how a technical person like an IT Manager could have missed an irregularity like the one committed by IBS in their pricing. This irregularity would have, under normal circumstances, have disqualified the company, as that is tantamount to breaking the rule of the game. It might turn out that the P36 million the company quoted is not correct because the other component (services) was not costed."

19. Again, it seems to me that Mr. Sesa's suspicions of Mr. Pandey go beyond anything which can be justified on the information before us. For the present purpose, however, what is more significant is that the point about pricing to which Mr. Sesa drew attention has been proved to be correct. The relevant section of the tender submitted by IBS was eventually made available and is found in the Record as an appendix to a Supplementary Affidavit by Mr. Miles dated 24 February 2005. The document includes a fully priced schedule of items of hardware and software, but the section for services, including development cost, testing, implementation cost and training cost is left blank. Mr. Miles' supplementary Affidavit refers also to the Technical Proposal and quotes from it as follows:

> "In this part, all the project services such as training, technical support, plans of installation and delivery, documentation requirements, and project management are preliminarily premeditated to be finalized with the Department of Immigration whenever the contract is awarded."

20. In the course of the hearing on this appeal, full hard copies of both tenders were at last produced. From the IBS document, at p.112 of 149, it appears that the paragraph quoted is the first of a section headed "3.12 Project Services". The bid document continues:

> "3.12.1 Project Management
>
> The section describes the way in which GET will manage the development and implementation of a system for Botswana DoI, the basis for which will be a Project Management Plan. The following sections show the typical aspects, tailored wherever possible to the requirements.
>
> The Project Management Plan is a working document intended to be updated and maintained throughout the project implementation period and covers all project management aspects as well as containing a number of key project management deliverables."

21. A glance at the following pages confirms that what is given is a general description of what a project management plan might typically contain, without any attempt to relate the general description to the specific case of this project. That of course may be a perfectly proper way to go about planning and tendering for a contract of the size and complexity of this one, but the point is that the approach is clearly different from that adopted by AST and envisaged by the ITT.

22. <u>The judgement of MARUMO J.</u>

In his judgement, MARUMO J. dealt in detail with the interlocutory proceedings and set out the history and the relevant terms of the tender. He then proceeded to consider the position of the Board in relation to the statutory provisions summarised above. He pointed out that the evident purpose of the Act was to ensure that public works and services are procured with the utmost propriety and to eschew corruption and patronage. He added (in para.28):

> "Manifestly, Parliament in its wisdom intended to assemble an elaborate structure which, properly utilised, would ensure, among other things, the fair and unbiased award of public contracts, many of which involve not insignificant amounts of public funds."

23. Later, in para.30, he emphasised that the Board is given extensive powers to enable it to act as guardian of the public interest and in para. 31 he said:

> "The key principles demanded by the Act are fairness, equity, accountability and transparency. An attitude on the part of either the [Board] or the procurement entities under its supervision which debases these basic and rudimentary principles, so readily apparent even upon a precursory, elementary consideration of the Act must meet with the disapprobation of the courts. The Board is constituted to be a fair and principled adjudicator. It must not only be fair and principled, it must be seen to be so."

24. In the next section of his judgement, MARUMO J. considered the position of the Board in relation to the common law and held that the Board was a statutory public authority performing

public functions and that its actions were subject to the common law review principles. He further held that the Board as an administrative decision maker was not entitled to maintain secrecy about the circumstances in which its decisions were made (see para. 35). From there, he proceeded to point out that the invitation to tender had required a full costing of the hardware and software and also the development and implementation costs, whereas the tender by IBS, which was accepted because it was within the budget, did not include those costs. He said;

> "By accepting the 3rd. respondents' non-compliant bid in that state the [Board] conferred an unfair advantage on it. It effectively tilted the playing field in its favour by creating a situation where it could be and actually was argued that its bid was within the budget whilst the other was not. The reality of the matter is that both bids were beyond the Department's budget and the matter had to be approached from that premise."

25. The judge went on to say that the terms of the successful bid showed that the bidders were aware that important items were not costed in the tender and to suggest that the attitudes of the Board towards the two tenders were inconsistent. He also dealt with other aspects of the successful tender which he found unsatisfactory. In paras. 49 to 58 of his judgement MARUMO J. reviewed the way in which the Board had responded to requests for information and to the affidavits lodged on behalf of AST and held that the Board had failed in its duty to provide full and

frank information a bout its dealings with the tenders. He held that the decision of the Board to award the tender to IBS was flawed and should be set aside. He subsequently held that the tender should be awarded to AST, but that is a matter to which I will return.

