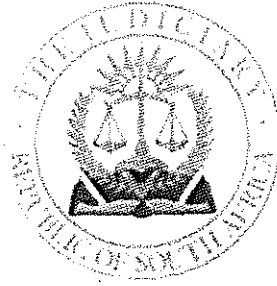

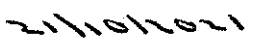


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11686/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
 	
<div style="display: flex; justify-content: space-between;"> SIGNATURE DATE </div>	

In the matter between:

GIJIMA HOLDINGS (PTY) LTD

APPLICANT

And

STATE INFORMATION TECHNOLOGY

AGENCY SOC LIMITED

FIRST RESPONDENT

MINISTER OF POLICE

SECOND RESPONDENT

In2IT TECHNOLOGIES (PTY) LTD

THIRD RESPONDENT

ADVANCED VOICE SYSTEMS (PTY) LTD

FOURTH RESPONDENT

 JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application by the applicant, Gijima Holdings (Pty) Ltd ("Gijima") to review and set aside the decision of the first respondent, the State Information Technology Agency SOC Ltd ("SITA") to appoint the third respondent, In2IT Technologies (Pty) Ltd ("In2IT") as a service provider following a tender process. SITA conducted the procurement process on behalf of the South African Police Service ("SAPS"), as it is contracted by the SAPS to ensure that services are provided in terms of a service level agreement between SITA and the SAPS. The Minister of Police is cited as the second respondent. The Minister is cited only by virtue of the SAPS's interest in the matter and no direct relief is sought against the second respondent.

[2] The services covered in the tender, and the subject of this application, are rendered to the SAPS to maintain and support a substantial part of the Private Branch Exchange communication system ("PBX system") of the SAPS, including the most important telephone number of them all: 10111. Gijima has been rendering these services to the SAPS for more than 14 years. Gijima's contract expired, but was extended on an *ad hoc* basis on more than one occasion in 2020, before finally coming to an end on 20 February 2021.

[3] On 4 September 2020, more than six months before the contract expired, SITA published a tender titled *"Provision of Maintenance and Support for PBX Systems for the South African Police Services for a Period of Three (3) Years"*. The tender recorded that the SAPS uses the PBX systems in all of South Africa's provinces and that the successful bidder could be appointed for one or more provinces. Only Gijima and In2IT submitted bids. On 17 December 2020, SITA's board resolved to appoint In2IT as the

successful bidder to provide the relevant services in all 9 provinces. Gijima was informed of SITA's decision not to appoint Gijima on 19 February 2021. In its letter to Gijima, it was recorded that both the Bid Evaluation Committee and Bid Adjudication Committee had been satisfied that all the mandatory requirements of the tender had been met by the "successful bidder" and that the "successful bidder" would begin rendering services from 21 February 2021. SITA requested Gijima to give SITA its "handover report" by 14h00 on 21 February 2021. On 2 March 2021, Gijima was informed that the successful bidder was In2IT.

[4] On 19 February 2021, SITA and In2IT concluded a memorandum of understanding (to which a service level agreement was attached). In2IT's appointment was effective from 21 February 2021 and In2IT is currently providing the services to the SAPS.

[5] Gijima, aggrieved by SITA's decision, launched an urgent application in two parts. Part A was resolved by an order of Wepener J in the urgent court, providing for the expedited hearing of Part B. In Part B, which is now before this court, Gijima seeks to review the decision to award the tender to In2IT in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").¹

[6] The outcome of this application is largely dependent on the interpretation of paragraph 5.2 of the tender document. Paragraph 5.2 states that one of the mandatory requirements of the tender was that bidders had to be an Original Equipment Manufacturer ("OEM"), or duly authorised representative of the OEM, or a registered OEM partner, to maintain or support the NEC and Mitel "brands" covered by the tender.

¹ It is now well-accepted that decisions to award tenders are reviewable in terms of PAJA. See *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation* 2018 (3) SA 90 (SCA) at para 9.

Gijima contends that the reference to “brands” in paragraph 5.2, should also include the specific models listed in a separate annexure (Annex A.5) in the tender document. Gijima’s cause of action is therefore a simple one: it, and its partner in the tender (the fourth respondent, Advanced Voice Systems (Pty) Ltd (“AVS”)), are the only entities in South Africa authorised to service and maintain the majority of the PBX models – being NEC and Mitel models – covered by the tender.² They were, consequently, the only entities in South Africa that could satisfy the mandatory requirement. That being so, the decision to award the tender to In2IT, which could not satisfy this mandatory requirement, was unlawful.

[7] SITA and In2IT contend that Gijima is only a disgruntled unsuccessful bidder trying to “abuse its monopoly to hold the government to ransom.” It is submitted that both Gijima and In2IT complied with the administrative and mandatory requirements of the tender. As a result, both bidders then had to be evaluated for price and BBBEE points. Since both BBBEE scores were the same, the evaluation boiled down to price. SITA assessed the bidders’ bid prices, and found that there was a substantial difference in price: Gijima’s bid price was approximately R160.3 million, whereas IN2IT’s bid price was approximately R88.9 million. This amounts to a difference of R71.4 million (55.5%). Gijima’s bid price was not only significantly higher than In2IT’s bid price, but it also exceeded SITA’s budget for the services by approximately R40 million (33,61% more than SITA’s budget). Hence, it was only logic for SITA to appoint In2IT as the service provider.

² AVS is cited by virtue of its interest in the relief sought. No relief is sought against AVS.

[8] In response, Gijima submits that, as In2IT did not satisfy the mandatory requirements, it should have been eliminated for non-compliance with the tender requirements. The question of price comparisons between Gijima and In2IT— which from SITA's correspondence was the decisive factor — should for that reason not have arisen.

[9] The facts of this application and the law applicable in this review are largely common cause. Because both parties' cases mainly hinge on the purpose of the tender document and the proper interpretation of the tender specifications, it is necessary to discuss those specifications in more detail below.

THE TENDER

Purpose of the tender

[10] The first issue that needs to be examined is the purpose of the tender. The genesis of the tender can be found in the business case, dated 2 June 2020, that was prepared for SITA. As its title page clearly indicates, its purpose was to request approval for procurement of technical support and maintenance cover for PBX systems for the SAPS for a period of three (3) years. The business case further explains the stakes involved in the PBX systems not being able to operate. It describes some of the existing PBX systems as "Mission Critical systems" and that SITA "cannot afford that the client has no services should the current contract expire". Under the heading "Business objective and portfolio", it is explained that the purpose of the request was to ensure the on-going technical support and maintenance services. This includes the enhancement of the SAPS owned PBX telephone systems, that will encompass the repair, upgrade, ad-hoc expansion and additional feature requirements of SAPS on

the current PBX infrastructure throughout South Africa. It is repeatedly made clear throughout the business case that the purpose of the tender is to service and maintain the existing PBX systems used by the SAPS and that these would only "gradually" be replaced.

[11] In paragraph 1.2 of the tender document, it is explained that the SAPS currently uses approximately 267 legacy PBX systems comprising the following brands/models: NEC/Philips, Ericsson MD/BP series and Siemens (the manufacturers of the PBX systems). These systems are described as "legacy" systems, because they have been in use for some time and in some cases use technology now considered to be obsolete or nearing the end of its life cycle. These legacy PBX systems are located at various SAPS service centres and facilities across all nine provinces in South Africa and need to be maintained and supported through its lifespan. The SAPS, through its continuous modernisation programme, will gradually replace the legacy PBX systems with modern Voice Over Internet Protocol (VOIP) telephony. However, in the meantime, the SAPS requires a service provider to provide maintenance and support in respect of the legacy PBX systems.

