
REPORT No: 52 of 2020/21

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“Allegations of improper conduct and maladministration by the Eastern Cape Department of Health relating to the procurement of motorbikes with side-car ambulance or clinic”

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC
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TABLE OF CONTENTS

Executive Summary.................................................................3

1. INTRODUCTION..................................................................................7

2. OWN INITIATIVE INVESTIGATION .................................................7

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR..........10

4. THE INVESTIGATION........................................................................14

5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS..............................................20

6. FINDINGS..........................................................................................61

7. REMEDIAL ACTION...........................................................................63

8. MONITORING...................................................................................64
EXECUTIVE SUMMARY

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report communicates the findings and appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, following an own initiative investigation into allegations of improper conduct and maladministration by the Eastern Cape Department of Health (ECDoH) in connection with the procurement of motorbikes with a side-car ambulance or clinic.

(iii) The investigation commenced on 14 July 2020 at the Public Protector’s own initiative, in terms of section 6(4) of the Public Protector Act, on the grounds of information that came to the attention of the Public Protector from media reports on the launch of what was referred to as “Scooter Ambulances” by the ECDoH, on 12 June 2020.

(iv) Based on the analysis of the allegations made and information obtained, the following issue was identified for investigation:

(a) Whether the supply chain management process followed by the ECDoH when it awarded to Fabkomp (Pty) Ltd contract number SCMU3-20/21-0022-HO to supply motorbikes with side car ambulance or clinic was in contravention of the applicable laws and legal prescripts regulating procurement, and if so, whether such conduct was improper and amounts to maladministration.
(v) The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the ECDHo and other organs of state, a meeting with the successful bidder for the contract, analysis of all relevant documents and information obtained and application of all relevant laws, policies and related prescripts.

(vi) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding whether the supply chain management process followed by the ECDHo when it awarded to Fabkomp (Pty) Ltd contract number SCMU3-20/21-0022-HO to supply motorbikes with side car ambulance or clinic was in contravention of the applicable laws and legal prescripts regulating procurement, and if so, whether such conduct was improper and amounts to maladministration.

(aa) The allegations that the procurement process followed by ECDHo when it awarded Fabkomp contract number SCMU3-20/21-0022-HO to supply motorbikes with side car ambulance or clinic was improper and in contravention of applicable legal prescripts, is substantiated.

(bb) The investigation has revealed the following significant administrative or conduct failures on the part of the ECDHo during the procurement process:

(i) A shortened period of publication or advertisement of the bid in respect of contract number SCMU3-20/21-0022-HO
on the ECDPh’s website, from 21 to 9 calendar days (with only five working days).

(ii) A lack of mandatory prior approval of deviation from normal Supply Chain Management (SCM) processes by the Eastern Cape Provincial Treasury, as required by Paragraph 4.3 of the ECDPh SCM Policy;

(iii) A lack of reasons recorded and approved by the Head of the Department for shortening the publication period of the bid defeated the competitiveness enshrined in Treasury Regulation 16A6.4.

(cc) The ECDPh contravened or did not observe the provisions of section 217(1), 195(1) of the Constitution, Section 38(1) of Public Finance Management Act, 1999 (PFMA), Treasury Regulation 16A6.3(c), Treasury Regulation 16A6.4, Paragraphs 8 and 14 of National Treasury Instruction 3 of 2016/2017, Treasury SCM Instruction 2 of 2016/2017, Paragraphs 4.2.1, 4.3, 3.3, 3.4, 3.5, 3.7 and 1.10 of ECDPh SCM Policy in the process of this procurement.

(dd) The conduct of the ECDPh was improper and constitutes maladministration. It accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(vii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

(a) The Acting Head of the ECDPh to:
(aa) Take the appropriate steps in respect of disciplinary action in terms of section 38(h) of the PFMA and the applicable policies of the Department against the officials that were involved in and responsible for the non-compliance with the provisions of the SCM Policy and Treasury Regulations pertaining to the procurement of the scooter/ambulance or clinics, within (90) days from the date of this report; and

(bb) Ensure that all the officials involved in SCM processes and the Senior Managers of the Department attend a workshop on the relevant legislation and other legal and policy prescripts and instructions of the National and Provincial Treasuries regulating the procurement of goods and services by the Department, within 60 days from the date of this report.

(b) The Member of the Executive Council of the Eastern Cape Provincial Government (MEC) for Health to:

(aa) Oversee to ensure that appropriate steps are taken in respect of disciplinary action in terms of section 38(h) of the PFMA and the applicable policies of the Department against any decision maker(s) regardless of position across all the ranks of seniority that were/was involved in and responsible for the non-compliance with the provisions of the SCM Policy and Treasury Regulations pertaining to the procurement of the scooter/ambulance or clinics, within (90) days from the date of this report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

1. INTRODUCTION

1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of investigation and the remedial action:

1.2.1 The Premier of Eastern Cape, Mr Lubabalo Oscar Mabuyane;

1.2.2 The Minister of Health, Dr Zweli Mkhize;

1.2.3 The Member of the Executive Council of the Eastern Cape Provincial Government for Health, Ms Nomakhosazana Meth (MEC); and

1.2.4 The Acting Head of the Eastern Cape Department of Health (ECDoH), Dr S Zungu.

2. OWN INITIATIVE INVESTIGATION

2.1 The investigation commenced on 14 July 2020 as an own initiative of
the Public Protector, in terms of section 6(4) of the Public Protector Act, on the grounds of information that came to the attention of the Public Protector from media reports, as referred to below.

2.2 On 12 June 2020, the mainstream media across the spectrum reported on the launch of what was referred to as “scooter ambulances” by the ECDoH.¹ The launched scooter ambulances were reportedly fitted with a bed on one side, an overhead gazebo with a first aid kit and oxygen on board.

2.3 At the time, the Eastern Cape Province had recorded the third highest number of Covid 19 cases in the country. It was reported that the ECDoH would be using the scooter ambulances in the fight against the Covid-19 pandemic, as an initiative aimed at taking emergency services to the rural areas in the province.

2.4 The Minister of Health, Dr Zwelini Mkhize, MP (Minister Mkhize), was joined by the former Eastern Cape MEC for Health, Ms Sindiswa Gomba at the launch of the programme in East London. Ms Gomba was quoted in the media² as having stated, inter alia, the following:

“These are not your ordinary scooters. They are specialised and have beds. We are introducing the use of scooters because for far too long

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we have heard how our ambulances could not get to people in far-flung rural areas.

Ours is a rural province and because of its terrain, we sometimes could not get to people who desperately need medical attention, especially when it rains. Not anymore.

That will now be a thing of the past. With these scooters, we will be able to get to some of the most remote areas. We are ensuring that people in hinterlands also get an effective and efficient health care service.

Minister Mkhize we are ensuring that just because people live in rural areas should not disadvantage them. Not anymore. We are levelling the playing fields with these specialised scooters so that we do not hear horrific stories of how people’s lives might have been saved had ambulances been able to get to them.

We want everyone to have access to medical care. The Department has its fair share of challenges, that much we acknowledge, but getting to people regardless of their location should not be one of them.

It will not be one of them anymore. Even if you are in the mountainous Matatiele or Lusikisiki we will get to you. No matter how treacherous the roads leading to your village we will now be able to get to people in need of medical care”.

2.5 It was further reported that the 100 scooter ambulances were procured at a cost of R10,1 million and that an Emergency Service (EMS) crew will be trained to use them.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

2.6 A month later, in July 2020, Minister Mkhize is reported to have made an about turn and admitted during a Parliamentary question and answer session that the scooter ambulances do not meet the basic criteria for "patient transport as an ambulance". Minister Mkhize reportedly stated that the National Department of Health was not consulted by the ECDoH on the specifications, before the procurement of the scooters.

2.7 The ECDoH was allegedly advised not to use the scooter ambulances as they do not meet the specific requirements, as provided for in the EMS Regulations relating to minimum patient compartment space and equipment.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that: "The Public Protector has the power as regulated by national legislation:

(a) To investigate any conduct in state affairs, or in the Public Administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) To report on that conduct; and


REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

(c) To take appropriate remedial action”.

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the powers to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the matter of the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that:

“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”

3.6 In the above-mentioned matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

5 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
6 Supra at para [73].
3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);

3.6.3 “Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution.” However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);

3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);

3.6.6 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);

3.6.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate,
concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d); and

3.6.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).

3.7 In the matter of the President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the Constitution (para 71);

3.7.2 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);

3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):

a) Conduct an investigation;

b) Report on that conduct; and

c) To take remedial action;
3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105);

3.7.6 The fact that there are no firm findings on the wrongdoing, does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (para 107 and 108); and

3.7.7 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).

3.8 The ECDoH is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector’s mandate.

3.9 The jurisdiction of the Public Protector was not disputed by the ECDoH in this matter.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of sections 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration or other improper conduct?

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong and what action should be taken?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the department to prevent improper conduct and/or maladministration as well as prejudice.
4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration, where possible and appropriate.

4.3 On analysis of the complaint and the available information, the following issue was identified and investigated:

4.3.1 Whether the supply chain management process followed by the ECDoH when it awarded to Fabkomp (Pty) Ltd contract number SCMU3-20/21-0022-HO to supply motorbikes with side car ambulance or clinic was in contravention of the applicable laws and legal prescripts regulating the procurement of goods and services and if so, whether such conduct was improper and amounts to maladministration.