26. Heads of Argument for the Board

The main lines of argument for the Board in the appeal were as follows -

1. The judge had misconstrued the Act and misunderstood the nature of the duties imposed on the Board. The Board's responsibility was a supervisory one to oversee the procurement and disposal of assets. Although the Act removes from the procuring entity the final decision as to whom a tender is to be awarded, it leaves intact the entity's role in the primary consideration of the individual bids.
2. Any failure to carry out a proper evaluation of the IBS bid and in particular to assess its conformity to the invitation to tender was a failure of the Department. The Board fully considered all material put before it and there was nothing placed before it which brought any defect in the bid of IBS to its attention.

3. The judge had misunderstood the position in regard to the bid document of IBS. That document was not part of the record of proceedings before the Board and was not considered by it. The Board was bound neither to consider it nor to produce it to AST and was not guilty of any impropriety in the conduct of the present proceedings and in particular in relation to any delay in producing the IBS document.
4. The Board rejected the ATS bid because it exceeded the budget and this was a perfectly proper exercise of its discretion.
5. The judge paid attention to matters which he should not have considered, including hearsay and other irrelevant or inadmissible material in the affidavits.
6. The Board had properly considered the material before it and its decision was not vitiated by any error of law or of approach.

27. <u>The exercise of the Board's duties.</u>

This case raises fundamental questions about the nature and extent of the statutory duties of the Board. These are addressed in the first two of the propositions in which the contentions on behalf of the Board are summarised above. In his submissions, Mr. *Peter*, for the Board, stressed that the Board has a supervisory function. It is a body with a full-time executive chairman and three full time and three part-time members. It is not tasked with, and indeed not capable of, taking over and performing the functions of procurement entities. Those entities remained responsible for the performance of their functions. The Board would perform its statutory duty of supervision if it examined reports made to it, taking them at face value at first. If on such an examination it appeared that there was something deficient, further examination might be required. But if the reports were comprehensive and thorough, it was not for the Board to look for "ghosts and shadows." where there was no indication that anything of the kind might exist. There was a statutory duty on the Board under section 27 of the Act to "ensure" compliance, but that could only mean taking reasonable steps to that end.

28. It is clear, in my opinion, that the Board is a supervisory body, not an executive one. It would be a serious mistake to impose obligations on the Board which would amount to requiring it to duplicate the work of the procurement entity and check every step of the evaluation process which the entity had followed. That would be to create an extra layer of bureaucracy in the procurement procedure and would be liable to complicate and delay a process which is often quite slow and complex already. It does, however, appear to me that the formulation of the

Board's duties suggested by Mr. Peter fails to give sufficient weight to the importance of the functions which the Board is asked to perform and to the emphatic language of the Act. In his judgement, MARUMO J. said , at para.30:

> "Quite clearly the Act constituted the 1st Respondent and clothed it with extensive powers to enable it to play the role of guardian to the public interest in the area of public procurement and asset disposal. It is a momentous fiduciary duty whose gravity should not be downgraded for a moment."

29. That passage, in my view, places a proper emphasis on the importance of the Board's function. Against that background, it seems to me that when sections 26 and 27 say that the Board is to ensure compliance, that requirement cannot be satisfied by a mere examination of reports taken at face value. It requires at least a sceptical and penetrating scrutiny of the material placed before it and a readiness to ask questions to make sure that the material which lies behind the reports and the basis of any recommendations has been properly understood. In a case like this, where a balance has to be struck between undue interference on the one hand and adequate scrutiny on the other it is not possible to formulate a simple rule which can easily be applied to determine what the Board has to do in any particular case. In any event, the Board is a relatively recent creation and with experience it will no doubt become easier to formulate some sort of guidelines or working practices: at this stage any attempt to state the Board's duties more precisely

would be unsatisfactory and it is better, in my opinion, to proceed case by case.

30. Two incidental issues.

Before proceeding to deal with the heart of the matter of the Board's decision, I should mention two issues which were raised in argument but which are not, in my view, essential to the decision of this case. Firstly, in his submissions for AST Mr. *Redding* made the point that the process which leads up to a decision by the Board to accept a tender should be regarded as a single process, albeit a composite one, not, as Mr. *Peter* rather suggested, two separate processes, one involving the procuring entity and the other involving the Board. The importance of the distinction is that if the process is regarded as a single one, the Board might be held responsible for failures on the part of the procuring entity, even if the Board itself did not, and even could not have, identified the failures. I am inclined to think that that argument fails to allow sufficiently for the fact that the Board, however demanding its duties, still has a supervisory rather than an executive function. If the Board delegates some part of its scrutiny to some other agency, it will no doubt be responsible for what that agency does or fails to do, but it would, I think, probably be going too far to make the Board automatically responsible for failures in evaluation by the procuring entity. However, I do not think that it is necessary for the purposes of this case to decide whether Mr. *Redding's* argument is correct or not.

