

2 Soccer City

What it says about the murky world of government tenders

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FAST FACTS ON SOCCER CITY

- The stadium cost approximately R3,4 billion to build and upgrade
- It occupies 25 hectares on the east of Soweto.
- It has a seating capacity of 94 000.
- The playing area is 11 232 m².
- 80 000 m² of concrete, 9 000 tons of reinforced steel, 7 100 tones of structural roof steel and 11 million bricks were used to construct it.
- It has 228 (mainly corporate) suites, split evenly between two levels.

INTRODUCTION

Designed as an African calabash and dubbed 'the melting pot', Soccer City is the showpiece stadium for the 2010 FIFA World Cup and is set to host the opening match, six further matches and the final match. With seating for 94 000 specta-

tors and as the biggest stadium on the continent, it is rightly regarded as South Africa's 'national stadium'. It hasn't come cheap, however.

At last count, Soccer City cost R3,4 billion to build and upgrade – funded by taxpayers through the National Treasury. While this was more than the R3,1 billion spent on Durban's new Moses Mabhida Stadium,¹ it remains less than the R4,5 billion spent on Cape Town's Green Point Stadium (see chapter in this publication, *How Cape Town Got Its White Elephant*).² But having spent so many tax rands building Soccer City, Johannesburg residents will have understandable expectations that the stadium will be able to provide some return on their investment.

The stadium owner, the City of Johannesburg, apparently shares this expectation. It states in its 2008 annual report that the World Cup 'should be mobilised to ensure a long-term and sustainable benefit to the citizens long after the event is over'.³

This assurance that taxpayers will indeed see some tangible economic benefit from the event that cost them so much will provide some comfort, given the extensive debate over the extent to which FIFA parachutes into a host country for the World Cup and extracts the bulk of the profits from the event, leaving mixed feelings in their wake about the benefit of staging the tournament. This appears to be confirmed by the fact that in exchange for using specific stadiums – such as Soccer City or Ellis Park in Johannesburg – for the 2010 World Cup, FIFA has agreed to pay a 'rental' to the stadiums. This is attested to by a contract signed on 13 March 2006 between FIFA, the Local Organising Committee (the LOC, which has been mandated to handle the World Cup organisation on behalf of the South African Football Association, SAFA) and Ellis Park stadium.⁴ The contract says the LOC:

shall pay to the stadium authority as rental for the use of the stadium during the exclusive use periods, an amount equal to ten percent of the net ticket revenues in respect of matches and/or events held at the stadium during the competition.⁵

Obviously, the 'net ticket revenues' for the event are dependent on a host of factors, including actual attendance at matches and exchange rate fluctuations on tickets bought overseas.

However, an investigation has revealed that thanks to a curiously shadowy deal, the City of Johannesburg (hereafter the City) has effectively ceded all of the cash it will earn for the World Cup from FIFA to a little-known company established in 2009, called National Stadium SA (NSSA).⁶ NSSA was selected by the City on 30 October 2008 as the winning bidder for a ten-year contract to ‘manage’ Soccer City, before and after the World Cup.⁷ But besides the fact that the NSSA contract effectively sees the City forego all profit from the World Cup, there are other disturbing aspects of the contract that have serious implications for policymakers.

Foremost among these is that serious questions have emerged about legitimacy of NSSA’s ‘empowerment status’ – which was a key pillar of its tender bid according to all concerned. In this case, only months before the tender application was made, NSSA’s 50 per cent shareholder Global Event Management (GEM) struck a curious deal which saw 26 per cent of its shares transferred to an employee and former security guard, Gladwin Khangale.

This aptly highlights how policy flaws in South Africa’s tender laws help mask crucial details of supposedly ‘public tenders’, providing fertile ground for serious conflicts of interest to fester.

TENDER WHEELING-DEALING AT THE CITY OF JOHANNESBURG

With a substantial R200 billion awarded in state tenders every year⁸ – which equals the amount due to be collected from individuals in personal income tax by Treasury in the 2008/2009 year⁹ – a successful bid for government business represents a handy pension for the winner. Yet, as many experts have written, the awarding of public tenders is ‘still notoriously opaque’, with tenders being ‘rarely directly accessible’¹⁰ – the result being that irregularities are only exposed after the fact.

An apt case study of the dangers of this opaque system can be found in the awarding of the contract to manage the Soccer City stadium. In February 2008, the City announced an invitation to tender for the ‘general management of the Soccer City stadium, due for completion in April 2009’.¹¹ The closing date for tender applications was 1 April 2008.

Among the tasks that the winning bidder was to have performed was a plan for the ‘commercial and operational management of the stadium, and stadium

precinct'. The tender invitation called for a 'detailed business plan, which includes management and staffing structure, operational plans, commercial and marketing plans and options for the ownership/management fee structures'.¹² Essentially, the plan was to sign up a stadium manager not only to keep the revamped Soccer City running properly, but also to ensure that after the World Cup, the stadium wouldn't simply become a white elephant unable to justify the R3,4 billion it took to upgrade it for the two-month event.

With no publicity, the City's tender adjudication committee shortlisted three companies, one of which was NSSA. A 'public participation' process then took place from April to July, and the tender review and adjudication process lasted until 24 October 2008.¹³

On 30 October 2008, council minutes say it was resolved that 'the service level agreement between the city and the appointed management company for the management of Soccer City stadium, be approved'.¹⁴ It said the service level agreement had to 'be amended to include a condition regarding the ownership of Soccer City'.¹⁵

A contract was then negotiated, the upshot being that NSSA signed the deal to manage the stadium for ten years on 20 January 2009. The Soccer City developers officially handed over Soccer City to the City and NSSA in March, and FIFA are then expected to take control from about April to August 2010, before handing back the reins to NSSA.

