

Bigen Africa Services v City of Cape Town: Audit Culture and State Self-Review in the Water and Sanitation Sector

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Abstract

In *Bigen Africa Services (Pty) Ltd v City of Cape Town* (WC) (unreported) case number 18681/2020 of 1 June 2021, the Western Cape High Court found that the inclusion of a local office as a pre-qualification criterion in tenders for professional water and sanitation services fell afoul of section 217(1) of the Constitution. This provision requires all organs of State to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The court's reasoning on this point can be critiqued on the basis that it conflated distinct tests for determining the materiality of a deviation. However, the case raises broader concerns around the pre-eminence of audit over operational logic in the water and sanitation sector, and the use of state self-review to resolve the conflict.

Keywords

Local government; water and sanitation service provision; audit culture; state self-review; public procurement.

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1 Introduction

Bigen Africa Services (Pty) Ltd v City of Cape Town (hereafter *Bigen*)¹ adds to the growing jurisprudence on state self-review, which since the Constitutional Court (CC) decision in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* (hereafter *Gijima*)² must be dealt with according to the principle of legality. *Bigen* is the first review of this nature dealing with the local government mandate of water and sanitation service provision. In *Bigen* the City of Cape Town used self-review defensively, after a group of professional contractors asked the court to review and set aside the City Council's resolution not to finalise framework contracts with them after an extended tender process. The nub of the conflict was the inclusion of a local office criterion as a pre-qualification requirement in tenders for professional water and sanitation services, which was justified operationally. The City's reputation as a clean governance actor that upholds fair, equitable and transparent procurement practices was at stake. But the broader contestation relates to the pre-eminence of audit culture and the domination of audit over operational logic.

In this case note we analyse the *Bigen* case and provide comment from two perspectives, namely the insights to be gained from applying the conceptual framing of "audit culture" and the tension in the case between audit and operational needs; and how state self-review featured in resolving this tension. To ground this analysis we first set out the facts, issue and judgment.

2 Facts

In delivering on its constitutional and statutory mandate to provide water and sanitation services, the City of Cape Town makes "extensive" use of contracted and professional services. These take the form of framework contracts between the City's Water and Sanitation Department (hereafter the Department) and private companies to provide professional services as

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¹ *Bigen Africa Services (Pty) Ltd v City of Cape Town* (WC) unreported case number 18681/2020 of 1 June 2021 (hereafter *Bigen*).

² *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC) (hereafter *Gijima*).

and when required.³ In 2016 the Department put out a tender for professional services for a number of its line functions.⁴ Tender 35C, as it came to be called, drew on templates formulated by the City's Supply Chain Management (SCM) department. One of these templates included a requirement that tenderers have an office in the Cape Municipal Area. The Department supported the inclusion of a local office requirement. Tender 35C accordingly specified that tenderers should have a local office within 60 km of the Cape Town Civic Centre, and that key personnel would be expected to operate out of the local office as the exigencies of projects required.⁵

The Department's justification for including the local office criterion was based on the operational demands of water and sanitation services. These included: ensuring that the contractor's key professional staff were accessible to the City and other service providers and available for regular interaction and stakeholder meetings; permitting urgent meetings and shortening response times in the case of pipe bursts or water treatment process problems; ensuring that the consultant's senior representatives (and not only key professional staff) would be available for face-to-face meetings with City staff in the vicinity of the City's offices; facilitating the secondment of City staff to the consultant's local office for training, thus supporting "valuable skills transfer"; and ensuring an "ongoing local presence" to implement linked construction contracts.⁶

Tender 35C passed through the City's bid evaluation and adjudication committees and was awarded in March 2017.⁷ Framework contracts subsequently concluded with eight successful bidders were expected to run for a two-year period until June 2019.⁸ The local office criterion was unproblematic.

In February 2019 the Department started work on tender 293C to open bidding to replace the framework contractors engaged pursuant to tender 35C. Tender 293C, worth R364 million,⁹ was broader in ambit, including a call for professional services for the Department's stormwater and river

³ *Bigen* para 25.

⁴ *In casu*, bulk water, engineering and asset management, reticulation, and wastewater treatment.

⁵ *Bigen* paras 29-30.

⁶ *Bigen* paras 31-32.

⁷ *Bigen* para 34.

⁸ *Bigen* para 35.

