

COST OF DEVIATION

A report on an investigation into alleged irregular award of a tender and irregularities relating to payments for the construction of top structure of RDP houses in Area 9 and 10 Uitenhage, in Port Elizabeth, Eastern Cape

Report No: 4 of 2015/16



PUBLIC PROTECTOR
SOUTH AFRICA

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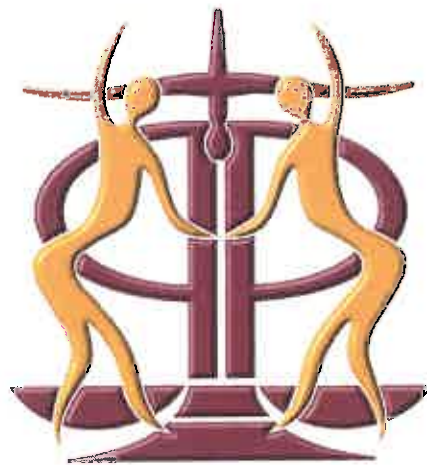


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**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF
THE PUBLIC PROTECTOR ACT, 1994**



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“COST OF DEVIATION”

**REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR AWARD OF A
TENDER AND IRREGULARITIES RELATING TO PAYMENTS FOR THE
CONSTRUCTION OF TOP STRUCTURE OF RDP HOUSES IN AREA 9 AND 10
UITENHAGE, IN PORT ELIZABETH, EASTERN CAPE**



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"...The stimulation of SMMEs must be seen as part of an integrated strategy to take this economy onto a higher road - one in which our economy is diversified, productivity is enhanced, investment is stimulated and entrepreneurship flourishes..."

Extract from the Preamble to the White Paper on National Strategy for the Development and Promotion of Small Business in South Africa, tabled in Parliament on 20 March 1995 by the Department of Trade and Industry.

Executive Summary

- (i) **"Cost of Deviation"** is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act 23 of 1994.
- (ii) The report communicates my findings and the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged irregular awarding of a tender to build RDP houses in areas 9 and 10 Uitenhage, Port Elizabeth, the irregular utilisation of conditional grant funds meant for top structures causing improper allocation and insufficiency of funds for work done on the top structure for each housing unit, by Nelson Mandela Bay Metropolitan Municipality (the Municipality) in 2009, resulting in the underpayment of the Complainants by the amount of **R10 161.00 per unit on 1286 units**.
- (iii) The Complainant is Gobo Gcora Construction represented by its Directors, Mr Sipho Gcora and his wife, Mrs Khuselwa Gobo Gcora. Gobo Gcora Construction is a subcontractor to WK Construction, the Contractor, which was awarded a tender by the Municipality, for the provision of internal services and top structures in areas 9 and 10 Kwa-Nobuhle, Uitenhage. The role of the Complainant was to build the top structure of the said houses. The Complaint was also that WK construction should not have been awarded the tender as the main contractor as the law prohibited it from



being awarded a building contract of that nature as it was not registered with the National Home Builders Registration Council (NHBRC) as required by law.

(iv) In the main, the Complainant alleged that:

- 1) The tender to build RDP houses in areas 9 and 10 in Kwa-Nobuhle, Uitenhage was irregularly awarded to the Contractor in contravention of the Housing Consumers Protection Measures Act No. 95 of 1998.
- 2) In October 2010, the Municipality irregularly used funds allocated under the conditional grant for the building of subsidised houses in contravention of the conditions of approval as prescribed by the Director General for Human Settlements and the Housing Act.
- 3) The Complainant was directed to implement verbal variation orders that were made by the Municipality's engineer and was not paid for the additional work done.
- 4) The Municipality contravened its Supply Chain Management Policy, the Municipal Finance Management (MFMA) and the Housing Act by appointing and effecting payment to the Contractor for the construction of houses while the Company was not registered with the National Home Builders Registration Council (NHBRC) as is required by the Housing Consumer Protection Measures Act.
- 5) On 26 March 2009, the Director General for Human Settlements announced per letter a subsidy for the construction of houses for the 2009/2010 financial year. The letter allows for municipalities on the MEC's approval to spend up to a maximum of R18 521.35 per serviced stand for the construction of water mains, sewer mains, internal roads and storm water.