The choice of NSSA wasn't an uncontroversial decision, even at the time. According to the minutes of that October council meeting, Democratic Alliance councillor Mike Moriarty 'requested that more details be provided to the council in respect of the form and the contents of the public participation process'.¹⁶ Johannesburg Mayor Amos Masondo responded by asking the council to approve the resolution anyway, while pledging that 'reports would, on an ongoing basis, be submitted to council to indicate the progress in this regard'.¹⁷

However, emphasising the dearth of public communication about the awarding of tenders, news that the Soccer City management tender had been awarded only dribbled out in May 2009. Specialist publication *Engineering News* reported that Global Event Management had been awarded a five-year contract to manage the Soccer City Stadium.¹⁸ Sibongile Mazibuko, the FIFA 2010 executive director in the office of Johannesburg mayor Amos Masondo, was quoted as saying:

We opted for a professional company as opposed to a municipal manager [because] it is a huge investment, and we want to take advantage of the asset.¹⁹

The fact that it was NSSA – not GEM, as reported by *Engineering News* – that landed the tender, and that it was a ten-year deal, not a five-year contract, underscores the paucity of detail on tenders, even months after the fact.

When contacted by the author, Mazibuko refused to answer any questions on the contract.²⁰ ‘That’s part of the contract, and I’m not at liberty to discuss that,’ she said. Equally, when it came to the tender process, she refused to reveal any details of who NSSA competed against. ‘We received a number of tenders, – more than three, – but we don’t reveal who contests these tenders,’ she said.²¹

In fact, the public would be none the wiser had the author not been able to lay hands on confidential tender documents and the stadium-use agreement signed between the City and NSSA on 20 January 2009. Those documents reveal that, far from getting a return from the R3,4 billion investment in Soccer City, the City has effectively ceded all the profits they will get from the FIFA World Cup to NSSA.

This underscores the fact that the estimated R17 billion cost of erecting the soccer stadiums for a once-off FIFA event far exceed the benefits, as is cogently argued elsewhere in this publication (see particularly the chapter on Cape Town).

GIVING AWAY THE CROWN JEWELS

The ‘stadium management agreement’ is the licence that allows NSSA to take control of the management of Soccer City.²² The interesting part is the payment terms, which spell out a ‘profit share arrangement’ between the company and the City. This deal is divided into two terms: the ‘excluded period’, during which FIFA has control of the stadium, and any other time.²³

For the period after the World Cup, there is a sliding scale depending on how much profit is actually generated. If Soccer City generates less than R10 million in ‘net profit after tax’, for example, NSSA will pay the City 18 per cent of that amount, while another 5 per cent will go into an ‘employee share trust’, and a further 5 per cent is set aside for ‘stadium-related skills development’. The

remaining cash – 72 per cent of the profit in this case – will go to NSSA and its shareholders.²⁴

But what will become of the profits from the FIFA World Cup itself, which was, after all, the reason for spending R3,4 billion on building the stadium in the first place? The contract says, ‘the income to be generated by the stadium in terms of the FIFA agreements shall be deposited into [a] Provisional Account’.²⁵ This ‘provisional account’ will be set up at a bank by NSSA, and will be run jointly by the company and the City. This FIFA World Cup income will then be used for all pre-World Cup expenditure including ‘staff salaries, the cost of artisans and contractors, maintenance costs, IT expenses, human resources expenses, and NSSA expenses’ – an estimated R30 million.²⁶

But it will also be used for ‘all capital expenditure ... after the FIFA World Cup 2010’ and ‘all future unforeseen operating expenditure’ incurred by NSSA. And, if all these expenses come to more than the entire World Cup income, the City even says ‘such shortfall shall be paid by [the City] to NSSA’.²⁷

So, in essence, all the cash from the World Cup will go into a bank account jointly controlled by NSSA and used for ‘expenses’ – this despite the commitment that the World Cup should benefit all residents of Johannesburg.

How much money is likely to flow into this ‘provisional account’ from the World Cup? What is the likely value of the 10 per cent of ‘net ticket revenues’ for the World Cup events that FIFA will pay to the City of Johannesburg as rental for the stadium? A letter from the City’s Mazibuko to Investec Bank in May 2009 confirmed that Soccer City ticket sales during the FIFA World Cup were expected to amount to R1 544 728 185.²⁸ This is based on various assumptions, with ticket prices ranging from \$20 each for the group matches (but only 10 per cent of the tickets are sold through this channel) to \$900 each for tickets to the final (half of the available tickets are sold at this price).²⁹

The letter implied that by May 2009, the City was likely to be paid R154 472 818 as ‘rental’ by FIFA – money that it appears will go straight into the ‘provisional account’. Since May, the currency has strengthened considerably from around R8.30 to the US dollar to around R7.30 at the time of writing. In an interview with the author, NSSA CEO, Jacques Grobbelaar, says he now expects the FIFA revenue to the stadium to be in the order of R128 million.³⁰

This isn’t small change for NSSA SA, and the question remains: why did the City agree to cede the crown jewels (in the form of the World Cup profit) to the ‘management company’? While a return of R128 million on the stadium cost

would not come close to matching the construction costs, it would at least go some way to meeting the promise that the event should benefit all citizens in an economic sense.