⁹ Online Tenders 2021 <https://www.onlinetenders.co.za/news/city-of-cape-town-wins-case-over-r364-million-water-and-sanitation-tender>.

catchment branch. Framework contracts concluded pursuant to tender 293C would run for three years, regarded as a "good governance measure" for the City's contracts.¹⁰

By that time the SCM Department had excluded a local office criterion from its template. But the Bid Specification Committee (BSC) finalising tender 293C decided to include it, in terms similar to tender 35C. This was based on the Department's experience with tender 35C, and its view that a local office was a "practical necessity" for the effective implementation of the professional services related to water and sanitation.¹¹

Tender 293C elicited an unusually large number of bids and the evaluation processes were not complete by the time the tender 35C framework contracts were supposed to end. The City was thus compelled to take its first "stop-gap" measure by extending the tender 35C contracts for six months.¹² The list of preferred bidders was finalised by December 2019, and forwarded to the City's Bid Adjudication Committee (BAC). The ten preferred bidders included the applicants and the fourth to ninth respondents.¹³

However, while this process was unfolding, the Auditor-General of South Africa (AGSA) was engaging with the City about the constitutionality and legality of the local office criterion in an unrelated tender (dealing with sewer works). The AGSA was concerned that the inclusion of a local office requirement as a responsiveness (pre-qualification) criterion created a bias in favour of local bidders, and was thus anti-competitive.¹⁴ This would offend against section 217(1) of the Constitution, which requires organs of state in the national, provincial or local spheres of government to contract for goods or services in accordance with a system that is "fair, equitable, transparent, competitive and cost-effective".¹⁵

The SCM Department tried to convince the AGSA that the local office criterion was necessary to prevent non-compliance with environmental legislation and to provide for a fully functioning local office for the execution

¹⁰ *Bigen* para 36.

¹¹ *Bigen* para 38.

¹² *Bigen* para 43.

¹³ *Bigen* para 49.

¹⁴ *Bigen* para 45.

¹⁵ The AGSA relied additionally on s 112(1) of the *Local Government: Municipal Finance Management Act* 56 of 2003 (MFMA) and reg 27(2) of the Supply Chain Management (SCM) Regulations (Gen N 868 in GG 27636 of 1 July 2005). Reg 27(2)(a) of the Regulations stipulates that bid specifications "must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services".

of the contract,¹⁶ but the AGSA was unmoved. The AGSA insisted that including a local office criterion as a responsiveness criterion was unacceptable, although it could be retained as part of a "functionality assessment" of the bid.¹⁷ Wielding its disciplinary stick, the AGSA thus found that all the expenditure the City had occurred as a result of the offending tender was irregular.¹⁸

In early December city officials accepted the AGSA's finding and resolved to implement corrective measures in relation to "biased tender specifications".¹⁹

The BAC for tender 293C was unaware of the City's engagement with the AGSA. Only a few days after City officials resolved to accept the AGSA's position, it instructed the Department to start negotiations with the identified preferred bidders on price.²⁰ It also put the second stop-gap measure in place by extending the tender 35C contracts for a further 9 months (to 30 September 2020). The extension was deemed sufficient to allow for the processes prescribed in section 33 of the *Municipal Finance Management Act* (MFMA) to run their course.²¹ At the end of December 2019 the successful bidders were notified of the outcome.²²

For the first half of 2020 parallel meetings and engagements continued. On the one hand, officials from the City's SCM Department and local, provincial and national Treasury met to discuss the City's "biased" drafting of tender specifications. A series of internal communications detailing corrective action were issued. On the other hand, the committees responsible for the

¹⁶ *Bigen* para 46.

¹⁷ *Bigen* para 47.

¹⁸ *Bigen* para 47.

¹⁹ *Bigen* para 48.

²⁰ *Bigen* para 50.

²¹ Section 33 of the MFMA deals with municipal contracts having future budgetary implications. The processes prescribed in this section are triggered when a municipality intends entering into a contract that will impose financial obligations on that municipality beyond the three years covered in the annual budget for the financial year. In the case of these contracts, and at least 60 days before the meeting of the municipal council where the contract is to be approved, the municipal manager must: (i) make the draft contract and an information statement summarising the municipality's obligations under the proposed contract to public; (ii) invite the local community and other interested parties to make comments or representations; and (iii) solicit the views and recommendations of the National Treasury, the provincial treasury, the national Department of Co-operative Government and, in the case of contracts involving the provision of water, sanitation or electricity, the responsible national department.

²² *Bigen* para 50. This was done by Mr Basil Chinasamy, the Director: SCM, who had been present at the meeting with the AGSA on 6 December 2019, where the legality of the local office criterion was thrashed out; *Bigen* para 51.

tender 293C contracts continued to meet to ensure the section 33 processes under the MFMA unfolded correctly.