4.4 The Key Sources of information

4.4.1 Documents and letters exchanged

4.4.1.1 Copy of a News 24 Online article dated 09 July 2020;

4.4.1.2 Letter to the Head of the ECDoH, dated 16 July 2020;

4.4.1.3 Response letter from the ECDoH, dated 30 July 2020, accompanied by annexures, including:

(a) Copy of Bid Advertisement/Invitation to Bid Document;
(b) Copies of the Bid Documents for Fabkomp (Pty) Ltd (Fabkomp) and Zencare;
(c) Copy of the Supply Chain Management (SCM) Policy of the ECDoH;
(d) Copy of an internal Demand Memorandum, dated 03 April 2020;
(e) Copy of a Memorandum approving the appointment of the Bid Specification Committee (BSC), dated 03 April 2020;
(f) Copy of the Minutes of the BSC meeting held on 4 April 2020;
(g) Copy of the Minutes of the Bid Evaluation Committee (BEC) meeting held on 15 April 2020;
(h) Copy of the Minutes of the Bid Adjudication Committee (BAC) meeting held on 4 May 2020; and
(i) Copy of the Letter of Award (LoA) signed on 19 May 2020 and 22 May 2020;

4.4.1.4 Letter of request for further information to the ECDoH, dated 07 August 2020;

4.4.1.5 Letter to the Head of Department of the Eastern Cape Provincial Treasury, dated 11 August 2020;

4.4.1.6 Report received from Fabkomp, dated 28 June 2020;

4.4.1.7 Copies of Specification Compliance Documents received from Fabkomp, including E-Natis, IOS, RMBI, OEM, MIB, ISO etc, received on 11 August 2020;

4.4.1.8 Letter to the National Regulator for Compulsory Specifications (NRCS), requesting verification of specification documents dated 13 August 2020;

4.4.1.9 Additional response received from the ECDoH, dated 20 August 2020 with additional documents;

4.4.1.10 Letter to the Director General of the National Treasury, dated 20 August 2020;

4.4.1.11 Response letter from the NRCS, dated 25 August 2020;
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCM3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

4.4.1.12 Response letter from the Eastern Cape Provincial Treasury, accompanied by attachments, including follow up letters to the ECDoH dated 25 August 2020;

4.4.1.13 Response letter from National Treasury, dated 27 August 2020;

4.4.1.14 Letter to the Director-General: Office of the Premier, requesting minutes of the Executive Committee (EXCO) meeting, dated 09 September 2020;

4.4.1.15 Response from Director-General: Office of the Premier dated 22 September 2020 accompanied by:

(a) Copy of the Minutes of EXCO Meeting; and

(b) Copy of Presentation of 13-point plan for the ECDHo;

4.4.1.16 Letter to the ECDHo requesting its annual procurement plans, dated 08 October 2020;

4.4.1.17 Response letter from the ECDHo accompanied by copies of procurement plans, dated 22 October 2020;

4.4.1.18 Letters to the former MEC of Health and the Premier, requesting clarity on their oversight role on procurement of the scooter ambulances, dated 02 November 2020;

4.4.1.19 Responses from the Premier and MEC clarifying their executive role in connection with the procurement, dated 06 and 10 November 2020 respectively;

4.4.1.20 Copy of the Annual Procurement Plans of the ECDHo;

4.4.1.21 Copy of a High Court interdict obtained by Special Investigating Unit against the ECDHo prohibiting the implementation of contract with
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

Fabkomp for the procurement of the scooter ambulances, dated 18 September 2020;

4.4.1.22 Letter to the Auditor General of South Africa (AGSA) dated 19 January 2021 and

4.4.1.23 Response letter from the AGSA, dated 15 February 2021.

4.4.2 Email Correspondence sent and received

4.4.2.1 Email correspondence with Fabkomp on 11 August 2020;

4.4.2.2 Email correspondence with Ms NA Nkosi, the General Manager in the Office of the Head of the ECDoH on 4 September 2020.

4.4.3 Meetings

4.4.3.1 Meeting with Mr B Harmse of Fabkomp on 12 August 2020.

4.4.4 Legislation and other legal prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);

4.4.4.2 The Public Protector Act, 23 of 1994;

4.4.4.3 The Public Finance Management Act 1 of 1999 (PFMA)

4.4.4.4 Treasury Regulations issued under the PFMA, March 2005;

4.4.4.5 The Supply Chain Management (SCM) Policy of the SCM of the ECDoH; and
4.4.4.6 National Treasury Supply Chain Management Instruction Notes;

4.4.5 Case law considered

4.4.5.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); and

4.4.5.2 *President of the Republic of South Africa vs Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017).

4.4.6 Notices issued in terms of section 7(9) of the Public Protector Act, 23 of 1994

4.4.6.1 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act to the Acting Head of the ECDoH, Dr S Zungu on 2 December 2020, affording her an opportunity to respond to the information and evidence obtained during the investigation. The State Attorney responded on her behalf on 15 March 2021, indicating that she has nothing further to add.

4.4.6.2 A copy of the section 7(9) notice was provided to the former Head of the ECDoH, Dr T Mbengashe for his response. He replied on 1 March 2021.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

5 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the supply chain management process followed by the ECDoH when it awarded to Fabkomp (Pty) Ltd contract number SCMU3-20/21-0022-HO to supply motorbikes with side car ambulance or clinic was in contravention of applicable laws and legal prescripts regulating the procurement of goods and services, and if so, whether such conduct was improper and amounts to maladministration:

Common cause or undisputed facts

5.1.1 The ECDoH is a Provincial Department of the Eastern Cape Provincial Government.

5.1.2 Fabkomp is a private company registered with the Companies and Intellectual Property Commission (CIPC) on 23 October 2001, with registration number 2001/025525/07. The two current active Directors of Fabkomp are Mr Brian Harmse and Mr Michael Frank Du Toit. Fabkomp is also registered on the National Treasury Central Supplier Database (CSD).

5.1.3 Fabkomp is a manufacturing entity based in King Williams Town and has been in business for 37 years, following the purchase of Triple J Engineering (Pty) Ltd7 in 2001 as a going concern, when the name was changed to Fabkomp. Fabkomp manufactures automotive components and other products for the automotive and engineering industry.

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7 It had been in business for a number of years prior to being bought in 2001.
5.1.4 Fabkomp’s range of products include the conversion of vehicles for Eskom; the manufacturing of ambulances and clinics on the back of pickups, the conversion of vans; the manufacturing of beds, sanitising equipment and trailers, including clinic type trailers; the supply of hazmat personal protective equipment; and others.

5.1.5 Ranger Production Company SA (Pty) Ltd is a private company registered with the CIPC on 03 February 2003 with registration number 2003/002311/07. The three current active Directors of Ranger Production Company SA (Pty) Ltd are Mr Robert Charles Deacon Elliot, Mr Brian Harmse and Mr Michael Jonathan Norman.

5.1.6 The Ranger Production Company SA (Pty) Ltd is based in King Williams Town and has another assembly facility in East London. The Company is generally known as “e-Ranger”. E-Ranger is an international company, which is 51% owned by international shareholders. Fabkomp owns 49% of the shares.

5.1.7 E-Ranger is the importer and the exporter of e-Ranger products and deals with all orders outside of South Africa. E-Ranger United Kingdom (UK) offices do not generate their own income, as all sales are run through the e-Ranger South Africa operations.

5.1.8 Fabkomp supplies the local market, as it has the quality systems and Broad Based Black Economic Empowerment (BBBEE) certification that the South African market requires. Fabkomp purchases imported motorbikes and accessories from e-Ranger in South Africa.

5.1.9 A Demand Memorandum for approval to procure motorcycles for outreach services in by the ECDoH was submitted by the Senior Manager: Demand Management, whose name is not stated in the document. The Demand Memorandum was addressed to the Superintendent General (Head of Department) but the date as to when it
was drafted is not indicated.

5.1.10 The Demand Memorandum was recommended by the Deputy Director General: Dr L Matlwane (Dr Matlwane), the Chief Financial Officer; Mr M Daca and was approved by the then Head of the Department, Dr T Mbengashe, on 03 April 2020.

5.1.11 On 03 April 2020, a Memorandum to approve the appointment of the Bid Specification Committee (BSC) members for the procurement of motorcycle mobile clinics for the ECDoH was submitted by the General Manager SCM, Ms C Mgijima. This memorandum was signed by Dr T Mbengashe on the same day (03 April 2020), approving the following persons as BSC members:

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<tr>
<th>Name</th>
<th>Status</th>
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<tbody>
<tr>
<td>(a) Mr K Tungata</td>
<td>Chairperson</td>
</tr>
<tr>
<td>(b) Mr K Matshotyana</td>
<td>Deputy chairperson</td>
</tr>
<tr>
<td>(c) Ms N Zamxaka</td>
<td>Member</td>
</tr>
<tr>
<td>(d) Dr L Matiwane</td>
<td>Member</td>
</tr>
<tr>
<td>(e) Mr P Sharma</td>
<td>Member</td>
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5.1.12 All the above BSC members signed and acknowledged their individual appointment letters, on 03 April 2020. According to the attendance register, the BSC meeting was held on 04 April 2020 at the East London Call Centre offices of the ECDoH and the specifications for the tender were set and detailed, as per the minutes of the BSC meeting\(^8\) that were obtained during the investigation.

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\(^8\) Dated 03 April 2020.
The tender contract number SCMU3-20/21-0022-HO to procure motorbikes with side car for community health outreach was advertised on the ECDoH’s website on 06 April 2020, with the closing date of 15 April 2020, as an emergency bid.

In terms of an email dated 06 April 2020, from Mr Philasande Mtheleli of the ECDoH SCM Unit, (Mr Mtheleli) to Ms Nodumo Boqwana, a request was made for the Bid Document to be uploaded on the departmental website. A “Signed Motorbike with side car Bid Document 06 04 2020. Pdf.” was reflected as an attachment to the email. Kayalethu Tungata, Nyanisa Mqongwana, and Siyanda Manana were also copied on an email from Mr Mtheleli to Ms Nodumo Boqwana for a request to upload the Bid document on departmental website.

The email from Mr Mtheleli to Ms Nodumo Boqwana read as follows:

“Good Morning Ms Boqwana,

Please find attached the Bid Document for the Procurement of Motorbike with side car for Community Health Outreach Services for the Eastern Cape Department of Health. Can you please reflect the bid description on the website next to the Bid Number as this is the only platform to advertise.”

In terms of the Invitation Bid Document/Advert for the procurement of the motorbikes with side car for community health outreach services for the ECDoH, the bidding procedure enquiries were all to be directed to Mr Mtheleli. However, it does not appear from the Bid Document who approved or authorised a shortened advertisement period for five (5) working days (10 and 13 April were public holidays). That particular part on the Bid Document/Advert was not signed.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

5.1.17 After the closing of the tender, the ECDoH received two bids, which were shortlisted for screening as set out below:

<table>
<thead>
<tr>
<th>Bidder</th>
<th>Bid Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fabkomp (Pty) Ltd</td>
<td>R10 148 750.00</td>
</tr>
<tr>
<td>Zencare (Pty) Ltd</td>
<td>R12 993 500.00</td>
</tr>
</tbody>
</table>

5.1.18 According to the Bid Advertisement and Bid Documents, the evaluation criteria was divided into three stages, as follows:

5.1.18.1 **Stage 1: Administrative Compliance which entailed the following:**

- The bid document has been completed comprehensively and correctly
- Complete and sign Declarations Forms SBD1, SBD4, SBD, SBD9 and SBD6.
- Bidders must be legal entity or partnership (consortiums acceptable subject to Paragraph 10 of Part 1 of the Bid Documents)
- Bidders must be registered with Central Supplier Database (CSD) and have compliant tax status

<table>
<thead>
<tr>
<th>NON-NEGOTIABLES</th>
</tr>
</thead>
<tbody>
<tr>
<td>ISO 9000 Certification</td>
</tr>
<tr>
<td>Accreditation Certificate by Original Equipment Manufacturer (OEM)</td>
</tr>
<tr>
<td>Manufacture Importer Builder Certificate (MIB)</td>
</tr>
<tr>
<td>Affiliation to Motor Industry Recognised Body (MIRB)</td>
</tr>
</tbody>
</table>

*Failure to comply with (including non-submission of the non-negotiables indicated above) would invalidate the bid and result in disqualification of the bidder.*

5.1.18.2 **Stage 2: Functionality and Technical Evaluation:**

25
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCM3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

(a) Bidders’ compliance would be tested against submitted documents and furthermore the Bid Evaluation Committee will conduct *in loco* inspections to validate the information submitted. For bidders to go to the next stage of evaluation, 100% would need to be obtained.

5.1.18.3 **Stage 3: Price and Broad Based Black Economic Empowerment (BBBEE) Scoring:**

(a) The bid would be evaluated in terms of the 80/20 points system as stipulated in the Preferential Procurement Regulations 2017. Eighty (80) points where applicable will be allocated for price and 20 points for attaining the BBBEE status level contributor.

(b) Bidders were required to, together with their bid submit original and valid South African National Accreditation System (SANAS) accredited BBBEE status level verification certificates or certified copies to substantiate their BBBEE claims.

(c) A bid would not be disqualified from the bidding process if the bidder does not submit a certificate substantiating their BBBEE status level of contribution or is a non-compliant contributor. Such bidder will score zero (0) out of 20 points for BBBEE.

<table>
<thead>
<tr>
<th>BBBEE STATUS LEVEL OF CONTRIBUTOR</th>
<th>NUMBER OF POINTS (80/20 SYSTEM)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td>2</td>
<td>18</td>
</tr>
<tr>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>4</td>
<td>12</td>
</tr>
</tbody>
</table>
5.1.19 The Bid Evaluation Committee (BEC) of the ECDoH consisting of the following members, commenced its meeting on 15 April 2020:

<table>
<thead>
<tr>
<th>Name</th>
<th>Designation</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr M Van Zyl</td>
<td>Director: Finance HIV/TB Directorate</td>
<td>Chairperson</td>
</tr>
<tr>
<td>Mr K Tungata</td>
<td>Director: Fleet Management</td>
<td>Member</td>
</tr>
<tr>
<td>Mr T Bolo</td>
<td>Acting Senior Manager: Monitoring and Compliance</td>
<td>Member</td>
</tr>
<tr>
<td>Ms Z Mbange</td>
<td>Deputy Director: Health Program CHW</td>
<td>Member</td>
</tr>
</tbody>
</table>

5.1.20 The BEC resolved to recommend Fabkomp as the successful bidder, as indicated in the minutes dated 15 April 2020, which were signed by the Chairperson and all members.

5.1.21 The Bid Adjudication Committee (BAC) of the ECDoH resolved to support the recommendation of the BEC to award the contract to Fabkomp as the
highest scoring bidder with 100 points. The members of the BAC were as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr M Daca</td>
<td>Chairperson</td>
</tr>
<tr>
<td>Mr S Frachet</td>
<td>Member</td>
</tr>
<tr>
<td>Mr J Cronje</td>
<td>Member</td>
</tr>
<tr>
<td>Mr K Matshoityana</td>
<td>Member</td>
</tr>
<tr>
<td>Ms C Mgijima-Mafo</td>
<td>Member</td>
</tr>
</tbody>
</table>

5.1.22 Consequently, the ECDoH awarded the contract to Fabkomp as the preferred and successful bidder.

5.1.23 The Letter of Award (LoA) was signed by Dr T Mbengashe on behalf of ECDoH on 19 May 2020 and further signed on 22 May 2020, by the Manager: Mr Riaan Swanepoel, on behalf of Fabkomp.

5.1.24 The LoA concluded between the ECDoH and Fabkomp reads, in part, as follows:

“LETTER OF AWARD: SCMU-20-0022-HO (D): PROVISION OF MOTORBIKES WITH SIDE CAR FOR COMMUNITY HEALTH OUTREACH SERVICE FOR THE ECDOH (COVID 19 DEVIATIONS)

In terms of the original proposal, we are pleased to advise that you are hereby appointed in terms of this letter of award (LOA) as the “preferred bidder” having obtained the highest preference points in terms of the preferential procurement policy framework Act, for the “Emergency Deviation” in terms of the delegation 3.8 of the Accounting Officers delegated powers, for the provision of motorbikes with side car for community health outreach service, as a once off supply and delivery.

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9 As per minutes of the BAC meeting held on 04 May 2020 at East London.
10 Emphasis added
This LOA is subject of a formal comprehensive 3 year maintenance plan to be provided by the supplier within 14 (Fourteen) days from the date hereof.

1. **Scope of agreement**

The supplier will provide, motorbikes for community health outreach service, as a once off supply, and despite the date of signature hereof, with effect from date of purchase order to be issued to the supplier after acceptance of this LOA.

2. **Termination**

2.1 Either party may terminate the supply agreement by providing to the other party with 30 calendar days prior written notification. Notwithstanding the above, such termination will not prejudice or affect any right of action or remedy which has accrued or will accrue thereafter to either Party.

3. **Rates and payment terms**

3.1 **Rates:** All goods supplied under this appointment will be supplied at the rate stipulated in the original bid proposed and as tabled below, with any further additional discount or charges agreed to in writing and duly signed off by both parties. This award is for a total bid amount of **R 10 148 750.00** inclusive of Vat @15%

3.2 This bid is awarded as follows:

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>QUALITY</th>
<th>UNIT PRICE</th>
<th>TOTAL BID PRICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motorbike with side car for</td>
<td>100</td>
<td>R 94 587.50</td>
<td>R 9 458 750.00</td>
</tr>
</tbody>
</table>
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

<table>
<thead>
<tr>
<th>community, health outreach service with a minimum of 12 months' warranty</th>
<th>100</th>
<th>R 6 900.00</th>
<th>R690 000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 year maintenance plan</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total Bid price (inclusive of vat 15%)</strong></td>
<td></td>
<td></td>
<td><strong>R 10 148 750.00</strong></td>
</tr>
</tbody>
</table>

**Issues in dispute**

5.1.25 On 12 June 2020, the mainstream media across the spectrum published the launch of what infamously became known as *scooter ambulances*, by the ECDoH.