- 6) The Municipality contravened the above as it spent in excess of R27 000.00 for the provision of water mains, sewer mains and internal roads.
 - 7) The Municipality used funds that are appropriated for house construction to pay for work done under engineering services by the Contractor, a contractor that was precluded from performing house construction work at the time of awarding the tender.
 - 8) All the funds accessed for top structure should be paid to him, the Complainant.
 - 9) The Complainant was short paid by an amount of R10 161 per unit on 1286 units.
- (v) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level. The Municipality did not contest or dispute the jurisdiction of the Public Protector.
- (vi) Some of the aforementioned allegations relating to the relationship between the Municipality, the Contractor and the Department of Human Settlements, were not canvassed in particular detail. The report is, accordingly, only confined to the alleged maladministration by the Municipality that allegedly resulted in the Complainant suffering prejudice.
- (vii) As the investigation proceeded, my attention was drawn to the fact that litigation had taken place whereby the Municipality succeeded in showing that it had no contractual relationship with the Complainant. In this regard, it is important to note that this



investigation eschewed the contractual question focussing on whether or not the Municipality was responsible for any improper conduct or maladministration and if the answer is affirmative, whether the Complainant was prejudiced by such improper conduct or maladministration.

(viii) Based on an analysis of the complaint, the following issues were identified to inform and focus the investigation:

- A. Whether the tender for the construction of RDP houses in Areas 9 and 10 in Uitenhage, Port Elizabeth to the Contractor was irregularly awarded;
- B. Whether the funds from the conditional grant for building the top structure were irregularly used for internal services;
- C. Whether the Municipality improperly allocated insufficient funds for work done on the top structure for each housing unit; and
- D. Whether the Complainant suffered prejudice due to the conduct of the Municipality in the circumstances.

(ix) The investigation process proceeded with an attempt to resolve the dispute by mutual agreement between the Municipality and the Complainant. When these endeavours failed, the evidence and information gathered during the process were used as a basis for a full investigation culminating in his report.

(x) Upon completion of the investigation, a notice issued in terms of section 7(9) of the Public Protector Act, was addressed to the Acting Municipal Manager of the Nelson Mandela Metropolitan Municipality. **The Municipality accepted the findings and remedial action in its written response dated 14 December 2015.** The actions of the leadership of the Municipality in this regard are appreciated and commended.



- (xi) Key laws and related prescripts taken into account to help determine if there had been maladministration by the Municipality, were principally those imposing administrative standards that should have been upheld by the Municipality or its officials when awarding the tender and making payments from the conditional grant were the Municipal Finance Management Act 56 of 2003(MFMA), Housing Consumers Protection Measures Act 95 of 1998 (HCPMA) and the Housing Act, 1997. Special attention was paid to section 114(1) of the Municipal Finance Management Act, National Treasury Practice Note No 8 of 2007/2008 and section 27 (1)(d)(i)(ii) of the Supply Chain Management Policy of the Nelson Mandela Metropolitan Municipality, 2009, as the Municipality initially wrongly relied on it for authority to procure services from a company not registered with the National Home Builders Registration Council (NHBRC) as required by law.
- (xii) The regulatory framework was also used to determine the legality of the Municipality's benefit from the shortfall in payments for work done on the top structure on each housing unit, which benefit had never been denied. Regarding the responsibility of the state to for pay for services rendered even if there is no contract with the service provider, some of the observations in my report titled *"Unsettled Settlement"* were helpful. Key in this regard is that remedial action in terms of section 182 of the Constitution seeks to remedy injustice suffered due to improper conduct in state affairs and is not a remedy for breach of contract as envisaged in civil law. In this regard the absence of a contract or evidence of breach thereof is immaterial.
- (xiii) Having regard to the evidence, the regulatory framework determining the standard the Municipality should have complied with and the impact on the Complainant, I make the following findings:

1 Regarding whether the tender for the construction of RDP houses in Areas 9 and 10 in Uitenhage, Port Elizabeth was irregularly awarded:



- (a) The allegation that the tender to build the RDP houses was irregularly awarded is substantiated;
- (b) Section 114(1) of the MFMA, and paragraph 36(1) of the Municipal Supply Chain Management Policy do not permit Municipalities to deviate from procuring services from suitably qualified service providers. These only permit process deviations in specified circumstances, which include emergencies and single source suppliers.
- (c) The Municipality awarded the tender to build RDP houses to a Contractor that was not registered with the National Home Builders Registration Council (NHRBC) in violation of section 10(1) of the Housing Consumers Protection Measures Act, 1998;
- (d) The Municipality's award of the tender to build RDP houses to a Contractor not registered with the NHBRC in violation of section 10(1) of the Housing Consumers Protection Measures Act, constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution; and
- (e) The Municipality's awarding of the tender to build RDP houses to a Contractor that did not comply with section 10(1) of the Housing Consumers Protection Measures Act is also in violation of sections 195(1)(b) and 217 of the Constitution, section 114(1) of the MFMA and paragraph 27(1)(d)(i)(ii) of its SCM Policy. The Municipality's conduct in this regard also constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.