It was only in early July, that alarm bells over the local office criterion in the yet-to-be-concluded 293C contracts began to ring. The Water and Sanitation Department asked the SCM Department for clarity on whether tender 293C fell into the category of contracts needing to be cancelled.²³ It entreated the City not to cancel the tender, citing a number of adverse consequences, including the difficulty of the pending expiration of the tender 35C contracts and the prospect of the City not having access to professional water and sanitation services for the ensuing 18 months.²⁴

However, by September 2020 the departmental heads for water and sanitation and SCM, amongst others, had concluded that the local office criterion was tainted as a material irregularity and tender 293C could therefore not proceed. The process for a replacement tender would run on an expedited process and the third stop-gap (of extending the tender 35C contracts on a month-to-month basis until September 2021), would have to be instituted.²⁵

After some further uncertainty it was decided that the Executive Mayor and Mayoral Committee would recommend to council that it terminate the section 33 process relating to tender 293C and resolve not to enter into long-term contracts with the winning applicants.²⁶ This recommendation was approved by the Cape Town City Council in late October 2020.

A few days later, in early November 2020, the City published a fresh tender for the same professional services (tender 194C). The specifications for this tender had expunged the offending local office criterion.

Some of the successful bidders subsequently launched review proceedings in early December 2020, asking the court to review and set aside the Council's resolution. The applicants argued that the local office criterion did not have to be met at the time of tendering and that it was not, as such, a pre-qualification criterion.²⁷ On this interpretation the tender was valid and should be upheld, paving the way for signing the long-term contracts.

²³ *Bigen* para 61.

²⁴ *Bigen* para 62.

²⁵ *Bigen* paras 63-64.

²⁶ *Bigen* paras 64-66.

²⁷ *Bigen* para 6.

In March 2021 the City launched a counter-application for self-review, asking the court to set aside the decisions of the municipal sub-committees that had processed tender 293C.²⁸ The City's application for self-review was thus made almost two years after the initial decision to approve and advertise tender 293C had been taken.

3 Issues

Based on the need to consider the City's counter-application for self-review and the fact that the success of the counter-application rendered the relief the applicants sought moot, Cloete J accepted that the matter had evolved into a legality review rather than a review under the *Promotion of Administrative Justice Act*²⁹ (PAJA).³⁰ The legality review essentially turned on two substantive issues:

(a) whether the local office criterion in tender 293C was a responsiveness requirement, which needed to be complied with by bidders at the time of tendering; and

(b) if so, whether the inclusion of a local office criterion rendered tender 293C unlawful and, linked to this, whether the City could condone this illegality.³¹

The court also had to decide whether the City had unreasonably delayed its application for self-review. This case note focusses on the substantive issues relating to the local office criterion, notwithstanding that the unreasonable delay issue took up a substantial portion of the judgment.³²

4 Judgment

On the first issue, the court had no trouble finding that the local office criterion was indeed a responsiveness requirement. The court had regard to the plain language of the tender documentation, which included a clause indicating that in order to be considered for an appointment in terms of the tender, "tenderers *must* have an office [locally]". Moreover, the bidders were required to mention the address of that office in the same document. This

²⁸ *Bigen* para 8.

²⁹ *Promotion of Administrative Justice Act* 3 of 2000.

³⁰ *Bigen* para 9.

³¹ *Bigen* para 20.

³² *Bigen* paras 22-24, 68-88. In any event, the court decided that while the delay in bringing the self-review application was unreasonable, and while the City could provide no satisfactory reason for the delay, it could be overlooked (*Bigen* WC paras 78, 81 and 88).

strongly suggested, the court opined, that the local office needed to already exist at the time the bid was submitted.³³

The court also pointed to a number of clauses that dealt with responsiveness, which stated in unequivocal terms that only tenders satisfying specific criteria (inclusive of the local office criterion) would be considered responsive, that the City was obliged to reject a non-responsive tender offer, and that non-responsiveness could not be cured by correction or withdrawal of the material deviation.³⁴ The court rejected the applicants' argument that the local office requirement applied only to individual projects commissioned pursuant to the tender award on the basis that this would be an overly-strained interpretation.³⁵

The court then turned its attention to the question of the local office criterion as a "material deviation". The court noted the principle of interpretation enunciated in *Cape Town City v Aurecon SA (Pty) Ltd*,³⁶ i.e. that when a court considers an issue relating to the materiality of any deviance from legal requirements, it must conduct its evaluation with regard to the purpose of the provision.³⁷ Two questions of materiality arose in this case: the materiality of non-compliance with the local office criterion, and the materiality of deviating from the stipulations laid down in section 217(1) of the Constitution, section 112(1) of the MFMA, and section 27(2)(a) of the SCM Regulations.³⁸

On the first question of materiality, the City could accept a tender that failed to meet pre-qualification requirements, provided the offer did not constitute a "material deviation".³⁹ Clause F.3.8.2 defined a material deviation as one that would not detrimentally affect the scope, quality or performance of the services tendered for, significantly change the City's or the tenderer's risks and responsibilities under the contract, or affect the competitive position of other tenderers presenting responsive tenders.⁴⁰ To determine if the failure to specify a local office constituted a material deviation, the court

³³ *Bigen* paras 92-93.

