



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE
SPECIAL INVESTIGATING UNIT AND
SPECIAL TRIBUNALS ACT 74 OF 1996
(REPUBLIC OF SOUTH AFRICA)
HELD VIRTUALLY**

CASE NO: GP12/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
	
03/02/2026	
SIGNATURE	DATE

In the matter between:

SPECIAL INVESTIGATING UNIT

APPLICANT

and

DEPARTMENT OF WATER AND SANITATION

FIRST RESPONDENT

**DIRECTOR GENERAL: WATER AND
SANITATION**

SECOND RESPONDENT

MINISTER OF WATER AND SANITATION

THIRD RESPONDENT

AECOM SA (PTY) LTD

FOURTH RESPONDENT

JUDGMENT

Mashile J

Introduction

[1] The Applicant (“the SIU”) seeks relief to declare Contract 1/2/25/2017/1/NWRI/MIHLOTI awarded to the Fourth Respondent (“AECOM”) for a contract period of eighteen (18) months to render services for the emergency upgrading of the Thukela Goedertrouw Transfer Scheme constitutionally invalid, reviewed and set aside. The application is founded on the contravention of Section 217 of the Constitution.¹ The review of the contract is centred on the principle of legality.

[2] Notwithstanding that AECOM was not invited to submit a bid for the emergency upgrade, it nonetheless attended a compulsory site visit, following which, the First Respondent (“the Department”) appointed it to execute the emergency upgrade of the Thukela Goedertrouw Transfer Scheme. In the ensuing investigation, the SIU found that the Bid Evaluation Committee (“BEC”) members accepted and evaluated the bid documents from AECOM for the emergency upgrade of the Thukela Goedertrouw Transfer Scheme. It is not disputed that the Bid Adjudication Committee (“BAC”) did not support the recommendation of the BEC for the approval and acceptance of the AECOM

¹ Constitution of the Republic of South Africa Act, 108 of 1996 (“the Constitution”).

tender. That said, the Acting Director General, Mr Mkhize ("Mkhize"), advised AECOM that it had been recommended for appointment under W0486 WTE.

[3] When it emerged that irregularities could corrupt the award, the President of the Republic of South Africa issued Proclamation R.28 of 2019 ("the Proclamation") directing the SIU to investigate the matters referred to in the Schedule to the Proclamation. The investigation covered the period between 1 January 2016 and 5 July 2019, or issues which took place after 5 July 2019 but are relevant to, connected with, incidental or ancillary to the issues mentioned in the Schedule or involve the same persons, entities, or contracts, investigation under the authority of the Proclamation.

[4] The Proclamation further and specifically tasked and authorised the SIU to exercise or perform all the functions and powers assigned to, or conferred upon it by the Special Investigating Units and Special Tribunals Act, 74 of 1996 ("the SIU ACT"), including the recovery of any losses suffered by the Department or the State in relation to matters listed in the Schedule to the 2019 Proclamation.

[5] In opposition to the review, AECOM has raised three preliminary issues. These are:

- 5.1 The matter has finally been decided - *res judicata*;
- 5.2 The SIU unreasonably delayed in launching this review application; and
- 5.3 Disputes of fact concerning the determination of the legality of the contract.

[6] Of the Four Respondents, AECOM is the only party opposing the relief the SIU seeks in this application. In addition to not opposing the application, the Department has, in fact, filed an affidavit in support of the case of the SIU. In essence, there is only one Respondent: AECOM.

Factual Matrix

[7] During April 2016, uMhlathuze Municipality identified a need to adjust the water transfer pipeline from Thukela River to Goedertrouw Dam to increase and/or double the existing water capacity of the Goedertrouw Dam. Against that background and on 6 April 2016, the Mayor of uMhlathuze wrote to the former Minister of Department to draw her attention to the fact that at a disaster management meeting, the representatives of the Municipality, the Industry Stakeholder's, the Departments of Agriculture and Water and Sanitation, resolved that the transfer pipeline from Thukela River to Goedertrouw Dam should be adjusted to double the current capacity of the Dam. The letter recorded that the project is envisaged to be completed within twelve to eighteen months at the cost of R450 000 000.00.

[8] On 25 May 2016, the uMhlathuze water board invited several professional service providers to a briefing session regarding the intended bid invitation for the enhancement of the Thukela Goedertrouw Dam pump Transfer Scheme. Amongst the attendees of the briefing session was AECOM. The briefing session was held on 27 May 2016 at the Muldersdrift Pump Station in Nkandla. Tender invitations were subsequently issued to the briefing session attendees. On the closing date of the tender invitation, the Municipality received bids from three service providers: Royal Haskoning DHV for R170 690 790.00, Aurecon Group for R13 961 000.00, and AECOM for R14 223 780.00.

[9] Still in April 2016, the uMhlathuze Water board approached the Department and requested it to fund the Enhancement Capacity Project of the Thukela-Goedertrouw Transfer Scheme. On 29 July 2017, however, the Department resolved that the uMhlathuze water board did not have the technical capacity to execute a project of the magnitude of the Thukela-Goedertrouw Transfer Scheme and opted instead to appoint a service provider from the database of the Department. Following the aforesaid decision, the Department formulated the bids' terms of reference and technical specification for the appointment of a suitable professional service provider from the database for a period of 18 (eighteen) months.

[10] Financial authority was then sought through a submission prepared by the Acting Chief Director: Asset and Strategic Management, Mr P Muneka. The submission recorded the following:

- 10.1 To obtain approval for the implementation of emergency works: upgrading of the Thukela Goedertrouw Transfer Scheme;
- 10.2 To obtain approval to fund the emergency works from revenue. The budget required for the 2016/2017 financial year was R176 500 000.00 and R230 500 000.00 for the 2017/2018 financial year;
- 10.3 The submission further recorded that the UMhlathuze Municipal area and surrounding areas, including the Uthungula District Municipality, were in the grip of a severe drought and running dry of water for 20 weeks. Communities, farmers and industries were being supported by the Thukela Goedertrouw Transfer Scheme and Goedertrouw Dam as the only source of water; and
- 10.4 The total budget required to upgrade the Transfer Scheme was recorded as R407 000 000.00. It was also recorded that funding for the financial year 2016/2017 was sourced from the reprioritised list of project and maintenance activities, amounting to R176 500 000.00.

[11] On 1 June 2016, the then Director General, Ms Magaret Diedricks, approved the submission mentioned above. Notwithstanding that the project was not planned for the 2016/2017 financial year, it was nonetheless approved for implementation during that year. For the next financial year, 2017/2018, an amount of R300 000 000.00 was allocated for the project, even though these were not the adjusted estimates of national expenditure. On 10 August 2016, Mr Muneka prepared a submission for the procurement of professional services for the urgent upgrade of the Thukela Goedertrouw Transfer Scheme, for a contract period of eighteen months. The submission recorded a budget allocation over the two financial periods as follows:

- 11.1 2016/2017 – R176 500 000.00; and
- 11.2 2017/2018 – R230 500 000.00.

[12] The total from the entire project was recorded as R407 000 000.00. The former Acting Director General subsequently approved the submission on 26 August 2016, Mr Sfiso Mkhize. Following the approval of the submission above, the Department formally invited service providers from the database to submit bids and to attend a compulsory briefing session scheduled for 5 September 2016. The Department selected and invited ten companies to attend the compulsory briefing session. The minutes of the briefing session record that:

“On the day of the compulsory briefing session, another company which had previously been invited by uMhlathuze Water in the previous process, attended a compulsory briefing session and tendered for the bid. The company attended the briefing session although it was not selected as part of the ten service providers that were invited to attend the briefing session and to submit respective bids.”

[13] The minutes of the briefing session further note that:

“Some of the supply chain management personnel raised concerns and discomfort in including AECOM in the evaluation process since it was not invited to attend the briefing session and/or to submit bid. In response thereto, it is minuted that it was recorded that the committee bid directed to request the director general for rectification of inclusion of AECOM in the bid process notwithstanding that it did not form part of the selected providers who were invited to submit their bids and/or attended the briefing session[sic].”

[14] An internal memo dated 30 November 2016 and signed by the Chief Financial Officer, Mpho Mofokeng, records that the Acting Director General was informed as follows:

“It was noted after the briefing session that one of the bidders (AECOM) who attended the compulsory briefing session for WP0485/WTE for the upgrade of Thukela Goedertrouw scheme was not invited by the Department and this bidder is part of the professional service providers and is on the list of panel when it was established and there were allocated project [sic].”

This information was discovered when the bidders were sent the amended bid document as per agreement which took place at the compulsory briefing session. The information was reported to the Chief Director SCM, and the bidder was requested to indicate how they got the invitation and how they found out about the changes of the briefing session. The company responded through telephone, indicating that they were invited by uMhlathuze Water officials without giving a name of the specific official or the person who invited them. When SCM conducted a site visit at Goedertrouw, the bidder also attended but was not informed about the site's inspection [sic]."

[15] Bids were subsequently received and opened on the 14th of October 2016. The minutes record that the following bids were received:

15.1 Impofu-Izazi-Jav for an amount of R791 829 290.00;

15.2 Southern Zambezi/Khato Civils/Motla Projects/Ceenex for an amount of R221 699 642.894; and

15.3 AECOM for an amount of R559 939 232.52.

[16] The BEC subsequently convened on 1 November 2016 to evaluate the received bids. The minutes of the bid evaluation committee record that in May 2016, uMhlathuze Water Board approached companies from the Department's pre-approved database under WP0485/WTE to request a proposal for the upgrade of the Thukela Goedertrouw Transfer Scheme. The project was then cancelled, and the Department was requested to proceed with the project. The minutes further recorded that the Director General approved the pre-approved database panel for use in obtaining a proposal for the project.