[12] Although it is explained that the quantity of legacy PBX systems may decrease over the duration of the contract owing to the SAPS modernisation programme, the SAPS still relies on PBX. There is nothing concrete in the papers to indicate when the legacy systems will be replaced. For example, one of the models of the NEC brand is the iS3000. Whilst NEC is no longer manufacturing the iS3000, the software support of the iS3000 will only expire in 2024. In a letter from Gijima dated 20 September 2020, it advised SITA that the iS3000 platform has already reached the end of new hardware availability, but that Gijima is in a position to continue to support the iS3000 platform

for the “foreseeable future” on account of its current stockholding. In the letter Gijima commits to service the iS3000 platform until 31 December 2024.

[13] As the term of the contract is for a period of three years (with the option to extend the contract for a further 24 months), it is probable that some of the PBX systems will be in use for at least another three years. In this context it is important to record that the tender document specifically notes that the VOIP telephony system is not part of the scope of the tender.

Models v brands

[14] The tender explained, in some detail, the scope of work covered by it. In paragraphs 2.1(1), it was required that the successful bidder was to provide preventative and corrective maintenance of the PBX systems and *ad-hoc* services. Paragraph 2.1(1)(b) explained that corrective maintenance takes the form of repairs; the replacement of faulty equipment; and day-to-day fault management. In paragraph 2.1.(1)(c) it is required that the successful bidder must provide *ad hoc* services, which are based on requests received from client if and when required, including upgrades on PBX infrastructure, expansion of PBX infrastructure, additional feature requirements on PBX infrastructure and software upgrades “**to the specific brands of PBX systems**”. (Emphasis added)

[15] The tender differentiates between “brands” and “models” of the PBX systems. From a reading of the tender document it is clear that the “brands” of the PBX systems are: Siemens; Ericson/Mitel; and, NEC/Philips. Various Technical Schedules were, however, also included in the tender document as part of Annex A.5 to the tender specifications. The first of these, headed “Location Schedule”, listed all of the SAPS

sites around South Africa that are covered by the tender. The tender specifications made clear that the “goods or services must be supplied or provided for at the physical locations” mentioned in the schedule.³ In each entry in the Location Schedule, the precise address of the particular site is given, and then, importantly, the PBX brand and **model** is listed (emphasis added). In other words, it provides a list of all the police stations that make use of the PBX system, what brand it uses i.e NEC/Philips or Ericson or Siemens and then the model of the brand. For example, in the case of NEC/Philips the model that is often in use is the iS3000. This list, for that reason, made clear the specific brands of PBX systems, and also the models of the brands, covered by the tender.

[16] The use of the iS3000 model by the SAPS is not insignificant. Out of 262 SAPS sites subject to the tender, 152 use the iS3000 platform. The respondents, in their papers, also provided a table to show, as at end of April 2021 (approximately two months since In2It had been appointed) where new systems (Cisco) are being used, and where legacy PBX systems have been removed. The purpose of the table is seemingly to show that the migration of the PBX systems is in an advanced stage. The table is, however, not evidence to show that migration is at an “advanced state”. What the table does show is that the total systems used by the SAPS are 703. Out of that number, there are 453 Cisco systems (presumably the modern equivalent of PBX) and 5 Huawei systems. This means that there are still 245 legacy PBX systems that are being used, which reveals that there has been a migration of about 22 legacy systems since the tender was advertised. SITA does not say how long migration will take and Gijima states that there are sites that are simply not ready to be converted to VOIP.

³ Paragraph 2.2(1).

Taking into consideration the other statistics available to court, the iS3000 is consequently still being used at approximately 152 sites out of a total of 703 sites. It is more than half of the 245 legacy systems in use and is still a significant amount of telephones being used by the SAPS.

Requirements of the tender

[17] The second issue that needs to be examined is the tender specifications. The tender specifications made clear that the bids would be evaluated in various stages.

These are:

1. Stage 1: administrative pre-qualification verification;
2. Stage 2A- 2C: technical mandatory requirement evaluation;
3. Stage 3: special conditions of contract verification; and
4. Stage 4: evaluation of Price/B-BBEE.⁴

[18] The bidder must qualify for each stage to be eligible to proceed to the next stage of the evaluation. Each of these evaluation phases was described and discussed in the tender documentation. Annex A.1 dealt with Stage 1, which is the administrative pre-qualification verification. Regarding Stage 2A-2C, the technical mandatory requirements (Annex A.2:5.1), the following was explained:

“5. TECHNICAL MANDATORY

5.1 INSTRUCTION AND EVALUATION CRITERIA

*(1) The bidder **must comply with ALL the requirements by providing substantiating evidence** in the form of documentation or information, failing which it will be regarded as “NOT COMPLY”.*

(2).....

⁴ Paragraph 3(2).

(3).....

(4) *The bidder must comply with ALL the TECHNICAL MANDATORY REQUIREMENTS in order for the bid to proceed to the next stage of evaluation*”.

[19] In the tender specification, under the heading, “**5.2 TECHNICAL MANDATORY REQUIREMENTS**”, each of the technical mandatory requirements that had to be satisfied, for a bidder to advance to the next stage of evaluation, were listed. The document made clear that:

“(2) The bidder must be an OEM, or duly authorised representative of the OEM or a registered OEM partner to maintain or support the following brands of PBX systems:

1. *Siemens*
2. *Ericsson/Mitel; and*
3. *NEC/Philips systems.”*

[20] The tender specifications explained that the bidders were to prove that they satisfied this requirement by providing letters or certificates showing that the bidder “*is the OEM or duly authorised representative of the OEM or an OEM partner for all (3) product brands.*” The tender specifications also made clear that SITA reserved the right to verify that all information provided by the bidders was valid at the time of the bid.

[21] Paragraph 6 of the tender specifications dealt with the “**Special Conditions of Contract.**” In paragraph 6.2.3 “**STATEMENT OF WORK**”, it is again noted that the supplier must provide preventative and corrective maintenance and *ad hoc* services. It also specifically states that the supplier must provide maintenance and support to **PBX equipment as listed in Annex A.5** (emphasis added). As mentioned earlier, Annex A.5 listed the brands **and** the models of the PBX systems. In Note 1 and 2 of

the same paragraph, it is stated that *"the quantity of legacy PBX systems may decrease through the duration of the contract due to the SAPS modernisation programme"* and *"the supplier must provide software upgrades to the specific brands of PBX systems that forms part of this bid, should such a request originate from the SAPS client."*

[22] In paragraph 6.1 it is noted that:

"(1) The successful supplier will be bound by Government Procurement: General Conditions of Contract (GCC) as well as this Special Conditions of Contract (SCC), which will form part of the signed contract with the successful Supplier. However, SITA reserves the right to include or waive the condition in the signed contract.

(2) SITA reserves the right to—

(a) Negotiate the conditions, or

(b) Automatically disqualify a bidder for not accepting these conditions.

(3) In the event that the bidder qualifies the proposal with own conditions, and does not specifically withdraw such own conditions when called upon to do so, SITA will invoke the rights reserved in accordance with subsection 6.1(2) above,

(4) The bidder must complete the declaration of acceptance as per section 6.3 below by marking with an "X" either "ACCEPT ALL" or "DO NOT ACCEPT ALL", failing which the declaration will be regarded as "DO NOT ACCEPT ALL".