³⁴ *Bigen* paras 94-95.

³⁵ *Bigen* paras 96-98.

³⁶ *Cape Town City v Aurecon SA (Pty) Ltd* 2017 4 SA 223 (CC).

³⁷ *Bigen* para 89.

³⁸ See fn 23 above.

³⁹ *Bigen* para 99. Clause F.3.8.3 reserved the City's rights "to accept a tender offer which does not ... materially and/or substantially deviate from the terms, conditions and specifications of the tender documents".

⁴⁰ *Bigen* para 100.

accordingly needed to consider the effect of not having a local office on the service itself, on the risk involved and on other tenderers.

The applicants argued that the City had a discretion to condone non-compliance with the local office criterion, especially where the bidder's non-compliance could be remedied at a later stage (by setting up a local office at the time of the award of the contract). The discretion to condone meant that the tender was fair and competitive in the applicants' view.⁴¹

Given that the effect of condoning non-compliance with the local office criterion would open the tender to more and not fewer bidders, competitiveness was arguably not the key factor determining materiality. However, as the logic of the original bid committees confirmed, the lack of a local office could affect the scope, quality and performance of the professional water and sanitation services that the City sought to procure. However, as the applicants argued, the local office criterion could be met at a later stage, shifting condonation back into the realm of non-materiality and affording the City the discretion to condone.

Curiously, though, the court did not apply the three-legged materiality test. Instead, it shifted immediately to the second materiality question of materiality, i.e. whether the local office criterion fell foul of section 217(1) of the Constitution and supporting statutory provisions. As authority for the legal position on section 217(1) and pre-qualification criteria it cited the Supreme Court of Appeal's (SCA) *ratio* in *Afrubusiness NPC v Minister of Finance*,⁴² where the SCA held that any pre-qualification criterion which is sought to be imposed must advance a "fair, equitable, transparent, competitive and cost-effective" procurement system.

At this point, the court could have deliberated on the characteristics of procurement systems that comply with the objectives of section 217 or, perhaps more pointedly, on the state conduct that would clearly render such systems unfair, inequitable, opaque, anti-competitive and wasteful. It might also have considered the place of the local office criterion in the broader context of the tender, which had been transparently advertised and attracted an unusually high number of bids. Further, the only tenderers who failed to

⁴¹ *Bigen* para 101.

⁴² *Afrubusiness NPC v Minister of Finance* 2021 1 SA 325 (SCA). The *Afrubusiness* decision dealt with the legality of reg 4 of the Preferential Procurement Regulations, 2017 (Gen N R32 in GG 40553 of 20 January 2017) which specified mandatory and restrictive pre-qualification criteria if an organ of State decided to apply pre-qualification criteria to advance certain designated groups.

provide details of a local office were declared non-responsive for other reasons.⁴³

Most importantly, it could have reflected on the rationality of the local office criterion, the purpose of section 217 of the Constitution and the context of the water and sanitation sector. It had, after all, already confirmed that all parties agreed that the local office criterion was rational and beneficial and therefore not arbitrary.⁴⁴ The pointed question to which the court could have applied its mind was whether the local office criterion was so fatally biased as to render the entire tender process uncompetitive. Turning to the supporting statutory provisions, it might also have expressly deliberated on the meaning of "potential suppliers" in regulation 27(2)(a) of the SCM Regulations, and whether "potential suppliers" in this context necessarily meant all potential suppliers spread throughout South Africa, or to a pool of potential suppliers that could be limited by a non-arbitrarily imposed geographical requirement.