31. Secondly, there was some argument before us about the status and effect of an accepted bid. It is clear that the tender documents envisage that a contract will be negotiated after the acceptance of a bid. It follows that the mere acceptance of a bid does not give rise to a concluded contract to execute the project. Mr. *Peter* submitted, as I understood him, that an accepted bid nevertheless created a situation in which any negotiations must be confined to matters of detail and to the arrangements for the carrying out of the project, and could not include fundamentals such as the contract price. He further submitted that the effect of acceptance of the IBS bid would be that IBS would become bound to perform the whole contract, including the supply of the service element, for more or less the amount of their tender. I have considerable doubt about that argument because it seems to me difficult to conceive some intermediate position between a complete contract and no contract at all. I further doubt whether the IBS bid could be interpreted without reference to the sections which specify the items quoted for and their prices. If there was some kind of binding pre-contract, I doubt whether it could go beyond an agreement not to deal with some other party pending negotiation of a contract with the

successful bidder. In any event, in my opinion, this issue might possibly be of some relevance in considering whether the Board was guilty of inconsistency in dealing with AST as opposed to IBS, but I do not think that it is necessary to decide it in order to deal with the main issue on this part of the case.

32. <u>The decision to approve the tender of IBS</u>

The circumstances, so far as known, surrounding the decision to approve IBS and reject AST have already been described. It is, I think, important to note, in the first instance, that the acceptance of one bid and the rejection of the other are recorded in a single brief note, signed by, presumably, two members of the Board. In the heads of argument for the Board and, to an extent, in the submissions of Mr. *Peter,* it was suggested that the decision to reject AST could be looked at on its own, and justified on the simple ground that the Board were entitled to reject a bid which was very much over the budget available. That would, I think, be quite unrealistic. The whole thrust of the presentation to the Board was that there were two, and only two, tenderers who could carry out the project and that, on a comparison of their respective strengths and weaknesses, AST had the advantage. The adjudication which the Board had to make was, therefore, in the first instance at least, a straight choice between two competitors.

33. It further seems to me that it can be seen that, for whatever reason, the question of the overall tender price fell into the background in the course of the preparation of the evaluation reports. The whole thrust of the sub-committee's report is towards the evaluation of the solutions proposed by the competing tenderers and their capacity to deliver the contract. Cost is mentioned, but only, in my reading, as a kind of secondary issue. This attitude is carried forward in the response of Mr. Pandey and Mr. Majola when Mrs. Seleka did raise a question about cost and budget. Incidentally, it seems to me that it is quite possible, indeed likely, that the members of the evaluation committee, or at least the sub-committee, were quite well aware of the difference between the tenders but that it did not occur to them to highlight it.

34. However, when one does look at the issue of pricing, in my opinion, the conclusion that the IBS tender was not "responsive" to the ITT in that regard is inevitable. It is sufficient to refer back to section 2 and paragraphs 3.10, 3.11 and 3.25.6 of the ITT and to the sections of IBS technical proposal quoted in paragraphs 19 and 20 above. The question then is whether the Board can be said to have failed in their duty in a material way in failing to recognise and act on that conclusion. There is, in my opinion, no doubt that the Board were required, in terms of

section 26 (a) and section 35 (2) of the Act, to ensure that the Department were dealing with properly comparable bids which met the ITT requirements. In the particular circumstances of this case, it seems to me that there was material before the Board which should have led it, in the exercise of the kind of penetrating scrutiny which I have tried to describe above, to make enquiries to satisfy itself that the tenders were comparable. That is not only because of the amount of the difference in overall price, although that in itself might well have provoked inquiry. It is also because a reading of the whole terms of the evaluation reports and the response to Mrs. Seleka's e-mail should have led the Board to question whether the Department had dealt fully with the question of comparative prices.