[23] It is clear from the tender document that this evaluation phase was intended to enable SITA to determine whether each bidder's submission satisfactorily conveyed an intention to meet the special conditions of contract. The approach adopted by the tender was to record that the successful bidder would be bound by the special conditions of contract, unless any one (or more) of them was waived. As can be seen from subparagraph (4) quoted above, bidders had to complete a declaration indicating

whether they accepted all of the terms in the special conditions of contract. In the event that any bidder did not confirm, in its submission, that it would be bound by all of the special conditions of contract, SITA reserved the right either to negotiate further with the bidder or to disqualify it automatically.

[24] Although SITA had the right to waive these conditions in the final contract concluded with the successful bidder, none of them were waived by SITA in its contract with In2IT. The final service level agreement concluded between SITA and In2IT included the following special conditions that are relevant to this review:

1. The contract provides that the successful bidder must provide maintenance and support to the PBX equipment as listed in Annex A.5 to the tender specification (Annex E to the final service level agreement concluded between SITA and In2IT).
2. The contract mirrors the distinction drawn in the tender specifications between preventative and corrective maintenance and ad-hoc services. It is specifically recorded that the successful bidder is required to “provide software upgrades to the specific brands of PBX systems that forms [sic] part of this bid should such a request originate from the SAPS client”.
3. The contract provides that the successful bidder represents that it has the necessary expertise, skill, qualifications and ability to undertake the work required in terms of the statement of work or service definition, to provide the services and perform all obligations without interruption.

4. The contract also provides that the successful bidder is required to “*ensure that [the] work or service is performed by a person who is certified by [the] Original Equipment Manufacturer or Original Software Manufacturer.*”

[25] In2IT confirmed that it has the capacity to provide the services included in the scope of work for the tender by providing the services in accordance with the service level agreement that was concluded.

The interpretation of paragraph 5.2

[26] The third issue relates to the proper interpretation of paragraph 5.2 referred to above. Paragraph 5.2 (which is repeated here for convenience sake), which falls under mandatory technical requirements, requires each bidder to be “*an OEM, or duly authorised representative of the OEM, or a registered OEM partner to maintain or support the following brands of PBX systems, Siemens, Ericsson/Mitel and NEC/Philips systems*”. As stated earlier, an OEM is an Original Equipment Manufacturer. The OEM’s are all international companies that manufacture equipment used in PBX systems.

[27] Gijima’s core submission is that paragraph 5.2 had to relate to the specific models covered by the tender. In other words, where the paragraph says that a bidder must be an “OEM partner to maintain or support” NEC systems, it axiomatically refers to the models manufactured by NEC covered by the tender. With reference to Annex A.5, referred to in paragraph 6.2.(3) of the tender, Gijima submits that In2IT, accordingly, did not comply with a mandatory requirement of the tender because In2IT is not an authorised representative of an OEM in respect of a range of models that forms part of the legacy PBX systems. As a result, In2IT cannot perform maintenance services

for all the models listed in the tender. In particular, Gijima contends that In2IT cannot provide maintenance services for the iS3000 systems and certain specific Mitel systems. (AVS, Gijima's partner is the only entity that can service the Mitel MD110 and BDP110 ranges.) According to Gijima, SITA ought to have disqualified In2IT and not assessed In2IT's bid price.

[28] The respondents argue that Gijima's interpretation of paragraph 5.2 contradicts the plain text of the paragraph and requires a rewriting of the plain text of the request for bids. It is submitted that it was not necessary in terms of paragraph 5.2 for the successful bidder to be an authorised representative in respect of the specific models covered by the tender. SITA avers that the request for bids was deliberately drawn this way to only provide for brands and not models, because some of the PBX platforms have reached, or were nearing, end-of-life, and SITA deemed it not necessary to include a requirement for the bidders to be certified on specific platforms. This is because the risk of maintaining end-of-life PBX platforms would, in any case, be borne by the bidders themselves rather than the OEM. The wording of the mandatory requirement and the narrow scope of the tender were thus deliberate policy choices informed by SITA's technical expertise. SITA submits that the court should accordingly give effect to the plain text of paragraph 5 and that there is no basis to elevate this "minor detail into a full-blown requirement that a bidder had to be authorised to support each model of each brand." It is submitted that, given the realities of antiquated technology and the low probability of the SAPS ever wanting software upgrades, the far more sensible and text-faithful interpretation of paragraph 5.2 is that a bidder needed to be authorised over brands, not authorised over models. It is submitted that In2IT is a "registered OEM partner" of all three brands (either itself or through its

partnership with ST Solutions). The respondents also argue that, because In2IT has a “teaming agreement” with an entity that is an NEC and Mitel representative in respect of different models, the tender specifications were met. It does not matter, according to their argument, if the successful bidder satisfied this requirement only in respect of models not covered by the tender.

[29] The only sensible way to interpret and give meaning to paragraph 5.2, is to firstly have regard to the purpose of the tender. The purpose of the tender is clear. It is to appoint a service provider to maintain **all** the legacy PBX systems through their **lifespan** (emphasis added). As alluded to above, PBX systems of particular manufacturers come in various models and the manufacturers may appoint different representatives for different models. For example, in the case of the NEC/Philips PBX systems, the OEM is NEC, who in turn has authorised representatives around the world. There are clear practical consequences to being an authorised representative in respect of **specific models**, including the exclusive ability to perform essential software upgrades on them. NEC does not only say that Gijima is a NEC partner, it also confirms that Gijima is the sole NEC representative for certain specific models. The purpose of the tender was for the successful bidder to not only maintain the brands, but all the models of the PBX system that are currently in use at the SAPS sites. What would otherwise be the point to include the requirement that the bidder should be a partner of an OEM, but the reality is that it cannot actually service the models that are covered by the tender? SITA's answer to this is that the tender envisaged that partnerships and joint ventures would be formed, and paragraph 5.2 was designed to appreciate that if a bidder has a partnership with an OEM, it would be able to comply with the tender requirements.

[30] This argument is not consistent with the evidence. The evidence shows conclusively that having this type of broad partnership with an OEM is not enough to satisfy the requirements of the tender. Even though In2IT can show, broadly speaking, that it is an OEM partner of NEC, it is not authorised to do repairs and maintenance on the IS3000 series, which is a core part of the bid.

[31] Secondly, in interpreting paragraph 5.2, one cannot ignore paragraph 6, which sets out the special conditions of contract. The tender provided for the special conditions of contract to be included in the signed contract. SITA was, however, entitled to waive or renegotiate any of the special conditions of contract. One of the special conditions of contract is paragraph 6.2.(3) "STATEMENT OF WORK" which clearly state that *"the supplier must provide maintenance and support to PBX equipment as listed in Annex A.5."* Annex A.5, as explained earlier, is a list with every site of the SAPS where the PBX systems are in use and the specific model of the brand used at that site. SITA did not waive any of the special conditions of contract. Moreover, SITA decided to keep paragraph 6.2.(3) and carry it through to the contract. The contract, as a result, provides that the successful bidder must provide maintenance and support to the PBX equipment as listed in Annex A.5 to the tender specification (Annex E to the final service level agreement concluded between SITA and In2IT). The contract between SITA and In2IT confirms that the scope of the tender was to provide maintenance services in respect of the listed sites, and in respect of the brands **and models** identified as being used in each of those sites. It follows that paragraph 6.2.(3) is a mandatory condition that is part of the contractual obligation.