5.1.26 The launched scooter ambulances were fitted with a bed on one side, an overhead gazebo with a first aid kit and oxygen on board.

5.1.27 The photograph below depicts a sample of the side car scooter ambulance units displayed on the day of the launch by the ECDoH.
5.1.28 A month later, the media reported that the ECDoH was allegedly advised not to use the above shown scooter ambulances as they do not meet the specific requirements for patient transport, as provided for in the applicable Regulations relating to minimum patient compartment space and equipment.\textsuperscript{11}

5.1.29 On 12 August 2020, the investigation team visited Fabkomp at its premises at Sweetwaters in King Williams Town and interviewed the Director, Mr Brian Harmse (Mr Harmse), in connection with the contract between Fabkomp and the ECDoH.

5.1.30 Mr Harmse indicated that the contract awarded to Fabkomp by the ECDoH entailed the supply of side car clinic units, and not the side car ambulance unit(s) version as displayed during the launch.

\textsuperscript{11} http://journalismiziko.dut.ac.za/current-affairs/scooter-project-does-not-meet-basic-criteria-of-an-ambulance-mkhize.
5.1.31 He stated that at the launch on 12 June 2020, most of the units displayed at the request of the ECDoH were the side car ambulances, as these were the only units that Fabkomp had in stock at the time. Further, that these ambulances were about to be shipped to Kenya for a project being rolled out there. Fabkomp had only just started to manufacture the clinic versions for the contract at the time.

5.1.32 Mr Harmse further indicated that there were no clear instructions on how to manage the proceedings at the launch. As a result, Fabkomp presented what was an on-show version and the test drives were done with side car ambulance units, but the contract is for side car clinic units.

5.1.33 The picture below shows a side car clinic unit which is alleged to have been ordered in terms of the contract awarded to Fabkomp.

5.1.34 It was further indicated by Mr Harmse that Fabkomp had not received an official order from the ECDoH. However, they decided to start manufacturing the side car clinic units, as verbal instructions had been given to go ahead.

5.1.35 On 12 August 2020, the investigation team obtained the following documents from Fabkomp in order to establish compliance with the non-negotiable areas of operational specifications of the bid:
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCM3-20-21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

(a) “ISO 9000 Certification
(b) Certification by Original Equipment Manufacturer (OEM)
(c) Manufacture Importer Builder Certificate (MIB)
(d) Affiliation to Motor Industry Recognised Body (MIRB)
(e) ENATIS (E91) registration certificate”.

5.1.36 On 13 August 2020, the National Regulator for Compulsory Specifications (NRCS)\(^\text{12}\) was requested to verify the authenticity and validity of the documents and to indicate whether these documents can be equated to a homologation process required of an entity building vehicles.

5.1.37 The Chief Executive Officer of the NRCS, Mr E Mamadise, replied on 25 August 2020, stating intem alia that:

5.1.37.1 Fabkomp is registered with the Department of Transport in terms of the relevant requirements of the National Road Traffic Act, 1996 (NRTA) and therefore falls within the regularity scope of the NRCS.

5.1.37.2 Amongst other business activities, Fabkomp manufactures sidecars and fits them on motorcycles. The fitment of sidecars changes the description of the motorcycle to a “motorcycle with side car”. Fabkomp sidecars are intended for use as police, mobile clinic and ambulance vehicles.

5.1.37.3 During 2006 and 2007, Fabkomp applied for model numbers in respect of the various sidecars that they intended to sell. The requirement for motorcycle with a sidecar were as specified in the NRTA Regulations.

\(^{12}\) The NRCS previously operated as the Regulatory Division of the South African Bureau of Standards (SABS). NRCS became an entity on its own in 2008 after the promulgation of the NRCS Act (Acts 5 of 2008) and started its operations in September 2008. The NRCS through its automotive business unit is responsible for the implementation of compulsory specification(s) for motor vehicles and other related components and accessories. In addition, the NRCS also performs the function of inspectorate of manufactures, builders and importers of motor vehicles (MIB) in terms of the National Road Traffic Act 93 of 1996.
5.1.37.4 Fabkomp’s application was assessed in terms of NRTA Regulations and upon confirmation of their compliance, model numbers were issued and identified as follows:

(a) Model No. 54043: Clinic Sidecar issued on 24 October 2006,

(b) Model No. 540404: Ambulance Sidecar issued on 24 October 2006, and

(c) Model No. 54278: Police Sidecar issued on 27 February 2007.

5.1.37.5 The NRCS indicated that the respective model numbers issued can be used to build vehicles that are of the same design and have the same technical details, including the type of motorcycle.

5.1.37.6 Accordingly, the NRCS confirmed that the documents were issued by the NRCS whilst still functioning as the Regulatory Division of the South African Bureau of Standards.

5.1.37.7 The NRCS also confirmed that Fabkomp complied with the approval process which can be equated to the homologation process required of an entity building vehicles for the purpose of selling it.

5.1.38 In his response to the matters being investigated, dated 30 July 2020, the former Head of the Department, Dr T Mbengashe stated that the ECDoH undertook an emergency procurement process for motorbikes with side car and that the process has gone as far as issuing the LoA to the recommended bidder.

5.1.39 Further, that the BAC and the SCM Division of the ECDoH were undertaking a normal pre-order issuance process that included negotiation of the final terms with the recommended bidder, Fabkomp.
5.1.40 According to the response by Dr T Mbengashe, no invoices had been submitted by Fabkomp, as no order had been issued, hence no payments were made.

5.1.41 Dr T Mbengashe further pointed out that the ECDoH intended to continue with the use of specialised scooters to conduct tracking and contact tracing of Covid 19 patients, strengthening central chronic medicine dispensing and distribution for HIV/AIDS and Tuberculosis and non-communicable disease patients. The scooters are intended to improve household coverage in the hard to reach areas in poor communities of the Eastern Cape Province.

5.1.42 According to the bid evaluation documentation obtained during the investigation from the ECDoH, particularly in respect of Stage 3: Price and BBBEE Scoring, Fabkomp’s BBBEE status is reflected as level 2, thereby scoring 18 points.

5.1.43 The same BBBEE status of Fabkomp (which is level 2 and therefore =18 points on the conversion table) is also indicated in the documents provided by Mr Harmse, during the investigation on 25 September 2020.

5.1.44 It was noted that the BEC of the ECDoH awarded Fabkomp 20 points, despite its level 2 BBBEE status which equates to 18 points. This discrepancy was not addressed or explained in the Minutes of the BEC meeting.

5.1.45 Furthermore, it was established that the bid was advertised for a shortened or truncated period of only 9 calendar days, (06 April to 15 April 2020 and 5 working days as 10 and 13 April were public holidays) and that it was considered an Emergency Deviation in terms of the delegation 3.8 of the Accounting Officers delegated powers,13 as indicated the wording of the LoA and bid documents.

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13 Emergency 5 days tender advertisement.
5.1.46 Further clarity was sought from the ECDoh in respect of the procurement process followed in awarding the contract to Fabkomp.

5.1.47 On Thursday 20 August 2020, the General Manager: Office of Superintendent General (Head of Department), Ms Nonhlanhla Anda Nkosi replied. Attached to her response was National Treasury Instruction No. 3 of 2020/2021, which is titled: “COVID-19 Disaster Management Central Emergency Procurement Strategy for PFMA Organs of State”. It was signed by the Director General: National Treasury: Mr Dondo Mogajane on 15 April 2020.

5.1.48 Ms Nkosi referred to paragraph 5.1 of National Treasury Instruction No. 3 of 2020/2021 as well as the Demand Memorandum which was approved on 03 April 2020, for the procurement of motorcycles with sidecar.

5.1.49 Paragraph 5 of National Treasury Instruction No. 3 of 2020/2021 is titled “PROCUREMENT OF COVID-19 RELATED ITEMS AND SERVICES NOT COVERED BY THIS INSTRUCTION”. Paragraph 5.1 provides as follows:

“5.1 If an item or service is not covered in this instruction, and is considered to be a specific requirement for the institution to combat Covid-19, the emergency procurement prescripts may be followed:

i. Accounting Officers of national and provincial departments and accounting authorities of national and provincial public entities may deviate from inviting competitive bidding in cases of emergency – paragraph 8.1 and 8.2 of National Treasury SCM Instruction 3 of 2016/17 (Prevention and combating abuse in SCM). This does not require National Treasury’s approval.

ii. Accounting officers/authorities are required to report within 10 working days to the relevant treasury and the Auditor-General all
cases where goods and services above the value of R 1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s invoiced and the reasons for dispensing with the prescribed competitive bidding process. “

5.1.50 In the light of the date of National Treasury Instruction No. 3 of 2020/2021 namely 15 April 2020, which is the date on which it took effect, it was not clear how the ECDoH\textsuperscript{14} sought to rely on it for procurement of the scooter ambulances, the advertisement of which was already published on 6 April 2020.

5.1.51 It is further evident that Dr T Mbengashe had already approved the Demand Memorandum for procurement of motorcycles on 03 April 2020, which was prior to the issuing of National Treasury Instruction No. 3 of 2020/2021.

5.1.52 Furthermore, Annexures A and C of National Treasury Instruction No. 3 of 2020/2021 contain a clear and exhaustive list of what is considered Personal Protective Equipment (PPE) for the purpose of Covid-19 emergency procurement. It does not provide for scooters or motorcycles.