WHO IS NATIONAL STADIUM SA?

- The company that landed the contract to manage Soccer City for the next ten years is as anonymous as it comes.
- It was incorporated in late 2008 as a 50/50 joint venture between Global Event Management (GEM), and Intelligent Venue Solutions SA (IVS).
- Both cite impressive CVs. GEM claims to have been in business for 23 years, providing security services and acting as a stadium consultant on the Angola Stadium and Wembley Stadium UK. Its big contracts include a R100 million management contract for the Ellis Park stadium.
- GEM is 74 per cent controlled by the Diligence Group, while Gladwin Khangale is listed as a 26 per cent empowerment shareholder (see discussion below).
- IVS, which appears to have only been incorporated in January 2008, boasts that it acted as a consultant on the Millenium Stadium in Cardiff. Its shareholders consist of four individuals: Mark Ransom, Russell Stephens, Barry Pollen and Andrew Moss.

‘A BLANK CHEQUE’

Mike Moriarty, the former Democratic Alliance councillor for Johannesburg who now sits in the Gauteng legislature, says his party opposed the resolution to appoint NSSA for exactly this reason.³¹ ‘What we saw and what was drafted appeared to be a wholesale ceding of rights for very little benefit. The City was effectively giving away a blank cheque,’ he says. Moriarty says the council weren’t told of the benefits for the City and there was no financial information attached. ‘The only response we had to our questions was that the City had done their homework, and they were getting something for nothing. But we couldn’t see what that “something” was,’ he says.³²

Moriarty says there would be three reasons for doing a deal that on the face of it doesn't look reasonable at all: either it was simply the wrong decision, or it was a masterstroke based on some unknown fact, or there was some underhand reason for doing it. 'Here, the City argued that by doing this deal, they don't carry any of the operational risk or costs,' he says.³³

But there are a number of problems with this reasoning. First, while it is true that some stadia have proven a big drain – the Johannesburg Athletics Stadium being the prime example – Soccer City is projected to make a net profit. According to NSSA's projections in its tender bid, Soccer City will make a R60 million net profit during 2010.³⁴ This will be almost entirely attributable to the World Cup as net profits will rocket from R1,4 million in April to a R23,8 million net profit during June and R23,9 million during July.³⁵ This net profit drops in 2011 and 2012 to R10,3 million each, primarily because 'game income', which includes ticket sales, falls from R49,5 million in 2010 to R2,5 million afterwards.³⁶ But even at the outset, all expectations were that a sizeable profit could be made.

Grobbelaar, however, says these profit projections 'are outdated', and that all the World Cup income will go into the 'provisional account' anyway to be used for capital expenditure and unforeseen expenses.³⁷ But the point is, it appears there is money to be made for a savvy operator, which distinguishes Soccer City from Cape Town, where there are serious question marks over the economic viability of the Green Point Stadium in the longer term.

Second, the 'management contract' with NSSA shows that the City certainly does bear some of the risk. It contains a full page of 'obligations' on the City, including to 'take out and maintain insurance in respect of the stadium and its assets against the risks to which they are ordinarily subject'.³⁸

Third, the City also appeared to have signed a collateral agreement with Investec bank on 6 May 2006 under which it agreed to pay 'any amounts owing or incurred by [National Stadium] to you, providing that the amounts recoverable hereunder shall not exceed R130 million'.³⁹ This 'security agreement', signed by Mazibuko and due to expire in January 2011, was meant to help NSSA raise 'bridging finance' to complete the building of the stadium.

Quite whether this security agreement was implemented is uncertain, because Grobbelaar said that 'no agreement has been signed [with] Investec Bank by either party'.⁴⁰ He says that 'in executing finance options, NSSA confirmed the terms of engagement (as stipulated in the Stadium Management

Agreement) with Investec'.⁴¹ Either way, this illustrates that the City not only ceded its World Cup profit: it wasn't shy of taking on obligations, either.

As Steven Levitt argues convincingly in his book *Freakonomics*, if there is behaviour that seems out of the ordinary, there is usually an incentive scheme behind it somewhere.⁴² So a possible inference is that City officials who decided to cede the World Cup profits were incentivised to do so. It stands to reason that if those officials were incentivised to keep the World Cup profit, they would have found some way to do that. Instead, a reasonable inference is that the incentive for the City officials was primarily to cut a deal to reduce financial risk for the council, rather than to seek the highest return on investment. This would raise serious questions, considering that officials carry a public responsibility to improve the socio-economic status of their constituency, and not simply surrender taxpayers' cash to projects of dubious long-term value.

When asked about her incentive structure, Mazibuko told the author that she receives only a set salary and no bonus.⁴³ The City's annual report reveals that Mazibuko is on a 'fixed-term contract' and there are specific 'performance agreements' in place for her. However, it does not elaborate on these performance targets.⁴⁴ Either way, this case study suggests government needs to consider the unintended consequences of incentivising public servants simply to avoid risk, especially if municipalities are seeking to become financially independent entities able to provide a return on taxpayer money. Further transparency of public servants' incentive structure would be welcomed, as it would throw new light on the motivation behind government decisions.

WEIGHING UP THE QUID PRO QUO

Grobbelaar, CEO of NSSA, says one of the reasons why the City chose this option is because it was worried the stadium might end up as an expensive white elephant with no practical use after the World Cup.⁴⁵ 'It could turn out to be a huge political embarrassment if a R3 billion stadium ends up not being used. So part of the criteria for the tender was to create a legacy for the stadium,' he says.