2. *Regarding alleged irregular use of funds from the conditional grant for building the top structure for internal services:*

- (a) The allegation that the Municipality irregularly used funds from the conditional grant for building the top structure for internal services, a purpose for which it was not intended for, is substantiated;
- (b) The Municipality failed to comply with the directive dated 20 March 2009 from the Provincial Department of Human Settlements, that the Municipality should utilise R 22 162.00 per stand from the funds of the top structure, but it utilised R27 000.00;
- (c) The Municipality's conduct in this regard constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

3. *Regarding whether the Municipality improperly allocated insufficient funds for work done on the top structure for each housing unit:*

- (a) The allegation that the Municipality improperly allocated insufficient funds for work done on the top structure for each housing unit is substantiated;
- (b) The Municipality failed to regulate the discrepancy between the drawings of the top structure for the houses and the bill of quantities. Such failure constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution; and
- (c) The Municipality also failed to show how the Contract Price Adjustment (CPA) was applied to the top structure. Such failure also constitutes maladministration



as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

4. *Regarding whether the Complainant suffered prejudice due to the conduct of the Municipality in the circumstances:*

- (a) The Complainant, who is a small business person, suffered enormous prejudice in that it was left out of pocket after using its own money to fill the gap arising from the Municipality's funding shortfall after the latter wrongly used for internal purposes, the grant money meant for the top structure construction.
- (b) The Complainant's prejudice was exacerbated by the fact that it has taken five (5) years for the Municipality to accept its wrongdoing and agree to remedy the injustice suffered by the Complainant.
- (c) The prejudice suffered by the Complainant includes interest that could have been earned and opportunities it could have taken had the money been received instantly as well as emotional pain and suffering experienced by its directors as they sought to claim the money in the five (5) year journey.
- (xiv) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where it would have been had the improper conduct or maladministration not occurred, while addressing systemic Supply Chain Management deficiencies in the Municipality, is to require the Municipality:
 - (a) In consultation with the Complainant, to reconcile payments made to the Complainant for the top structures and pay the **Complainant the deficit, with interest**, within 30 days thereof.



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- (b) To audit work done as per the drawings of the houses that would have given rise to adjustments in the bill of quantities, and pay the Complainant those relating to the construction of the top structure, accordingly.
 - (c) To issue a written apology to the Complainant and its directors.
 - (d) To ensure that in circumstances where deviation is reasonably foreseeable, it puts in place specific systems to regulate the effects of the deviation in the operational issues that may adversely affect its accountability for the expenditure.
 - (e) To ensure that all its officials involved in Supply Chain Management are properly familiarized with the MFMA, with particular reference to permissible deviations in terms of Chapter II of the MFMA.
 - (xv) The Municipality deserves to be commended for a rational response to the findings communicated through the notice issued in terms of section 7(9) of the Public Protector Act and the commitment made to implement the remedial action seeking to place the Complainant as close as possible to where it would have been but for the improper conduct. The action of the Municipality's top leadership in this regard is exemplary.



REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR AWARD OF A TENDER AND IRREGULARITIES RELATING TO PAYMENTS FOR THE CONSTRUCTION OF TOP STRUCTURE OF THE RDP HOUSES, IN AREA 9 AND 10 UITENHAGE, IN PORT ELIZABETH, EASTERN CAPE

1. INTRODUCTION

1.1. *"Cost of Deviation"* is my report as Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act) following an investigation into alleged maladministration in the procurement of a principal service provider to build RDP housing in the Nelson Mandela Bay Metropolitan Municipality (the Municipality) and improper use of grant funds for the said project by the Municipality resulting in a subcontractor being underpaid.

1.2. The report is submitted in terms of section 8(1) of the Public Protector Act, to: The Executive Mayor of the Nelson Mandela Metropolitan Municipality;

1.1.1 Copies of the report are also provided to the following:

1.2.2 The Acting City Manager of the Nelson Mandela Metropolitan Municipality, Mr Johann Mettler; and

1.2.3 The Complainant

1.3 The report relates to an investigation into the alleged irregular awarding of a tender to build RDP houses in areas 9 and 10 Uitenhage, Port Elizabeth, the irregular utilisation of conditional grant funds meant for top structure, and improper and insufficient allocation of funds for work done on the top structure of each housing unit.



2. THE COMPLAINT

2.1. Mr Sipho Gcora and Mrs Khuselwa Gobo Gcora, who are directors of Gobo Gcora Construction lodged a complaint on 28 March 2011, on behalf of Gobo Gcora Construction (the Complainant) alleging that the Municipality was unduly refusing to pay their company the amount of **R10 161.00 per unit for 1286 units** duly earned from building top structures of RDP houses following verbal variation orders that increased the scope of work for work completed by their company as a subcontractor to WK Construction. They also alleged that the main contractor, WK Construction should not have received the tender in the first place as it was not registered with the National Home Builders Registration Council (NHBRC) as required by law.