5.1.53 On 04 September 2020, Ms Nkosi submitted a further response by way of an email\textsuperscript{15}, in which it was indicated that following the response of the Eastern Cape Provincial Treasury (ECPT) to a request for deviation (refusal to approve deviation), the ECDoh then followed a competitive bidding process. It was submitted in the same email that, this competitive bidding process nullified the need for a deviation.

\textsuperscript{14} As per email dated 20 August 2020 received at 09:58.

\textsuperscript{15} As per email dated 04 September 2020 received at 13:54
5.1.54 Further, reference was made to the Eastern Cape Provincial Executive Committee (EXCO) meeting, chaired by the Premier on 20 March 2020, relating to the approval of a departmental 13 point strategy to respond to the Covid-19 pandemic, which included the procurement of 100 motorbikes.

5.1.55 The Minutes of the EXCO meeting referred to, state that the procurement of 100 off-road motorbikes was part of the presentation of Dr T Mbengashe on the Health Response Plan\textsuperscript{16} to EXCO.

5.1.56 However, no specific or particular resolution was taken by the EXCO to procure 100 motorbikes, save for a general indication that “Provincial departments and public entities may reprioritise their budgets to fund contingency plans in line with the provisions of the Regulations (sic) and further that local suppliers must, as far as possible be given preference in line with the regulations, but value for money and quality of products must still be ensured”.\textsuperscript{17}

5.1.57 On 10 November 2020, the Director-General of the Eastern Cape Provincial Government, Mr Mbulelo Sogoni responded in connection with the role of the Premier in the procurement of the motorbikes with sidecar. He stated that:

“It is apparent from the minutes and the EXCO Resolution that whilst the Head of the Department of Health presented the department’s 13-point plan, it was neither approved nor declined by EXCO. Procurement, as instructed by the Public Finance Management Act, 1999(Act No. 1 of 1999) is the prerogative of the accounting officer of the department, and EXCO could not authorize that which falls within the purview of the head of department.”

\textsuperscript{16} Health’s 13 Point Plan to Respond to Covid.
\textsuperscript{17} As per Resolutions minutes of the Special EXCO meeting dated 24 March 2020, signed off by Acting Director General: Mr M Machemba.
The Premier advises that he had no role in the procurement of the scooters, and that the Head of Department of Health, as the accounting officer, was responsible for such procurement”. (emphasis added)

5.1.58 Similarly, the former Eastern Cape MEC for Health, Ms Sindiswa Gomba responded in connection with her role in the procurement of the scooter ambulances on 06 November 2020, stating inter alia that:

The concept of motorcycles came before the country experienced COVID-19. The Department of Health Policy Speech for the 2020-2021 financial year, makes mention of the plan to use motorcycles.

A presentation was done to the Department on the 10th December 2019, exposing the department to other mode of transportation as we were preparing for the 2019 festive season. This presentation was done by Mr. Ryan Swanepoel from E-RANGER Company.

The 13-point plan is a product of internal departmental discussions. I met with the top management on the 26 March 2020, to discuss our response to the pandemic and submit such to the Executive Council for adoption as part of the broader Provincial response strategy. I was aware of the 13-point plan as it was a product of departmental discussion.

The Public Finance Management Act provides for the Executive Authority of a Department not to be involved in the procurement processes. The role I am delegated to play is to exercise an oversight function. I exercised this function by often asking progress in relation to the acquiring of the scooters, as there was pressure presented by the pandemic.

In exercising my oversight, I was assured that the procurement processes are being followed in accordance with prescripts of the law.
I made sure that this project, among others identified in the policy speech, is part of the procurement plan regulated to be submitted to the Provincial Treasury. Procurement Plan is submitted to ensure that the project is in line with the Departmental Programme and is budgeted for.

When these allegations started to come up, I duly instructed the then Head of Department Dr Mbengashe to provide me with a report on the project and the process followed in the implementation of this project. I subsequently received a report from the HOD on the 17 July 2020.

In recognising that there are these serious allegations, I raised the matter in the Portfolio Committee, which provides oversight on the Department. A decision was then taken to halt the project pending the investigation to be undertaken by the Portfolio Committee.

On the 03rd November 2020, the Portfolio Committee presented its report on the findings of their investigations. They concluded on the following:

- The procurement process of the Department was never concluded, as there was no purchase order generated for this project.
- There was no budgetary line item set aside for this project.
- No payments nor any financial transaction was ever done on this project”.

5.1.59 During the investigation, the Acting Head of the ECDoH stated in a letter dated 27 October 2020 that the ECDoH did submit its Annual Procurement Plan (APP) to the Eastern Cape Provincial Treasury (ECPT) by 31 March 2020, as required. The procurement of the scooter ambulances was included in the submitted APP.

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18 Both Procurement Plan and Revised Procurement were submitted on 27 October 2020 as proof to the Public Protector.
5.1.60 She further indicated that the ECPT confirmed receipt of the ECDoH’s submitted APP.

5.1.61 Further, that the ECDoH submitted two revised APPs to the ECPT. The first revision was to take into account Covid-19 procurement following the declaration of the National State of Disaster and imposition of lockdown regulations. The second revision was to take into account spending trends in the first quarter and to allow departments to reprioritize as necessary. The procurement of the motorbikes was part of both revised APPs. In the case of these revisions, the ECPT stipulated the submission dates for the APP, namely 31 May 2020 and 13 August 2020 respectively, and the ECDoH complied with those submission deadlines.

5.1.62 The Acting Head of the ECDoH further highlighted that the original APP was not fully aligned with the 2020/21 Annual Performance Plan in that the procurement of the motorbikes was not reflected in detail in the APP. According to her letter, this was subsequently corrected in the amendment to the Annual Performance Plan, which was submitted to the Eastern Cape Provincial Legislature in August 2020.

5.1.63 During the investigation, on 20 August 2020, the National Treasury was requested to indicate whether National Treasury Instruction No. 3 of 2020/2021 also envisaged items such as the Scooter Ambulances/Clinics, as procured by ECDoH, other than the listed PPE’s. The Acting Chief Procurement Officer, Ms Estelle Setan, responded on 27 August 2020, stating inter alia that:

“It is clear from the citation that although the Instruction was intended for central emergency procurement of Personal Protection Equipment, however, it was understood that there would be other COVID-19 related procurement done, thus the instruction provides the relevant clarity to
accounting officers or accounting authorities to still invoke paragraphs 8.1 and 8.2 of Instruction No.3 of 2016/17 for emergency procurement for such instances." 19

5.1.64 Furthermore, the ECPT was engaged to seek clarity on whether the procurement of the scooter/motorcycle clinics was reported and whether it granted the ECDoH approval for a deviation in this regard.

5.1.65 Mr D Majekke, the Head of the Department of the ECPT responded on 26 August 2020 as follows:

5.1.65.1 On 20 March 2020, the ECPT received a request from the ECDoH to deviate from competitive bidding procedures by applying the sole source procurement method for the procurement of one hundred (100) motorcycle mobile clinics.

5.1.65.2 The ECPT noted amongst others, the following reasons provided by the ECDoH:

(a) The ECDoH is employing strategies to improve primary healthcare in the province including strengthening outreach programmes;

(b) The motorcycles are assembled in King Williams Town and supplied to African markets by Ranger Production Company SA (Pty) Ltd (e-Ranger);

(c) The motorcycles are imported from China and converted into mobile clinics, using locally sourced steel;

(d) E-Ranger will assemble the motorcycle clinics and train the Departmental officials to operate them;

19 Emphasis added (Prevention and Combating Abuse in SCM).
(e) The motorcycle mobile clinics will provide the experience of a clinic away from the clinic buildings and thus manage the numbers at the facilities and improve care;

(f) The required product is not on the list of awarded items on the RT57 contract;

(g) The Departmental Fleet Management Unit conducted a search for other competitors in South Africa, which yielded no results;

(h) The requirement/need for this product became known in November 2019, however since the outbreak of Covid-19 pandemic, the need has become urgent;

(i) The indicated lead time for delivery is six (6) months;

(j) The cost implications for a single motorcycle clinic is R103, 500 which equates to a total cost of R10, 350,000.00 for 100 units;

(k) The costs include the items required for maintenance of motorcycle mobile clinics; and

(l) The supplier will also train the departmental officials to maintain the motorcycle mobile clinics.

5.1.65.3 The ECPT scrutinised the request by ECDoH and responded on 25 March 2020 as follows:

(a) The ECDoH had not provided the specifications of the motorcycle mobile clinics as far as equipment and capabilities are concerned;
(b) There was no evidence that the market had been tested to prove that E-Ranger was the only company in the Eastern Cape that could offer the same or similar product;

(c) The ECDoH had not indicated if it had a disaster management plan for Covid-19;

(d) The ECDoH had not provided the project plan linked to the purchase of the motorcycle mobile clinics;

(e) This project did not find expression in the 2019/20 Financial Year (FY) Procurement Plan. The ECPT did note that the project find expression in the 2020/21 FY Procurement Plan, with a budget allocation of R10 000 000.00.

(f) Reference was made to National Treasury Instruction Note 3 of 2016/17, Paragraph 8.1 which states that accounting officers must only deviate from inviting competitive bids in cases of emergency and sole supplier status. Paragraph 8.2 states that an emergency procurement may occur when there is a serious and unexpected situation that poses an immediate risk to health, life, property or the environment, which calls an emergency to action and there is insufficient time to invite competitive bids. Furthermore, paragraph 8.3 state that sole source procurement may occur when there is evidence that only one supplier possesses the unique and singularly available capacity to meet the requirements of the situation.

In the light of the above, the ECPT was therefore unable to grant the ECDoH approval to deviate from competitive bidding procedures by applying the sole source procurement method for procurement of 100 motorcycle mobile clinics.
On 23 June 2020, the ECPT followed up with correspondence, reminding the ECDoH that it had not responded to the issues raised above. ECDoH responded to ECPT with the following:

(a) The BEC report;
(b) The BAC report;
(c) The Central Supplier Database (CSD) summary report of the preferred bidder; and
(d) A summary detailing the process followed.

The ECPT scrutinised the above reports and observed the following:

(a) The bid was advertised on the ECDoH website on 06 April with a closing date of 15 April 2020, thereby deviating from the stipulated 21 days advertising period and advertised the bid for six (6) working days (nine calendar days) as an emergency. At the closing date of the bid, the following two bids were received:

i. Fabkomp with a bid price of R10 148 750 and
ii. Zencare (Pty) Ltd with a bid price of R12 993 500.

(b) The ECPT was not provided with the Demand Memorandum or other documentation wherein the emergency had been justified.

The ECPT concluded that the ECDoH did not comply with the following conditions as requested by the ECPT:

(a) Detailed specifications for motorcycle mobile clinics as far as equipment and capabilities are concerned;

(b) Availability of evidence that E-Ranger is the sole supplier to assemble motorcycles and convert them to clinics;
(c) Ensuring that the Department’s officials are trained to operate the motorcycles; and

(d) Achieving value for money i.e. the unit price is fair and reasonable or market related.

5.1.66 On 23 July 2020, the President of the Republic of South Africa mandated Special Investigating Unit (SIU) in terms of Proclamation R 23 of 2020 as published in Government Gazette 43546 to conduct investigations into certain matters in respect of affairs of all the state institutions as defined in section 1 of Special Investigating Units and Special Tribunals Act, 1996.

5.1.67 Pursuant to the issue of the Proclamation referred to above, the SIU is conducting its own investigation in respect of this contract: SCMU 20/21-0022-HO: Motorcycle Ambulance/Clinic.

5.1.68 On 13 November 2020, the Public Protector’s investigation team convened a meeting with the SIU with the view to collaborate on issues related to this investigation. The SIU indicated that its investigation has progressed to a point of securing a court order, interdicting the ECDoH from implementing the contract for the procurement of the scooter/motorcycle clinics, pending the finalisation of a High Court review application.²⁰

5.1.69 It also transpired during this meeting that the Directorate of Priority Crimes Investigation of the South African Police Service (DPCI) also known as the Hawks, is conducting criminal investigations of fraud and corruption related to the award of this contract under Bisho CAS 08/09/2020.

²⁰ In the Special Tribunal Established in terms of section 2(1)(b) of the Special Investigating Units and the Special Tribunals Act, 74 of 1996.
5.1.70 The Auditor General of South Africa (AGSA) was requested on 19 January 2021 to indicate whether it had also conducted an audit into the procurement of the scooters/motorcycles by the ECDoH. Mr Sipho Ndaba, Corporate Executive: Investigations responded on 15 February 2021, indicating that the AGSA had not conducted an audit into the matter. However, the contract was audited and found to be irregular as the scooters/motorcycles were procured through the emergency procurement process and the reasons provided for the deviation did not meet the criteria of an emergency. He further stated that the ECDoH had not made any payments at the time when the AGSA concluded its special report on COVID-19 expenditure in December 2020 and that the audit team would follow up on this during its planning for 2020/2021.

Response to the Notice issued in terms of the provisions of section 7(9)(a) of the Public Protector Act

5.1.71 Section 7(9)(a) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances”.

5.1.72 A Notice was issued in terms of section 7(9) of the Public Protector Act to the Acting Head of the ECDOH: Dr S Zungu on 02 December 2020.

5.1.73 The Acting Head of the ECDoH responded on 15 March 2021 through a letter signed off by Ms M Govender from the Office of the State Attorney stating, *inter alia* that:
“My client has considered your correspondence of 2 December 2021 and 12 March 2021. Having considered the correspondence and taken legal advice, my client does not have anything further to add at this stage.

I trust that you will proceed to conclude your investigation and I await your report”.21

5.1.74 On 18 February 2021, the former Head of the ECDoH, Dr Mbengashe was served with a Notice issued in terms of section 7(9) of the Public Protector Act, affording him an opportunity to respond to the information and evidence obtained during the investigation and the intended findings of the Public Protector. In particular clarity was sought with regard to the approval of the shortening of the advertisement period.

5.1.75 Dr Mbengashe replied on 01 March 2021 and stated inter alia:

“The department made use of emergency procurement for its Covid-19 procurement and the scooters were part of the demand memo for Covid-19 procurement. Instruction note 3 of 2020/21 provided for procurement of other items other than PPE through emergency deviation to the extent that it was related to fighting the pandemic.22

That PT has declined the sole source request therefore nullified the request for deviation.23

After the department was declined sole source deviation by Provincial Treasury in 2019, the department did follow competitive bidding and advertised the bid, however this was not done for the normal 21 days, but a shortened period (5 days) as part of emergency procurement covered by

21 Letter of response to a Notice by Dr S Zungu at Para 4 and 5.
22 Dr Mbengashe’s submission at Para 1.
23 Dr Mbengashe’s submission at Para 1.
Instruction note 3 of 2020/21 in 2020. This was because scooters were identified to be a necessary resource to support the departmental Covid-19 response in relation to tracking and tracing of contacts in hard to reach areas.\textsuperscript{24}

Indeed, the bid process followed for the procurement of the scooters was shorter than 21 days because the scooters were being procured as part of the Covid-19 emergency procurement which allowed for departments to deviate from normal procurement processes due to the emergency nature of the pandemic. Notwithstanding this provision allowed for by Instruction note 3 of 2020/21, the department still followed competitive bidding processes for its Covid procurement but for a shortened period (5-day bids) for various commodities including the scooters.\textsuperscript{25}

As the former Accounting Officer of the ECDOH, I concede that Fabkomp was erroneously awarded an additional 2 points on their BBBEE status. This was an administrative error which did not have an impact on the overall outcome of the award” \textsuperscript{26} (sic)

5.1.76 The gist of Dr Mbengashe’s response is that the bid was still competitive despite the advertisement period being shortened to only five working days. It also appears from Dr Mbengashe’s submission that the motorcycles/scooters were considered to be a PPE and/or Covid-19 related commodity, as envisaged in Instruction Note 3 of 2020/21.

5.1.77 As already indicated, the concept of using motorcycles/scooters was introduced in the ECDoH before the country experienced COVID-19. The motorcycles/scooters could not therefore be treated as an emergency procurement under the guise of the Covid-19 pandemic.

\textsuperscript{24} Dr Mbengashe’s submission at Para 2.
\textsuperscript{25} Dr Mbengashe’s submission at Para 3.
\textsuperscript{26} Dr Mbengashe’s submission at Para 4.
Application of the relevant legal framework

5.1.78 The principle of legality in South African law is enshrined in section 2 of the Constitution, which provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

5.1.79 In this instance, the above can be understood to imply that the exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.

5.1.80 Section 217(1) of the Constitution provides that:

“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.”

5.1.81 The general rule under section 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective and that is the standard which was expected of the ECDoH in procuring the motorcycle/scooter clinics.

5.1.82 Section 195(1) of the Constitution provides, amongst others, that:

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27 Steenkamp NO v Provincial Tender Board of the Eastern Cape [2006] ZACC 16; 2007 (3) SA 121 (CC) para 33.
(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;
(b) .............;
(c) ........;
(d) Services must be provided impartially, fairly, equitably and without bias;
(e) ........;
(f) Public administration must be accountable; and
(g) Transparency must be fostered by providing public with timely, accessible and accurate information.”

5.1.83 It is common cause that ECDoH officials are public servants and therefore expected to maintain a high standard of professional ethics, foster transparency and to be accountable and impartial in matters of public administration.

5.1.84 Section 38 of the Public Finance Management Act28 (PFMA) places certain obligations on Accounting Officers:29

5.1.85 Section 38(1)(a)(iii) of PFMA requires the Accounting Officer to implement an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

5.1.86 Section 38(1)(c)(ii) of PFMA requires the Accounting Officer to take effective and appropriate steps to prevent unauthorized, irregular and

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28 Act 1 of 1999.
29 Accounting Officer means a person mentioned in section 36 of PFMA, in this instance a Head of Department.
fruitless and wasteful expenditure and losses resulting from criminal conduct.

5.1.87 Section 38(n) stipulates that the Accounting Officer must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act (PFMA).

5.1.88 Section 44(2)(d) of the PFMA provides that a delegation or instruction to an official in terms of subsection (1), does not divest the Accounting Officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

5.1.89 Section 63 of the PFMA regulates the functions of the Executive Authorities and stipulates inter alia:

(1) (a) .................;
(b) In performing their statutory functions executive authorities must consider the monthly reports submitted to them in terms of section 39 (2) (b) and 40 (4) (c).

5.1.90 The ECDoH is a department under direct control of the Eastern Cape Provincial Government. The PFMA applies to all National, Provincial Government Departments and Public Entities listed in the schedules to the PFMA. Therefore, the PFMA is also applicable to the ECDoH.

5.1.91 In this instance, ECDoH was expected amongst other things to ensure compliance with an appropriate procurement and provisioning system.

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30 In terms of section 1 of the PFMA, Executive Authority in relation to a national department, means the Cabinet member who is accountable to Parliament for that department; in relation to a provincial department, means the member of the Executive Council of a province who is accountable to the provincial legislature for that department.
which is fair, equitable, transparent, competitive and cost-effective by observing the minimum period of 21 days for bid advertisement when handling this contract.

5.1.92 The National Treasury may make regulations or issue instructions (Practice Notes) in terms of section 76(4)(c) of the PFMA, applicable to all institutions to which the PFMA applies.

5.1.93 In terms of Treasury Regulation 16A6.3(c), the Accounting Officer (the Head of the Department) must ensure that bids to supply services/goods are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer may determine.

5.1.94 In this instance, the ECDOH advertised the bid in respect of this matter for a shortened period of five (5) working days as opposed to 21 days.

5.1.95 Section 2 of the Broad-Based Black Economic Empowerment Act31 (BBBEEA) has as its objectives to facilitate broad-based black economic empowerment by:

(a) “Promoting economic transformation in order to enable meaningful participation of black people in the economy;”

(b) Achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;

(c) Increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new

enterprises and increasing their access to economic activities, infrastructure and skills training;

(d) Increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;

(e) Promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;

(f) Empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and

(g) Promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector."^{32}.

5.1.96 It follows therefore that the ECDoH in applying and interpreting BBBEEA had to do so, as to give effect to its objectives and to promote the provisions of the Constitution. Evidence obtained during the investigation revealed that Fabkomp is a BBBEE level two (2) contributor which equals to 18 points on the conversion table. However, as indicated above, the BEC awarded Fabkomp 20 points as if it was a level one (1) BBBEE contributor.

5.1.97 The object of Preferential Procurement Policy Framework Act (PPPFA)^{33} is to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217 (2) of the Constitution.

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^{32} BBBEE Amendment Act 46 of 2013.

^{33} PPPF Act No 5 Of 2000.
5.1.98 Section 5 of PPPFA provides that the Minister may make Regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.

5.1.99 Regulation 4 of the Preferential Procurement Regulations, 2017 (PPR 2017) is titled pre-qualification criteria for preferential procurement and stipulates as follows:

4(1) “If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups\textsuperscript{34}, that organ of state must advertise the tender with a specific tendering condition that only one or more of the following tenderers may respond-

(a) a tenderer having a stipulated minimum B-BBEE status level of contributor;
(b) an EME\textsuperscript{35} or QSE\textsuperscript{36};
(c) a tenderer subcontracting a minimum of 30% to-
   (i) an EME or QSE which is at least 51% owned by black people;
   (ii) an EME or QSE which is at least 51% owned by black people who are youth;
   (iii) an EME or QSE which is at least 51% owned by black people who are

\textsuperscript{34} Designated Group” means-
(a) black designated groups;
(b) black people;
(c) women;
(d) people with disabilities; or
(e) small enterprises, as defined in section 1 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996).
\textsuperscript{35} EME means an exempted micro enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act.
\textsuperscript{36} QSE means a qualifying small business enterprise in terms of a code of good practice on black economic empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act.
women;
(iv) an EME or QSE which is at least 51% owned by black people with disabilities;
(v) an EME or QSE which is 51% owned by black people living in rural or underdeveloped areas or townships;
(vi) a cooperative which is at least 51% owned by black people;
(vii) an EME or QSE which is at least 51% owned by black people who are military veterans;
(viii) an EME or QSE.

(1) A tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender”.

5.1.100 Treasury Regulation 16A6.4 which deals with the Procurement of Goods and Services provides as follows:

“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.” (Our underlining)

5.1.101 In this case, the ECDoH indicated that following the declining of the ECPT to approve its request for a sole source procurement method, the deviation was nullified and the ECDoH consequently embarked on a competitive bidding process. However, ECDoH still decided to deviate from the prescribed competitive bidding process by shortening the bid advertisement period, without prior approval or authorisation by ECPT.

5.1.102 No reasons for deviation or shortening the bid publication period whatsoever were recorded and approved by the accounting officer in the approved Demand Memorandum, dated 03 April 2020.
5.1.103 Paragraph 8 of National Treasury Instruction 3 of 2016/2017 (Preventing and Combating Abuse in the Supply Chain Management System)\(^{37}\) which deals with deviation from normal bidding process, provides that:

“8.1 The Accounting Officer/Accounting Authority must only deviate from inviting competitive bids in cases of emergency and sole supplier status.

8.2 An emergency procurement may occur when there is a serious and 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.

8.3 Sole source procurement may occur when there is evidence that only one supplier possess the unique and singularly available capacity to meet the requirements of the institution.

8.4 The Accounting officer/Accounting Authority must invite as many suppliers as possible and select the preferred supplier using the competitive bid committee system.

8.5 Any other deviation will be allowed in exceptional cases subject to the prior written approval from the relevant treasury.”

5.1.104 Paragraph 14 of National Treasury Instruction 3 of 2016/2017 indicates that this SCM Treasury Instruction applies to all institutions and public entities and that should be understood to include ECDoH.

\(^{37}\) This SCM Treasury Instruction is issued in terms of section 76(4) of the PFMA. Refer to Paragraph 18.
5.1.105 In this matter, the deviation from normal bidding process of advertising for a minimum of 21 days had no prior approval from relevant Treasury.

5.1.106 National Treasury SCM Instruction 2 of 2016/2017 (Treasury SCM Instruction 2 of 2016/17)\(^\text{38}\) is titled *Procurement Plans-Submissions and Reporting* and states as its objective the requirements for compilation, submission and amendments of procurement plans and reporting thereon.

5.1.107 Paragraph 3 of SCM Instruction 2 of 2016/17 states *inter alia* that:

3.1 “The accounting officer or accounting authority must:

3.1.1 Submit an approved annual procurement plan to the relevant Treasury by 31 March of each year;

3.1.2 Align the procurement plan with the institution’s budget and annual performance plan for a specific financial year;

3.1.3 Include all expenditure on goods, works and services in excess of R500 000 (including VAT), per transaction on the template whether or not the expenditure:

3.1.3.1 to be incurred is in terms of a transversal contract or by any other means;
3.1.3.2 relates to items where the tender process has already commenced;
3.1.3.3 is procured by the institution or through an agency and

\(^{38}\) Which took effect from 01 May 2016.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SCMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

3.1.4 Compile the procurement plan in the Microsoft Excel format and as outlined in template contained in Annexure A, to this Treasury Instruction ……”

5.1.108 In terms of paragraph 4 of the Treasury SCM Instruction 2 of 2016/17:

4.1 “The accounting officer accounting authority must:

4.1.1 Submit the quarterly reports to the relevant Treasury by the 15th of the following month end of the quarter

4.1.2 Report in the format as outlined in template contained in Annexure B to this Treasury Instruction”.

5.1.109 Paragraph 5 of the Treasury SCM Instruction 2 of 2016/17 states the following:

5.1 “The accounting officer or accounting authority must:

5.1.1 Approve any amendments to the original procurement plan;

5.1.2 Submit the approved amended procurement plan, within 10 days calendar (sic) from approval, to the relevant Treasury”.

5.1.110 Paragraph 6 of the SCM Instruction 2 of 2016/17 stipulates that this Instructions applies to all institutions and public entities. ECDOH as a provincial department of government was expected to adhere to the dictates of this Instruction when it comes to submission of Procurement Plans to the relevant Treasury.

39 Quarterly reporting.
5.1.111 The ECDoH SCM Policy\(^{40}\) was approved on 23 May 2016. It states, *inter alia*, as its goal to implement a system that is fair, equitable, transparent, competitive and cost effective in the ECDoH.\(^{41}\) The ECDoH SCM Policy applies to its officials involved in the process of SCM.\(^{42}\)

5.1.112 Paragraph 4.2.1 of the ECDoH SCM Policy regulates the Publication of Bid Invitations for Competitive Bids and stipulates *inter alia* that;

4.2.1.3 “In general, a normal time frame for closing of bids is a minimum of **twenty one (21) calendar days** after the date of publication. This is meant to allow prospective bidders sufficient time to obtain the relevant bid documents, evaluate their goods/services to determine if they meet requirements, complete the bid documents and submit bid responses. Furthermore, it also ensure fair, transparent and competitive bid process (sic).

4.2.1.4 Bids with Local Production and Content as prescribed by the Department of Trade and Industry (DTI) must be advertised for a minimum period of thirty (30) calendar days unless deviation has been approved by the Provincial Treasury”. \(^{43}\) (Emphasis added)

5.1.113 Paragraph 4.3 of the ECDoH SCM Policy regulates the shortening of advertising period and states the following:

4.3.1 “Shortening of advertising period can only be followed after approval has been obtained from the Provincial Treasury”. (Emphasis added)

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\(^{40}\) Eastern Cape Department of Health SCM Policy 2017.