Grobbelaar says the City agreed to this deal because it had learnt some nasty lessons from the Johannesburg Athletics Stadium, which was built in 1994, but which has steadily degenerated into disrepair.⁴⁶ 'The City quite rightly looked at this example, realised they weren't in the stadium management business them-

selves, so looked for the expertise of companies that do know how to manage stadiums, so that they didn't end up throwing away even more money,' he says.⁴⁷

This is a justifiable concern, given the poor prospect of Cape Town's Green Point stadium being used for anything of economic value after the two-month World Cup. But equally, this scenario is highly dependant on the actual stadium concerned. As the business plan and profit estimates for Soccer City spell out, there are real expectations that this stadium will be soundly profitable.

As part of its plan, NSSA plans to organise a number of money-spinning events at Soccer City, which will be rebranded after the World Cup as 'National Stadium'. This includes international rugby matches, a series of exhibition matches involving teams like Manchester United, A-list musicians using the stadium as a concert venue, and local Premier Soccer League teams using it as a base.

Grobbelaar is also adamant that NSSA won't simply Hoover up all the cash from the World Cup.⁴⁸ 'The perception is that all this money from the World Cup will go to NSSA. But we won't get that money. At this stage, that R128 million will go into the provisional account,' he says.⁴⁹ That cash, according to Grobbelaar, will be used to finish the construction of the stadium. This includes putting in place audio-visual equipment, erecting press facilities, finishing building the suites and painting the walls.

At this stage, he estimates that these capital expenses could suck up another R75 million, which leaves about R53 million 'unaccounted for'.⁵⁰ Grobbelaar says this 'balance' is 'clearly dedicated to any other extraordinary operational expenditure, maintenance and unforeseen expenses' for the next eight years.

If after eight years (when NSSA's contract expires) there is still R40 million in that provisional account, this carries over and will remain in the account for the next management company. So the money will stay in that account.⁵¹

Grobbelaar stresses that this is a fair arrangement: his company does not receive any grant or monthly 'management fee', but is taking control on a 'pure financial risk' basis.

However, if the money from the World Cup is to be used to cover other expenses over the duration of the management contract that would otherwise be for NSSA's account – which seems to be the case – then the company is clearly benefitting from the World Cup cash. Grobbelaar argues that one of the reasons for this odd financial structure is that the construction company hired to build Soccer City was not contracted

to provide a 'finished product', so a method needed to be found to finance the completion.⁵² 'The City was very clever in ensuring that it didn't lean further on taxpayers' money because it will use the FIFA World Cup money to complete the stadium, and for ongoing maintenance,' he says.⁵³

He says that, with 94 000 seats being built at Soccer City for R3 billion, construction costs work out to R31 914 per seat (it's actually more, considering the stadium will cost R3,4 billion). Grobbelaar argues that this is far cheaper than Cape Town's R4,5 billion Green Point stadium which works out to R83 636 per seat. 'Sure, the City may not now get the FIFA World Cup money which is used to complete the stadium. But which is the better option for taxpayers ultimately?' he asks rhetorically.⁵⁴

Hank Ferreira, another director of NSSA, says 'one of the reasons we were successful [in the tender bid] is that we took a lot of the risk ourselves, like putting down the guarantees for the City ... They do get a profit share, but the majority of the risk was taken by NSSA,'⁵⁵ he says.

But the City, along with the host cities for the nine other World Cup stadiums, were initially allocated R7,62 billion by National Treasury, spread over four years, to build the stadia.⁵⁶ This cost escalated, and according to National Treasury's latest 2009 budget, government was to have contributed R11,5 billion to building the stadia. When you include the contributions from host cities and provinces, estimates are that total government spending exceeded R17 billion. What happened to that cash, and how come World Cup proceeds will now be used to pay back debt?

'Well, the stadium was well over budget and (in some cases) the specifications in place weren't in the contracts,' says Ferreira.⁵⁷ For example, he says the original construction contracts included no clauses obliging contractors to build dividing walls in the kitchens in the suites.

So the underlying question is: to what extent did the City 'compromise' on the NSSA contract in order to get more cash to complete the stadium? After all, it looks very much like NSSA performed a 'favour' for the City. It therefore appears that the City's inability to raise more finance to complete the stadium meant it was pushed into a situation where it had to cede its World Cup profits to NSSA, which would then apply for a bridging loan itself. This then allowed the City to comply with its FIFA obligations to hand over the completed stadium for the World Cup.

However, Grobbelaar is adamant that the City ‘did not compromise on any deal’.⁵⁸

The FIFA agreement said the City would only get the ticket money towards the end of 2010, so we obtained a bridging facility to help them out. We anticipated that it would be easy to obtain the money, but it turned out to be extremely difficult.⁵⁹

However, he would not reveal where this cash ultimately came from, citing only ‘private funders’.⁶⁰

But it is no secret that the rapidly expanding costs of Soccer City have put pressure on a council that is under pressure to deliver basic services and which ended its 2008/2009 financial year with a R510 million operating deficit.⁶¹ A report tabled in the Council in September 2009 showed that the City asked department heads to slash their capital spending budget by R670 million and their operating budgets by R477 million to free up funds.⁶² Of this R1,1 billion, R800 million will be channelled to meet the extra costs of Soccer City. On this issue, eThekweni’s deputy mayor Logie Naidoo was quoted by *The Times* newspaper as saying the extra 2010 costs ‘will certainly affect service delivery’.⁶³

Ferreira, however, says the ‘bridging finance’ amounted to R120 million, and fixed ‘the host city’s problem’.⁶⁴

The NSSA facilitated that loan of R120 million, and that money will be used to [pay] the capital items. Once the host city receives all that money [from FIFA towards the end of 2010], then they repay that loan.⁶⁵

This, however, appears to raise a clear conflict of interest. Though Grobbelaar praises the City for being ‘clever’ in structuring the deal, the question is: to what extent did the City’s need for some other party to raise cash on its behalf see it compromise on the stadium management contract, foregoing cash that would otherwise accrue to taxpayers?