35. It is a familiar principle in administrative law that a tribunal or agency must direct its mind to the proper question, and properly direct itself as to the factors which it should take into account (see, among many other authorities, *Council of Civil Service Unions v Minister for the Civil Service* [1985] LRC (Const.) 948, LORD DIPLOCK at 1026-7). In this case, in my opinion, the course of proceedings coupled, perhaps, with rather too limited an understanding of the duties of the Board, led the Board to award the tender to IBS without having applied its mind to the essential issue of the comparability of the tenders

and their conformity with the ITT in regard to pricing. Accordingly, the judge was correct to hold that the decision to award the tender to IBS should be set aside.

36. For completeness, I should mention that the IBS tender was criticised on three other grounds, relating to the provision of a bid security document, the identity of the tendering company and the provision of tendering statements. I do not think it necessary to deal with these criticisms, which were, individually and collectively, far less significant that the issue of the tender prices.

37. <u>The Board's Response to AST's application.</u>

In his judgement, MARUMO J. examined the way in which the Board responded to the application made to the court by AST. This led to some severe criticism of the conduct of the Board: and this in turn formed an important part of the judge's reasoning in deciding to make the order requiring the Board to award the tender to AST. In order to see what substance there may be in these criticisms, it is necessary to go through the record of proceedings, at perhaps tedious length

38. The first intimation of AST's complaints about the award to IBS in contained in a letter from AST's attorneys to the Board dated

28 November 2003. The letter made two main points namely that the evaluation report which preceded the decision was "misleading"; and that there had been no line by line costing of the IBS tender (or at least of the services element). In the letter, the attorneys demanded action on the complaints and, in the concluding paragraph, requested the Board to give careful consideration to them, as concerning a matter of national importance. The Board did not reply. AST then applied for an interim interdict to prevent further proceedings in relation to the award to IBS, and the interdict sought was granted on 9 December 2003.

39. The application for review was filed on 4 March 2004, with a founding affidavit by Mr. Miles. The complaints made were the same as those in the letter of 28 November 2003, namely that the evaluation report was misleading (a complaint clearly derived from Mr. Sesa's doubts as expressed in the document FG) and that the IBS tender was incomplete (see paras. 35 and 41 of the founding affidavit (Record pp.77 and 79). The Board filed a Notice of Opposition on 11 March 2004, but did not at that time file an answering affidavit (see Record p.214). The Board filed its record of proceedings on 18 June 2004 (Record167 ff.), but this record did not include any further statement or minute of the Board's reasons for its decision. The record did not include any bid documents, and it appears from

what has transpired since that the Board did not have the tender documents, and took the view that they had never formed part of the record of their proceedings.

40. Thereafter it appears that there were some attempts by the parties interested to resolve the problem, including two meetings in August 2004, described in a supplementary affidavit by Mr. Miles dated 21 January 2005. At these meetings, questions arose about the ability of IBS to proceed with the contract. I do not think it necessary to go into that aspect of the matter, except to say that after the meetings there was some doubt as to whether IBS had conceded that they would not be able to perform (see eg, Record p.86) and to note that IBS has never sought to take an active part in these proceedings. The attorneys for AST followed up on these meetings by writing to the Board on 7 and 21 December 2004, inquiring about the Board's position, but received only a formal reply (see Record pp.212, 215 and 216).

41. An opposing affidavit by Mr. Ruhukwa, the Secretary to the Board, was filed on 24 January 2005. Two passages in the affidavit are of importance. Firstly, paragraph 10, which replies to paragraph 25 of the founding affidavit states

> "The contents of this paragraph are vehemently denied for they are contradictory. The Applicant swears in Paragraph 22 of its Founding Affidavit

> that it is "not in possession of the whole of the [IBS] bid" and yet it purports to boldly state that some documents that are not in its possession does not comply with certain requirements of the invitation to tender. However, in the interests of justice and averting the need for discovery procedures annexed hereto are extracts from the winning bid indicating compliance with the invitation to tender as per the requirements of the said clauses."

Six extracts from the IBS bid were annexed, but unfortunately these all related to the parts of the tender which were specifically priced and there was no reference to the unpriced section.

42. The second significant paragraph is paragraph 16, which replies to paragraph 36 of the founding affidavit and states:

> "The contents of this paragraph are denied and I verily believe and aver that the 1st Respondent did not rely on the said report but rather on scores and bid documents that I further aver were the correct documents to take into account in coming to a decision of this nature. In consequence the applicant is put to strict proof of the allegations herein."

The statement made in that paragraph is repeated in a second affidavit by Mr. Ruhukwa dated 25 January 2005 (p.239, para.22). That statement may well have contributed to creating an impression that the Board did have the bid documents.