The court engaged in none of this analysis. Instead, it declared, without more, that the local office criterion materially deviated from the objectives of section 217(1) because it excluded potential bidders who did not have a local office at the time of submitting their bids. "This hampers competition" and "impedes the fairness of the tender process", it continued, bringing the local office criterion into conflict with the "clear imperatives" of section 217(1) and the supporting statutory provisions.⁴⁵ It therefore concluded that the local office criterion rendered the tender unconstitutional and unlawful.⁴⁶ Turning back to the first materiality question, it found further that a deviation from the local office criterion could only be a material deviation, affording the City no power to condone.⁴⁷

With respect, we find this last aspect of the court's reasoning difficult to follow – that a local office criterion is anti-competitive does not mean that condonation for failing to have a local office is anti-competitive as well. Our view is that the court incorrectly conflated distinct parts of the inquiry. More importantly, though, the court failed to give due consideration to the tender system, which in this instance included a power to condone and a non-arbitrary geographical limitation, in the light of the purpose of section 217(1)

⁴³ *Bigen* para 42.

⁴⁴ *Bigen* para 92.

⁴⁵ *Bigen* para 103.

⁴⁶ *Bigen* para 105.

⁴⁷ *Bigen* para 104.

of the Constitution and the operational needs of the water and sanitation sector.

We take our discussion of the *Bigen* case further by suggesting that it illustrates how "audit culture" can conflict with the operational needs of the water and sanitation sector in a context of neo-liberal governmentality. We also consider the effectiveness and desirability of using the court-led institution of state-self-review to resolve the conflict.

5 The *Bigen* judgment, neo-liberal governmentality and audit culture in the water and sanitation sector

5.1 *Neoliberal governmentality and audit culture as a conceptual frame*

Vannier⁴⁸ points out that neoliberal government is an encompassing set of processes and techniques that involves a shift away from direct State ownership and managerial control to a situation where private institutions participate in the provision of public services to varying degrees.⁴⁹ Neo-liberal governmentality in the water and sanitation sector has been well-ventilated and it is understood that private sector participation can take many forms, including service contracts, concessions and full divestiture.⁵⁰ In the *Bigen* case the City of Cape Town's "extensive" use of private contracted and professional services was described as essential for realising the City's obligation to provide water and sanitation services, indicative of a neo-liberal governmentality, at least in this metro.⁵¹

The reasons put forward for adopting a neoliberal approach to water and sanitation services include mobilising investment, efficacy and efficiency.⁵² In South Africa the lack of skilled water engineers has also been advanced as a reason for procuring private sector participation.⁵³ Proponents of a neoliberal approach argue that the private sector is in a better position to "save" the water sector, reduce government spending and decrease social inequality.⁵⁴ Critics maintain that marginal cost accounting and the profit motive have detrimentally impacted on the poor's access to water and

⁴⁸ Vannier 2010 *PoLAR*.

⁴⁹ Vannier 2010 *PoLAR* 285-286.

⁵⁰ Esteban Castro 2008 *Progress in Development Studies* 67.

⁵¹ *Bigen* para 25.

⁵² Esteban Castro 2008 *Progress in Development Studies* 65-66.

⁵³ Mathekganye, Van Heerden and Ukwandu 2019 *African Journal of Public Affairs* 50.

⁵⁴ Esteban Castro 2008 *Progress in Development Studies* 67-68.

sanitation services and reinforced and even deepened existing social inequalities.⁵⁵

Vannier observes that audit culture is a key process and feature of neo-liberal governmentality.⁵⁶ In the twenty-first century external audits are mechanisms to promote accountability, transparency and good governance,⁵⁷ especially in a public sector relying on private sector service providers. Through audit processes of assessment and certification accountability and good practice are demonstrated and made visible.⁵⁸ But audits have moved beyond a technical process aimed at independently evaluating the validity and reliability of an audited entity's records and processes to being a form of governmentality, a way to govern and manage people and organisations.⁵⁹ The profession and meaning of auditing have expanded as virtually every aspect of contemporary professional life and organisational behaviour has become subject to elaborate systems of inspection.⁶⁰ As Sampson⁶¹ observes, "[t]he audit juggernaut soaks us up like a sponge; it penetrates us like a Foucauldian biopower".⁶²

The rise of audit culture has been driven firstly by the spread of the audit function. Auditors have moved far beyond verifying company accounts and now monitor contracts, evaluate organisational systems for efficacy and efficiency, and – on the basis of this knowledge – advise on governance and management systems.⁶³ Secondly, audits enable enumeration and the construction of easy-to-read decontextualised, numerically-based indicator and ranking systems,⁶⁴ some of which have become powerful tools to construct scientific and policy objects.⁶⁵ It is these indicator and ranking systems, which appear to offer at-a-glance comparisons of audited phenomena, that create new forms of governance, power, subjectivity and agency.⁶⁶

⁵⁵ Chirwa 2004 *LDD* 187, Bond 2019 *J Contemp Afr Stud* 275.