TENDER SECRETS

Would such a deal structure have been acceptable to South Africans, had they known of it before the City signed the contract? It’s impossible to say, because

the reality is that the public had no idea that Johannesburg residents wouldn't see a cent of the World Cup money, nor were they aware of the terms of NSSA's deal.

Don Forbes, a Johannesburg city councillor representing the Democratic Alliance, says the murky details of NSSA's appointment illustrates the vacuum of knowledge around supposedly public tenders:

We as councillors don't have access to the details of specific tenders. We have to ask for that – such as what were the merits, or the return for the council – but often we don't get that information.⁶⁶

When it came to National Stadium, 'we still don't know what the details of that contract were: does it give you the right to sub-contract, for example'.⁶⁷

The bottom line, as Moriarty told his council colleagues at that October meeting, is that there was insufficient information available for the public-appointed nominees to assess whether this really was the best option for citizens.

There are similar concerns mounting about the poor transparency over the management contract of the Green Point Stadium in Cape Town. In this case, a management consortium including Sail and the French company Stade de France have negotiated a deal under which they will pay the City of Cape Town 30 per cent of the stadium's net profit less municipal rates.⁶⁸ But if the stadium fails to turn a profit, the City of Cape Town will only be paid one Rand per year. Retired engineer Ralph Malan said the project has 'been bedevilled from the start by official deception of the public'.⁶⁹ *The Daily Telegraph* wrote that the 'extraordinary terms of the deal, which so heavily favour the operating company, have raised suspicions that the City of Cape Town was outmanoeuvred by the consortium's lawyers'.⁷⁰ NSSA's Grobbelaar cites the Cape Town case as an example of how risky it is for a company to take full control of a stadium, given potential losses.⁷¹ But the NSSA case study succinctly encapsulates the real problem: a dearth of information about public tenders.

Ironically, this situation has been exacerbated by amendments to the Municipal Finance Management Act (MFMA) in 2004, which were meant to fix corruption and dodgy tenders. Prior to that, city councillors were part of tender committees that assessed all tenders of R1 million and above. Partly to address the conflict of interest entailed in party members squabbling for access to tenders, the MFMA placed the adjudication of tenders within the ambit of

City officials.⁷² This is fine in theory, but in practice, it hindered the ability of opposition party councillors to challenge aspects of tenders that they now don't get sight of.

Evaluation and acquisitions committees staffed by City officials now have the final say on tenders.⁷³ Disclosure simply involves releasing a report to councillors at either three- or six-monthly intervals reporting their decisions. 'What we now cannot see are the details of the job being tendered for, who the competing bidders were, and ultimately why a bidder was chosen,' Moriarty says.⁷⁴

This is a nasty unintended consequence of the MFMA, which was meant to improve governance at local government level, – not add another cloak of secrecy onto multi-million Rand decisions. Fitzgerald Ramabua, the deputy director for committees in the City of Johannesburg, defends the process. 'Look, when the tenders are closed, all the bids and values are read out publicly. It will say, "Joe Soap put in a bid of R5", for example,' he says.⁷⁵ Ramabua says a losing bidder can approach the municipality to request reasons why it was rejected, and members of the public can use the Promotion of Access to Information Act to ask for details of tenders:

But the information submitted is confidential, and we will not give information about other bidders unless compelled to under the Access to Information Act.⁷⁶

The problem is few people know about – or even use – these legal avenues to prise out information. For example, the MFMA makes provision for a 'tender ombudsman' to exercise oversight, whom losing bidders can approach. However, Ramabua confirms that 'no one has followed that route' in the City of Johannesburg.⁷⁷ In fact, the City of Johannesburg hasn't even appointed an ombudsman yet.

But Ramabua rejects the implication that, as a consequence, decisions are often made arbitrarily, pointing out that the bid specification and bid adjudication committees include experts – such as lawyers and engineers – employed by the City.

Grobbelaar, who has entered about 20 tenders, also believes the current MFMA regime does provide sufficient transparency:

There is a public participation process, and tenders are lodged so that in ten years time, a tender committee can dig up past tenders to investigate someone's history.⁷⁸

But the absence of politicians in the tender adjudication process, he believes, helps remove the suspicion of fraud or influence.

The 'public process' allows the public to see the actual contract and pose any questions to the tendering parties, but hardly anyone does. In this case, for example, there were no questions or challenges to NSSA's tender – despite some rather pressing concerns.

The theory and the practice of the 2004 MFMA amendment are clearly at odds. As the *Financial Mail* pointed out, if the officials who are now in charge of adjudicating tenders owe their positions to a political party, then this MFMA amendment won't fix anything.⁷⁹ In fact, the unintended consequence is *less* transparency on tenders, with often-vociferous opposition parties now joining the public in the gallery of the blind. Opposition parties, after all, are incentivised to scrutinise and challenge decisions made by the ruling party, contributing to a healthy democracy. Public officials, however, are only incentivised to look after their jobs, and if they're lucky, get a bonus at the end of the year.