43. On 9 February 2005, MUSUKU J. ordered the Board to file the complete IBS bid, and a supplementary record was filed on 16

February 2005, containing the bid documents. On 18 February 2005, AST's attorneys wrote requesting certain documents which they thought were missing from the record, namely pricing details and bid security and tendering statements. On 21 February, the Board sent further documents including a schedule of prices, but these still did not reveal the absence of pricing for the services element of the tender. On 24 February, a further replying affidavit and supplementary affidavit by Mr. Miles were filed, again referring to the issue of the failure to price services.

44. The Board did not, so far as I can see, respond directly to this renewed attempt to direct their attention to the issue of the unpriced element of the ITT. To complete the narrative of the procedure in this application, on 17 March 2005, the Board filed an interlocutory application to strike out substantial parts of the AST affidavits as hearsay and also an application for security for costs. Various documents were lodged in connection with the latter application, and some of them were referred to in the argument before us, in connection with a submission that the financial status of AST had changed since the date of the tender. Since, however, I do not think that it will be necessary to deal with that argument, the documents need not be examined. The question of security for costs itself was dealt with by agreement. The application to strike out came before MASUKU

J. who gave his ruling on 20 June 2005. Both parties appealed and the matter came before this court on 25 July 2005. By consent, the ruling of 20 June 2005 was abandoned and it was agreed, not without some encouragement from the court, that all issues, preliminary and substantial, should be dealt with together. It is only necessary to add that some further delay was occasioned by the lodging of further affidavits by Mr. Sesa, Mr. Pandey, Mr. Majola and Mr. Ruhukha.

45. <u>The judge's criticisms of the conduct of the Board.</u>

The judge criticised the conduct of the Board, in relation both to their dealings with the tender decision and their conduct in the proceedings, and some of his comments were very severe. He began this part of his judgement by stressing the obligation of the Board to be open its dealings with the public and with persons affected by its decisions. He observed, in para. 30:

> "It must not only be fair and principled, it must be seen to be so."

46. In paragraph 34, he stressed the importance of the right of the applicant for an order under Rule 61 to obtain a true record of the proceedings of the authority or tribunal whose decisions to be brought under review, and he referred to the judgement of KREIGLER AJA in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 at 660. So far, I agree entirely with what he said.

47. He then proceeded to consider the way in which the Board dealt with the IBS tender. He observed, in para. 39, that IBS deliberately left the services element out of their bid, citing the passage from para.3.12 of the Technical Proposal, quoted above. From there, he proceeded to hold that the Board conferred an unfair advantage on IBS by accepting their tender. In my view, the judge went too far in expressing his criticisms as he did, and based his views on a misunderstanding of the position of the Board. Of course, if the Board had realised that there was this marked difference between the contents of the two bids and had deliberately preferred IBS, they would have been guilty of unfairness, particularly if there had been some element of concealment of the contents of the IBS bid. The information before us, however, does not demonstrate any such element of concealment. The IBS bid was perfectly clear about what it included and what it did not include. What went wrong was that, as I have suggested above, the importance of the pricing element of the bids was lost sight of in the evaluation process, so that the Board did not appreciate that the two bids were not directly comparable. There is nothing to show that the Board did not act in good faith in the exercise of their duties as they understood them at the time. They did, I think, take too limited a view of what their duty of supervision required, but I do not

think that it has been established that they violated their duty to act fairly, as the judge found in para. 48.

48. The judge was also very critical of the conduct of the Board in the course of this application to the court, which he described as "extremely disturbing" (para. 44). He said that the Board had filed a record, in response to the application, which was "incomplete" and that on two subsequent occasions they had failed to remedy the failure by filing the full terms of the relevant parts of the bids. He described the Board's actions as "calculated moves intended to conceal important information."

49. Again, in my opinion, the judge went too far in his criticism. As Mr. *Peter* pointed out in his argument, the criticism starts from the misunderstanding that the full terms of the bids formed part of the Board's record. I do think that the Board is open to some criticism in that they failed, apparently, to take any steps to find out what the true position was and to disclose it, once the issue of the true nature of the IBS tender had been raised. In my view, the Board had a duty to investigate, in terms of section 53 as well as in pursuance of their general duty to ensure fairness, and they took much too negative a stance in their response to the application. However, I would see this as another case of misconstruction of their obligations, rather than anything more sinister.