⁵⁶ Vannier 2010 *PoLAR* 285.

⁵⁷ Ngoepe and Ngulube 2013 *ESARBICA Journal* 52.

⁵⁸ Vannier 2010 *PoLAR* 284-285.

⁵⁹ Shore and Wright 2015 *Social Anthropology* 24.

⁶⁰ Shore and Wright 2015 *Social Anthropology* 22, 24.

⁶¹ Sampson 2015 *Social Anthropology*.

⁶² Sampson 2015 *Social Anthropology* 80.

⁶³ Shore and Wright 2015 *Social Anthropology*. The most notorious example of the nefarious spread of the audit function to governance and management systems in South Africa is of course the scandal surrounding Bain & Co.'s restructuring of the South African Revenue Services.

⁶⁴ Shore and Wright 2015 *Social Anthropology* 27.

⁶⁵ Sampson 2015 *Social Anthropology* 80.

⁶⁶ Shore and Wright 2015 *Social Anthropology* 22.

Audit culture remedies a trust deficit in modern societies (and distrust of the State and public authorities in particular),⁶⁷ but by constituting reputation they also create risk.⁶⁸ The prospect of reputational risk is one of the key drivers of compliance from the audit function, but this can become overblown when audits feed indicator and ranking systems that enable comparability and competition, and when the prospect of "losing face" in these ranking systems causes audit logic to override other logics (such as the logic of operational efficiency associated with having a local office for water and sanitation services).

The "runaway effects" of the auditing and ranking function can also have serious social and economic effects and unpredictable consequences "when systems of measurement become entangled with national and transnational political agendas and commercial interests".⁶⁹ But, more importantly, at an organisational level the new ethics of accountability associated with the audit culture drives bureaucratisation, burn-out, employee disengagement, gaming, cynicism, loss of trust, and diminished professionalism.⁷⁰ One should add that the audit culture also requires resource reallocation – from the resources required to undertake particular line functions towards investing in systems and people with financial, accounting and legal skills.⁷¹

5.2 Does the Bigen case exhibit elements of audit culture?

In the *Bigen* case one is of course not simply dealing with auditing firms but with the AGSA, which is a Chapter 9 institution. The constitutional function of the AGSA is to audit and report on the accounts, financial statements and financial management *inter alia* of all municipalities.⁷² The AGSA also has the additional powers and functions prescribed by national legislation. These additional functions under the *Public Audit Act*⁷³ include performing an "appropriate audit" of state institutions "to determine whether appropriate

⁶⁷ Shore and Wright 2015 *Social Anthropology* 26.

⁶⁸ Bruce 2011 SACQ 4.

⁶⁹ Shore and Wright 2015 *Social Anthropology* 26.

⁷⁰ Shore and Wright 2015 *Social Anthropology* 26.

⁷¹ Merten 2021 <https://www.dailymaverick.co.za/article/2021-06-22-local-government-failures-another-year-another-inspection-another-bad-outcome-with-a-few-exceptions/>. It is revealing, for instance, that this article cites AG Tsakani Maluleke lamenting the fact that in 68% of municipalities the people in the finance department do not have the requisite skills. This in turn drives the use of consultants who contribute to findings of irregular and wasteful expenditure.

⁷² Section 188 of the *Constitution of the Republic of South Africa*, 1996.

⁷³ *Public Audit Act* 25 of 2004.

and adequate measures have been implemented to ensure that resources are procured economically and utilised efficiently and effectively".⁷⁴

Further, as Bruce points out, in order for the AGSA to execute its mandate under section 20 of the *Public Audit Act* the incumbent must engage with "regulatory auditing", which entails examining compliance with key legislation, as well as auditing compliance with "predetermined objectives" captured in performance measurement systems and data.⁷⁵ The need for such regulatory auditing obviously also applies to the AGSA's statutory duty to audit procurement measures, such as the need to comply with section 217(1) of the Constitution.

South Africa is in dire need of effective and accountable government that is free of corruption and the AGSA plays a key role in assuring this. However, as Matlala and Uwizeyimana have pointed out, most South African municipalities are not taking corrective action on irregularities raised in the AGSA's prior year audits, notwithstanding their enormous resource investments.⁷⁶

Despite this, the AGSA's annual audit of the country's 257 municipalities creates a kind of indicator and ranking system⁷⁷ that enables political actors to make claims about "good" and "clean" governance. For example, the latest local government audit findings enabled Premier Alan Winde to claim that the DA-led Western Cape government "vastly outperformed" other regions and that it was the "top province for good governance".⁷⁸

The potential claims that can be made based on this indicator and ranking system allows for a different reading of the AGSA's power to declare expenditure "irregular". Irregular expenditure has a specific meaning in law,⁷⁹ but the classification also creates a form of social power and capital

⁷⁴ Section 5(1)(aA) and 20(3) of the *Public Audit Act* 25 of 2004.