\(^{41}\) Paragraph 1.2 of the ECDoH SCM Policy, the Goal.

\(^{42}\) Paragraph 1.13 of the ECDoH SCM Policy.

\(^{43}\) Our emphasis.
5.1.114 Paragraph 3.3 of the ECDoH SCM Policy provides for the Application of Pre-Qualification Criteria and states the following:

3.3.1 “Institutions must at procurement and tender planning stage identify procurement opportunities to advance designated groups and apply pre-qualification criteria stipulated in PPR 2017, Regulation 4 for this purpose.

3.3.2 Institutions must conduct market research or industry analysis to identify procurement opportunities, level of transformation in the particular sector or commodity, supply market, their BBBEE status level and availability of EMEs or QSEs who may be eligible for tender.”

5.1.115 Paragraph 3.4 of the ECDoH SCM Policy provides for Procurement Planning and states the following:

“Procurement planning should take place before the beginning of the financial year when the institution’s strategic plan and budget have been approved. Procurement plans cannot be developed in isolation, it should instead form part of the institution’s and other functional strategies. The Demand Management within SCM Unit must perform hand-in-hand with user directorates such as budget sections in the formulation of procurement plans”.

5.1.116 Paragraph 3.5 of the ECDoH SCM Policy provides for Compilation of Procurement Plan as follows:

(a) “Completion of the above activities should result in the compilation of the procurement plan from respective end user programs to be implemented by the SCM Unit. This central compiled plan should be in line with the
need required based financial availability indicating the description of goods, value, method of procurement, projected dates within procurement process i.e. specification, evaluation, advert and bid award.

(b) The Demand Management Unit should on a continuous basis monitor and assess the validity and accuracy, implementation of and compliance to the procurement plan.

(c) The final procurement plan must be submitted to the relevant Treasury on/before 31 March 2017. The procurement plan must be aligned to the budget allocation for the department.

(d) Quarterly the procurement plan must be verified and re-aligned to the budget allocation.

(e) Reporting on the departmental procurement plan to the relevant Treasury must be done on a monthly and quarterly basis”.

5.1.117 Paragraph 3.7 of the ECDoH SCM Policy provides for Procurement Plans in respect of advertised competitive bids and states the following:

(a) “The accounting Officer of the department must submit to the Provincial Treasury by 30 April of each year, a procurement plan containing all planned procurement for the financial year in respect of the procurement of goods, works and/or services.

(b) Procurement plan must be approved by the Accounting Officer or his or her delegate prior to submission.

(c) The relevant information must be furnished in the format contained in the Procurement Plan Template as prescribed.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE EASTERN CAPE DEPARTMENT OF HEALTH RELATING TO THE AWARDING OF CONTRACT NUMBER SOMU3-20/21-0022-HO TO FABKOMP (PTY) LTD FOR PROCUREMENT OF MOTORBIKES WITH SIDE-CAR AMBULANCE OR CLINIC.

(d) *The Department must not advertise a bid for which no provision has been made in the budget as well as in the departmental procurement plan*.

5.1.118 The provisions of SCM Policy as cited here, seek to further underscore that the shortening of advertising period can only be followed after approval has been obtained from the Provincial Treasury, which in this instance, no approval was obtained.

**Conclusion**

5.1.119 The original APP of the ECDoH was not fully aligned with the 2020/21 Annual Performance Plan in that the procurement of the motorcycles/scooters was not reflected in detail. This was subsequently corrected in the amendment to the APP, which was submitted to the Eastern Cape Provincial Legislature in August 2020, as required.

5.1.120 The totality of evidence at hand revealed unusual haste under the banner of Covid-19 pandemic in the procurement process of the motorcycles/scooters, which was marked by administrative shortcomings and inconsistencies on the part of the ECDoH. When ECDoH approached the ECPT for approval of a deviation on 20 March 2020, the ECDoH did so on the basis of a sole supplier source, market proof of which was not submitted to ECPT. The ECPT declined to approve the request for a deviation.

5.1.121 On 03 April 2020, the ECDoH then changed its approach and followed a competitive bidding process, however the period of the publication of the advertisement of the tender was still shortened from 21 to 9 calendar days.
(with only five (5) working days). No reasons were recorded by the then Head of the ECDoH, Dr Mbengashe for the shortening of the advertisement period.

5.1.122 This deviation in connection with shortening of the advertising period was also not approved by the Head of the Department and the ECPT, as is required by paragraph 4.3.1 of the ECDoH SCM Policy. On 03 April 2020, Dr T Mbengashe in his capacity as the former Head of the ECDoH, approved the Demand Memorandum for procurement of motorcycles for outreach services, as a normal bidding process. There were no reasons recorded for any deviation at all, yet the bid publication period was shortened and/or truncated.

5.1.123 Dr Mbengashe who was the Head of the ECDoH at the time, has since left the Department. The SIU has already brought an application in the High Court for the review and setting aside of the contract awarded by the ECDoH to Fabkomp, which is to be heard in April 2021. No payment was made by the ECDoH to Fabkomp in terms of the contract.

5.1.124 During Stage 3 of the bid evaluation process, Fabkomp was awarded an additional two (2) BBBEE scoring points, resulting in a total of 20 points, as a level one (1) BBBEE contributor, whereas Fabkomp is in fact a level two (2) BBBEE contributor, qualifying for 18 points. This was conceded by the Acting Head of the ECDoH as an error, but did not have a significant impact on the awarding of the bid.

5.1.125 Based on the exposition of the above factual evidence, it is concluded that the ECDoH did not fully comply with the provisions of the Constitution, PFMA, BBBEEA, Treasury Regulations and Practice Notes and the ECDoH SCM Policy in the procurement of the motorcycle/scooter ambulances/clinics.
6 FINDINGS

6.1 Regarding whether the supply chain management process followed by the ECDoH when it awarded to Fabkomp (Pty) Ltd contract number SCMU3-20/21-0022-HO to supply motorbikes with side car ambulance or clinic was in contravention of the applicable laws and legal prescripts regulating procurement, and if so, whether such conduct was improper and amounts to maladministration:

6.1.1 The allegations that the procurement process followed by ECDoH when it awarded Fabkomp contract number SCMU3-20/21-0022-HO to supply motorbikes with side car ambulance or clinic was improper and in contravention of applicable legal prescripts, is substantiated.

6.1.2 The investigation has revealed the following significant administrative or conduct failures on the part of the ECDoH during the procurement process:

6.1.2.1 A shortened period of publication or advertisement of the bid in respect of contract number SCMU3-20/21-0022-HO on the ECDoH’s website, from 21 to 9 calendar days\(^{44}\) (with only five working days);

6.1.2.2 A lack of mandatory prior approval of deviation from normal SCM processes by the ECPT, as required by Paragraph 4.3 of the ECDoH SCM Policy;

6.1.2.3 A lack of reasons recorded and approved by the Head of the Department for shortening the publication period of the bid defeated the competitiveness enshrined in Treasury Regulation 16A6.4.

6.1.3 The ECDoH contravened or did not observe the provisions of section 217(1), 195(1) of the Constitution, Section 38(1) of PFMA, Treasury Regulation 16A6.3(c), Treasury Regulation 16A6.4, Paragraphs 8 and 14 of National

\(^{44}\) The period which fell within the Easter public holidays.
Treasury Instruction 3 of 2016/2017, Treasury SCM Instruction 2 of 2016/2017, Paragraphs 4.2.1, 4.3, 3.3, 3.4, 3.5, 3.7 and 1.10 of ECDoH SCM Policy in the process of this procurement.

6.1.4 The conduct of the ECDoH was improper and constitutes maladministration. It accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

7 REMEDIAL ACTION

The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

7.1 The Acting Head of the ECDoH to:

7.1.1 Take the appropriate steps in respect of disciplinary action in terms of section 38(h) of the PFMA and the applicable policies of the Department against the officials that were involved in and responsible for the non-compliance with the provisions of the SCM Policy pertaining to the procurement of the scooter/ambulance or clinics, within (90) days from the date of this report; and

7.1.2 Ensure that all the officials involved in SCM processes and the Senior Managers of the Department attend a workshop on the relevant legislation and other legal and policy prescripts and instructions of the National and Provincial Treasuries regulating the procurement of goods and services by the Department, within 60 days from the date of this report.

7.2 The MEC for Health to:
7.2.1 Oversee to ensure that appropriate steps are taken in respect of disciplinary action in terms of section 38(h) of the PFMA and the applicable policies of the Department against any decision maker(s) regardless of position across all the ranks of seniority that were/was involved in and responsible for the non-compliance with the provisions of the SCM Policy and Treasury Regulations pertaining to the procurement of the scooter/ambulance or clinics, within (90) days from the date of this report.

8 MONITORING

8.1 The Head of Department must submit an Implementation Plan to the Public Protector within thirty (30) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 The submission of the implementation plan and the implementation of the remedial action taken shall in the absence of a court order be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.

ADV. KHOLEKA GCALIKA
ACTING PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 31 March 2021

Assisted by: Vusumuzi Xolani Dlamini
Eastern Cape Provincial Representative
Public Protector South Africa