2.2 The specific allegations made by the Complainant were that:

2.2.1 In June 2009, a tender was submitted to the Municipality for building 1445 RDP houses in areas 9 and 10 in Kwa-Nobuhle, Uitenhage.

2.2.2 The project should have been awarded in September 2009, but was only awarded in November 2009 and the contract was only signed on 25 January 2010.

2.2.3 The tender validity period was extended to accommodate the internal delays within the Municipality, which included an increase in material prices. The bill of quantities which was provided by the Municipality had shortcomings which were only corrected verbally on site.

2.2.4 At the time that the tender was submitted the rate to build a house was R66 889.00 excluding VAT and contingency.



- 2.2.5 If the houses were to be built in line with the bill of quantities which was provided at the time of tender for pricing purposes, the houses would have been of inferior quality.
- 2.2.6 The Complainant was compelled to effect/ implement verbal changes that were made by the engineer; however the Complainant did not receive payment for additional work done.
- 2.2.7 As a result of ground conditions in the projects they were working on the total approved funding per unit in Kwa-Nobuhle area 10, which was R77 050.00 which excluded the amount of R1500.00 for solar geyser variation, which is something they did not do and do not expect payment for. The total approved amount per house was R78 550.00 which included the R1500.00 for solar geyser variation.
- 2.2.8 The above mentioned amounts are being approved for the construction of houses and claimed from the Provincial Department, however the funds are not used for what they have been approved for.
- 2.2.9 The Complainant was short paid by an amount of **R10 161.00 per unit on 1286 units.**
- 2.2.10 Despite the fact that the MEC of Human Settlements has only approved R25 564 543.20 for civil or municipal engineering services, the Contractor was irregularly paid R35 254 125.28 which resulted in irregular expenditure of R9 689 582.08.
- 2.2.11 It is common sense to assume that the Municipality, the Engineer and the Contractor have contravened the law by using funds approved for houses, which is the work that the Complainant is doing, to enrich the Contractor.



2.2.12 The letter dated 26 March 2009 issued by the previous Director-General for Housing stated that "in cases where the subsidy funding is used for the provision of municipal engineering services as indicated, the maximum amount that may be considered for the 2009/2010 financial year is R22 162.00 per stand.

2.2.13 According to the above mentioned letter, the maximum amount that may be considered for municipal engineering services is R18 531.25 per stand. However, in Kwa-Nobuhle area 10, R28 584.43 was paid to the Contractor. This presents an escalation of 54.25% per unit.

2.2.14 In Kwa-Nobuhle area 9, there was an over expenditure of R15 000.00 on municipal engineering services.

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***
- (c) to take appropriate remedial action."***



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- 3.3 Section 182(2) 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 Act also gives the Public Protector power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5 The Nelson Mandela Metropolitan Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the jurisdiction of the Public Protector.
- 3.6 None of the parties disputed the power to investigate. However, at the initial stages of the investigation, the Municipality objected to the Complainant's *locus standi* as the Complainant was a subcontractor with no direct contractual relationship with the Municipality, an objection that allegedly succeeded in the courts. It was conceded that the objection would be valid if the investigation sought to deal with breach of contract.
- 3.7 The Municipality was advised that the investigation sought to establish if there was any improper conduct on the part of the Municipality involving maladministration or a related administrative wrong envisaged in section 6 of the Public Protector Act and if the Complainant or any other person had suffered prejudice or injustice as a result of such improper conduct.



4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 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. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 When an attempt to get the parties to settle the dispute through a conciliation process did not yield results, a formal investigation was undertaken. The investigation process included correspondence, interviews, sourcing of documents and the sourcing and application of relevant laws and related prescripts.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, 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 amount to maladministration? If so how can the



Complainant or victim of injustice be placed as close as possible to where they would be if it were not for the improper conduct or maladministration.

- 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. In this particular case, the factual enquiry principally focused on whether or not the Municipality awarded the tender to the contractor in the manner alleged, whether it used funds from the conditional grant for the top structure for internal services, and whether it allocated insufficient funds for work done on the top structure for each housing unit.
- 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 organ of state to prevent maladministration and prejudice. The specific questions in this regard focussed on whether the award of the tender complied with the substantive and procedural requirements of the law and related prescripts. Key in this regard was whether or not a Municipality can award a tender to a company that is not registered with the NHBRC. The investigation also sought to clarify the rules for the use of conditional grants and if these were complied with. Finally, the law was consulted regarding the Municipality's duty to pay for work it has benefited from and which has not been paid for by the main contractor due to the Municipality's failure to pay in full for work done even if that work was done on the basis of verbal variation orders. In this regard account was taken of the fact that the work in question had to be done as the RDP houses could not be without top structures or roofs.
- 4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for correcting improper conduct or maladministration and redressing its consequences. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the organ of state concerned



complied with the regulatory framework setting the applicable standards for good administration.