⁷⁵ Bruce 2011 SACQ 7.

⁷⁶ Matlala and Uwizeyimana 2020 *African Evaluation Journal* 2.

⁷⁷ Merten 2021 <https://www.dailymaverick.co.za/article/2021-06-22-local-government-failures-another-year-another-inspection-another-bad-outcome-with-a-few-exceptions/>. In the latest AGSA audit (2019/20), for instance, only 27 of South Africa's 257 municipalities (10.5%) obtained a "financial clean bill of health".

⁷⁸ Winde 2019 <https://www.dailymaverick.co.za/opinionista/2019-05-08-clean-government-in-the-western-cape-shows-the-way-for-the-rest-of-south-africa/>. We are not suggesting that these claims are untrue or unfounded, but are merely observing the kind of political claims that audit-driven indicator and ranking systems can ground.

⁷⁹ "Irregular expenditure is expenditure that was not incurred in the manner prescribed by legislation, and does not necessarily mean that money was wasted or that fraud

for those political and administrative actors that can avoid it. The imperative of avoiding a finding of "irregular" expenditure gives even greater sway to those who wield the audit function and for their logic to predominate. In fairness, the City's arguments about operational needs probably didn't stand a chance.

The issue can also become obscured. What was really at issue in the *Bigen* case was whether the bidding in tender 293C was uncompetitive, and whether any supposedly uncompetitive elements could be condoned, given the agreed operational requirements of the water and sanitation context. The courts have underscored the importance of opening up public business to a wide range of potential suppliers and keeping deviations within strict confines,⁸⁰ but have also affirmed that competition is a means to ensuring the prudent use of resources and not an end in itself.⁸¹ However, as we have argued, the court did not substantively engage with whether the local office criterion was anti-competitive, and whether, if so, the specification nevertheless fell short of a material deviation.

The court, therefore, unreflectively prioritised audit over operational logic by failing to grapple with the competitiveness of tender 293C, which served as the basis for a finding of material non-compliance with section 217 of the Constitution. However, having opted for self-review of its procurement decisions, the City of Cape Town was still able to emerge as the governance "good guy". The City's lawyers must surely have felt gratified when the court observed that "[t]here can be no question ... that the City acted in good faith throughout and with the intent to ensure clean governance, not only in respect of tender 293C but many others as well".⁸²

6 *Bigen* and state self-review

We conclude by commenting on how the institution of state self-review was used in this case. In the constitutional era, state self-review has shifted from

was committed." AGSA date unknown <https://pfma-2020-2021.agsareports.co.za/pmfa-2020-21/unauthorised-expenditure/>.

⁸⁰ See *Excellerate Services (Pty) Ltd v Umgeni Water* (1738/19P) [2020] ZAKZPHC 41 (17 July 2020) para 57; *Lornavision (Pty) Ltd v South African Broadcasting Corporation SOC Limited* (19502/17) [2017] ZAGPJHC 208 (1 August 2017) (hereafter *Lornavision*) where the court said "all potential suppliers should be afforded the right to compete for public sector business through competitive bidding" (para 103); *Premier, Free State, v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA) para 30; *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC) para 43.

⁸¹ *Lornavision* para 25.

⁸² *Bigen* para 107.

being an optional mode of common law recourse for a state institution to seek relief against itself,⁸³ to a process mandated by a constitutional duty to formally undo irregular decisions.⁸⁴ Theoretically, therefore, state self-review should be viewed as a positive tool to advance accountability in public administration, affording the self-reviewing organ of state an opportunity to demonstrate its commitment to open, responsive and accountable government.⁸⁵

Unfortunately, the recent jurisprudence of state self-review reveals something rather different. While there are examples that show the use of state self-review to enhance accountability in public administration,⁸⁶ the most recent series of cases evinces a pattern of further abuse of state power – by using state self-review to avoid huge monetary obligations toward private contractors.⁸⁷

Gijima is a case in point. Here the State Information Technology Agency (SITA) contracted with Gijima Holdings for IT services. SITA extended the contract several times, but eventually terminated it while it still owed the service provider R20 million.⁸⁸ The latter instituted an urgent application against the SITA, but the parties were able to settle. The settlement agreement was intended to compensate Gijima for the loss arising from the contract termination, and the SITA agreed to comply with all procurement

⁸³ Pretorius 2020 *THRHR* 245-260.