'MY HAND IS HEAVY'

In a case like NSSA and the Soccer City management deal, the opaque tendering system means there are more questions than answers. But in other cases this lack of transparency allows for blatant corruption. This is how 49-year-old Johannesburg businessman and former CEO of Great African Seating, Vivian Lottering, tells it.⁸⁰

In 2007, Lottering's company was asked to submit a tender for the seating at Soccer City, which his company valued at R45 million:

We were very confident because it was pretty much our product specified in the tender request. We did an excellent presentation to the adjudicators and our product and price was very competitive.⁸¹

But soon after, Lottering says, he and his partner got a phone call from a man whose identity he still refuses to reveal who attempted to solicit a bribe:

He said to us, ‘the job is yours, but my hand is heavy’. So I asked what it would cost him to move his pen. He told us R2 million, but I said there was no way I could afford that.⁸²

The following Monday, Lottering’s Great African Seating got a letter saying that its bid had been turned down.

Lottering says he was bitter, and approached various members of the SAFA and other forums without luck. ‘The feeling I got from speaking to various people is that the World Cup comes around just once, so now is the time for people to cash in using whatever means they can,’ he says.⁸³ An unhappy post-script is that, partly because of its failure to win the World Cup contract, Great Africa Seating went into liquidation in 2008.⁸⁴

Public access to all the tenders would allow for questions to be asked when the best tender is rejected, which would contribute to exposing decisions made for the wrong reasons.

Is there any justifiable reason for keeping tender documents confidential? When it comes to tenders, the City’s supply chain management says ‘all information designed and prepared for the city is proprietary’ and ‘all supplier information shall be treated as confidential’.⁸⁵ As a token concession to proper disclosure, it adds that ‘to ensure transparency, fairness and to restrict abuse, the City must publicly advertise the requirement to allow other interested parties to submit bids’.⁸⁶

But Dr Danny Titus, former chair of the South African chapter of Transparency International, believes there is no reason to keep tender information confidential.⁸⁷ ‘There is no justification at all. Here and there, you could argue a case of proprietary information, but not in general, given the money involved and importance to the country,’ he says.⁸⁸ Titus first raised concerns about the poor transparency in 2010 World Cup tenders two years ago. ‘We spoke to the Local Organising Committee, who were very open with us. But they said that the cities themselves had jurisdiction over the stadiums, so that’s where the problems lies,’ he says.⁸⁹

Titus’ fears were confirmed by the preliminary findings of a probe by the Competition Commission into construction companies colluding on tenders

for the World Cup. In July 2009, the Competition Commission announced that it was investigating illegal price-fixing by companies involved in building World Cup stadia – including Murray & Roberts, Group Five, Wilson Bayly Holmes Ovcon, Basil Read and Stefanutti Stocks.⁹⁰

Construction costs for the stadia had ballooned far higher than expectations. The Competition Commission was concerned that there ‘seemed to have been very little in the form of competitive bids from the major players’.⁹¹ Essentially, it suspected that tenders were ‘divvied up’, with firm A agreeing to tender only for the Cape Town stadium, for example, and firm B agreeing to tender for Soccer City. Competition Commissioner Shan Ramburuth was quoted by news agency Reuters as saying ‘We have good grounds (to believe) this has happened, and we are investigating.’⁹²

Two months later, the Competition Commission confirmed it had received ‘several applications for corporate leniency from construction companies for collusive practices’ – essentially a plea bargain under which a company’s fine is reduced in exchange for testifying against other offenders.⁹³ The Commission said its ‘preliminary investigations’ indicated there may be ‘widespread collusion in the construction industry’, including fixing margins for tenders and then ‘compensating losing bidders’.⁹⁴ Other illegal behaviour included allocating tenders through the use of score cards, and colluding by submitting blatantly uncompetitive bids.

Though Murray & Roberts fumed about these claims, denying any ‘wide spread and prevalent collusion’, it later issued a strange statement.⁹⁵

Murray & Roberts does not deny that in isolated instances, individuals in the Group have acted fraudulently in what can be construed as collusive behaviour. This is the independent action of individuals for personal gain. The Group has forensically investigated all its operations in the context of Competition Law and where such isolated irregularities have been found, it has engaged with and placed leniency markers with the Competition Commission.⁹⁶

Then in November 2009, cement maker Pretoria Portland Cement (PPC) confessed to ‘historical market-sharing arrangements with other cement producers in the late 1990s’⁹⁷ – essentially reaching deals with competitors to divide up

jobs. CEO Paul Stuver claimed to be ‘shocked and disappointed’ by this revelation, but the Competition Commission probe continues.

Though PPC’s admission that the deal was struck in the late 1990s implies this was before any World Cup contracts were awarded, the Competition Commission said the agreement was ‘implemented up until this year’.⁹⁸

Importantly, these events confirm that the concerns about corrupt deals being struck under cover of darkness thanks to an opaque tender system are not simply academic issues. We may never know how many of the World Cup stadium construction deals sapped excessive amounts of taxpayers’ money precisely because of this problem.

THE PROBLEM OF BLACK EMPOWERMENT AND TENDERS

Another indictment of the tender system, illustrated by the NSSA management contract case study, relates to the policy of black economic empowerment (BEE).

As happens with many government tenders, NSSA believed it important to highlight their BEE credentials in making their tender bid to Johannesburg. This is standard practice.

The City’s supply chain management policy, which seeks to implement the 2003 Broad-Based Black Economic Empowerment Act, sets out its commitment to use its ‘buying power as leverage to ensure effective implementation of broad based Black economic empowerment objectives’.⁹⁹ That policy makes it pretty clear that the odds of getting a tender accepted depend partly on black ownership and involvement in a company. However, when contacted, City personnel told the author that there is ‘no specific requirement’ for BEE, but ‘you should attach your BEE certificate to an application’.¹⁰⁰

Nonetheless, the pressure to be able to claim acceptable empowerment status has led to some bizarre cases of ‘fronting’ – companies tying up artificial deals to transfer shares to so-called ‘black partners’ for minimal value. These cases don’t only include small companies operating below the radar, either.

In 2007, for example, the JSE-listed transport company Super Group was drawn into a fronting fracas when Kei Fleet Solutions (KFS) took it to court claiming it had been used as a front to help Super Group’s Eastern Cape FleetAfrica unit land a R731 million five-year contract to handle the government

fleet.¹⁰¹ KFS director Mkululi Pakade said in a 2007 affidavit that his company had been ‘disregarded as a meaningful and active business partner in FleetAfrica Eastern Cape (despite owning 26 per cent), with the result that KFS finds itself in a position where it operates as a front to meet BEE requirements’.¹⁰²

This pressure on companies bidding for tenders provides fertile ground for irregularities and tender-rigging to occur. Combine that with the poor transparency around details of public tenders, and many companies feel they have licence to do artificial ‘share transfer deals’ where black people end up as the owners of large chunks of shares without having paid market value.

In the case of the Soccer City management tender, NSSA also felt compelled to include extensive documents elaborating on its empowerment status. According to the Department of Trade and Industry, government will recognise a ‘level four contributor’ as 100 per cent compliant with BEE rules. The top level – ‘level one contributors’ – get 135 per cent recognition. In practice, this means that those companies that buy from a ‘level one’ contributor get a 35 per cent advantage over a firm that buys from a ‘level four’ contributor.

In the tender documents, GEM provided a certificate from BEE-SEESA, which confirmed it was a ‘level four contributor, with a score between 65 per cent and 75 per cent’.¹⁰³ This was partly based on the fact that, while 74 per cent of its shares are held by Diligence Holdings, the other 26 per cent are owned by a previously disadvantaged individual, Gladwin Khangale. IVS-SA also provided a certificate from Empowerdex confirming it too was a ‘level four contributor’ with recognition for buying from black-owned companies.

In this case, empowerment credentials were necessary. In an interview, the City’s Mazibuko said that empowerment had been ‘an important part’ in deciding to award the tender to NSSA.¹⁰⁴ She said this was ‘in line with the city’s policy on black economic empowerment’.¹⁰⁵ According to a diagram presented by NSSA, Khangale still owns 26 per cent of his shares in GEM.

Yet, there are some worrying elements to NSSA’s ‘empowerment credentials’, which highlight how some firms could feel coerced into doing sham black empowerment deals in order to win tenders. The first factor to arouse suspicions is that the 42-year-old Khangale was appointed as a director of GEM only on 1 October 2007 – a few months before the invitation to tender was announced. A letter sent by secretarial company Actasec Services CC on 2 November records that it would ‘like to confirm that the transfer of 26 shares to MG Khangale was

processed with effect from 1 October 2007, and that Mr Khangale now holds a 26 per cent shareholding in the company'.¹⁰⁶

However, a breakdown of responsibilities, filed with the tender documents, records that while Khangale owns 26 per cent of the company and supposedly spends 100 per cent of his time at GEM, he has no financial responsibility for signing of loans, cheques, surety, acquisitions or any major contracts. Nor does he have the power to hire or fire anyone. In the tender documents, it lists Khangale's management responsibility as 'supervision of office personnel' and 'supervision of field/production activities'. This limitation on the responsibilities of a major shareholder and executive is a red light.

Another red light is that records at the Companies and Intellectual Property Registration Office list Khangale's address as '7105 Mahlangu Street' in Heidelberg. In a later meeting with the author, Khangale confirms that he still stays at that address. However, Mahlangu Street is in Ratanda, a low-income township area west of Heidelberg, where residents typically have little disposable income, let alone the funds to be dealing in stock of large companies.

The author went to meet Khangale at GEM's offices at the Nasrec exhibition centre next to Soccer City, but he was jittery and said 'I don't think I can disclose anything'.¹⁰⁷ He confirmed that he owned the shares at one stage, but said he no longer owned them. But when asked what happened that led to him disposing of the shares, Khangale clammed up, saying 'I can't explain that to you ... there's some confidentiality on that'.¹⁰⁸

He was equally evasive when asked why a 26 per cent shareholder had no rights to take any decision, referring all questions to GEM Managing Director, Hank Ferreira. He also appeared too scared to even confirm that he was still a director of GEM.

More alarmingly, Khangale's version of events contrasts with the official version. Hank Ferreira, the MD of GEM and a director of NSSA, says Khangale 'is still a shareholder ... The shares are still issued. Nothing has changed per our tender bid'.¹⁰⁹

However, it turns out that Khangale has not yet parted with a cent for that 26 per cent. Ferreira says a valuation was done which put the value of that 26 per cent at around R100 000.¹¹⁰ 'He bought those shares from the other shareholders ... at this stage there is a deferred payment plan,' he says. Ferreira also stated that once the company becomes 'profitable and dividends are paid', then Khangale

must start paying back that R100 000. He says Khangale has full rights to a 26 per cent dividend, however.¹¹¹

When the author put it to Ferreira that it was quite a coincidence that Khangale pops up as a 26 per cent shareholder shortly before a major tender, Ferreira denied this.¹¹² 'He was a shareholder long before we decided to get involved in the tender. The shares were transferred, I think, more than a year before the transaction, so it had nothing to do with the tender,' he says.¹¹³ In fact, the shares were transferred four months before the tender was announced, according to the letter from Actasec.