[32] This interpretation not only accords with the purpose of the tender, but is also sensible and allows for a business-like interpretation of the tender specifications. It

would simply have been nonsensical for SITA to go to the trouble of listing which models are covered by the tender, and to impose a specific requirement about the need to be an OEM partner/representative, if it were not necessary to be an OEM partner or representative in respect of the specific models covered by the tender. It is nonsensical, not only at the level of construction, but also at the level of implementation. Being an OEM partner/representative in respect of specific models carries practical implications that are relevant to whether they can be maintained and serviced. Without being an OEM partner in respect of the models covered by the tender, it is not possible to service or maintain them comprehensively. On that account, it would make no sense to interpret the tender specifications to allow a bidder to be appointed despite not being an OEM partner/representative in respect of the models that have to be serviced and maintained by the winning bidder. If paragraph 5.2.2 is interpreted in the context of the purpose of the tender, the reference to an OEM partner cannot be satisfied in just being a generic OEM partner. The bidder must be a OEM for specific models.

[33] This interpretation is also in line with SITA's own approach to the tender specifications. On 18 December 2020, a day after the tender was awarded to In2IT, SITA sent a letter to both Gijima and In2IT in which it asked the parties to *"provide confirmation that the bidder indeed has the technical ability to provide maintenance and support as outlined"* in the tender specifications. It required bidders to provide this confirmation in the form of the *"Latest OEM Letter/Certification confirming that the bidder has the capacity to provide the required services as per advertise [sic] scope of work to SITA clearly indicating the information on the table below."* The table then listed each of the models covered by the tender, including the iS3000 range of NEC.

It is common cause that the iS3000 range is one of the models listed in Annex A.5 of the tender specifications, in use in many SAPS sites around the country. In other words, the bidders were expressly asked to provide confirmation that they had the capacity to service the specific models covered by the tender and that having a general relationship with the OEM, in relation to different models, would not be sufficient to be awarded the tender. Gijima complied with this requirement whilst In2IT did not. Instead In2IT provided a lawyers' letter in which it stated that SITA's request was unreasonable as it could not be expected from the OEM to confirm the information, as the OEM does not have this information. The letter further stated that In2IT *"has the capacity to provide the required services in respect of NEC/Philips, Ericsson and Siemens in respect of each and every model referred to in the Request."*

[34] In2IT's statement that the OEM would not be able to give SITA the information it seeks, is peculiar. There are numerous examples in the papers where there is correspondence from a relevant OEM, where it explains its relationship between the parties. The very best way in which In2IT could prove to SITA that it is able to serve a particular brand and model, was to provide a letter from the relevant OEM, because it is the nature of the relationship between the OEM and the particular bidder that determines its ability to service the models. That is why SITA included that requirement in the tender.

[35] SITA contends that the letter was not sent by its board, but by the head of procurement of SITA to all the bidders. It argues that the court should not place any reliance on the two letters, as both were written after the tender was awarded.

[36] I am alive to the fact that the court must assess the lawfulness and rationality of a decision based on the facts that were available before the decision maker at the time of making the decision.⁵ But the letter is important for another reason: The Supreme Court of Appeal, in *Commissioner, South African Revenue Service v Bosch*,⁶ held that the conduct of administrators, such as those implementing tender specifications, “provides clear evidence of how reasonable persons in their position would understand and construe the provision in question”⁷ Leaving aside SITA's explanation for sending the letter, it shows that its interpretation of the tender specifications is unsustainable.

[37] For these reasons alone, the application must succeed.

Software upgrades

[38] Gijima also relies on another paragraph in the tender document to show that SITA's decision was unlawful. That is the requirement that the successful bidder had to perform software upgrades. Gijima argues that this is a further mandatory requirement and points out that an entity, that is not an OEM partner (or an OEM representative, for that matter), in respect of each specified model of the PBX systems covered by the tender, cannot conduct software upgrades on those models. It can, accordingly, not comply with the tender requirements.

[39] In2IT in its answering affidavit in Part A, contends that this requirement was not mandatory and could be waived. SITA, which filed its answer three days later, followed

⁵ *etv (Pty) Ltd v Minister of Communications* 2016 (6) SA 356 (SCA). *DA v Premier Gauteng* JDR 2020 JDR 0700 par 35.

⁶ 2015 (2) SA 174 (SCA) at para 17.

⁷ *Commissioner, South African Revenue Service v Bosch* 2015 (2) SA 174 (SCA) at para 17; *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126 at para 15

suit. SITA contends that because companies like NEC, Ericsson, and Siemens no longer manufacture PBX's, it is unlikely that they will continue to release software updates, even if updates are notionally possible. Technology that has reached end-of-life, is generally not kept on "software life support". Apple, for example, no longer releases software updates for older versions of the iPhone.

[40] Under the heading "special conditions of contract", in paragraph 6.2.3(e), the tender states that the supplier must provide software upgrades to specific brands of PBX systems, that forms part of the bid should such request(s) originate from the SAPS client. In2IT signed the special declaration of acceptance provided for in paragraph 6.1(4), and in Clause C2.1 of the contract, entered into between SITA and In2IT, the obligation to provide software upgrades was retained. These requirements to upgrade software on request was therefore not waived by SITA and was carried through to the actual contract. The contract itself accordingly provide an obligation on In2IT to provide software upgrades. Clause C6.2.2 of the contract also deals with software upgrades, and requires In2IT to inform SAPS and SITA in writing when *"system software has reached end-of-sale or end-of-support, including when the OEM release new software for a particular brand of PBX."* The contract also provides that should the SAPS elect to have any PBX software upgraded, prior approval in the form of a change control for each upgrade and applicable province shall be submitted.

[41] Gijima is the sole certified supplier and maintenance and support entity in South Africa for the iS3000 platform. As stated earlier, the use of the iS3000 by the SAPS is not insignificant. In its founding affidavit Gijima explains the importance of regular software upgrades as follows:

“26.2 As part of its status as the sole maintenance and support entity in South Africa, Gijima offers Software Assurance in respect of, amongst many others, the iS3000 platform. Software Assurance is NEC's software subscription and support program, specially designed to complement existing NEC software licenses and systems. This ensures that all bug fixes and any software-related issues will be addressed by the OEM as and when they occur and get reported. Should the client not upgrade the software to the latest version they will not have any recourse to the OEM — in our case, NEC — to ask for assistance in addressing whatever problems may arise. An example could be that the SAPS upgrades its network or windows environment and suddenly its switchboard no longer works. In order to fix this, the supplier (ie Gijima until recently) might have to install a later version of software in order to correct the problem.

26.3 Only Gijima has the licence and right to conduct software updates in respect of the iS3000 range. Therefore, it is a practical and legal impossibility for the third respondent to satisfy the tender requirement to provide software upgrades to the specific brands of PBX systems forming part of the bid; ie, the iS3000 range.”

[42] Neither of the respondents seriously deny these allegations. In2IT, however, avers that it does not require any particular software licence to comply with its obligations under the tender and its contract with SITA, and that the SAPS has, in any event, not requested any software upgrades. It further avers that it is unlikely that NEC will be releasing any software upgrades for the iS3000 equipment given that the PBX system is obsolete technology and the iS3000 is no longer manufactured.

[43] Despite In2IT's denial that it does not need a license, no meaningful dispute of fact is raised by it on the papers. It is further noteworthy that In2IT does not aver that it can, as a matter of fact, do software upgrades for the iS3000. SITA, on the other hand, accepts that In2IT cannot do software upgrades for iS3000, but says that NEC had stopped manufacturing the iS3000 systems, and, as a result, the SAPS is moving on to new systems. It further submits that since the SAPS is in the process of migrating from the legacy systems, it would be unreasonable to request software upgrades for these legacy systems, and offering these services in the bid submission was irrelevant in the light of the ongoing migration from the legacy systems.

[44] But, the fact remains that when In2IT submitted its bid it confirmed that it is able to do these software upgrades. The requirement about the software upgrade then found its way into the contract and was not waived by SITA. The requirement to do software upgrades thence forms part and parcel of the mandatory requirements of the tender. The iS3000 is still in use, it is still supported, it can be repaired, and software upgrades can be done until 2024. And, it is an undeniable fact that it is only Gijima that can perform software upgrades of the iS3000.

[45] In2IT argues that Gijima's "blinkered focus on software upgrades" misses the point and that software upgrades constitute a small, if not insignificant, component of the scope of work. It refers to In2IT's pricing schedules, which shows that software upgrades, across all models and brands, amounted to approximately 1.5% of the total contract price. Of that, possible software upgrades to the iS3000 range, which are by no means certain and would only need to be effected if requested by the SAPS, would be a fraction of that 1.5%. It is contended that Gijima's insistence that, for this fact

alone, this tender should be a competition of one, is to insist on a “small tail wagging a big dog”.

[46] The respondents’ argument that software upgrades need only be done if there is a specific request and that it is only a small part of the contract, does not take the matter further. Gijima’s undisputed evidence is that software upgrades are essential to the proper functioning of hardware. The whole point of the tender was to be the “Stopgap”.⁸ If, instead of repairing and maintaining, In2IT can just replace the legacy PBX systems, there would have been no need for this tender. There was thus a reason that the drafter of the tender document included the need to do software upgrades, and once SITA made the deliberate decision to include it in the tender, it cannot be avoided on the basis that it is only a small component of the tender. SITA is also the one that carried the obligations of software upgrades into the service level agreement with In2IT.

[47] The same is true for the hardware part of the PBX systems. Gijima says in its founding affidavit that *“Any hardware in the iS3000 platform that has to be replaced in the dozens of SAPS sites across the country still using the platform, will need to be licensed. Only Gijima has the right to issue such licences.”* Gijima explains it as follows:

“Every engineer that wishes to make changes to the iS3000 platform needs a form of software called SMPC loaded on his or her laptop. This software has recently replaced the system that used to be employed— technicians needed

⁸ A temporary way of dealing with a problem or satisfying a need. Oxford Dictionary.

to use a dongle (ie, a similar device to the small plastic devices one may use to connect to the internet via an LTE network) in order to connect to the iS3000 system and make changes to it (an example of a change that might need to be made is the adding of an extension). Only Gijima is licensed to provide the SMPC software and only Gijima is licensed to use the dongles. So, the third respondent cannot lawfully access either the relevant software or the dongles. That being so, its technicians will be unable to make changes to the iS3000 platform at any of the SAPS sites using it.”

[48] This statement is, again, met with a bare denial, and no meaningful dispute of fact was raised on these issues by the respondents.

[49] The question is what will happen if In2IT cannot repair an iS3000? The answer is in its bid. It reserved the right not to repair end-of-life equipment such as iS3000. It even included a waiver that it will not be held responsible. Instead, it will quote to replace it with a replacement model. None of these possible replacements forms part of its tender. Many of the SAPS systems covered by the tender are end-of-life for hardware and so, by excluding them from its bid, In2IT has precluded itself from satisfying one of the core requirements of the tender. So effectively, it carved out part of the scope on what it must do and exonerated itself from doing it. This aspect is bolstered by the fact that Gijima has shown that during the period March to May 2021, In2IT had quoted R245 000 to replace end-of-life equipment with new equipment. That is in addition to its initial quoted price.

[50] SITA's answer to this conundrum is that, whether the products are replaced immediately or gradually it is not for Gijima to dictate and it is SITA and the SAPS that

retain the discretion to determine how they manage the consequences of the products being discontinued. It contends that Gijima is trying to use its software licence to hold SITA hostage, no matter how unlikely those upgrades may be. This answer is, for the reasons set out earlier in the judgment, completely unsatisfactorily.

[51] In2IT further contends that sight should not be lost of In2IT's actual performance of the tender so far and that SITA has confirmed that In2IT is performing adequately. For these reasons, so it is argued, Gijima's main ground of review is unsustainable. It further submits that In2IT's partnership with ST Solutions has proven to be enough, as In2IT has successfully replaced several iS3000 parts without any difficulty, and that it has attended to several "faults" in respect of the iS3000.

[52] It has never been Gijima's case that In2IT would be unable to attend to minor faults, such as cabling issues and the like, which do not relate to exclusivity as an OEM partner or representative. The limitation arises in the context of significant faults, including those which rely on an ability to link software to hardware and generally entailing the use of software or original NEC spares. Although In2IT has mentioned that it can service the contract effectively, it does not explain what type of faults had been repaired in relation to the iS3000 system. Gijima, in response, has put up an email of a whistle-blower that alleges that In2IT has been unable to service PBX systems where Gijima is the sole supplier. It is, however, difficult to resolve this factual dispute on paper. But it is, in any event, irrelevant for purposes of the review because,

as a matter of law, both rationality and legality must be assessed at the time the decision was made.⁹

[53] It is not disputed by either of the respondents that In2IT cannot perform software upgrades on those models in respect of which only Gijima and AVS are authorised representatives. In2IT's inability to do software upgrades therefore strengthens Gijima's argument on the interpretation of the tender specifications. It makes no sense to, (a) impose an OEM representative/partner requirement, (b) impose an obligation to perform software upgrades that can only be performed by an OEM representative/partner, but then read the specifications to allow the appointment of an OEM representative/partner who cannot perform software upgrades in respect of the models covered by the tender. If regard is had to the purpose of the tender, namely to provide maintenance and support to the existing legacy PBX systems identified in Annex A.5, it clearly includes not only maintaining the hardware and replacing parts, but also the upgrade of the software.

Procedural irrationality

[54] Gijima also raises what the Constitutional Court in *National Energy Regulator of South Africa v PG Group (Pty) Ltd*,¹⁰ has described as "procedural irrationality". This is when the means (including the process of making a decision) are not linked to the purpose or ends. It establishes the notion that a decision will be invalid if the process

⁹ *etv (Pty) Ltd v Minister of Communications* 2016 (6) SA 356 (SCA). *DA v Premier Gauteng* JDR 2020 JDR 0700 par 35.

¹⁰ 2020 (1) SA 450 (CC) at para 48.

used to take the decision is not rationally related to the achievement of the purpose for which the power was conferred.¹¹

[55] It is clear that SITA, in publishing its business case, recognised the specific needs of the SAPS in relation to the legacy systems. I agree with Gijima that it knew, or ought to have known (both from its prior relationship with Gijima and from its knowledge of the industry), that NEC representatives and partners are given the exclusive right, in certain circumstances, to maintain and support specific models of PBX systems. In this context, it published the tender specifications. Having assessed each bid, it decided to appoint In2IT.

[56] Then, after making its decision to appoint In2IT, it sends a letter to both bidders to enquire whether each bidder had “the technical ability to provide maintenance and support” in respect of the listed PBX models. Only Gijima could respond positively to this question. Despite asking the question, and notwithstanding the answers it received, SITA went ahead and appointed In2IT anyway.

[57] This is the quintessential example of an irrational decision-making process. For the reasons given by the Constitutional Court in *National Energy Regulator of South Africa*, and as envisaged by section 6(2)(f)(ii)(cc) of PAJA, this is a further reason why SITA’s decision must be set aside.

OTHER ISSUES RAISED BY THE RESPONDENTS

Sole supplier bidding and the competition issue

¹¹ *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at para 36.

[58] SITA contends that Gijima had, until the tender was published, been performing the services for 14 years “without competition”. It argues that the appointment of Gijima would be inimical to fair competition and contrary to Section 217 of the Constitution which requires procurement to be “fair, equitable, transparent, competitive and cost-effective”. It is submitted that Gijima is leveraging its licence with NEC to secure a monopoly and the outcome of this very tender shows that the “dangers to the public purse of anti-competitive conduct and abuses of dominance in the procurement context, are far from hypothetical”.

[59] In order to consider this argument, it is necessary to take a step back and briefly return to the business case that was prepared for SITA, as well as the appropriateness of sole supplier-bidding in certain circumstances. The business case demonstrates that a very specialised skill was required in this case and that the SAPS needed an entity that would be able to service and maintain the specific PBX models used in the 267 SAPS’ sites covered by the tender.

[60] SITA’s Supply Chain Policy recognises the possibility of sole-supplier bidding, which applies when only one supplier exists to satisfy the requirements of the tender. This is consistent with the approach adopted throughout government, as reflected in guidance from National Treasury.¹² For government to function, it has to be possible for procurement to take place in circumstances, which will be uncommon, where only one bidder (or a very small class of bidder) is available to satisfy the needs of the organ of state procuring the service. It is self-evident that, in such cases, concerns about unfair competition (or the absence of competition) are inapposite. By definition,

¹² Treasury Instruction 3.

sole supplier bidding is used in circumstances where there is no scope for ordinary competition because of either the nature of the services required, or the nature of the market.

[61] After preparing the business case, SITA prepared a request for a deviation from ordinary supply-chain rules, by asking for a deviation to allow it to publish a tender with "brand specific request[s] for procurement of maintenance and support services". Then, despite being aware of the specialised services required, SITA sent the matter out to a full, competitive, open-tender. Only after doing this, did SITA then follow the steps in the Supply Chain Policy designed to determine whether sole-supplier procurement was necessary. It did this in the form of approaching NEC and asking it to confirm Gijima's sole-supplier status. This is something that, both as a matter of logic and as envisaged by the Supply Chain Policy itself, should be done before deciding whether to use sole-supplier status. By the time SITA obtained official confirmation that Gijima was the sole-supplier of the relevant information, there was nothing meaningful that could be done with this information.

[62] SITA contends that the use of sole-supplier status is "not compulsory" and that SITA "would not have known" of Gijima's sole-supplier status until "Gijima made these claims in its response to the tender". In2IT appears to adopt a similar position. Firstly, it is not a question of whether it was compulsory, but what was appropriate in the circumstances. Secondly, the averment that SITA would not have known of Gijima's status until after receiving the bids is deeply troubling. It reveals total ignorance of SITA's own Supply Chain Policy, as shown above, and is a deliberate attempt to ignore knowledge of the factual background to this tender which was clearly within SITA's

knowledge when it prepared the business case and its direct knowledge of Gijima's sole-supplier status (acquired in December 2019).

[63] Section 217 of the Constitution makes it clear that open competition is important, especially in government procurement. This is, however, not a normal tender for the supply of maintenance services or repair of government products that any number of entities would be able to do. This is a unique situation where there is an entity, the SAPS, that is still using legacy PBX systems. These PBX systems will have to be replaced in the future. When that time arrives, SITA will issue a new tender. In the interim, the legacy PBX systems need to be maintained. If the evidence then shows, as a matter of fact, that only one company can properly maintain and service a significant number of the legacy PBX systems because of the contractual relationship between this company and the entity that manufactures the PBX systems, it cannot be wished away by referencing competition. It is irrational to ignore the facts and appoint another entity because it is cheaper.

[64] The concept of sole-supplier bidding is based on a recognition that, in carefully defined and regulated circumstances, it may sometimes be necessary to adopt a different approach. This is a case in point. On the facts in the current matter, sole-supplier bidding ought to have been used. There was partial recognition of this by SITA in its formulation of its business case and in some of the steps that it took after publishing the bid. I agree with Gijima that SITA ultimately appears to have been distracted by inapposite concerns about competition. This led it to adopt an irrational approach to the tender that ultimately resulted in the appointment of an entity that did not satisfy the tender specifications and could not provide the services required.

[65] As stated, the tender specifications make clear that the SAPS intends to overhaul its entire telephony system, and replace hardware that has reached end-of- life. The procurement of the new systems will no doubt be the subject of open competition – as it is required to be – and can (and should) be designed in a way that multiple entities could, in principle, qualify not only to supply the hardware but also to service it. The current state of affairs, in which only Gijima and AVS can supply the required services, is temporary and may be avoided in the future.

The low price issue

[66] SITA places great emphasis on the fact that In2IT's price was much cheaper than Gijima's price. Gijima's bid exceeded SITA's budget for the services by approximately R40 million. It is contended that SITA could not have appointed Gijima, even if there was no competing bidder, and had it appointed Gijima, it would have done so in contravention of the Public Finance Management Act 1 of 1999 ("the PFMA").

[67] But, price should never have been assessed in this bid. SITA's approach directly inverts the proper order of enquiry. Its stance is almost to say that, because In2IT was so much cheaper, it had to be appointed. Instead, SITA should have assessed In2IT's compliance with the tender requirements. There was ample evidence at its disposal to demonstrate that In2IT did not comply with the requirements of the tender. SITA should then have excluded In2IT from further evaluation. Ultimately, that being the case, the comparative price of Gijima and In2IT is irrelevant to the outcome of this review.

[68] In any event, Gijima has adduced detailed evidence on the issue of price, and has demonstrated that SITA's assessment of price resulted in an approach that compared

apples with oranges (and grossly underestimated In2IT's true cost). Moreover, in its replying affidavit, it has pared down its price to come in under the budget.

CONCLUSION

[69] The main ground of review in this application is that SITA failed to comply with mandatory requirements of the tender in appointing In2IT.

[70] As I have found that the respondents' interpretation of the tender specifications cannot be sustained, the application must succeed. Gijima and AVS are the only entities that satisfy the tender requirements. They are the only entities authorised to service and maintain the specific NEC and Mitel models mentioned above, and they are also authorised to service and maintain the remaining models covered by the tender (other NEC and Ericsson models, as well as Siemens). Since In2IT could not satisfy the bid requirements in respect of the NEC and Mitel models, it could not satisfy the requirements of the tender.

[71] Sections 6(2)(a)(i) and 6(2)(b) of PAJA require administrators such as SITA to comply with tender specifications and requirements. This is also required by section 6(2)(i). Consequently, SITA's decision to select In2IT as the successful PBX bidder, despite its non-compliance with a mandatory requirement of the bid, renders SITA's decision unlawful in terms of sections 6(2)(a)(i), 6(2)(b) and 6(2)(i) of PAJA. In addition, SITA took into account irrelevant considerations,¹³ such as competition and price, and followed a haphazard and irrational decision-making process. SITA's decision is accordingly also set aside in terms of sections 6(2)(f)(ii)(cc) and (dd) of

¹³ See section 6(2)(e)(iii) of PAJA

PAJA, as its decision is not rationally connected to the information that was before it when it took its decision. It is also not rationally connected to the reasons given for it by SITA.

[72] For all of the reasons given above, the decision to appoint In2IT therefore falls to be reviewed and is set aside.

REMEDY

The law on remedy

[73] Once a ground of review under PAJA has been established, section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The court has no discretion in this regard.¹⁴ In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*,¹⁵ the Constitutional Court reaffirmed that when it comes to judicial review, “*Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.*”

[74] In terms of section 172(1)(b) of the Constitution, this Court “*may make any order that is just and equitable*”. Section 8 of PAJA gives detailed legislative content to the Constitution’s just and equitable remedy.¹⁶ In terms of section 8(1)(c) of PAJA, such remedies include, (i) remitting the matter for reconsideration by the administrator, with

¹⁴ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC), para 84.

¹⁵ 2014 (4) SA 179 (CC) at para 30.

¹⁶ *Allpay 1*, para 25.

or without directions; or (ii) in exceptional cases, substituting or varying the administrative action or correcting a defect resulting from the administrative action. Gijima contends that the facts of this case justifies an order of substitution.

[75] Our courts have had occasion to consider the issue of substitution in several decisions. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*,¹⁷ the Constitutional Court held that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.¹⁸ The court referred to several factors that it considered to be relevant in considering whether substitution should be ordered. These are: (1) whether the court is in as good a position as the administrator to make the decision; (2) whether the decision is a foregone conclusion; (3) whether there has been undue delay; and (4) whether there is evidence of bias or incompetence on the part of the administrator. The court, however, emphasised that the ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties.

[76] The factors referred to in *Trencon* is not a shopping list that must be satisfied. Although SITA's approach to the decision-making process is regrettable, there is no indication of bias or even incompetence in the papers. As far as undue delay is concerned, it is common cause that the contract is of limited duration and that six months have already passed since In2IT was appointed. The question is not only whether there has been undue delay in the taking of the decision at first instance. It

¹⁷ 2015 (5) SA 245 (CC).

¹⁸ *Trencon Construction* (supra) at para 47.

also has to be asked whether the remedy of remittal will cause undue delay.¹⁹ In this case, the contract is for a three-year period and relates to services that may well be defunct by the end of the contract period. By the time that judgment is rendered in this matter, several months would have passed since In2IT began rendering the relevant services. A remittal would, for that reason, cause undue delay. Any interruption in the supply of services that is the subject of this bid would also result in prejudice to the public. That being the case, the only two remaining factors that need to be examined in more detail, is whether the court is in as good a position as the administrator to make the decision, and whether the decision is a foregone conclusion.

Is substitution appropriate in this case?

[77] The review turned on the proper interpretation of the tender requirements. Only two bidders submitted bids. In2IT did not comply with the mandatory requirements and the implication is that In2IT should have been treated as non-responsive. As only one compliant bidder remains, namely Gijima, it is submitted that the court is in as good a position as the decision maker to make a decision. It is submitted that the merits are common cause and that there are no matters of a polycentric or technical nature that need to be determined. It is argued that it is accordingly a foregone conclusion that Gijima should be appointed.

[78] In2IT and SITA object to the prospect of substitution and proposes that the court should refer the tender back to SITA as the administrative body statutorily empowered to assess bid submissions for the services. They contend that an order for substitution

¹⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) at para 51.

interferes with the separation of powers and should only be granted in exceptional circumstances, and that it would not be just and equitable to make such an order.

[79] The respondents further contend that it is not a foregone conclusion that SITA would have appointed Gijima if In2IT was disqualified. They mainly base their argument on the following: Firstly, Gijima's bid price exceeded SITA's budget for the services by R40 million (33,61% more than SITA's budget). Appointing Gijima in these circumstances, would be a violation of section 38 of the PFMA. It is submitted that the public interest in the protection of scarce public resources will be undermined if SITA is ordered to appoint a bidder with a tender price that was almost double that of its competitor and exceeded SITA's budget.²⁰ Secondly, it is submitted that SITA has no obligation to accept any of the bids in the tender. In support of this argument SITA refers to the standard terms in the tender, in which SITA reserved the right not to procure the services subject to the tender, and to cancel and/or not award the tender to any of the bidders. Thirdly, it is contended that the replacement or migration process from the legacy PBX system is currently underway and is in an advanced stage. The advantage Gijima claims over In2IT is thus no longer relevant. It would not be in the public interest to compel SITA to appoint a service provider for services SAPS no longer needs. Fourthly, there is public interest in this tender and there should be no breakdown of services. It is submitted that In2IT is an innocent tenderer and the court

²⁰ *Marcé Projects (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2020] 2 All SA 157 (GJ), paras 81 and 82.

should therefore decline to substitute, as it would not be just and equitable in the circumstances. As a result, In2IT should be allowed to continue with the contract.

[80] None of these arguments are convincing. After Gijima received the Rule 53 record it emerged that SITA had a budget. The budget issue was also pertinently raised in SITA's answering affidavit in Part B. That being the case, Gijima, in its replying affidavit, proposed a "*pared down*" bid price of R96 050 846.56, which is under budget. SITA complains that Gijima is making out a case in reply, and that the court should reject it. I do not agree. In *EFF v Speaker of the National Assembly*,²¹ the Constitutional Court held that the court's power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution.

[81] The submission on the price and the budget misses the important distinction between a decision to appoint Gijima and the terms of the agreement between the parties, which is yet to be concluded if Gijima is appointed and which is facilitated by prayer 3 of the notice of motion in Part B. If this court orders substitution, it remains open to the parties to reach an appropriate accommodation on price. In fact, Gijima has explained in detail that it would easily be able to accommodate SITA's budget. It stated that it would have tailored its bid accordingly, had the bidders been made aware of SITA's budget and had SITA not misled the parties by including a whole host of items in the pricing schedule, which it now says that it does not want or need. SITA's

²¹ 2018 2 SA 571 CC par 211.

budget is accordingly not an obstacle to substitution and, in paring down its price, Gijima has alleviated any fears there might be of the court appointing an entity in contravention of the PFMA.

[82] SITA, however, contends that even on Gijima's "*pared down*" price, which excludes the service Gijima claims In2IT did not include in its pricing for the services, Gijima's revised price is still much higher than In2IT's bid price of approximately R88.9 million. Therefore, even on Gijima's new price, Gijima still would have scored fewer points than In2IT. It further argues that it is not in the public interest to compel SITA to appoint a service provider for services the SAPS no longer needs, and that scarce public resources will be undermined if SITA is ordered to appoint a bidder with a tender price, even after it was "*pared down*", that exceeds that of its competitor.

[83] The answer to this is simple. Firstly, In2IT did not comply with the mandatory technical requirements of the tender and should never have reached the stage of price. Secondly, Gijima will only be able to charge for what it actually does. So, if Gijima ultimately only provided 20% of the services it quoted for, it can only charge 20%. Thirdly, SITA's argument is totally divorced from the actual circumstances of the tender. SITA drafted the tender. There is no indication in the papers that the migration is at an advanced state. The whole premise of the tender is that the SAPS needs these services to be performed for at least another three years. It is for this reason that SITA included these services in its pricing schedule. Two examples come to mind. It is expected of the bidders to provide *ad hoc* services if requested by the SAPS. In the pricing schedule, the bidders had to quote for these *ad hoc* services. Gijima quoted for it. SITA now labels it as "future unsure events" and Gijima is criticised for quoting for it. Also, the tender requires the bidders to repair and maintain hardware and to

perform software upgrades. Gijima submits a comprehensive quote, only for SITA to turn around and hold the price against Gijima on the basis that the SAPS will no longer be needing software upgrades. This is not appropriate and it is unreasonable to interpret the tender in this manner. It was not acceptable for SITA to choose an entity that carved out these obligations.

[84] It is, in any event, not appropriate at remedy stage to take note of comparative prices. The court has to proceed on the premise that In2IT should not have advanced to the next stage in the tender process. Gijima, in my view, gave a reasonable explanation for the difference in price. Gijima has also made a tender on record to come in under the budget.

[85] In2IT's argument about SITA's right to decide to accept no bids or to cancel the tender is also incorrect. Organs of state are constrained in their right to cancel tenders by regulation 13 of the Preferential Procurement Regulations, 2017.²² One of those grounds (such as changed circumstances) would have to apply and it would not be open to SITA simply to cancel the tender unilaterally.²³ This is especially pertinent in a context such as the present. It would be unlawful for SITA to appoint In2IT (and thereby express an intention to proceed with the tender as awarded) only to cancel the tender in the face of this review application, and in the absence of one of the grounds in regulation 13 being present.²⁴

²² GNR32 of 20 January 2017 (Government Gazette 40553).

²³ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC) at paras 68-9.

²⁴ *Head of Department, Mpumalanga Department of Education v Valozone* 268 CC 2017 JDR 0586 (SCA) at para 16.

[86] With reference to *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd*,²⁵ SITA argues that there was no corruption involved in the awarding of the tender and that SITA, at the most, only made a *bona fide* error in appointing In2IT. It further contends that In2IT has shown it is able to perform in terms of the contract, and that it would not be in the interest of justice to set it aside.

[87] Although courts should not be over technical, it is noted that SITA did not take this point in its answering affidavit. In fact, in the Part A proceedings, when the respondents were faced with the possibility of an urgent interim interdict, In2IT stated in its answering affidavit, that Gijima will not be left without a remedy if the interim interdict was not granted, as this was a case where the court could practically and responsibly set aside the contract if the court is against In2IT.

[88] The facts in *Moseme*, relied upon by SITA, are in any event entirely distinguishable from the facts in the current matter. In *Moseme* the contract had been performed in part, and the setting aside of the contract would not only have been disruptive, but would also have given rise to a host of problems.²⁶ This court does, however, recognise that there are cases where the courts have granted orders permitting an invalid administrative act to stand.²⁷ This is not such a case. There are no practicalities that I was made aware of that would result in an injustice if substitution is granted. Courts have granted substitution in far more complicated cases.²⁸ In this matter the court is dealing with a simple maintenance and service contract. It does

²⁵ 2010 4 SA 359 SCA at para 15.

²⁶ At para 15.

²⁷ See *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (s) SA 638; *Millenium Waste Management v Chairman, Tender Board Limpopo Province* 2008 (2) SA 481 (SCA).

²⁸ See *Trencon supra* and *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 SCA.

not require great capital outlay nor does it require a massive investment in order to be compliant. It is a simple “pay- as you- go” contract. On the facts before me, In2IT is not able to perform in terms of the tender requirements. The iS3000 that forms part of the legacy PBX systems, is still being used in approximately 152 police sites. The PBX systems are the backbone for a number of essential services that the SAPS provides to the public, including emergency telephone numbers like 10111. It is critical that the SAPS' telephone system works and is properly maintained. Without a functioning telephone system — and the legacy PBXs at the centre of the system — police officers would be unable to communicate or receive information through their telephone lines, either internally or externally. The legacy PBX systems must therefore be properly maintained until it is replaced with modern technology.

[89] In *Director-General, Department of Home Affairs v Link*,²⁹ the High Court ordered substitution because the decision was a foregone conclusion. It held that “*there was only one proper and inevitable conclusion that the court could come to*”, and there was no “*further information or factual or technical enquiry*” that was needed before one inevitably arrived at this conclusion.³⁰ I find myself in a similar position.

[90] I am satisfied that this court is in a good position as the decision maker to make a decision. The outcome is a foregone conclusion and it is in interest of justice that substitution be granted. To ensure that there will be no interruption of services, the third respondent, In2IT, should be left in place while Gijima and SITA negotiate the contract.

²⁹ *Director-General, Department of Home Affairs v Link* 2020 (2) SA 192 (WCC)

³⁰ *Link* at para 68.

THE COSTS IN PART A

[91] Gijima launched this application in two parts. In Part A of its application, Gijima sought to interdict SITA from implementing the decision to appoint In2IT as the successful bidder and an order directing SITA to replace In2IT with Gijima pending the determination of the review application. Part A of the application was removed in the urgent court and an order was granted providing for the expedited hearing of Part B. The applicant was ordered to pay the wasted taxed costs of Part A, as tendered. As an agreement could not be reached between Gijima and SITA, the urgent court reserved the costs as between Gijima and SITA.

[92] The common cause facts that led to the postponement of Part B on expedited timeframes are the following: After Gijima had instituted proceedings in the urgent court, it seemingly realised its application in Part A was inept. As a result, on the Saturday immediately before the hearing on Tuesday, Gijima offered to abandon the Part A relief, but demanded that SITA should agree to Part B (the review application) proceeding on an expedited basis. It tendered the costs of both respondents. In2IT accepted the proposal, but SITA did not. Gijima accordingly filed heads of argument and a draft order in which it proposed that the order ultimately made by Wepener J in Part A be made.

[93] SITA explains that it considered the interdict application (Part A) to be frivolous and vexatious, and was of the view that it was not obliged to agree to Part B to be heard on an expedited basis. It apparently considered itself to have good prospects of persuading the urgent court to dismiss Part A with costs. But that did not happen. Gijima's stance was vindicated in urgent court, because Wepener J made the order proposed by Gijima, even though there was no agreement to the order by SITA.

[94] There was compelling triable issues raised in the papers, which clearly justified the hearing of Part B on an expedited basis. On the face of it, Wepener J was of the same view. In addition, SITA expressly embraced the concept of an expedited review in its answering affidavit in Part A. It then made an about turn and changed its mind. Instead of agreeing to an expedited review, it requested the urgent court to dismiss the whole application. Had SITA agreed to the tender, it would have been unnecessary to detain the urgent court, and the order could have been made by consent (including with a costs order in SITA's favour). Having made its election not to consent, the matter had to be argued. There is no reason, in this context, that SITA should be awarded the costs of Part A.

ORDER

[95] In the light of the above, the following order is made:

1. The decision of SITA to award the PBX tender to In2IT, is reviewed and set aside.
2. The decision of SITA is substituted with a decision to appoint Gijima, in partnership with AVS, as the successful tenderer in the PBX tender.
3. SITA is ordered to conclude a memorandum of agreement, reflecting the terms of the provision by Gijima (in partnership with AVS) of the services pursuant to the PBX tender, within 30 days of this Court's judgment in this application.
4. Pending the conclusion of the agreement envisaged by paragraph 3 above, and the subsequent appointment of Gijima and AVS pursuant to that agreement, the service level agreement concluded between SITA and In2IT on 19 February 2021 is to remain in force.

5. SITA and In2IT are ordered to pay Gijima's costs in respect of Part B.
6. In respect of the reserved costs of Part A (as between Gijima and SITA), each party is to pay its own costs.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 October 2021.

APPEARANCES

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Attorney for the third respondent:	Schindler Attorneys
Counsel for third respondent:	Adv J. Gautschi SC Adv J. Mitchell
Date of hearing:	30 August 2021 and 31 August 2021
Date of judgment:	21 October 2021