4.2.5 The investigation revealed that it involved much more than a mere lack of standing for the Complainant as a sub-contractor to raise issues with the Municipality but a number of issues of maladministration ranging from the irregular award of a tender, irregular utilisation of funds from the conditional grant for top structure for internal services, and improper and insufficient allocation of funds for work done on the top structure for each housing unit.

4.3 On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Whether the tender for the construction of RDP houses in Areas 9 and 10 in Uitenhage, Port Elizabeth to the Contractor was irregularly awarded;

4.3.2 Whether funds from the conditional grant for building the top structure were irregularly used for internal services;

4.3.3 Whether the Municipality improperly allocated insufficient funds for work done on the top structure for each housing unit; and

4.3.4 Whether the Complainant suffered prejudice due to the conduct of the Municipality in the circumstances.



4.4 The Key Sources of information

4.4.1 Documents

- 4.4.1.1 Copy of the advertisement for the tender and list of applications for the tender dated 10 June 2009;
- 4.4.1.2 Adjudication Committee Meeting: Supplementary Agenda dated 17 September 2009;
- 4.4.1.3 Funding Agreement between the Department of Human Settlements and the Municipality dated 29 May 2010;
- 4.4.1.4 Letter to the Municipality, Mr Mapu, Senior Manager, Project Management & Quality Assurance increasing the scope of work dated 7 May 2010;
- 4.4.1.5 Memorandum to the City Manager, Dr L Msengana, explaining reasons for exceeded project budget and contract price dated 4 June 2013;
- 4.4.1.6 Memorandum to the City Manager, Acting Municipal Manager, S Thys explaining reasons for exceeded project budget and contract price dated 13 June 2013;
- 4.4.1.7 Response to letter in terms of Section 7(4) and Section 7(5) of the Public Protector Act by the former City Manager, Mr Mpilo Mbambisa, dated 10 September 2014;
- 4.4.1.8 Schedule of payments from the Complainant in relation to the top structure of the houses;
- 4.4.1.9 Response from the Complainant on Section 7(4) and (5) of the Public Protector Notice;



4.4.1.10 Response from the Municipality on letter dated 10 September 2014; and

4.4.1.11 Schedule of payments to the Contractor by the Municipality.

4.4.2 Meetings and Interviews conducted

4.4.2.1 On the 25 June 2014, a meeting was held with the Complainant regarding the allegations and the following people were in attendance:

4.4.2.2 Adv. Thuli Madonsela: Public Protector;

4.4.2.3 Adv. Kevin Malunga: Deputy Public Protector;

4.4.2.4 Adv. George Maxakato: Senior Investigator;

4.4.2.5 Ms Siphokazi Jika: Senior Investigator; and

4.4.2.6 Mr Sizwe Mazantsi: Investigator.

4.4.2.7 9 September 2014, the following interviews were held with the officials from the Municipality and Department of Human Settlements regarding the allegations by Mr Gcora:

4.4.2.8 Mr L Petuna, Executive Director: Human Settlements;

4.4.2.9 Mr Ilhaam Adams: Executive Secretary;

4.4.2.10 Mr Calvin Brummer: Director Development and Support: Human Settlements

4.4.2.11 Ms Bonnie Chan :Internal Audit;

4.4.2.12 Mr Mawande Bisiwe: Assistant Director, Development and Support: Human Settlements;

4.4.2.13 Ms Ntombekhaya Mzinzi: Legal Section, Office of the City Manager; and

4.4.2.14 Mr Zweledinga Nkayitshana: Director, Administration.



4.4.3 On 10 September 2014, interviews were held with the officials from the Municipality regarding the submission of the documents that were requested:

4.4.3.1 Mr L Petuna, Executive Director: Human Settlements;

4.4.3.2 Mr Calvin Brummer: Director Development and Support: Human Settlements;

4.4.3.3 Ms Bonnie Chan: Internal Audit Mr Mawande Bisiwe: Assistant Director Development and Support: Human Settlements; and

4.4.3.4 Mr Zweledinga Nkayitshana: Director Administration.

4.4.4 On 27 October 2014, a meeting was held with the following officials from the Municipality and the Complainants with a view to finding alternatives in resolving the dispute

4.4.4.1 Complainants (Mr and Mrs Gcora in their capacity as Directors of Gobo Gcora Construction)

4.4.4.2 L Petuna

4.4.4.3 Mr M Bisiwe

4.4.4.4 Mr C Brummer

4.4.4.5 Mr Mconi

4.4.4.6 MS N Mzinzi

4.4.4.7 Mr D Lavin

4.4.4.8 Mrs B Chan

4.4.4.9 Mr T Ngcolomba

4.4.5 Correspondence sent and received

4.4.5.1 Letter sent to the Office City Manager, dated 18 August 2014;

4.4.5.2 Letter received from the Executive Director, Human Settlements dated 10 September 2014;



4.4.5.3 Copies of tender documents collected on 09-10 September 2014;

4.4.5.3.1 Response from the Complainant dated 27 October 2015;

4.4.5.4 Complainant's comments on the response from the Municipality dated 5 November 2014

4.4.5.5 Internal Audit Risk Assurance Report from the Municipality dated 4 February 2015;

4.4.6 Notices issued in terms of Section 7(9) of the Public Protector Act, 1994 to:

4.4.6.1 Mr. M Clay, the then Acting City Manager Nelson Mandela Metropolitan Municipality dated 22 October 2015;

4.4.7 Request for information to enable response to the notice issued in terms of section 7(9) of the Public Protector Act, 1994, from

4.4.7.1 Mr M Clay, the then Acting City Manager Nelson Mandela Metropolitan Municipality dated 18 November 2015.

4.4.8 Response to the notice in terms of Section 7(9) of the Public Protector Act, 1994, from

4.4.8.1 Mr Johann Mettler, the Acting City Manager Nelson Mandela Metropolitan Municipality, dated 15 December 2015.

4.4.9 Legislation and other prescripts

4.4.9.1 Acts

4.4.9.1.1 The Constitution of the Republic of South Africa, 1996

4.4.9.1.2 The Public Protector Act No. 23 of 1994

4.4.9.1.3 Public Finance Management Act No. 29 of 1999



4.4.9.1.4 Municipal Finance Management Act No. 56 of 2003

4.4.9.1.5 Housing Consumers Protection Measures Act No. 95 of 1998; and

4.4.9.1.6 The Housing Act No. 107 of 1997.

4.4.9.2 Regulations

4.4.9.2.1 Treasury Instruction Note on enhancing compliance monitoring of 31 May 2011;

4.4.9.2.2 Municipal Supply Chain Management Regulations;

4.4.9.2.3 National Treasury Practice Note 8 of 2007/8;

4.4.9.2.4 National Treasury Circular 3/4/3/2/10 of 24 March 2006; and

4.4.9.2.5 The National Housing Code 2009.

4.4.9.3 Policies

4.4.9.3.1 Nelson Mandela Municipality Supply Chain Management Policy 2009.

4.4.9.4 Agreements

4.4.9.4.1 The funding agreements between the Provincial Department of Human Settlements and the Municipality.

5. STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1 Regarding the alleged irregular award of the tender to a Company which does not qualify

5.1.1 Procurement irregularities

5.1.1.1 General Principles



5.1.1.1.1 The conduct and procurement of goods and services in Nelson Mandela Metropolitan Municipality (the Municipality) is principally regulated by its own corporate Supply Chain Management (SCM) Policy.

5.1.1.1.2 Key provisions regulating the impugned conduct of the NMMM as per the complaints cover Demand Management and Acquisition Management. Any procurement transaction executed according to the rules and accordingly qualifying not to be adjudicated as constituting maladministration or improper conduct would have conformed to the demand management and acquisition management processes.

5.1.1.1.3 I have considered it proper to also present a comprehensive overview of all the key constitutional provisions, laws, policies and related regulatory instruments that collectively shape the standard of compliance that the impugned NMMM decisions should have complied with to escape being classified as irregular, thus constituting maladministration or improper conduct.

5.1.1.1.4 It must be understood upfront that for conduct to escape a finding of irregularity and ultimately, maladministration or improper conduct, the decision-maker must have had authority to act, acted within the confines of that authority and followed the procedure prescribed by the authorizing instrument should such procedure be prescribed.

5.1.1.1.5 However, it must be equally noted, as clarified by the Constitutional Court in **Allpay Consolidated Investment Holdings (PTY) Ltd v Chief Executive Officer of the South African Social Security Agency** that deviation per se does not deserve an irregularity finding.



5.1.1.1.6 Where the authorizing instrument permits deviation, a finding of irregularity can only be escaped if the conduct in question complied with the authority to deviate and remained within the permissible boundaries. In other words, deviation is permitted under specified conditions and becomes irregular if such specified conditions were not complied with. Conduct that does not comply with prescribed procedure or permissible deviation provisions, may still escape irregularity if the deviation was not material and the impugned conduct was reasonable and rational in the circumstances.

5.1.1.2 The Constitution

5.1.1.2.1 The Constitution enjoins the Municipality and all other organs of state to ensure that contracts for goods and services are entered into in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Section 217 of the Constitution provides that:

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



5.1.2 Allpay Consolidated Investment Holdings (PTY)Ltd v Chief Executive Officer of the South African Social Security Agency (No 1) (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC)

5.1.2.1 In his judgment on 29 November 2013 Justice Froneman held that:

"It is because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost-effective manner."

5.1.2.2 The Court further held that:

"...deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."

5.1.2.3 With regard to compliance with the regulatory framework in procurement, the court held that:

"Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms



of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair."

- 5.1.2.4 In resorting to procurement under emergency/urgency provisions state organs cannot rely on lack of planning or self-created urgency to justify deviation from the mandatory competitive and transparent bidding processes and the legislative prescripts.
- 5.1.3 Applicable Legislation**
- 5.1.3.1 Overview
- 5.1.3.2 Building on section 217 of the Constitution, national legislation seeks to provide public functionaries, principally accounting officers and authorities, with guidance regarding the key elements of a procurement system that is fair, equitable, transparent, competitive and cost effective. Practical measures need to be implemented to ensure that procurement in their organs of state is undertaken in accordance with such a system.
- 5.1.3.3 The legislative framework, which includes the Preferential Procurement Policy Framework Act No. 5 of 2000, the Municipal Finance Management Act No. 56 of 2003 and Treasury Regulations, also incorporates elements of financial management, more specifically relating to avoiding financial mismanagement in the procurement of goods and services.



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- 5.1.3.4 The legislative framework basically unpacks the constitutional principles such as fairness, equity, transparency and competitiveness while outlining processes to be followed for a proper procurement process.
- 5.1.3.5 It is worth noting that the six phased Supply Chain Management cycle, incorporating Demand Management, Acquisition Management; Logistics Management; Disposal Management; Risk Management; and Regular Assessment of Supply Chain Performance, that is captured in the Municipality's SCM Policy comes from paragraph 16A3.2 of Treasury Regulation which seeks to provide an integrated framework that seeks to simplify compliance with the legal framework for public functionaries involved in the procurement of goods and services. It is my considered view that compliance with the Municipality policy is automatic compliance with the constitutional and legal policy framework. In the same token, a violation of the Municipality's SCM Policy translates into contravention of the national legal framework on procurement.
- 5.1.3.6 Preferential Procurement Policy Framework Act (PPPFA), Act No. 5 of 2000, is the key legislation, directly giving effect to section 217 of the Constitution principally provides guidance on striking a balance between the weighting of the functionality of goods and services providers, incorporating pricing and ability to deliver, and considerations of equitable access to state contracts for historically disadvantaged business owners or suppliers.
- 5.1.3.7 The PPPFA provides the framework for implementation of preferential procurement policy. Section (2) states that:
- "(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:*
- (a) A preference point system must be followed;*

- (b)
 - (i) *for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*
 - (ii) *for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;*
- (c) *any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;*
- (d) ...
- (e) *any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;*
- (f) *the contract must be awarded to the tenderer who scores the highest points unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*
- (g) *any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have"*



5.1.3.8 The MFMA essentially sets standards for financial management, including financial controls, the MFMA's provisions have enormous compliance implications for and, to some extent; spill over to the regulation of aspects of state procurement. Key provisions in this regard are principally those relating to fiscal discipline or prudence and the duties imposed on accounting officers.

5.1.3.9 It is the MFMA read with Treasury Regulations and guidelines issued under it that bring everything regarding the responsibilities that the accounting officer was required to comply with to escape a finding of maladministration or improper conduct owing to procurement irregularities as alleged in the complaints investigated.

5.1.3.10 The preamble of the MFMA states that it seeks:

"To secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government; to establish treasury norms and standards for the local sphere of government; and to provide for matters connected therewith".

5.1.3.11 The MFMA imposes certain basic responsibilities on accounting officers regarding financial and procurement management. The questions that had to be answered with regard to the impugned conduct of the Municipality are principally regulated by section 80 and 61 which provides, among others, that:

"as accounting officer, must-

(a) exercise the functions and powers assigned to an accounting officer in terms of this Act; and

(b) provide guidance and advice on compliance with this Act to-



(i) *the political structures, political office-bearers and officials of the municipality; and*

(ii) *The accounting officer of a municipality must-*

(a) *act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;*

5.1.3.12 Section 62 which deals with general financial management functions provides:

(1) *The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure-*

(a) *that the resources of the municipality are used effectively, efficiently and economically;*

(b) *that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards;*

(c) *that the municipality has and maintains effective, efficient and transparent systems-*

(i) *of financial and risk management and internal control; and*

(ii) *of internal audit operating in accordance with any prescribed norms and standards;*

(d) *that unauthorized, irregular or fruitless and wasteful expenditure and other losses are prevented;*

(e) ...