50. The judge also criticised the Board, in paras. 55 and following, for refusing or failing to deal with important allegations in the affidavits filed by AST and for preferring to take their stand on technical points such as the contention that the allegations were based on hearsay. In this respect, I have much more sympathy with the judge's view. Looking at the whole course of proceedings, it does seem to me that the Board have been excessively negative in their responses and more concerned to fend off any possible criticism of themselves than to ensure that the issues raised by AST were properly investigated and understood. Again, this may be the result of a misconstruction of the duties imposed on the Board, and I would therefore close this section of this judgement by repeating that while the judge was, in my view, wrong to draw inferences amounting to misconduct on the part of the Board, he was right to stress the Board's responsibility for openness, fairness and transparency.

51. The substitution order

This part of the case, although important, can be dealt with relatively briefly. Having set aside the award to IBS, the judge ordered the Board to award the tender to AST. In doing so, he correctly directed himself in terms of well established authority as to the circumstances in which a court will, in review proceedings, take the exceptional step of making the decision itself rather than remitting the matter to the administrative authority. He referred in particular to the statement of HIEMSTRA J. in *Johannesburg City Council v The Administrator of the Transvaal* 1969 (2) SA 72 at 76 in which he defined the exceptional circumstances as follows:

> "(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by the reference back is significant in the context.
>
> ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."

52. In deciding to grant the substitutionary order, the judge referred, firstly, to the fact that, of the eight bidders originally interested, only AST and ISB had been found capable of delivering the project and that ISB had since declared itself unable to perform, leaving only AST: and, secondly, to his findings about the conduct of the Board as a factor weighing against a reference back. He considered arguments on behalf of the Board that it would be inappropriate to make the order when AST's tender exceeded the budget but held that, given the fact that it would be open to the parties to negotiate the

contract sum, there was no objection to making the order. He further held that he was not precluded from making the order by section 45 of the Act.

53. For the reasons already given, I think that the judge went too far in his criticisms of the conduct of the Board. On a proper view of the material before us, I do not think that this court need have any real doubt about the ability of the Board to treat fairly any issue relating to this project with which it may have to deal in the future. As regards the other matters, I think that it would be an extreme step for this court to order acceptance of a bid which exceeds, by a very substantial amount, the funds budgeted for the project. Further, it would not be correct to say that acceptance of the AST tender was the only option if the IBS tender was set aside: it would have been open to the Board to direct that neither tender should be accepted and that the Department should either negotiate a price within its budget, or look for additional funds or reconsider its requirements. The passage of time has, in any event, complicated the picture. This court has no knowledge of, for example, the extent to which developments in technology may have rendered obsolete or inappropriate the solutions which were proposed in 2003. In all the circumstances, therefore, in my opinion, this part of the judge's order should be set aside.

54. There remains a question as to what order this court should make. The normal order would be to remit to the authority to reconsider the matter. It is not, however, necessarily clear that that would be appropriate or helpful, given the changes of circumstances since 2003. There were, for example, some mentions of alleged changes in the status of AST which I have not thought it necessary to detail, but which might have some effect on the parties' future plans. In my view, therefore, the appropriate course is to set aside the substitutionary order and declare that it is open to the Department to refer back to the Board any matter in connection with the tender of AST, should they so decide.

55. Costs

The judge ordered the Board to pay the costs of the main application, but found the Board entitled to the costs of the interlocutory application for security for costs. There is no reason to disturb his finding about the costs of the interlocutory application. As regards the main application, I think that, looking to the whole circumstances, including the nature of the allegations raised and the conduct of the application, the most reasonable course is to make no order for costs.

56. The Court will therefore make the following order –

1. Paragraph 1 of the order of the High Court dated 25 November 2005 by which the decision of the appellant to award the tender to the third respondent was reviewed and set aside is confirmed.
2. Paragraph 2 of the said order of 25 November 2005 is set aside.
3. The Department of Immigration shall be entitled to refer any matter in connection with the tender of AST to the appellant for reconsideration if so advised.
4. Paragraph 3 of the said order of 25 November 2005 is confirmed in relation to the costs of the interlocutory application for security for costs but otherwise is set aside.
5. There will be no order for costs in the High Court nor this Court, except as provided in the preceding paragraph.

DELIVERED IN OPEN COURT AT LOBATSE ON 27 JANUARY 2006.

LORD COULSFIELD
JUDGE OF APPEAL

I AGREE

P. H. TEBBUTT
JUDGE PRESIDENT

I AGREE

N. J. McNALLY
JUDGE OF APPEAL