Jacques Grobbelaar, CEO of NSSA, says Khangale made a presentation to the GEM board 'long before the joint venture [with IVS-SA to form National Stadium] was even formed, or we even knew of a tender going out'.¹¹⁴ But again, there are contrasting stories. Initially, Grobbelaar says 'there was a portion of those shares not paid for', but later agrees with Ferreira's version that no payment was made.¹¹⁵ Grobbelaar says he 'cannot remember' the exact sum that Khangale was meant to pay for the shares.¹¹⁶

But when asked why a 26 per cent shareholder has no real power to hire or fire employees, or even sign the company cheques, Ferreira answered that 'once the shares are fully paid up, that will definitely change ... He is an HR manager being trained for bigger things. He is one of the members who moved through the ranks. As the skills levels pick up, changes will be made'.¹¹⁷

In fact, it turns out that Khangale joined GEM as a security guard in 2001. He then became a guard supervisor, before becoming an HR executive. According to Ferreira, he was 'pulled through the ranks, and put through our in-house training'. But Grobbelaar denies that this is window dressing in any form.¹¹⁸ 'I get frustrated when people refer to so-called window dressing, and I invite anyone to come and investigate the minute book because there's a path of issuing the shares,' he says.¹¹⁹

Grobbelaar says this was a 'private share transaction' anyway.¹²⁰ 'You've got to report on the facts. My service manager in NSSA is John Motsoneng, who joined 17 years ago. If I wanted to do window dressing, I would have done it with John. But I didn't do that because he wasn't in a position to buy the shares and had a different career path,' he says.¹²¹ Grobbelaar says that in any event, only 10 per cent of the ultimate 'score' that companies are awarded under the Department of Trade and Industry's broad-based BEE scorecard is given for black ownership.

Though Khangale's position as an empowerment shareholder raises the most serious questions, there are other issues about how NSSA represented itself. Although the tender documents say the 'empowered share trust' will hold up to 15 per cent of NSSA's shares, Ferreira says this has yet to happen.¹²² 'Soccer City is still in the construction stage and hasn't been handed over to the management company. Once it is, the trust and all those things will be finalised, and profits paid into the trust,' he says.¹²³

Grobbelaar attests to this:

The Stadium is not operational ... the trust, the policies and rules thereto, the election of trustees and shareholders agreements will be commissioned once the Stadium becomes operational.¹²⁴

But when these things are taken together, a serious question remains over the legitimacy of NSSA's empowerment credentials. The 2003 Broad-Based Black Economic Empowerment Act says the goal of the empowerment rules are to 'promote economic transformation in order to enable meaningful participation of black people in the economy', while affecting a real change in the 'racial composition of ownership and management structures'. Equally, the codes of good practice for black empowerment highlight the key principle that 'substance takes precedence over legal form'.¹²⁵

At the very least, the fact that a former security guard who lives in a low-income township obtained 26 per cent of a company set to make millions of rand from Soccer City without paying a cent, and in which he doesn't have the authority to even sign cheques, appears on the face of it to fly in the face of the spirit and principles of BEE.

CONCLUSION

The two Soccer City issues analysed in this report – the flawed black empowerment credentials, and the cession of the World Cup profits to a single company – highlight one throbbing public policy matter in need of urgent redress. The increasingly opaque nature of public tenders, as demonstrated in this report, severely undermines the other institutions dedicated to exposing conflicts of interest and ensuring sound governance.

Had full details of the NSSA contract been publicly revealed, it would have empowered publicly appointed office bearers and the media to ask the right questions. As it is, the public debate on state tenders is necessarily uninformed. Citizens with a stake in how their tax money is spent are consigned to flailing around in the dark when they have concerns about tenders.

Moriarty believes that government can still ‘open up’ the tender process to public scrutiny within the existing regime, without allowing politicians to take the actual decisions:

The Executive Acquisition Committee (EAC), which consists of unelected City officials, operates behind closed doors. I believe the EAC can still make the decision, but it can be publicly deliberated, and councillors can ask questions.¹²⁶

Under this model, there would be a ‘spectators’ gallery’ in which the public could also participate in the deliberations – if not the final decision.

There are already moves to introduce this greater transparency into the Cape Town municipality, and it seems a method that could be applied to all levels of local government.

When it comes to the Soccer City management contract, it seems the City is now locked into a ten-year deal with NSSA regardless. Unlike Green Point, the odds are good that Soccer City will not become a white elephant, provided NSSA’s business plan works. Either way, South Africans who contributed R3,4 billion to building the stadium will see none of the gate proceeds from the World Cup and only a small portion of any profit made by NSSA at the stadium for the next decade.

The City of Johannesburg is well aware of its obligations as host of the World Cup final. Its annual report says the way it manages the event ‘will define local and international perceptions of whether it is a successful World Cup or not’.¹²⁷ Similarly, the way government addresses the problem of murky state tenders will define whether South Africa allows undisclosed conflicts of interest to fester, or is serious about fighting corruption.

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