⁸⁴ *Pepcor Retirement Fund v Financial Services Board* 2003 6 SA 38 (SCA); *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 1 SA 356 (SCA); *Ntshangase v MEC for Finance: KwaZulu-Natal* 2010 3 SA 201 (SCA); *Khumalo v MEC for Education: KwaZulu-Natal* 2014 5 SA 579 (CC); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 3 SA 481 (CC); *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC); *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 4 SA 223 (CC); *State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC); *Hunter v Financial Sector Conduct Authority* 2018 6 SA 348 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 4 SA 331 (CC) 661; *Nelson Mandela Bay Metro v Erastyle* 2019 3 SA 559 (ECP); *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2019 6 SA 443 (ECG); *Swifambo Rail Leasing (Pty) Ltd v PRASA* 2020 1 SA 76 (SCA); *Compcare Wellness Medical Scheme v Registrar of Medical Schemes* 2021 1 SA 15 (SCA); *City Power SOC Ltd v Combined Private Investigations CC* 2021 3 SA 202 (GP); *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 4 SA 436 (SCA).

⁸⁵ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 4 SA 331 (CC) para 114.

⁸⁶ An example is *Swifambo Rail Leasing (Pty) Ltd v PRASA* 2020 1 SA 76 (SCA), where the reconstituted board of the Passenger Rail Agency of South Africa (PRASA) approached the High Court to declare the award of a tender invalid and have the decision set aside. The SCA pointed out that at least R2 billion of taxpayers' money had been spent in pursuit of the fraudulent and corrupt tender.

⁸⁷ Boonzaier 2015 *CCR* 19.

⁸⁸ *Gijima* paras 4-6.

procedures.⁸⁹ However, the proper procurement procedures were not followed. The SITA subsequently reneged on the settlement agreement (again after several extensions), and then sought to use state self-review to avoid paying Gijima R9 million – by arguing that its irregular procurement decisions needed to be set aside.⁹⁰ In deciding the matter the CC astutely observed that SITA's efforts "were directed at avoiding the contract".⁹¹ In its recent decision in the *Govan Mbeki Municipality* case the SCA expressly noted how state self-review and specifically procurement cases had become "worrisome".⁹²

On the face of it, the use of state self-review in *Bigen* aligns with the institution's theoretical justification: a "clean" municipality seemingly not trying to avoid its contractual obligations, with no obvious corruption or maladministration emerging from the facts of the case. However, in the light of what we have written above about audit culture, and the likelihood that the City was trying to avoid irregular audit findings, self-review could have appeared as a handy, albeit expensive and drawn-out strategic option for the City of Cape Town to re-establish its good governance credentials. As such, the SCA's "worrisome" evaluation of self-review cases in the context of procurement remains apt.

7 Conclusion

On the face of it, *Bigen* is a case about the procedures associated with unreasonable delay in state self-review, and the materiality of a local office criterion in the light of section 217(1) of the Constitution. In this note we have suggested there is much more to the case if one has regard to the contestation between audit and operational logic. It is disappointing that the court did not engage more robustly with the competitiveness of tender 293C and did not give greater weight to the operational needs of the water and sanitation sector where on-the-ground service delivery is so critical to the realisation of a host of human rights. We have also highlighted how audit findings link to indicator and ranking systems, in particular, the AGSA's ranking of municipal governance. Our hunch is that these rankings create reputational risk which aligns with a political agenda to ensure "clean governance", but we are cautious to assert that clean governance necessarily means better water and sanitation provision and not simply

⁸⁹ *Gijima* para 55.

⁹⁰ *Gijima* para 9.

⁹¹ *Gijima* para 55.

⁹² *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 4 SA 436 (SCA) fn 1.

better audits. We also maintain that the self-review mechanism in the context of procurement remains worrisome.

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List of Abbreviations

AGSA	Auditor-General of South Africa
BAC	Bid Adjudication Committee
BSC	Bid Specification Committee
CC	Constitutional Court
CCR	Constitutional Court Review
ESARBICA Journal	Journal of the Eastern and Southern African Regional Branch of the International Council on Archives
J Contemp Afr Stud	Journal of Contemporary African Studies
LDD	Law, Democracy and Development
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
PAJA	Promotion of Administrative Justice Act 3 of 2000
PRASA	Passenger Rail Agency of South Africa
SACQ	South African Crime Quarterly
SCA	Supreme Court of Appeal
SCM	Supply Chain Management
SITA	State Information Technology Agency
THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg