

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **✓**

Date: **15th May 2023** Signature: _____

APPEAL CASE NO: A5046/2022

COURT A QUO CASE NO: 11686/2021

DATE: 15TH MAY 2023

In the matter between:

IN2IT TECH (PTY) LIMITED

Appellant

and

GIJIMA HOLDINGS (PTY) LIMITED

First Respondent

**STATE INFORMATION TECHNOLOGY
AGENCY SOC LIMITED**

Second Respondent

MINISTER OF POLICE

Third Respondent

ADVANCED VOICE SYSTEMS (PTY) LIMITED

Fourth Respondent

Neutral Citation: *IN2IT Tech v Gijima Holdings and Others (A5046/2022)*
[2023] ZAGPJHC 478 (15 May 2023)

Coram: Makume, Adams *et* Crutchfield JJ

Heard: 26 April 2023

Delivered: 15 May 2023 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being

uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 15 May 2023.

Summary: Constitutional and administrative law – s 172 of the Constitution – rationality review, as well as review in terms of s 6(2)(a)(i) and 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – non-compliance with the mandatory requirements of the Request for Bids (RFB) – appeal against the granting of judicial review application –

Procurement by the South African Police Service (SAPS) of repair and maintenance services in respect of their PBX telephone system – award of tender to the appellant held to be invalid by the court *a quo* for want of compliance with the mandatory technical requirements of the bid – award of bid to appellant also held by the court *a quo* to be irrational –

Principle of legality – disconnect between the award of the bid and the purpose of the tender – first respondent's contention to that effect rejected –

Non-compliance with mandatory requirement of bid – proper interpretation of Bid documents – does not support conclusion of non-compliance – compliance in fact established.

Appropriate 'just and equitable' order in terms of s 172(1)(b) of the Constitution.

Appeal upheld and decision of SITA to award the tender to the appellant confirmed.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Windell J sitting as Court of first instance):

- (1) The appellant's appeal against the order of the court *a quo* is upheld, with costs.
- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -

- ‘(a) The applicant’s judicial review application is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).’
- (3) The first respondent shall pay the appellant’s costs of the appeal, including the costs of the application for leave to appeal to the court *a quo* and the costs of the application for leave to appeal to the Supreme Court of Appeal, all such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).

JUDGMENT

Adams J (Makume *et* Crutchfield JJ concurring):

[1] This matter arises from the award on 22 January 2021 by the third respondent, the State Information Technology Agency (SITA), of a tender to the appellant, In2IT Tech (In2IT). The tender was very descriptively entitled ‘Provision of Maintenance and Support for PBX Systems for the South African Police Service for a period of Three (3) years’ (‘the tender’). A PBX (or private branch exchange) is a piece of information technology equipment that manages, connects and routes telephones for an organisation. By and large, PBX does the same job that telephone operators and switchboards did in years gone by. The first respondent, Gijima Holdings (Gijima), in association with the fourth respondent, Advanced Voice Systems (AVS), was the only other bidder, but was unsuccessful mainly due to its bid price being substantially higher than that of In2IT.

[2] On 9 March 2021, Gijima launched an application in the Gauteng Division of the High Court, Johannesburg (the court *a quo*). The relief sought in part ‘B’ of that application was that the decision by SITA to award the tender to In2IT be reviewed and set aside and that the said decision be substituted by one in terms of which Gijima, in partnership with AVS, is appointed as the successful tenderer. Ancillary relief claimed was that SITA be directed to conclude an agreement with

Gijima within thirty days for the provision of the services by Gijima pursuant to the tender.

[3] The declaration of unlawfulness was sought on two bases. First, that there has been non-compliance with the provisions of s 6(2)(a)(i) and 6(2)(b) of the Promotion of Administrative Justice Act¹ (PAJA) in that, *inter alia*, 'a mandatory and material procedure or condition prescribed by an empowering provision was not complied with'², that being the mandatory requirements of the bid. Secondly, and if it was found that SITA did comply with the tender specifications and requirements, the award of the tender to In2IT was irrational in that the decision was not rationally connected to the information which was before it when the decision was taken, in particular the fact that Gijima, in partnership with AVS, was the only entity in the whole of South Africa capable of providing all of the services required in terms of the tender. In that regard, Gijima relied on the provisions of s 6(2)(f)(ii)(cc) and (dd) of PAJA³.

[4] These contentions by Gijima found favour with the court *a quo* (per Windell J), who, on 21 October 2021, reviewed and set aside the award and further ordered that Gijima be substituted in the place and in the stead of In2IT as the successful bidder. In2IT sought leave to appeal against the whole of the order of the court *a quo*. That leave was refused by the high court, but was granted on petition to the Supreme Court of Appeal. In essence, therefore, this appeal concerns the interpretation of the provisions of the bid documents relating to the mandatory technical requirements of the tender, as well as a consideration as to whether the award of the tender by SITA to IN2IT was rational.

¹ Promotion of Administrative Justice Act, Act 3 of 2000;

² Section 6(2)(b) of PAJA;

³ Section 6(2)(f)(ii) reads: 'A court or tribunal has the power to judicially review an administrative action if –

(ii) is not rationally connected to-

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator;'

[5] It bears emphasising that the basis on which the high court found that the award of the tender was unlawful and granted the review application was sections 6(2)(a)(i), 6(2)(b) and 6(2)(i) of PAJA, which require administrators, such as SITA, to comply with tender specifications and requirements. Additionally, so the court *a quo* held, 'SITA took into account irrelevant considerations, such as competition and price, and followed a haphazard and irrational decision-making process', which means that the decision to award the tender can and should be reviewed and set aside in terms of sections 6(2)(f)(ii)(cc) and (dd) of 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.

[6] I now proceed to deal firstly with the contention by Gijima that the award of the tender was correctly reviewed and set aside by the court *a quo* on the basis that SITA, as the decision maker, failed to comply with the mandatory technical requirements of the tender. A convenient starting point for this discussion is the wording of the Request for Bids ('RFB') document, which was published on 04 September 2020, with the closing date of 25 September 2020, and which described the purpose of the RFB as follows:

'The purpose of this RFB is to invite competent service providers (hereinafter referred to as "bidders") to submit bids to "Provide Maintenance and Support for legacy PBX systems for the South African Police Service (SAPS) for a period of three (3) years".'

[7] Importantly, the document explains the background to the RFB in the following terms:

1.2. BACKGROUND

- (1) The SAPS currently use approximately 267 legacy PBX systems comprising the following brands/models: NEC/Philips, Ericsson MD/BP series and Siemens. These legacy PBX implementations that are located at various SAPS service centres and facilities across all nine Provinces in South Africa need to be maintained and supported through its life-span.
- (2) NOTE: The SAPS, through its continuous modernisation programme, will gradually replace the legacy PBX systems with modern VoIP Telephony solution. The Modern VoIP Telephony system is not part of the scope of this contract. Therefore, the quantity of legacy PBX systems may decrease through the duration of the contract due to the SAPS modernisation programme.' (Emphasis added).

[8] The importance of the background as expounded on in the RFB document and its relevance will become clearer later on in the judgment. Suffice to note, at this stage, that the background, and in particular the fact that the SAPS was in the process of phasing out the PBX system, quite clearly plays an important role in the proper interpretation of the RFB document, especially in relation to exactly what is provided for in the 'Mandatory Technical Requirements' section.

[9] Moreover, it is instructive that the RFB expressly contemplated the movement by most organisations, including the SAPS, away from the use of the PBX Systems and the upgrading to an internet-based system for connecting their telephone networks, called VoIP (or Voice over Internet Protocol). From the papers, it is also common cause that the SAPS is in the process of upgrading its telephone network from PBX to VoIP, which axiomatically takes time. SAPS still uses 267 PBXs at sites across the country, some of which are made by Siemens, some by Ericsson/Mitel and some by NEC/Philips. They all need to be maintained while the upgrade to VoIP runs its course. The tender at issue in this appeal is aimed at doing that maintenance job for three years.

[10] The mandatory requirement in the RFB which, according to Gijima, In2IT did not comply with, required of Bidders to be 'an OEM, or a duly authorised representative of the OEM or a registered OEM partner to maintain or support the brands of PBX systems' used by the SAPS at the time the bid was published. An 'OEM' is a reference to an 'Original Equipment Manufacturer' and relates to the original manufactures of the PBX systems in use by the SAPS during the relevant time. Due to it being critical in the dispute between the parties, it may be apposite to quote the relevant provision verbatim. It reads, under the heading 'Technical Mandatory Requirements', as follows: -

(2) BIDDER CERTIFICATION / AFFILIATION REQUIREMENTS

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:

- a) Siemens;
- b) Ericsson/Mitel; and
- c) NEC/Philips systems.'

[11] Under the heading 'Substantiating Evidence of Compliance', the bidders were required to prove compliance with this requirement as follows: -

'Provide proof (letter or certificate) that the bidder is the OEM or duly authorised representative of the OEM or an OEM partner for all (3) products brands.

NB: SITA reserves the right to verify that all information provided is valid at time of bid.

NB: All letters or certificates must be dated, signed and on a letterhead of the entity that issued it.'

[12] It is the interpretation of these provisions, in particular the meaning of the word 'brands' referred to therein, which is central to this appeal. It is not in dispute that In2IT and/or its associated companies are authorised representatives of all three of the PBX brands used by the SAPS, namely Siemens, Ericsson/Mitel and NEC/Philips. These brands are the so-called OEMs referred to in the 'Technical Mandatory Requirements' provisions of the RFB. In2IT is not, however, an authorised representative for each model of each PBX system or brand. So, for example, it is common cause that In2IT is not an authorised representative of NEC/Philips in relation to its iS3000 model system, which is still used by the SAPS at most of its sites. It is indeed so that, on the evidence in the matter, Gijima is in fact the sole certified supplier and maintenance and support entity in South Africa for the iS3000 Range. This aspect, which forms an integral part of Gijima's case in this appeal, will be returned to later on in the judgment.

[13] What is also true is that NEC/Philips stopped making the iS3000 model at the beginning of 2019. On 22 January 2019, NEC/Phillips announced to its customers that, delivery, expansion and maintenance and support of a number of hardware articles of the iS3000 platform having been discontinued for a number of years, effective 01 January 2019 all iS3000 hardware products were declared as end of life products and would not be delivered after that date.

[14] It is the case of Gijima that the above mandatory requirements provisions are to be interpreted as requiring a bidder to be not just an authorised representative of each of the OEMs, but also an authorised representative in relation to each of the product models of each of the brands of the OEMs. The reference to 'brands', so the contention on behalf of Gijima goes, should be read and interpreted to include 'models'. Gijima arrives at this conclusion by applying

a purposive interpretation of the mandatory requirements provisions and of the RFB as a whole, by having regard to the considerations set out in the paragraphs which follow.

[15] In that regard, Mr Friedman, Counsel for Gijima, submitted that the genesis, the reason and the need for the tender and the related RFB are to be found in an internalised documented 'Business Case', prepared on behalf of the SAPS by SITA on or about 2 June 2020. That report, the purpose of which was to motivate a request for the approval to procure technical support and maintenance of the PBX system of the SAPS for a period of three years, explained the risks associated with the PBX systems breaking down and not being operational. It described some of the systems as 'mission critical' and warned that SITA could not 'afford that the [SAPS] has no services should the current contract expire'. The business case also clarified that the request to initiate a tender was to ensure on-going technical support and maintenance services, which included 'the enhancement of the SAPS owned PBX telephone systems, that will encompass the repair, upgrade, ad-hoc extension and additional feature requirements of SAPS on the current PBX infrastructure throughout South Africa'. The document iterated the purpose of the tender as being to service and maintain existing PBX systems, which would only 'gradually' be phased out and replaced.

[16] Moreover, so Gijima further contends, paragraph 1.2 of the RFB document expressly records that the SAPS then used approximately 267 'legacy' PBX systems, comprising brands/models of NEC/Philips, Ericsson MD/BP and Siemens. These systems are referred to as 'legacy' systems, because they have been in use for some time and in some cases use technology now considered to be obsolete and nearing the end of its life. 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 their lifespan. The intention of the SAPS is to replace, gradually, 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.

[17] What is more, so the argument on behalf Gijima was continued, the tender explained, in some detail, the scope of work covered by it. The winner was to provide preventative and corrective maintenance of the PBX systems and ad hoc services. Corrective maintenance takes the form of repairs, the replacement of faulty equipment and day-to-day fault management. Ad hoc services, which are based on requests received from the client, might include upgrades on PBX infrastructure, the expansion of PBX infrastructure, additional feature requirements on SAPS PBX infrastructure and software upgrades 'to the specific brands of PBX systems'.

[18] It is in this context as set out in the foregoing paragraphs, and having regard to the purpose for which the tender was published, that Gijima contends that the 'mandatory requirements' provisions of the RFB should be interpreted as requiring of the bidders to be authorised representatives of the OEMs in relation to any and/or all of their system models. Additionally, so the argument is developed, the tender expressly differentiated between 'brands' and 'models' of the PBX systems. The tender specifications made it clear that the 'goods or services must be supplied or provided at the physical locations' mentioned in the schedule, which importantly listed the PBX brand and model, which would require maintenance and repair pursuant to and in terms of the tender. This is an indication, according to Gijima's argument, that the bidders would have been required to be capacitated to maintain and repair all of the PBX models, including, for example, the iS3000 model of the NEC/Phillips brand, which only Gijima could do.

[19] This specific reference to 'brands', albeit not in the 'mandatory requirements' provisions, but in the 'Special Conditions of Contract', means that the intention of the RFB was that the bidders should be representatives in respect of the models in addition to being authorised representatives of brands. The simple point made by Gijima is that the tender document required of all of the bidders that they demonstrate that they would be able to meet the special conditions of contract. I interpose here to note that this, in my view, does not mean that the Special Conditions of Contract ('SCC') can and should be elevated to a mandatory requirement. To do so would clearly be wrong. One needs look

no further than the 'instruction' provisions of the SCC, which expressly provides that SITA had the right to waive any of the conditions of the signed contract. I return to this issue later on in the judgment.

[20] Gijima also attaches significant weight to the contract concluded between SITA and In2IT pursuant to the award of the tender to the latter, and the fact that the said agreement provides that the successful bidder would be required to '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'. This, so it is submitted on behalf of Gijima, could only be done by it, which again confirms the intention of the RFB that bidders would have been required to be representatives in relation to models, not just brands. Moreover, 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'.

[21] The *court a quo* agreed with Gijima's contentions and held that the 'mandatory requirements' provisions, properly interpreted, required of the bidders to be authorised representatives of the OEMs in respect of all of the PBX models used by SAPS at the time, notably the NEC iS3000, which was in use at most of the SAPS sites covered by the tender. Additionally, so it was found by the court *a quo*, one of the SCC, which In2IT confirmed it would be able to fulfil, was the need to do software upgrades on request, which, by all accounts, it could in fact not do. The court *a quo* accordingly agreed with Gijima that, because In2IT is not authorised to do repairs and maintenance on the iS3000 range from NEC because it is not permitted to do software upgrades, it could not service the iS3000 series comprehensively, which in turn disqualified them from the bid.

[22] I disagree. The more modern approach to interpreting contractual instruments that was started by decisions such as *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁴ and *Bothma-Batho Transport (Edms) Beperk v*

⁴ *Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

*S Bothma and Seun Transport (Edms) Beperk*⁵ and carried through into judgments such as, for example, *Novartis SA (Pty) Limited v Maphil Trading (Pty) Limited*⁶, has conveniently been summarised as follows in *North East Finance (Pty) Limited v Standard Bank of South Africa Limited*⁷:

'The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded.'

[23] Thus, whilst the logical point of departure remains the language of the provision itself, that is no longer the end of the enquiry and as was reiterated in *Tshwane City v Blair Athol Homeowners Association*⁸:

'It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. ... the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an unbusinesslike result. These factors have to be considered holistically.'

[24] The foregoing approach is subject to the proviso that the evidence must indicate a common understanding of the terms of the agreement, may not alter the meaning of the words used and should be used as conservatively as possible. In that regard, see: *KPMG Chartered Accountants (SA) v Securefin Limited and Another*⁹. The point is that, whilst accepting the parol evidence rule remains part of our law, the manner in which the parties themselves not only understood but implemented their contractual obligations is a very important aid in the interpretative process, provided of course that such interpretative exercise does not alter the written words of the contract itself.

[25] It is worth emphasising that the logical point of departure in the purposive and contextual interpretation exercise is the wording of the provision. *In casu*, the

⁵ *Bothma-Batho Transport (Edms) Beperk v S Bothma and Seun Transport (Edms) Beperk* 2014 (2) SA 494 (SCA)

⁶ *Novartis SA (Pty) Limited v Maphil Trading (Pty) Limited* 2016 (1) SA 518 (SCA)

⁷ *North East Finance (Pty) Limited v Standard Bank of South Africa Limited* 2013 (5) SA 1 (SCA)

⁸ *Tshwane City v Blair Athol Homeowners Association* 2019 (3) SA 398 (SCA)

⁹ *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA)

mandatory requirement provisions are clear and unequivocal that bidders were required only to be authorised representatives of the OEMs and their brands of PBX systems. The provision then goes on to specifically list the brands as Siemens, Ericsson/Mitel and NEC/Philips. It is reasonable to assume that, had the RFB intended to include the individual system models, it would simply have said so. This point is bolstered by the way in which the RFB, in the section headed 'Technical Schedules', which is part of the SCC, expressly draws a distinction between the concepts of 'brands' and 'models'. This list itemises where each of the 267 PBX's of the SAPS are located across the country. So, for example, a police station in Soweto has a Siemens ISDX L, a police station in Pretoria North an Ericsson/Mitel MD 110, a police station in Braamfontein has a NEC/Philips S1000, and so on.

[26] As already indicated, this table expressly draws a distinction between 'brands' and 'models', itemised under different columns of the table. Therefore, in my view, the 'mandatory requirements' provision – interpreted textually – does not support the case of Gijima that it was a mandatory requirement of the tender that bidders are to be authorised representatives in respect of the models of the OEMs.

[27] The next question to be considered is whether or not a purposive and contextual interpretation would displace the wording of the provision. And, in that regard, the very first consideration is the fact that the tender was simply a 'stopgap' aimed at maintaining and supporting obsolete communication technology, which has reached the end of its life. The RFB says so in the introduction in as many words. The point is simply that the systems, which were to be supported and maintained in terms of and pursuant to the tender, had come to the end of their lifetimes and the SAPS, by all accounts, was in the process of phasing them out. It stands to reason that, if a system had fallen into such disrepair that it required a major overhaul, it would simply be put out to pastures. If an old PBX breaks, it was to be replaced through internal network/system refresh programs. And so the successful bidder did not need to stock spare PBXs.

[28] In any event, according to some of the OEMs, the systems were no longer supported, which means that parts are no longer available and major repairs cannot be effected. So, for example, the iS3000 model of the NEC/Philips brand was discontinued as far back as January 2019, that is some two years prior to the bid being awarded to In2IT.

[29] This, in my view, translates into an understanding of the RFB that the bidders were not required, by the 'technical mandatory requirements', to have the ability to support any and/or all of the models. The point is simply that SITA issued a tender for 'maintenance and support' for the PBX's of the SAPS for three years while the systems were being upgraded to the VoIP systems. As provided for in the RFB, this very simply entailed maintenance and support of the PBXs in the form of: (a) preventative maintenance, which includes cleaning, performance testing and other repairs; (b) corrective maintenance, which includes repairs, replacements of faulty equipment, and day-to-day fault management; and (c) ad hoc services, which, as the RFB specified, are 'based on requests received from client if and when required', including 'software upgrades to the specific brands of PBX systems'.

[30] Gijima makes much of In2IT's inability to attend to upgrades on the iS3000 model. This, in my view, is immaterial. As indicated *supra*, the 'mandatory requirements' provisions provide that software upgrades are required only if SAPS asks for them. What is more is that the SCC, under the heading 'preventative maintenance', provides that the 'reports and proposals for the upgrade of these units (where necessary) must be submitted together with the quarterly maintenance invoice before payment will be processed'. And under additional requirements, the RFB requires the successful bidder to inform SITA of any 'End-of-life announcements made by the OEM in terms of Hardware'. The successful bidder must also propose hardware upgrades to SITA should upgrades become available.

[31] The simple point is that software upgrades, of which Gijima made much, were firstly unlikely to be required, because of the fact that the SAPS was phasing out the PBX systems. Secondly, upgrades, for example for the iS3000 range, did

not form part of the RFB. Gijima's focus on software upgrades, as supported by the court *a quo*, also loses sight of the narrow, stopgap purpose of the tender. As submitted by Mr Blou SC, who appeared on behalf of In2IT, PBXs are obsolete machines, and obsolete machines are generally not kept on software life support. It stands to reason that the release of a software upgrade by the OEMs for a PBX's they no longer make and no longer sell, is highly unlikely.

[32] Further with regard to context, it should be born in mind that one is here dealing with a RFB, where the text is clear: the requirement is linked to brands, not to models. It must be accepted that a tender document, more than is the case with other instruments, should be interpreted in a way that remained faithful to its text and apparent purpose. In any event, SITA confirmed in its answering affidavit that the requirement being attached to 'brands' and not to 'models' was no drafting error. If SITA really meant 'models' as against 'brands', it would have said so. As was said by SITA in their answering affidavit:

'With some of the PABX platforms having reached or nearing end-of-life from the OEM, SITA did not see it necessary to include a requirement for the bidders to be certified on specific platforms as the risk of maintaining end-of-life PABX platforms would, in any case, be borne by the bidders themselves rather than the OEM.'

[33] Accordingly, I am of the view that the purpose of the tender confirms what the text makes clear. The stopgap purpose of the RFB is to ensure that obsolete PBXs of the SAPS are maintained pending their replacement with more modern technology. For this reason, the RFB does not require bidders to include in their prices software upgrades and spare parts that might never be needed. SITA did not want bidders to price for an uncertain contingency, which explains why the RFB made clear that 'ad hoc' services, including software upgrades, would be requested only if needed. Expanding the mandatory requirement beyond its plain text to include authorisation over models (and not just brands) undermines the tender's sensible, cost-effective approach to supporting end-of-life equipment.

[34] Besides, the RFB distinguishes between mandatory requirements and special conditions of contract. The mandatory requirements are the rules of the game, whereas the special conditions, in contrast, are contractual clauses that SITA may enforce through usual contractual remedies if the successful bidders

do not comply. In their own terms, the special conditions were not mandatory. SITA had a right to negotiate them, and a right to waive them altogether. The point is simply that a special condition of contract cannot be a mandatory requirement of a RFB if the organ of state is free to waive it.

[35] In sum, I am of the view that, properly interpreted in context and having regard to its purpose, the 'technical mandatory requirements' of the RFB did not require of the bidders to be authorised representatives of all of the models of the PBX systems. Therefore, the court *a quo* erred in finding that In2IT did not comply with the mandatory requirements of the tender and that it ought to have been disqualified. As correctly contended by Mr Blou SC, the SCC are not mandatory and they cannot and do not alter the plain text of the RFB.

Gijima's Rationality Argument

[36] As indicated above, Gijima also contends for a review and setting aside of the award of the tender to In2IT on the basis that same was irrational.

[37] Gijima's argument goes as follows. SITA, in publishing the documented Business Case, referenced *supra*, which preceded the formal publication of the tender, recognised the specific needs of the SAPS in respect of the legacy PBX systems, and it knew, or ought to have known that NEC representatives and partners are given the exclusive right, in certain circumstances, to maintain and support specific PBX models, notably the iS3000 range. In that context, SITA published the tender specifications and then decided to appoint In2IT, despite the fact that In2IT could not service and maintain the iS3000 model.

[38] The foregoing, so the argument is concluded, translate into an approach and a decision, which were both procedurally irrational and in conflict with the provisions of s 6(2)(f)(ii)(cc) of PAJA, which provides that a court has the power to review administrative action if it is not rationally connected to the information before the decision maker. The court *a quo* agreed with this contention and held accordingly in its judgment. The point made by Gijima, with which the court *a quo* agreed, is that the decision of SITA, as the decision-maker, could not possibly have been made rationally since that decision was not rationally connected to the information it had before it when the decision was made, that being that In2IT

could not perform all aspects of the tender requirements. Put another way, according to Gijima, In2IT could never have rationally and lawfully been selected as the winning bidder given that it could not objectively fulfil the technical requirements of the bid. On that basis, it ought never to have been awarded the tender.

[39] In2IT counters this contention firstly on the basis that this is in effect an attack that should have been directed against the bid documents and not belatedly against the decision after the award is made. I find myself in agreement with this contention. In that regard, the Rogers J stated in *SMEC South Africa (Pty) Ltd v City of Cape Town and Others*¹⁰: -

[91] Furthermore, such an attack is concerned with the decision to issue the tender invitations on these terms, rather than with decisions made by the BECs and BACs. The function of the BECs and BACs was to evaluate the tenders in accordance with the tender documents. If SMEC considered that the decision to go out to tender on terms which did not require functionality to be scored was unlawful, it should have launched a timeous challenge once the tenders were issued on 31 July 2020 (T26) and 7 August 2020 (T36) respectively. That a decision to issue a tender on terms which violate procurement legislation is in principle susceptible to judicial review is apparent from the judgment of the Supreme Court of Appeal in *Airports Company South Africa*. But instead of challenging the decision to issue the tenders on supposedly objectionable terms, SMEC participated in the tenders, allowed the tender evaluation processes to run their course, internally appealed against the decisions to reject its bids as non-responsive, and only launched review proceedings on 17 May 2021 (T36) and 18 August 2021 (T26), after it had failed in its quest to be the successful bidder.

[92] In principle, it seems undesirable that a bidder should be at liberty to “take a chance” in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid. However, in view of the conclusion I have reached on other aspects, I need not finally decide this point.’

[40] I respectfully adopt the reasoning and views of Rogers J that it is undesirable for a bidder to take a chance in the hope that it will be awarded the tender and ‘keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid’. For this reason alone, Gijima’s rationality argument stands to be rejected.

¹⁰ *SMEC South Africa (Pty) Ltd v City of Cape Town and Others* (8277/2021;14097/2021) [2022] ZAWCHC 131 (23 June 2022);

[41] In any event, in my judgment, there is nothing irrational about SITA having awarded to In2IT the tender notwithstanding the fact that it was not licensed to maintain and support certain of the models of the PBX systems. I say so for the reasons alluded to supra in the context of the object for which the tender was issued, namely to maintain and support systems which have reached or were nearing the end of their lives. I reiterate that pursuant to the award of the tender, the winning bidder was required to repair, maintain and support systems, which had reached or were nearing the end of their lives. This In2IT could do. In the unlikely event that more was required to be done, such as hardware or software upgrades of any particular system, which could not be done, the system would probably have been shelved and replaced with an updated one.

[42] Moreover, as contended by In2IT, it is not as open and shut as Gijima would make it out to be that In2IT would factually not have been able to render the services required to be rendered pursuant to the bid. So, for example, the evidence in the matter indicates the existence of an agreement between Gijima and NEC/Philips (who used to make the iS3000 but has not made one since 2019), in terms of which Gijima was appointed as the 'sole certified supplier and maintenance and support entity in South Africa' for a number of 'NEC Solutions', including the iS3000 platform. Importantly, though, it was also confirmed by NEC/Philips that 'in the unlikely event that Gijima is no longer in the position to support the NEC ranges of solution', it undertook to 'appoint another agent in this region to fulfil this support role going forward during the products life term and according to commercially acceptable conditions'.