[17] The minutes further record that on the day of the compulsory briefing session, another company which had been previously invited by the uMhlathuze Water Board in the previous SCM process, attended the session and applied for the same bid. Consequently, the meeting raised the following concerns:

- 17.1 At the briefing session, the Department failed to allow the companies to introduce themselves to establish that the attendees were the companies invited;
- 17.2 The Department allowed a company that was not invited to attend the compulsory briefing session;
- 17.3 The Department accepted the company's proposal and even recorded its name and bid price as part of the bid opening procedure;
- 17.4 The Department communicated with the company, as far as inviting them to the site visit following the briefing session and sent them the additional information on the tender documents.

[18] It is also recorded that the meeting resolved that the Chief Director: Supply Chain Management should request, in writing, approval from the Director General for rectification to include AECOM in the bidding process. The reasons advanced were that:

"Department did not ensure that only companies invited to participate in the closed tender were involved in the process;

By allowing AECOM to attend the briefing session and sign the attendance register and communicate with the company as a participant in the close process, the Department created a legitimate expectation and some substantive procedural rights that the bids would be considered"

[19] On 09 November 2016, a submission was made by a certain Ms Zandile Makhathini and addressed to the Acting Director General. The purpose of the submission is recorded as follows:

"To request acting director general to permit the bid evaluation committee to consider for evaluation the bidder not initially invited in the close bid for WP0485/WTE for the upgrade of the Thukela Goedertrouw scheme for a contract period of 18 (eighteen) months on an emergency procurement and construction programme."

[20] The submission further recorded that of the eleven companies invited to the briefing session, ten attended; however, AECOM was not invited to the session but was nevertheless allowed to sign the register. It further states that:

“At this stage, it is crucial to mention that the bidder had been invited by uMhlathuze Water during the previous process of May 2016 to RFP for the same project. There has been some communication between AECOM, uMhlathuze Water and DWS on the new process of inviting bidders, although the company was ultimately not invited. DWS communicated with the company after the briefing session to arrange for the site visit and make the bidder aware of the corrections made in the tender document that had been given to the company [sic].”

[21] In view of the submission recorded above, the BEC recommended that the Acting Director General approve that AECOM's bid be considered to address the loopholes and promote fair competition, given that the Department received only two of the invited bids. On 9 November 2016, the Director General approved AECOM's inclusion in the bid, although it was not initially invited.

[22] On 30 November 2016, the former Chief Financial Officer addressed a memo to the Director General informing him that there was possible irregular expenditure in the procurement of services for the Thukela Goedertrouw Transfer Scheme as one service provider was not formally invited by SCM to a bid briefing and site visit. While that was the case, the service provider still attended in both instances and submitted a proposal. The bid evaluation committee disregarded the briefing session minutes by evaluating the bid with a bidder who should not have been considered. Additionally, the memo further recorded that two members of the bid evaluation committee who were absent during the bid evaluation were present during the bid adjudication.

[23] Attached to the internal memorandum was a submission prepared by the Director: Supply Chain Management, Mogale Shai and signed on 05 December 2018 by the Chief Director: Supply Chain Management, Virginia Mokgabela and the Chief Financial Officer, Mpho Mofokeng. The submissions refer the Director General to the internal memo

prepared by the Chief Financial Officer and record the Chief Financial Officer's note on a possible irregular expenditure in the procurement of a professional service provider.

[24] On 19 December 2016, the Acting Director General, Mr Sfiso Mkhize, signed off on the memo and recorded that the process was cancelled. In the submission prepared and signed by Mr P Muneka on 14 December 2016, he requested the Acting Director General to appoint AECOM SA from panel WP0485/WTE to render services for the emergency upgrade of the Thukela-Goedertrouw Transfer Scheme for a period of 18 (eighteen) months. The submission recorded that the project budget was R407 000 000.00 and that the PSP would submit professional rates and a bill of quantities for the construction.

[25] The following were stated as the reasons for the upgrading of the Transfer Scheme as an emergency:

"Communities, farmers and industries are being supported by Thukela Goedertrouw transfer scheme and Goedertrouw Dam as the only main source of water. Water crisis in the Richards Bay was reaching severe levels and procurement process needs to be conducted urgently. Water levels trend projections were showing that the region is now in a crisis and construction needs to start."

[26] On 16 December 2016, the Chief Financial Officer, Mr Mofokeng, signed off on the submission, and on 14 December 2016, the Acting Director General, Mr Sfiso Mkhize, approved the appointment of AECOM. The appointment was done by the Acting Director General and submitted to the Department's bid adjudication committee on 15 December 2016 for noting. The Chairperson of the Bid Adjudication Committee, Mr Ndileka Mohapi, confirmed that the committee was informed after the Acting DG had approved and that it did not serve at the committee in line with the procedure that bids should serve at the committee. The committee should then recommend the award to the Director General.

[27] The Acting DG signed a letter of appointment on 14 December 2016 under the heading 'Appointment for AECOM to Render the Services for the Emergency Upgrading

of the Thukela Goedertrouw Transfer Scheme for a Contract Period of 18 Months'. The appointment letter continues to state that:

"AECOM has been recommended for the request for proposal under W0485/WTE for the following emergency work:

To render the service for the emergency upgrade of the Thukela Goedertrouw Scheme for a contract period of 18 months.

The recommendation to appoint a company is subject to acceptance of technical instruction and submission of professional rate and bill of quantities."

[28] Through a letter dated 13 January 2017, AECOM responded to the Department's letter above and stated the following:

"Following the appointment of AECOM in the letter dated 14 December 2016, AECOM has acknowledged the appointment in the AECOM letter dated 15 December 2016 and met with DWS on 10 January 2017 and that in accordance with the requirement expressed by DWS an updated bid of quantity and price are provided towards finalisation of the contract between DWS and AECOM included were financial documents [sic].

Following the updated financial proposal by AECOM, Mr Muneka prepared a submission for the DG requesting approval of the financial proposal amounting to R646 520 802.80 for a contract period of 18 months.

It should however be noted that under the financial implication it was recorded that estimated budget allocation for the project was R407 000 000.00 but that the professional service provider will submit their professional rates and bill of quantities for the construction."

[29] In accordance with the above, on 26 August 2017, an agreement was concluded between the Department, represented by Mr Sfiso Mkhize, and AECOM. Since the conclusion of the contract, AECOM has been paid approximately R301 202 772.60 during

the financial year 2017/2018 and R556 726 172.00 during the financial year 2018/2019. Accordingly, the Department has, as of 1 September 2018, paid AECOM R357 928 945.06 for the upgrade of the Thukela Goedertrouw Transfer Scheme, against a budget of R646 502 802.80.

[30] Following concerns raised by the office of the Auditor General, in particular the finding that the procurement of AECOM constituted irregular, unauthorised and wasteful expenditure, the Acting DG mandated the Risk Management Committee (“the Committee”) of the Department to investigate the appointment of AECOM for the upgrading of the Thukela Goedertrouw Transfer Scheme. Once the Committee had finalised its investigation, it concluded that:

“The appointment of AECOM SA (Pty) Ltd is in contravention of section 217 of the Constitution of South Africa which states that when government contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

The appointment of AECOM was made in contravention of SCM Instruction Note 3 of 2016/2017: preventing and combatting abuse in the supply management system, which states that the accounting officer must invite as many suppliers as possible and select the preferred supplier they use in the competitive bid system. However, in this appointment Zandile Makhathini did not submit or use the competitive bid system in place and selected AECOM SA and submitted the request for approval directly to the Acting Director General.

The expenditure incurred resulting from the noncompliance with the legislation led to the Department incurring irregular expenditure amounting to R357 928 945.06.

Zandile Makhathini did not put control measure in place within her own area of responsibility to prevent irregular expenditure, and this is in contravention of section 45 of the Public Finance Management Act that states that an official in the Department must take effective and appropriate steps to prevent within that officials area of responsibility, any unauthorised irregular expenditure and fruitless and wasteful expenditure.

The former Acting Director General Sfiso Mkhize, the Former Chief Director Strategic Asset Management failed to discharge their legislative responsibilities.”

Issues

[31] The primary issue is to decide whether the procurement of the services of AECOM for the upgrade of the Thugela Goedertrouw Transfer Scheme, on behalf of the Department, was in accordance with Section 217 of the Constitution and the legislative framework governing procurements of goods and services by Organs of State. The issue arises against the backdrop that AECOM was not invited to tender, yet was preferred for the award of the tender in complete disregard of other bidders. In the second place, whether this Tribunal should place any legal significance to the difference between the approved amount and the contract amount, which was modified after the award or at the contract stage.

[32] Lastly, AECOM has raised, as one of the issues to be decided by this Tribunal, the question of whether the Department has suffered any damages as a result of this transaction. Given that the amount of damages may still be contested, I prefer to hold back on that matter until the appropriate time, when it is disputed. Should this Tribunal conclude that the procurement was not in line with Section 217 of the Constitution and all other legislation governing the procurement process, the award will be declared constitutionally invalid, reviewed and set aside. Thereafter, the Tribunal will consider what just and equitable relief, in the circumstances, should be granted.

Legal Framework

[33] It is common knowledge among all concerned in this matter that this review concerns the Department's procurement of goods and services. As such, it will be wise to explore the legislative framework and case authority governing the procurement of goods and services by Organs of State. The starting point here is the Constitution. Section 1 of the Constitution of the Republic of South Africa is founded on certain values, including, amongst others, the supremacy of the Constitution and the Rule of Law. The Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional*

Metropolitan Council, in quoting section 1 of the Constitution that the rule of law is a founding value of South Africa's constitutional democracy, and all organs of state and spheres of government must operate within the law.² This means the government's actions must be rooted in law and comply with the Constitution.³

[34] The doctrine of legality also requires, at the very least, that the exercising of public power and functions conferred on the Department, as the Organ of State, must be *intra vires*, exercised in good faith, and be rational in both purpose and process. The failure by the Organs of State to observe this contravenes the doctrine of legality. Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, and any law or conduct inconsistent with it is invalid. The obligations imposed by it must be fulfilled. *Fedsure Assurance Life Ltd supra*. One of the primary provisions of the Constitution in the context of the issues raised in this application is section 217(1) of the Constitution, which provides:

- “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”⁴

² *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (1999) 1 SA 374 (CC) paras 57-58.

³ *Khumalo & Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 ILJ 613 (CC) para 29.

⁴ Sub-s. (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001.

[35] The Supreme Court of Appeal in *Minister of Social Development v Phoenix Cash and Carry* at para ⁵, held that compliance with the provisions of section 217(1) of the Constitution is peremptory as it is the source of an Organ of State's power to procure goods and services. In a somewhat similar vein, the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁶, stated that the law on procurement is prescriptive because the award of public tenders is notoriously prone to influence and manipulation. Simply put, the purpose of section 217(1) read together with section 33 on just administrative action of the Constitution are to eliminate fraud and corruption in a procurement process.

[36] Section 217(3) of the Constitution provides that national legislation must prescribe a framework within which the policy referred to in subsection 2 must be implemented. It is against this background that the Preferential Procurement Policy Framework Act No. 5 of 2000 ("the PPPFA") was passed to give life to the provisions of Section 217(3) of the Constitution. Section 2 of the PPPFA lays down that an Organ of State must determine its preferential procurement policy and implement it within the framework set out in section 2(1) (a)-(g). Thus, Organs of State would have Supply Chain Management systems and are expected to comply with National Treasury Instructions and various other procurement canons.

[37] Equally important in this application is section 195(1) of the Constitution., which prescribes that:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

⁵ Minister of Social Development v Phoenix Cash and Carry [2007] 3 All SA 115 (SCA) at para 1.

⁶ Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at paras 33 -35.

- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated."

[38] Holding that an agreement concluded between a potential service provider and an Organ of State was invalid as it was noticeably different from the terms of the tender and the letter of award in *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd*⁷, the Court stated:

"... That is so because to allow a tender board to withhold from the body of tenderers its intention to conclude a secret agreement with one of them, an agreement which the others have never seen and have had no chance to match, would be entirely subversive of a credible tender procedure. One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what the true subject of tender is. One of the results of the adoption of a procedure such as Mr McNaught argues was followed is that one simply cannot say what tenders may or may not have been submitted, if it had been known generally that a fixed quantities contract for ten years for the original list of products, and some more, was on offer. That would deprive the public of the benefit of an open competitive process. It is not to be assumed that the Board intended to visit the iniquities that I have mentioned

⁷ *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30.

upon the body of tenderers or upon the public generally. Indeed, the contrary is to be presumed - that in referring to 'a contract' a lawful contract was intended".

[39] Another pertinent Act in this application is the Public Finance Management Act No 1 of 1999 ("PFMA"), whose object is to secure transparency, accountability, and sound management of the revenue, expenditure, assets, and liabilities of the institutions to which it applies. The PFMA seeks to give effect to, amongst others, the values behind sections 217 and 195 of the Constitution. It is evident from the following definition of 'irregular expenditure' in the PFMA that breaching a Treasury Instruction would render an expenditure irregular:

"irregular expenditure' means expenditure, other than unauthorized expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including –

(a) the Act; or (b) the State Tender Board Act, 1968; (Act No. 86 of 1968), or any regulation made in terms of that Act; or (c) any provincial legislation providing for procurement procedures in that provincial government."

[40] Treasury Regulations deal with various aspects of the PFMA. Regulation 16A addresses Supply Chain Management. Regulation 16A3.1 provides that the accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient Supply Chain Management system in his or her institution for:

40.1 The acquisition of goods and services; and

40.2 The disposal and letting of state assets, including the disposal of goods no longer required.

[41] 16A3.2 provides that a supply chain management system referred to in paragraph 16A.3.1, must –

41.1 Be fair, equitable, transparent, competitive and cost-effective;

41.2 Be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);

41.3 Be consistent with the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and

41.4 provide for at least the following –

- 41.4.1 Demand Management;
- 41.4.2 Acquisition management;
- 41.4.3 Logistics Management;
- 41.4.4 disposal management;
- 41.4.5 Risk Management; and
- 41.4.6 Regular Assessment of Supply Chain Performance.

[42] Regulation 16A.6.4 provides:

“If in a specific case, it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority”.

[43] In *Chief Executive Officer, South African Social Security Agency, and others v Cash Paymaster Services*⁸, the Court clarified that a material requirement of “regulation 16A.6.4 is that “there must be rational reasons for the decision” not to comply with a supply-chain policy”. In *Department of Transport v Tasima (Pty) Ltd*⁹ the Court confirmed that “in a case of an emergency or where there is only one supplier who can provide goods or services, the regulation permits a deviation from inviting competitive bids in terms of a fair, transparent and cost-effective tendering process”.

⁸ *Chief Executive Officer, South African Social Security Agency, and Others v Cash Paymaster Services (Pty) Ltd* 2021 (1) SA 216 (SCA) para 21,

⁹ *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 99.

[44] In *RAiN Chartered Accountant Incorporated v South African Social Security Agency* at para 30¹⁰, The Constitutional Court held as follows on the meaning to be assigned to the word, impractical, used in Regulation 16A.6.4:

“To use the hackneyed but useful legal phrase, what is impractical must surely depend on the circumstances of each case. In some instances, impracticality may manifest in absolute impossibility to engage in a competitive bidding process. Below that there may be a range of what constitutes impracticality. At the centre though must be the question of whether a competitive bidding process is well and sensibly suited for the circumstances. A dictionary meaning of ‘impractical’ is ‘not adapted for use or action; not sensible’. Ultimately what is impractical is a matter of judgement call to be made by the organ of state concerned. But what the organ of state may decide is not unbounded; it must be informed by the operative word – ‘impractical’. And that is an objectively accessibly accessible notion.”

[45] Fairness, as envisaged in Section 217 of the Constitution, is determined by assessing the facts of each case under scrutiny. This is the message the Supreme Court of Appeal conveyed in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*¹¹ when it stated the following:

“Fairness must be decided on the circumstance of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in his tenderer; It may be fair to allow a tenderer to correct an obvious mistake. It may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. What it is done may not cause the process to lose the attribute of fairness or, in the local governance sphere, the attribute of transparency, competitiveness and cost-effectiveness.”(Emphasis my own)

Points In *Limine*

¹⁰ *RAiN Chartered Accountant Incorporated v South African Social Security Agency* 2021(11) BCLR 1225 (CC) para 30.

¹¹ *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* para 14.

Res Judicata

[46] Before addressing the merits of this application, it is practical first to consider the three preliminary matters AECOM has raised. Needless to state that should this Tribunal uphold one of them, it will be the end of the road for the SIU and, their dismissal, the converse. The central theme of the *res judicata* principle is the prevention of repeat lawsuits. Thus, where a competent Court has pronounced on a matter between the same parties, concerning the same subject and stemming from the same cause of action, it will be appropriate to raise *res judicata* as a valid defence.

[47] In some instances, *res judicata* may bring about undesired hardships. In recognition of this fact and in appropriate circumstances, the requirement of the 'same subject and arising from the same cause of action' has been relaxed to ensure that justice prevails between litigants. Where this happens, it is referred to as issue estoppel. The Supreme Court of Appeal in *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others*¹², said the following of *res judicata*:

"Closely allied to the "once and for all" rule is the principle of *res judicata* which establishes that, where a final judgement has been given in a matter by a competent court, then subsequent litigation between same parties, or their privies, regarding the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met exception *rei judicate vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions."¹³

[48] In *Isedor Skog N.O. & Others v Koos Agullus & Others*¹⁴, the SCA per Molemela P, having referred to *Smith v Porritt*, which discusses the relaxation of the requirements of *res judicata*, concluded at para 66 that: "Following Boshoff and a line of judgments of this Court, it is now well- established that the requirements of *res judicata* should yield to

¹² *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41 at para 69.

¹³ *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH) at para 566 B - J.

¹⁴ *Skog NO and others v Agullus and others* 2023 JDR 0489 (SCA) para 14.

the facts of each case...” As I understand it, there may still be instances where the requirements need rigorous adherence, and there will be times when the interests of justice warrant relaxation.

[49] The essence of the argument of AECOM on *res judicata* is that the Award of retired Judge Fabricius (“the arbitrator”) dated 27 November 2024 constitutes a final determination of the terms of the main contract. This included the Detailed Bill of Quantities (“BOQ”) and AECOM's final account at Termination, both premised on the signed-off measurement sheets agreed between the Department and AECOM. Furthermore, as the argument continues, the arbitrator also dismissed the Department's challenge to the legality of the main contract. For that reason, AECOM concludes that it is not for the SIU or its Quantity Surveyor to question the terms of the main contract or the final account of AECOM at Termination.

Whether the SIU is the Same As The Department or Its Privy

[50] AECOM has asserted that the SIU is the same as the Department; alternatively, it is its privy. It is indisputable that the SIU was not a party in the arbitration proceedings between the Department and AECOM. The question is then, could it be perceived as a privy of the Department? The SIU is dissimilar to the Department insofar as its functions are governed by statute delineated in Section 4(1)(a) to (h) of the SIU Act. The Section is headed: the functions of the SIU and it provides:

“The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2 (1)-

- (a) to investigate all allegations regarding the matter concerned;
- (b) to collect evidence regarding acts or omissions which are relevant to its investigation;
- (c) to institute and conduct civil proceedings in a Special Tribunal or any court of law for-
 - (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;

- (ii) any relief relevant to any investigation; or
 - (iii) any relief relevant to the interests of a Special Investigating Unit;
 - (d) to refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority;
 - (e) to perform such functions which are not in conflict with the provisions of this Act, as the President may from time to time request;
 - (f) from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned or any court of law;
 - (g) upon the conclusion of the investigation, to submit a final report to the President; and
 - (h) to at least twice a year submit a report to Parliament on the investigations by and the activities, composition and expenditure of such Unit.
- (2) A Special Investigating Unit must, as soon as practicable after it has obtained evidence referred to in subsection (1) (d), inform the relevant prosecuting authority thereof, whereupon such evidence must be dealt with in the manner which best serves the interests of the public."

[51] The SIU, unlike the Department, is the only one that can bring matters before this Tribunal. The Department is open to using the normal Court system intended for all citizens of this country. It took up this matter between the Department and AECOM because of allegations of impropriety by employees of both the Department and AECOM. Such impropriety rendered the award of the bid and the subsequent agreement between the Department and AECOM constitutionally invalid. On this understanding, it is inexorable to conclude that the SIU cannot be the same as the Department nor is it its privy.

Whether the Cause of Action Considered at The Arbitration is Similar

[52] The cause of action in the arbitration proceedings arose from the Department's alleged failure to pay for services rendered by AECOM to it. However, in this case, the cause of action stems from the award of the tender to AECOM and the subsequent agreement, which was vitiated by irregularities rendering the process constitutionally unlawful. The issues the arbitrator had to determine during the arbitration proceedings, in

light of the Department's failure to pay, were radically different from those this Tribunal is to decide. The arbitrator could not have entertained the parties' agreement on its constitutional validity because he lacked jurisdiction.

[53] AECOM has stated that the arbitrator finally determined the contract's legality. I do not agree but for present purposes I am willing to assume that he has. A recognition of the argument advanced by AECOM will imply the subversion of the rule of law on agreements that ought to conform with the provisions of Section 217 of the Constitution and any other procurement prescripts that derive their application from the Constitution. If he has considered the contract's legality, the interests of justice would be better served by relaxing the traditional requirements of *res judicata*. Accordingly, I find that the arbitrator did not finally determine the issue as he lacked authority.

Whether the Relief Sought by The Department at Arbitration is Comparable with what The SIU Seeks In This Case

[54] The relief sought by the SIU in this matter is to review and set aside the tender award to AECOM and the agreement that ensued between the parties. On the other hand, the relief for which AECOM prayed was for payment of damages arising from services that it had rendered to the Department. The differences between the two reliefs require no elaboration because they are obviously not similar. In the circumstances, *res judicata* has been inappropriately raised.

Undue Delay in the Launch of This Review Application

[55] It is now settled that there exists no specific period within which a review under the principle of legality ought to be brought. That said, it is legally required that an application of such nature be brought within a reasonable time¹⁵ To establish whether a review application was brought within a reasonable period involves, firstly, a determination of whether there was an unreasonable or undue delay. Secondly, and if so, whether a Court

¹⁵ SIU v Member of the Executive Council for the Department of Transport, Kwa-Zulu Natal and Another 2024 ZAST 2 (27 February 2024), per Modiba P at para 40.

or Tribunal should nonetheless exercise its discretion to overlook the delay and decide the merits of the application.¹⁶

[56] In *Kwasa supra*, this Tribunal further restated that delay must be weighed together with the merits of the case. Victor JP then referred to the decision in *Geldenhuys v National Director of Public Prosecution and Others* 2009 (2) SA 310 (CC) para 21, where the Constitutional Court held that “*the general rule is that non-compliance with the rules of this court will be condoned when it is in the interests of justice to do so*”.

[57] The two-stage enquiry is wholly dependent on the facts that a party wishing to be condoned puts before a Court or Tribunal. AECOM was insistent that the facts put forward by the SIU show that the period taken to launch this application was inordinate and inexcusable, as the explanation was inadequate. Against that backdrop, it argues that the Department's Risk Management Investigation Report was approved on 3 and 7 September 2018. The SIU reported to the Portfolio Committee on Human Settlements, Water and Sanitation on the status of investigations into allegations of corruption within the Department on 3 November 2020. On 8 June 2022, it briefed the Standing Committee on Public Accounts, stating that Counsel had drafted papers and a closeout report had been submitted for final review.

[58] Given the above, the SIU has not explained away the sixteen-month delay from 5 July 2019 to 3 November 2020. Additionally, it has not accounted for the nineteen-month delay from 3 November 2020 to 8 June 2022. The total period for which it has not accounted for the delay is 35 months. AECOM raises the question: if, on the SIU's own version, it finalised its investigation in 2021, why did it only instruct its Counsel on 8 June 2022? Thereafter, and only two and a half years later, the SIU launched this application in April 2024 without a full account of the delay, concludes AECOM. In justification of its

¹⁶ See also *SIU v Kwasa Food Suppliers (Pty) Ltd and Others* (EC02/2024) [2025] ZAST 3 (12 February 2025) as per Victor JP at para 26.

approach, AECOM referred this Tribunal to the matter of *Altech Radio Holdings and Others v Tshwane City*¹⁷ where the Court held:

“The objective of state self-review should be to promote open, responsive and accountable government. The conduct of the City renders the delay so unreasonable that it cannot be condoned without disregarding its duty to act in a manner that promotes reliance, accountability and rationality, and that is not legally and constitutionally unconscionable. Here the delay is stark and the egregious conduct on the part of the city even starker. The city has a 'higher duty to respect the law'. It is not 'an indigent and bewildered litigant, adrift in a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline'.”

[59] Responding to the criticism that the delay of the SIU to bring this application to the Tribunal was unreasonable and unjustifiable, the SIU has set out reasons against which this Tribunal ought to decide whether the delay was unreasonable. Right from the onset, the SIU acknowledges that its investigation of the facts of the contract took several months. From the date it was entrusted with the duty to investigate the impugned contract, it not only interviewed various persons involved in the procurement division of the Department, obtained affidavits, secured forensic reports and corresponded with other organs of State like the Auditor-General, but it also had to attend to other matters that were referred to it simultaneously. Besides, throughout the preparation of this application, numerous issues arose that required further evidence.

[60] The SIU adds that around this period, it encountered obstacles and challenges in finalising matters that had initially been handled by the Office of the State Attorney before the Courts. These matters were subsequently moved back to the SIU. The SIU, as an Organ of State itself, has its attorney of record, the State Attorney, as contemplated in section 3 (1) of the State Attorney Act, 1956, as amended (Act No. 56 of 1957). Upon the establishment of this Tribunal, the SIU referred several matters to the Office of the State Attorney for institution before this Tribunal. The increase in these cases during the advent

¹⁷*Altech Radio Holdings and Others v Tshwane City* 2021 (3) SA 25 (SCA) para 71.

of COVID-19 accelerated due to investigations under Proclamation No R23 of 2020. In view of the Office of the State Attorney being the only institution statutorily authorised to handle legal State work, it soon became inundated and choked.

[61] It was also during this period that about 35 cases relating to COVID-19 investigations were instituted at this Tribunal. As a result of known inefficiencies at the office of the State Attorney, most cases did not receive prompt attention. There were also backlogs in issuing instructions to appoint Counsel in various matters that the SIU wished to institute at this Tribunal, as well as in paying Counsel who had rendered legal services to the SIU. Inexorably, the SIU lost some legal representation due to these inadequacies, as some legal practitioners refused to provide further services to the SIU.

[62] This situation was unsustainable for the SIU, as most cases that had to be instituted urgently to prevent asset dissipation could not receive the necessary attention. To address the prevailing challenges confronting the SIU in the prosecution of civil litigation matters, it embarked on a process of recruiting admitted practising legal practitioners to deal with the backlog in instituting urgent matters, attending to outstanding payment of legal fees, and the outstanding appointment of Counsel to various matters.

[63] On 16 March 2021, as a follow-up to this, the SIU appointed a Senior Manager: Civil Litigation, an admitted attorney of the High Court of South Africa, to assist in alleviating some of the challenges that continued to plague the SIU, stemming from inefficiencies at the office of the State Attorney. The SIU alleges that this intervention was undertaken to ensure that the mandate of recovering losses suffered by state institutions was not compromised. According to the SIU, the nature of the urgency warranted the appointment of an attorney to the office of the State Attorney as its attorney of record, to facilitate and assist it in all matters.

[64] The SIU claims that it struggled to finalise its matters before the Courts because of the legal representatives in the Office of the State Attorney. They failed to ensure that matters were properly attended to. The seconded official had to deal with a huge backlog

of matters sitting in different Courts, including this Tribunal, as well as a backlog of new instructions to appoint Counsel on various matters referred by the SIU to the Office of the State Attorney. The intervention required prioritisation of certain strategic matters. In doing so, it was resolved that the seconded official must prioritise and issue PPE matters that had huge claim amounts and whose funds were at risk of being dissipated by service providers.

[65] During this period, the SIU instituted several cases with this Tribunal, which this Tribunal ultimately finalised. These included, but not limited to, matters emanating from Gauteng Department of Education (Fikile Mpofana case, Chachulani case) Gauteng Department of Health, (Beadica case, Mlangeni brothers, Zakheni strategic case, Lukhele case, Lehloenya case, Ledla case, Masuku case,) National health laboratory case, (Hamilton Ndlovu case), Eskom case, (Mazibuko case) Transnet case, (CMI infrastructure case. These cases involved many millions of rand that otherwise should belong in the public fiscus.

[66] The SIU states that it soon became plain that its secondment of an official to the Office of the State Attorney was not a panacea to the flood of cases as some of them, including the current, could not be allocated Counsel immediately. For example, the first instruction in this matter was forwarded to the office of the State Attorney in or around February 2021. The Office of the State Attorney managed to appoint Counsel team on 14 June 2021. Several consultations were held throughout 2021 and 2022. Counsel prepared a draft, but the SIU did not approve the papers to be issued. The SIU instructed the Office of the State Attorney to firstly, release the Senior Counsel from the brief and secondly, to appoint a Senior Counsel who would be familiar with SIU matters.

[67] To address the persistent challenges plaguing the Office of the State Attorney, the SIU seconded another official to the Office of the State Attorney. This did not yield immediate positive results because of the cumbersome and laborious process followed by the Office of the State Attorney in appointing Counsel. The process involves, among others, sending request for quotation to potential legal practitioners. The State Attorney

would only assess quotations when it has received three valid quotes from different Counsel who had not have been appointed in the last two months. This process is slow, cumbersome, frustrating and generally, delays the process of appointing Counsel.

[68] Additionally, the SIU began a process of constituting a panel of attorneys to enhance the work carried out by the Office of the State Attorney as its attorneys of record. The SIU finalised the process aforesaid on 19 December 2022 when it advised the various firms of their appointment to its panel of attorneys. The panel of attorneys could not immediately commence work. This was due to the SIU simultaneously embarking on other formal business processes. These processes included, but not limited to, negotiations of terms and conditions of the Service Level Agreement ("SLA"), the drafting of the actual SLA and the development of internal processes to engage the panel of attorneys on a rotational basis.

[69] In consequence of the processes described above, the SIU could not promptly or properly or effectively utilise the services of the panel. The matter thus remained with the Office of the State Attorney to continue trying to appoint Counsel to guard and protect the interests of the SIU. The various firms of attorneys signed the SLA on 30 January 2023. At that juncture, the SIU was developing internal procedures to guide the appointment of Counsel in all the matters involving the SIU in which the panel of attorneys would be engaged. That process was finalized in March 2023.

[70] Noticing that challenges of appointing Counsel still lingered at the Office of the State Attorney, the SIU recalled all the matters to brief the panel of attorneys on a rotational basis. This matter formed part of those to be transferred from the office of the State Attorney. Attendant upon the transfer of files from the Office of the State Attorney were major delays. The fact that the seconded officials of the SIU were still involved in the PPE matters, backlogs of matters sitting in different Courts and on new instructions where Counsel needed to be appointed exacerbated the situation.

[71] The process of the transfer of files and the appointment of the firm of attorneys to the panel coincided with the audit season of the Auditor General of the Republic of South Africa ("the AG"). One of the areas which was sampled by the AG was the establishment of the panel of attorneys by the SIU. While conducting the audit, the AG made preliminary findings and announced that it intended to declare the process followed by the SIU in constituting the panel of Attorneys irregular. The AG's finding led to the SIU lodging a dispute with National Treasury. In any event, critical outstanding matters required the SIU to reconsider whether to continue utilizing the panel, notwithstanding the AG preliminary report.

[72] On 6 July 2023, the accounting officer of the SIU suspended the work carried out by the panel of attorneys whilst the dispute was pending with the National Treasury. A key consideration was a genuine concern that continuing with the panel whilst there is a preliminary AG finding might offend the provisions of Section 83 of the Public Finance Management Act, 1 of 1999, as amended ("the PFMA"). The National Treasury Dispute Resolution process took longer than it was anticipated. In consequence, the SIU had to approach the Office of the State Attorney again to take over the work that was undertaken by the panel of attorneys.

[73] On 30 August 2023, the Office of the State Attorney and the SIU held a meeting during which the parties agreed that the Office of the State Attorney would take over the matters then seized by the panel of attorneys. This was to be on the proviso that the SIU would address a formal referral letter to the Office of the State Attorney with full details of the matters, the particulars of Counsel on brief and their respective CSD registrations and proof of tax and VAT compliance. The SIU duly observed the terms of the agreement by writing to the office of the State Attorney on 8 September 2023 formally referring certain cases, amongst which, this one.

[74] The decision to accept the matters from the Office of the State Attorney did not settle the problem confronting both parties as they still had to ascertain payment arrangements of the legal practitioners. This required the SIU to draft a deviation

memorandum for payment of the briefed Counsel by SIU directly. The memorandum was only approved in November 2023. Only when the issue of the payment of Counsel was out of the way, did the attorneys at the Office of the State Attorney have a green light to retain the Counsel who were placed on brief by the Panel of Attorneys.

[75] Having received instructions to appoint Senior Counsel, the Office of the State Attorney appointed the current Senior Counsel in or around November 2023. Due to the December recess, the SIU investigation and Counsel teams only became available for consultations on 1 and 2 February 2024. Consultations took place, drafts were prepared by Counsel and the application was issued.

[76] As was stated in the *Kwasa* matter *supra*, the second stage of the inquiry implies a determination of the factors below:

- 76.1 The nature of the decision to be reviewed;
- 76.2 The duty to review in terms of the relevant empowering legislation;
- 76.3 The consequences of setting aside the decision to be reviewed;
- 76.4 The potential prejudice to the affected parties;
- 76.5 The court's ability to grant a just and equitable relief;
- 76.6 The interests of justice.

The Nature of The Decision To Be Reviewed

[77] The award of the tender was irregular because AECOM was preferred notwithstanding that it was not selected to be a party to the bidding process. As though that was not enough, AECOM provided a BOQ in the amount of R646 502 802.00) including VAT). This amount was well more than the budgeted project amount of R407 Million. The award was also made based on an emergency that allegedly prevailed at the time whose deviation the National Treasury refused to support.

The Duty To Review In Terms of The Relevant Empowering Legislation

[78] The SIU Act authorises the SIU to launch civil proceedings to review and set aside decisions unlawfully made and to seek damages where appropriate. That said, it is evident that the SIU is not seeking damages at this stage. The relief sought in this Tribunal is to review and set aside the awarding of the tender and not for damages. Paragraph 3 of the notice of motion reads that if a dispute arises on the amount to be paid back by AECOM, the matter be re-enrolled for determination by this Tribunal.

The Consequences of Setting Aside The Decision to be Reviewed

[79] The decision under review is one where the Department irregularly and unlawfully appointed AECOM even after the National Treasury had made it plain that it did not support the deviation. Furthermore, the Risk Management Report filed by the Department found that the appointment of AECOM was in contravention of section 217 of the Constitution, which states that when government contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Additionally, the report found that the appointment of AECOM was in contravention of SCM Instruction note 3 of 2016/207: Preventing and combating abuse in the Supply Management System, which states that the Accounting Officer must invite as many suppliers as possible and select the preferred supplier using competitive bid system and that the expenditure incurred resulting from non-compliance with legislation led to the department incurring irregular expenditure amounting to R357 928 945.06.

The Potential Prejudice To The Affected Parties

[80] Any threat of prejudice against the parties has diminished because the Department and AECOM were involved in an arbitration proceeding regarding the payment of the services rendered to the Department when this application commenced. Besides, neither party can claim prejudice where the legality of the appointment of AECOM is involved.

The Tribunal's Ability To Grant Just and Equitable Relief

[81] The SIU seeks relief that the award of the tender be reviewed and set aside. In addition, the Tribunal grants just and equitable relief. A reflection on the facts of this matter

suggests that the award to AECOM was irregular and unlawful. Should I make that finding, it will indubitably be and equitable for this Tribunal to review and set aside the award of the tender to AECOM.

The Interest of Justice

[82] The tender was intended to benefit the community, which was believed to be at risk of an imminent drought within 20 weeks. The project was still not finalised when this application was launched. The budget amount had been exceeded by R239 502 000.00. Besides, the parties invited to bid were completely overlooked in favour of a party that had not been requested to participate in the bidding process. This was a blatant violation of Section 217 of the Constitution, which requires fairness, competitiveness, and cost-effectiveness, among other elements. On that basis, I agree that it will be in the interests of justice to review and set aside the award of the tender.

[83] According to the *Kwasa* matter *supra* at paragraph 31, other aspects that ought to be weighed when establishing whether to grant condonation for the delay are:

- 83.1 The nature of the relief sought;
- 83.2 The extent and the cause of the delay;
- 83.3 The effect of the delay on the administration of justice;
- 83.4 The reasonableness of the explanation for the delay;
- 83.5 The importance of the issue raised.

[84] This Tribunal agrees with the SIU that prospects of success exist, especially in view of the audacious and bare-faced way the Department contravened section 217 of the Constitution when awarding the tender to AECOM. It is evident from the reasons furnished for the delay in launching the application that the SIU cannot be held responsible for the delay, as most of the obstacles arose outside its area of influence. In any event, under the principle of legality, a party must launch the application within a reasonable time. In the circumstances, I am satisfied that the SIU made every effort to launch the review but was unable to do so due to other parties, which also had sway over

the process and without whom it could not proceed. See, the *SABC* matter *supra* at paragraph 63.

[85] When deciding on a delay, public policy is a crucial consideration for the certainty and finality of a matter. See paragraph 51 of the *SIU v MEC Department of Transport supra*. The use of State funds for public benefit must be done in a lawful and procedurally fair manner. No party can be given an advantage over the other. There is a duty on officials in office to comply fully with the procurement laws. It is therefore a matter of public policy that the unlawful conduct that occurred in awarding the tender be authorised. Needless to say, despite being alerted to conspicuous irregularities, the Department still went ahead and made the unlawful award to AECOM.

[86] This leads me to the assertion advanced by AECOM that the Department, throughout these proceedings, has remained silent on what it did to ascertain that the matter received the attention of the authorities. The difficulty in these matters is often that the officials are the enablers of the irregularities, because the Department, as an entity, would not run itself. So, it is the officials who conclude these irregular contracts in the Department's name and ensure they go undetected. When the irregularities are ultimately exposed, the damage is usually too huge to reverse. Ordinarily, if the officials had adhered to procurement processes, there would have been an account of the period commencing in 2011 to the time when the SIU became seized of the matter. It should suffice to state that it was due to the Department's failure that the President had to issue the Proclamation. The evidence in this matter is that when the SIU commenced investigations, some of the officials had already been disciplined and dismissed from their positions. That said, they are not immune from criminal liability but whether they will criminally be charged to account is a matter beyond this Tribunal. In any event, this is the case of the SIU against AECOM and not the Department against AECOM.

[87] The next issue is to determine whether the decision, although unlawful, was made in good faith. See paragraph 64 of the *SABC* matter *supra*. When the Department awarded the bid to AECOM, it was in total disdain of two other bidders who had observed

the procedure, participated in the process and submitted bids. Moreover, the decision also disregarded the recommendation to advertise and invite the initial 11 potential bidders to restart bidding. It is also a common cause that the National Treasury did not support the decision to appoint AECOM using the emergency deviation. Overlooking all these, the Department awarded the tender to AECOM, and thereafter the parties concluded the contract at an amount far higher than the budget. It is noteworthy that the contract is patently different from the tender awarded to AECOM, making it unfair, uncompetitive and not cost-effective. In these circumstances, it is hard to say the Department acted in good faith.

[88] On the facts of this matter, the delay is unquestionably insufficiently explained, especially if one has regard to the date of the Proclamation, 19 July 2019, to the date of the conclusion of the SIU's investigation in 2021. The SIU account for the period is simply that the investigator had other equally important matters to investigate. The SIU has not taken the Tribunal into its confidence regarding which matters took precedence and the reasons therefor. That said, the period from the conclusion of the investigations to the time when the review was launched is wholly understandable, insofar as the SIU could not have proceeded in the face of the influence of other important role players on the process, which rendered it impotent.

[89] The issue is whether this Tribunal should, in these circumstances, exercise its discretion and condone the late launching of the review. It is trite that the discretion of this Tribunal to decide whether to condone the unconscionable delay is broad. That said, one must not lose sight of the statement of the Tribunal in the *Kwasa* case at paragraph 13 *supra* that there must be a basis on which to exercise discretion based on the facts of each case. Having regard to the evidence levied on the reason for the delay, it will be proper to exercise the discretion in favour of condonation. This must be right because the legality review delay is determined by the facts of each case, not necessarily by the time that has lapsed.

[90] I have already stated that the facts of this case direct that this Tribunal should exercise its discretion in a manner that disapproves of the process by which AECOM was appointed. There is no doubt that the award of the tender and the subsequent conclusion of the contract between the Department and AECOM were unlawful insofar as they violated the Constitution and other prescripts governing the procurement of goods and services by Organs of State. This, in my opinion, is sufficient to bestow power upon the Tribunal to exercise its discretion in favour of condonation. As a result, this preliminary point fails.

Disputes of Fact

[91] AECOM argues that damages can only be claimed in action proceedings. A party proceeding in motion seeking damages is precluded from doing so by Regulation 5.2(b) of the SIU Act, limiting the jurisdiction of this Tribunal to adjudicate claims for damages or losses on action only and not in motion. That provision of the Regulation has been confirmed in several cases, including *Muofhe v Dintwe and Milkor (Pty) Ltd v Evotex Engineering (Pty) Ltd*, from paragraphs 15 – 20¹⁸. The SIU states that it is not claiming damages and that there are no disputes of fact regarding the legality of the contract.

[92] A closer examination of the notice of motion validates the contention the SIU advances. This is that the SIU is not seeking any monetary relief against AECOM. This application concerns the setting aside of the award made by the Department to AECOM. However, should there be a loss occurring due to the reviewing and setting aside, the SIU will be entitled to recover it. If AECOM disputes the amount, it must pay the Department, as determined by the SIU, and the parties will place the matter before this Tribunal once more for adjudication of what is due. For present purposes, therefore, these motion proceedings are appropriate to resolve the issue of the award of the tender as it is purely a legal question ordinarily suited for resolution through motion. See, *Muofhe supra*.

¹⁸ *Muofhe v Dintwe* 2024 JDR 1759 (GP) paras 11-12. See also *Milkor (Pty) Ltd v Evotex Engineering (Pty) Ltd* 2025 JDR 1009 (GP) paras 15 – 20.

[93] At Paragraph 16 of the *Muofhe* judgment, the Court also notes that it has the discretion to dismiss an application if, at the time the application was launched, the Applicant was aware of the disputed facts. How AECOM submitted a bid, attended the site visits, had the bid awarded, and received the payments are all facts admitted. As such, the legality of the contract was never in dispute when the SIU launched the application. The Court in *Wightman t/a JW Construction v Headfour (Pty) Ltd (Pty) Ltd*¹⁹ held that an Applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. No legality disputes prevailed at the launch of the application.

[94] In determining whether a real dispute of fact has been raised, the Court must be satisfied that the party raising the dispute has seriously and unambiguously addressed the disputed facts. At paragraph 13 of the *Wightman* case, the Court held:

"A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will, of course, be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they are not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied..."

[95] The issue here is whether AECOM has raised genuine disputes of fact in the answering affidavit, warranting a dismissal of this application. An analysis of the objective

¹⁹ *Wightman t/a JW Construction v Headfour (Pty) Ltd (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13.

facts of this case shows that a closed bid was sent to 11 companies. AECOM was not part of those companies. Notwithstanding that AECOM did not make it to the list of invited companies, it attended two site visits and submitted a bid. It was then appointed through emergency procurement. The appointment and subsequent conclusion of the contract by the Department and AECOM were irregular insofar as they disregarded the provisions of Section 217 of the Constitution and other procurement processes. The contract amount exceeded the budget. Additionally, the National Treasury did not support the deviation because it was the result of poor planning. In any event, it appeared to it that the process was not fair and transparent.

[96] The purpose of these proceedings is to determine whether AECOM was properly awarded the tender and whether the contract concluded between it and the Department was legal. The SIU argues that the transaction was constitutionally invalid, while AECOM contends otherwise. If this is the position, then the matter for determination is really one of law. AECOM is adamant that the SIU depends on unsupported factual conclusions. It is difficult to deny that the emergency was not contrived, especially given that the Risk Management Report records that the Director General approved it. That said, Ms Makhathini and Mr Muneka should not have recorded the project as an emergency, as they were aware that it had been negotiated from March 2016 and would be completed after 18 months. They were aware at that time that there was no immediate risk to health, life, property or the environment requiring the Department to take immediate action because the completion would, in any event, have occurred well after the alleged disaster had struck (twenty weeks).

[97] Turning to the assertion that the contract amount exceeded the approved budget, it is important to note that the submission to Top Management to grant permission for the procurement of the services from a professional service provider for the urgent upgrade of the Thukela Goedertrouw Transfer Scheme for the contract period of 18 months indicates that the approved budget is R407 million. Thus AECOM'S contention that there was no approved budget is wrong. Regarding AECOM not being on the list of approved Professional Service Providers ("PSP"), it is clear that it was not on the WTE 0845 panel

of the Department in 2015. However, the name AECOM appears on the old PSP, created in 2013. The 2015 Panel list contains all the companies invited to the Department's closed bid, and AECOM was clearly not one of them.

[98] Mr Muneka stated during his interview with the SIU team that the Department effected payments using the tendered BOQ. However, the evidence is that the Department made the first payments to AECOM using the Second BOQ prepared by AECOM. This is corroborated by the statement of Mr Troyens attached to the answering affidavit of AECOM. My consideration of this matter reveals that there has been no genuine dispute of fact regarding the legality of the contract. As such, it would be inappropriate to dismiss this application on the ground that the SIU should have foreseen the probability of the alleged disputes of fact arising. Equally, I do not deem it proper to refer this matter for oral evidence because the application is meant to resolve a legal issue – whether the award of the bid was unconstitutional. If so, the contract that was subsequently concluded on the strength of that award must necessarily suffer a similar fate as the award of the bid. As a result, the preliminary point raised in this respect must fail.

Analysis of The Merits

The Arbitration Award

[99] AECOM asserts that an arbitration agreement can be terminated only with the parties' consent. Only a Court, acting in terms of Section 3 of the Arbitration Act 42 of 1965, can set aside an arbitration agreement or order that it ceases to have effect. Furthermore, the Arbitrator's Award is final and binding and may be challenged only under Sections 32 or 33 of the Arbitration Act. Any challenge had to be filed within six weeks of the award's publication. The award having been published on 5 December 2024, the SIU should have challenged it on or before 17 January 2025.

[100] AECOM points out further that the powers of this Tribunal to set aside an arbitration award are extremely limited. In this regard, Counsel for AECOM referred this Tribunal to

the matter of *Lufuno & Associates (Pty) Ltd v Andrews & Another*²⁰ where the Court restated the approach to the grounds of review set out in section 33 of the Arbitration Act, 42 of 1965, the essence of that decision is that where parties have elected to have their matters resolved by arbitration, deference should be given to arbitrators and their decisions. The difficulty this Tribunal faces is that, while AECOM is correct, it does not apply in this matter. The simple fact is that the arbitration award does not have the force of a Court order. Until it acquires the force of a Court order, this Tribunal cannot have regard to it. Besides, this matter is not between the Department and AECOM, but it is between the SIU and AECOM.

The SIU Report

[101] If it is correct that this matter primarily concerns the legality of the tender award and the contract that ensued, then the exercise of determining whether there was overpayment is futile at this juncture. I say this because it is manifest that the parties are likely not to agree on the amount to be reimbursed to the Department if this Tribunal sets aside the contract and declares it constitutionally invalid. For the aforesaid reason, it is my opinion to leave the matter and deal with it when it arises later.

An Arbitration Agreement Is a Self-Contained Contract

[102] The argument advanced by AECOM in this regard cannot stand in circumstances where I have already decided that the matter is not *res judicata*. That decision renders the assertion concerning the arbitration agreement being self-contained irrelevant. That must be the position, because the parties to the arbitration were the Department and AECOM, not the SIU. The argument put forward by AECOM will probably stand a chance when raised against the Department at an appropriate stage. For now, there are two reasons this Tribunal cannot entertain the assertion. Firstly, the matter is not *res judicata*, and secondly, the arbitration award has not been made a Court order. Accordingly,

²⁰ *Lufuno & Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 (CC) para 235.

whether the Department submitted to the arbitrator's jurisdiction is neither here nor there for the SIU.

The Legality of the Main Contract

[103] AECOM contends that the Department raised the legality of the main contract as a defence to AECOM's claim in the Arbitration. This is true, but I fail to see how such a defence, raised in the context of the Department's failure to pay what was due to AECOM, could be pertinent to a consideration of legality where the appointment of AECOM is said to have been unconstitutional. For what it is worth, I reiterate that the conclusion that this matter is not *res judicata* undermines AECOM's argument. The fact that the parties raised the issue of legality for the consideration of two distinct issues should, in any event, be sufficient to relax the elements of *res judicata*, as held in *Isedor Skog N.O. & Others v Koos Agullus & Other*²¹. Lastly, it is correct that the Constitutional Court has stated that the Tribunal is not a Court. Still, it has unambiguously held that the Tribunal can exercise enforcement powers similar to those of the higher Courts.²²

Section 4(1)(c) of The SIU Act

[104] Here AECOM argues that Section 4(1)(c)(i) of the SIU Act allows the SIU to institute and conduct civil proceedings for "any relief to which the State Institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such State Institution." The Arbitrator having made his award on 5 December 2024 in favour of AECOM, the Department had until 9 January 2025 to challenge the legal validity of the arbitration award under the Arbitration Act. The time within which the Department should have challenged the award has passed.

²¹ Skog NO and others v Agullus and others 2023 JDR 0489 (SCA) paras 64-65.

²² See *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* 2023 (2) SACR 1 (CC) paras 64-65 and 70 regarding section 8(2) of the Special Investigating Units and Special Tribunals Act No 74 of 1996.

[105] The argument advanced above disregards the fact that, insofar as this Tribunal is concerned, there is no Court order because the award has not been perfected for execution. For purposes of this judgment, there exists no hindrance for this Tribunal to deal with the question of setting aside the award and declaring it constitutionally invalid. Everything said, I cannot exclude the possibility that the argument raised by AECOM here later becomes relevant, but for now, I regard it as misplaced. Whether AECOM will prevail over the SIU, or whether the SIU's victory could be an empty shell, is not for this Tribunal to determine.

Hearsay Evidence

[106] AECOM alleges that some of the evidence levied by the SIU before this Tribunal is hearsay, albeit without specifically pointing out the objectionable parts. The deponent in the founding affidavit conducted certain interviews, which AECOM regards as hearsay. I agree with the SIU that such evidence cannot be regarded as hearsay because the deponent to the Founding Affidavit conducted the interviews himself. As such, he has first-hand knowledge of what the individuals he interviewed stated. There is no place in those statements where an appeal to the credibility of a third party is necessary.

[107] The relevant legislative provision, insofar as hearsay evidence is concerned, is s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, which lays down that:

"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (c) the court, having regard to-
 - (i) the nature of the proceedings.
 - (ii) the nature of the evidence.
 - (iii) the purpose for which the evidence is tendered.
 - (iv) the probative value of the evidence.
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends.
 - (vi) any prejudice to a party which the admission of such evidence might entail; and

- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interest of justice."

[108] The Supreme Court of Appeal in *S v Ndhlovu* defined "probative value" in the following terms:

"'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?' In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness."

[109] The Constitutional Court in the matter of *Kapa v S*²³, held that admission of hearsay evidence can only be done on application, and admission of such evidence is only allowed if it is in the interest of justice for such evidence to be admitted, together with the factors in S3 (1) (c) of the Law of Evidence Amendment Act.

"In determining whether the evidence is reliable, the court must consider (i) any interest in the outcome of the proceedings by the witness (ii) the degree to which it is corroborated or contradicted by other evidence (iii) the contemporaneity and spontaneity of the hearsay statement and (iv) the degree of hearsay."

[110] The substance of the evidence levied before this Tribunal lies in its corroboration of the Risk Management Report. The Report exposed how it came about that AECOM visited the site, how it submitted its bid documents, how it was selected to be awarded the tender and the various steps taken before the contract was signed. In addition, AECOM has not singled out what evidence is hearsay. It objects to the whole paragraph as impermissible hearsay without pinpointing which parts. In *Salzmann v Holmes*²⁴ the

²³ Kapa v S 2023 (4) BCLR 370 (CC) para 77.

²⁴ Salzmann v Holmes 1914 AD 152 at 156. The material part of Rule of Court 35 (O.F.S.) is as follows: -

35. . . . "If any argumentative or irrelevant or superfluous matter be stated in any pleading such matter shall, if shown to the Court or a Judge in Chambers by way of motion be struck out of such pleading with or without payment of costs as the Court or Judge shall direct."

Court held: "Whereas individual sections, which do not comprise an entire claim or defence, but are only portion of one, must, if objected to, be attacked by a motion to expunge". Thus, for AECOM to succeed in any application to strike out evidence, it must identify the evidence it seeks to exclude. The SIU cannot aptly reply to allegations of hearsay where their details are scant or lacking.

[111] AECOM contends that Mr Mkhize's unsigned questions and answers are impermissible hearsay. His evidence, however, shows that AECOM was appointed on 14 December 2014, on an emergency basis. Strangely, AECOM itself relies on the unsigned questions and answers of Mr Mkhize's interview. Given this, AECOM cannot claim that it is prejudiced as a result. In any event, there is no application to strike out the offending hearsay evidence. Given the circumstances of this matter, if there is any hearsay evidence, it would be in the interest of justice to admit it as its objective is to establish the constitutional invalidity of the contract between the Department and AECOM.

[112] Additionally, a refusal to admit such documentary evidence would defeat the purpose of the whole investigation intended to detect irregularities, unlawful conduct and malfeasance, which had caused loss to the public purse. The admission of such evidence would better serve the interests of justice. The purpose of the evidence is to set aside an unlawful contract and obtain a just and equitable remedy. If there is any prejudice of the amount to be paid by AECOM, it will be addressed by an order of just and equitable relief.

Constitutional Invalidity of The Award of The Bid and Contract

[113] Mr Mkhize, having advised AECOM that he had, on 14 December 2016, recommended its appointment under W0486 WTE, on 13 January 2017, AECOM submitted a letter to the Department containing an updated Bill of Quantities amounting to R646 502 802.80. This flew in the face of the submission to Top Management requesting permission to procure services from a professional service provider for the urgent upgrade of the Thukela Goedertrouw Transfer Scheme, with a contract period of 18 months, specifying an approved budget of R407 million.

[114] In no uncertain terms, the National Treasury on 5 April 22017, advised the Department that it did not support the deviation. In declining to support the deviation, the National Treasury said, first, that the emergency was due to poor planning. Secondly, there was no evidence that a fair and transparent process... was properly executed. Moreover, and lastly, it stated that the case was not reported to it within the prescribed period of 10 working days. In total disregard of the lack of support for the deviation from the National Treasury, the Department and AECOM concluded the contract on 28 September 2017 whose value amounted in all to R646 502 802.80, which was more than the tendered amount and that budgeted by the Department. This was unlawful if one has regard to the matter of *Metro Projects CC supra*.

[115] Paragraph 8 of Instruction Note 3 concerns deviations from the normal bidding process. Paragraph 8.1 prescribes that an accounting officer must only deviate from inviting competitive bids in cases of emergency. An emergency procurement, as per paragraph 8.2, may occur when there is a serious or unexpected situation that poses an immediate risk to health, life, property, or environment which calls an agency to action and there is insufficient time to invite competitive bids. The Risk Management Report found that:

- 115.1 The appointment of AECOM was in contravention of section 217 of the Constitution, which provides that when government contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective;
- 115.2 The appointment of AECOM was made in contravention of SCM Instruction Note 3 of 2016/2017: Preventing and combating abuse in the Supply Management System, which states that the accounting officer must invite as many suppliers as possible and select the preferred supplier using the competitive bid system. However, in this appointment, Zandile Makhathini did not submit or use the competitive bid system in place and selected AECOM and submitted the request for approval directly to the Acting Director General;

- 115.3 The expenditure incurred resulting from the non-compliance led to the Department incurring irregular expenditure amounting to R 357 928 945.06;
- 115.4 The process initiated and followed by Ms Zandile Makhathini in the procurement of AECOM as an emergency did not meet the requirements of an emergency, and this was in contravention of section 217 of the Constitution, SCM Note 3 OF 2016/2017, Public Finance Management Act, and Treasury Regulations;
- 115.5 The Director General approved but Ms Makhathini and Mr Muneka should not have recorded the project as an emergency because they were aware that the project had been negotiated since March 2016 and would be completed after 18 months. And that there was no immediate risk to health, life, property or environment which needed the department to act. The two officials had contravened the provisions of section 45 by failing to prevent within their areas of responsibility an expenditure which is irregular;
- 115.6 Ms Zandile Makhathini did not put control measures in place within her own area of responsibility to prevent irregular expenditure. This was in contravention of section 45 of the PFMA which states that an official in the department must take effective and appropriate steps to prevent within that official's area of responsibility any unauthorized, irregular, fruitless and wasteful expenditure;
- 115.7 Mr Mkhize failed to discharge the legislative responsibilities.

[116] Over and above the findings recorded in the Risk Management Report, Mr Mkhize further breached SCM Policy paragraph 9.124. which provides a negotiation mechanism that may be used when finalising the award of the business with preferred bidders, provided that such negotiations do not lead to a higher price than the bid as submitted. There is ample evidence showing that AECOM and the Department negotiated shortly after the bid was awarded, following which AECOM submitted a Bill of Quantities that was higher than what it had initially tendered. Here, both parties ought to have known that

their negotiations post-award, unless in compliance with section 217 and all other procurement prescripts, were unlawful. AECOM cannot claim innocence because it is not new to these processes, and if it were, it was incumbent upon it to familiarise itself with them. Besides, one would expect that any seasoned party in tender procurements to have a sense of fairness. Negotiating to the exclusion of other bidders detracts from fairness and equity.

[117] SCM Policy paragraph 9.1 provides that the Department shall only proceed with the acquisition of goods and services for which there is an approved budget. The budgeted amount for the project was R407 million. In breach of this provision, Mr Mkhize signed a contract with AECOM amounting to R646 502 802.80. Needless to state that the amount of the contract was considerably above what AECOM had tendered. This, of course, is what the Court in *Free State Provincial Government and Others v Firechem Free State (Pty) Ltd supra* held was not permissible. The other bidders did not know the latest contract amount between the Department and AECOM, rendering the whole process unfair, unjust, non-transparent, uncompetitive and not cost-effective. As such, it violates section 217 of the Constitution.

[118] The contention of AECOM that it was the Department that caused the amount to increase from R407 Million to R646 502 802.80 must be rejected. AECOM labours under the impression that an act will not be irregular or unlawful if executed together with the Department. If this is the approach, it is incorrect. The fact that the Department saw nothing wrong with engaging AECOM after the award of the bid, to the exclusion of the other bidders, renders the process entirely unfair, inequitable, non-transparent, non-competitive, and not cost-effective. It is unfair because it is a process that came after everyone involved believed R407 million was the budgeted amount for the project. It was also not transparent, as it was shrouded in secrecy. It was also not competitive because, had the other bidders been advised, they might have tendered differently, and the Department would have had the benefit of choosing from a variety.

[119] SCM Policy paragraph 9.137 provides that, in accordance with Treasury Regulations 16.A6.5 and the Supply Chain Management delegation, the procurement manager may approve deviations from the prescribed Supply Chain Management processes where it is impractical to follow the Bid/quotations processes. SCM Policy paragraph 9.138 provides that requests to deviate from the prescribed Supply Chain Management processes will, among others, be limited to the following cases: 9.138.2, emergency cases where immediate action is necessary to avoid a dangerous or risky situation, or misery.

[120] Notably, the Risk Management Report found that the Director General gave the approval. That being so, Ms Makhathini and Mr Munka should not have recorded the project as an emergency, as they were aware that it had been negotiated from March 2016 and would be completed after 18 months. Accordingly, there could not have been any immediate risk to health, life, property or the environment that required the Department to act, especially given that the alleged emergency was expected to strike within 20 weeks, yet at the launch of this application, the project stood incomplete. The two officials had contravened the provisions of section 45 of the PMFA by failing to prevent, within their areas of responsibility, irregular expenditure.

[121] SCM Policy paragraphs 9.140. and 9.140.1 provide that when requesting a deviation, it must be impossible or impractical to follow the prescribed Supply Chain Management processes. Impracticality is always contextual. Thus, depending on the facts of each case, it may well be that 'impractical' means it is completely impossible to engage in a competitive bidding process.²⁵ Given that the Department had invited other bidders and evaluated them until AECOM, which was not invited to submit the bid, was recommended for appointment by the BEC, it could not have been impossible to comply with section 217 of the Constitution.

²⁵ See RAIN Chartered Accountants Incorporated v South African Social Security Agency 2021 (11) BCLR 1225 (CC) *supra*.

[122] The Department also failed to observe the provisions of SCM Policy paragraph 9.141.3, which lays down that where the financial implications are above R 1 million, the approval must be reported to the National Treasury and the Office of the Auditor-General within 10 working days. In terms of SCM Policy paragraph 9.142, a lack of proper planning does not constitute an urgent or emergency case, and under no circumstances may a request for deviation be approved to circumvent the prescribed Supply Chain Management processes. In its letter to the Department, the National Treasury advised that it did not support the deviation because the emergency emanated from poor planning.

[123] Finally, it was not without significance that the Court in *Cash Paymaster Services (Pty) Ltd supra* held that a material requirement of regulation 16A.6.4 is that there must be rational reasons for the decision not to comply with a Supply-Chain Policy. The essence of the provision of the Regulation is that where it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids are recorded and approved by the accounting officer or accounting authority.²⁶

[124] I have already pointed out elsewhere in this judgment that the reasons furnished by the Department for the deviation were not only inconsistent but also flimsy and indubitably manufactured. This conclusion is inexorable when one bears in mind that AECOM would have this Tribunal believe that the emergency was anticipated to occur within twenty weeks. Yet, the Department expected the project to endure for a period not less than eighteen months, well beyond the expected time of the disaster. Where then is the rationality in that reasoning? Similarly, it took eight months to execute the decision to appoint. Where was the emergency? Against the above background, I am constrained to find that the award of the bid and the subsequent conclusion of the contract between the Department and AECOM were constitutionally invalid and stand to be reviewed and set aside.

²⁶ See Fn 9 *supra*.

Just and Equitable Remedy

[125] The relief sought by the SIU under this heading is that, following the declaration of constitutional invalidity of the award of the Tender and the resultant contract to AECOM, reviewed and set aside, the Tribunal must grant consequential relief in terms of s 8(2) of the SIU Act. Furthermore, the SIU also seeks relief that this Tribunal should, in terms of section 8(2)(b) of the SIU Act, direct that:

- 125.1 AECOM, within thirty days of this order, to provide the parties the Audited Financial Statements, invoices and/or any supporting documents regarding its income and expenses for the period in question relating to the value of the contract in the sum of R646 502 802.80 (including VAT), and the losses suffered by the Department in the sum of R429 291 313.28;
- 125.2 The SIU must, within sixty (60) days of receipt of the documents referred to above, inform AECOM of the amount relating to the profit that must be paid back to the SIU;
- 125.3 If a dispute arises regarding the amount to be paid back to the SIU, the matter may be re-enrolled for a determination by this Tribunal.

[126] The approach to just and equitable remedy has been that once a Court has declared an award unconstitutional, reviewed and set it aside, a respondent would be automatically barred from retaining any profits that may accrue from the transaction, regardless of that respondent's innocence. This is often referred to as the 'no loss but no gain principle.' Recent development, as per the matter of *Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others*²⁷, specifically held that the approach as stated in this paragraph was caused by a confusion in the interpretation of the judgment in the Constitutional Court matter of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social*

²⁷*Mafoko Security Patrols (Pty) Ltd and Others v Mjayeli Security (Pty) Ltd and Others* 2025 JDR 5132 (SCA) para 14.

*Security Agency and Others*²⁸ where the Court held: "It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract. And any benefit that it may derive should not be beyond public scrutiny."

[127] The correct position seems to be that disgorgement or forfeiture of profits depends on the facts of each case. It is dependent on several factors, which this Tribunal, in exercising its wide discretion in pursuit of a just and equitable remedy in terms of section 172(1)(b) of the Constitution, should engage. Setting the record straight, the Supreme Court of Appeal in *Mafoko supra* stated :

"The mistake made by certain courts that have sought to understand *Allpay II* is to equate the absence of a right to benefit from an unlawful contract with the exclusion of such benefit from the exercise by the court of its just and equitable discretion. *Allpay II* does not say this. Indeed, it simply holds that any benefit derived 'should not be beyond public scrutiny'. This means that any benefit derived from an unlawful contract falls to be scrutinised in order to determine how the court should exercise its just and equitable discretion. It does not mean that the benefit of an unlawful contract is excluded from remedial consideration, for then the benefit would indeed be beyond public scrutiny because it would fall outside the very exercise the court undertakes to weigh relevant considerations so as to arrive at a just and equitable order."²⁹

[128] AECOM does not seem to appreciate that its appointment was characterised by manifest irregularities, rendering it in contravention of section 217 of the Constitution and all the other procurement prescripts governing the process. It is intransigent in its view that it was appointed in an emergency and that its appointment is therefore immune from being regarded as irregular and unconstitutional. Perhaps I should reiterate that AECOM was not supposed to have been appointed in the first place because it was not invited to submit a tender. This is notwithstanding protestations by AECOM to the contrary.

²⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC) paras 66-67 ("*Allpay II*")

²⁹ See Fn 27 *supra* para 14.

[129] The project should never have been flagged as an emergency, and the officials who characterised it as such knew that it was not. AECOM, too, must have known that it was not invited, like the other bidders, and therefore should not have attended the compulsory briefing meeting on 9 September 2016. The letter purporting to invite it to the meeting is dated 23 September 2016, which confirms that it could not have been invited and that the letter was an afterthought. I have already made the point that it is aberrant that the emergency was such that, if nothing were done within 20 weeks, disaster would strike, yet the project was only expected to be completed after 18 months. The inevitable inference is that the emergency was, as the SIU has submitted, contrived. AECOM is, as such, not as innocent as it would have this Tribunal believe.

[130] AECOM is a tested multinational company not new to these government projects. It was, or should have known, as a multinational and experienced company in these projects, that there were procurement procedures to which companies and Organs of State should adhere. AECOM cannot claim not to have known that it was irregular to be awarded a bid with a certain approved amount, known by everyone, yet proceed to negotiate for a higher amount in the absence of the other bidders. AECOM is not blameless for what transpired in this project, as what was supposed to be a public tender became a private business matter between it and the Department. If this is endorsed, then the tender process was a sham.

[131] Furthermore, AECOM cannot claim innocence when it knew the disaster was intended to occur within 20 weeks. Yet, it was only anticipated to finalise the project after eighteen months. This is preposterous. Against that background, I must find that both the Department and AECOM colluded to have the latter appointed under the charade of a tender process.

[132] Having considered all the above, I find the following order to be appropriate:

1. The delay of the SIU to launch this application is condoned;

2. The decisions by the Department to award a bid to AECOM and to enter into a contract with it, as a service provider under Contract No: 1/2/4/25/2017/1/NWRI/MIHLOTI for a contract period of eighteen (18) months to render services for the emergency upgrading of the Thukela Goedertrouw Transfer Scheme (including any or all appointment letters, purchaser orders and renewals, extension and addenda to such contract), are declared constitutionally invalid, irregular and unlawful;
3. Both the decisions to award the bid and enter into any such contracts related to or that resulted from such decisions are reviewed and set aside;
4. In terms of Section 8(2)(b) of the SIU Act, AECOM is directed to, within thirty days of this order, provide the parties with the Audited Financial Statements, invoices and/or any supporting documents regarding its income and expenses for the period in question relating to the value of the contract in the sum of R646 502 802.80 (including VAT), and the losses suffered by the Department in the sum of R429 291 313.28;
5. The SIU shall, within sixty (60) days of receipt of the documents referred to in 4 above, inform AECOM of the amount relating to the profit that must be paid back to It;
6. If a dispute arises regarding the amount to be paid back to the fourth respondent, the matter may be re-enrolled for a determination by the Tribunal;
8. The parties may approach the Tribunal for directives on any issue regarding the orders sought herein.

JUDGE B A MASHILE
MEMBER OF THE SPECIAL TRIBUNAL

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Adv G Shabangu

Instructed by:

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Reference:

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Adv H Mpshe

Counsel for the 4th Respondent:

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Instructed by:

Barnard Inc

Reference:

Mr A Stander

Date of Judgment:

03 February 2026

Mode of delivery:

This judgment is handed down by email transmission to the parties' legal representatives, uploaded on Caselines and released to SAFLII and AFRICANLII. The time of delivery is deemed to be 03 November 2026.