[43] This, in my view, is the death knell for the 'rationality' argument, the point simply being that there is no evidence that a third party like In2IT would not be able to receive from NEC/Philips certification as a supplier. By all accounts Gijima's appointment was not exclusive – the evidence certainly does not point in that direction. The same reasoning applies to spare parts.

[44] I therefore conclude that the review was erroneously upheld by the court *a quo* on the basis that the award of the tender was irrational.

The Remedy

[45] In light of my findings relating to the review and setting aside of the award of the tender to In2IT, it is not necessary for me to deal in detail with the issue of the remedy. Suffice to state that, in my view, irrespective of whether or not the award is reviewable, the substitution order granted by the court *a quo* should not stand.

[46] As correctly submitted on behalf of In2IT, substitution is an ‘extraordinary remedy’ and remittal is almost always the prudent and proper course¹¹. SITA is best placed to decide how best to deal with this tender if the award is set aside. SITA exists precisely because procurement for information technology requires particular expertise. This tender is no different. SITA’s expertise is needed to determine how best to transition the SAPS from PBX to VoIP and how best to manage SAPS’s needs during the transition in a cost-effective way. For these reasons, I would not have ordered substitution.

[47] A court is constitutionally authorised, once it has found conduct to be unlawful, to craft an order that is appropriate to the circumstances. Section 172(1)(b) of the Constitution provides that, following upon a declaration of constitutional invalidity, a Court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity; and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[48] I am not convinced that, in the circumstances of this matter, the substitution order granted by the court *a quo* was just and equitable. It seems innately unjust and unfair that Gijima was permitted by the order of the court *a quo* to adjust its price *ex post facto* after having had the benefit of seeing what was tendered by the other bidder. It may very well be that the circumstances of the present case are such that it falls within the category of those cases where by reason of the effluxion of time and other considerations, notably the fact that Gijima’s price quoted would have cost the Fiscus a substantial sum of money

¹¹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) at para 42;

more than it is paying to In2IT, an invalid administrative act should have been permitted to stand.

Conclusion and Costs of Appeal

[49] For all of these reasons the appeal must succeed and the order of the court *a quo* should be replaced with one in terms of which the first respondent's judicial review application is dismissed.

[50] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*¹². There are no grounds in this case to depart from the ordinary rule that costs should follow the result. I therefore intend granting costs in favour of the appellant against the first respondent. The complexity of the matter does, in my view, warrant costs to include the costs of two counsel, with one being Senior Counsel (where so employed).

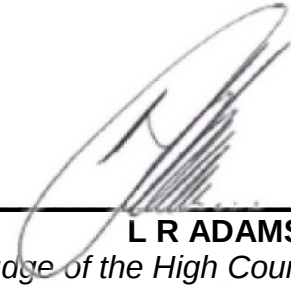
Order

[51] In the result, the following order is made: -

- (1) The appellant's appeal against the order of the court *a quo* is upheld, with costs.
- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -
 - '(a) The applicant's judicial review application is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).'
- (3) The first respondent shall pay the appellant's costs of the appeal, including the costs of the application for leave to appeal to the court *a quo* and the costs of the application for leave to appeal to the Supreme Court of Appeal,

¹² *Myers v Abramson*, 1951(3) SA 438 (C) at 455

all such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed).

A handwritten signature in dark ink, appearing to be 'L R ADAMS', is written over a horizontal line.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	26 th April 2023
JUDGMENT DATE:	15 th May 2023 – judgment handed down electronically
FOR THE APPELLANT:	Adv Jonathan Blou SC
INSTRUCTED BY:	Schindlers SI Attorneys, Melrose Arch, Johannesburg
FOR THE FIRST RESPONDENT:	Adv Adrian Friedman
INSTRUCTED BY:	Nicqui Galaktiou Incorporated, Illovo, Johannesburg
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	Mkhabela Huntley Incorporated, Sandhurst, Sandton
FOR THE THIRD RESPONDENT:	No appearance
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE FOURTH RESPONDENT:	No Appearance
INSTRUCTED BY:	No appearance