(f) *...that the municipality has and implements-*

(i) *...*

(ii) *...*

(iii) *...*

(iv) *a supply chain management policy in accordance with Chapter 11".*

5.1.3.13 The issue of awarding of tenders is regulated in the main by the provisions of section 112 of the Municipal Finance Management Act, which prescribes:

"(1) The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management."

5.1.3.14 Implementation of, and separation of duties in supply chain management is regulated by section 115 of MFMA, which provides:

"(1) The accounting officer of a municipality or municipal entity must-

(a) *implement the supply chain management policy of the municipality or municipal entity; and*

(b) *take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices".*

5.1.3.15 National Treasury Practice Note No: 8 of 2007/2008. The practice note is issued in terms of section 76(4)(c) of the Public Finance Management Act and is intended to regulate the threshold values within which accounting officers/authorities may



procure goods, works and services by means of petty cash, verbal/written price quotations or competitive bids.

5.1.3.16 Paragraph 3.4.1 of the National Treasury Practice Note 8 of 2007/2008 deals with bids above the R500 000.00 thresholds. It provides that:

"Accounting officers/authorities should invite competitive bids for all procurement above R 500 000".

Paragraph 3.4.2 prescribes that:

"Competitive bids should be advertised in at least the Government Tender Bulletin and in other appropriate media should an accounting officer/authority deem it necessary to ensure greater exposure to potential bidders".

Paragraph 3.4.3 deals with the issue of urgency or emergency situations and prescribes:

"Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 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 involved and the reasons for dispensing with the prescribed competitive bidding process".



5.1.3.17 Municipal Supply Chain Management Regulations, 30 May 2005, through the Regulations in the Gazette 27636, prescribe how the supply chain management policies should be and what it should contain. It prescribes:

Section 38(1) A supply chain management policy must provide measures for the combating of abuse of supply chain management systems, and must enable the accounting officer to-

(a) to take reasonable steps to prevent abuse of the supply chain management system

5.1.3.18 The Supply Chain Management Policy of Nelson Mandela Metropolitan Municipality (Municipality), 2009. Chapter 2 of the Municipality Supply Chain Management Policy, 2009 deals with demand acquisition, management, particularly sections 19 and 20 which deal with competitive bidding and the process thereof.

5.1.3.19 The Municipality SCM Policy provides for Bid Specification Committees

Section 27 (1) A a bid specification committee must compile the specifications for each procurement of goods or services by the municipality.

(2) Specifications-

a) must be drafted in an unbiased manner to allow potential suppliers to offer goods or services;

b) must take account of any accepted standards such as those issued by Standards South Africa, the International Organization, or an authority accredited



or recognized by the South African Accreditation System with which the equipment or material or workmanship should comply;

c) ...

d) May not create barriers in the contract requirements in the forms of specification, plans, drawings, design, testing and test methods, packaging, marketing of conformity certification.

The accounting officer may

Dispense with the official procurement process established by this Policy and to procure any required or services through any convenient process, which may include direct negotiations, but only

i) in an emergency:

ii) in any minor breaches of the procurement process by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature.

The accounting officer must record and explain the reasons for any deviations in terms of subparagraphs (1) (a) and 9(b) above this policy and report them to the next meeting of the council and include it as a note to the annual financial statements.

Combating of abuse of supply chain management system

The accounting officer must –

Take all the reasonable steps to prevent abuse of supply chain management system;



- 5.1.3.20 Touchstones or principles from previous Public Protector Reports were also considered. In this regard, principles regarding different responsibilities and processes in a valid supply chain process discussed in reports such as *"Against the Rules Too"*, a report on allegations of improper procurement of the lease of office accommodation for the SAPS in the Sanlam Middestad building in Pretoria and the Transnet Building in Durban by the National Commissioner of the South African Police Service (SAPS) and the Department of Public Works (DPW), and *"Derailed"* a report on allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA), were considered.
- 5.1.3.21 Key applicable lessons from the reports consulted relate to the proper use of permissible deviations. If the conditions for permissible deviations do not obtain at time of deviation, the deviation is unlawful.
- 5.1.3.22 Regarding the responsibility of the state to pay for services rendered even if there is no contract with the service provider, some of the observations in my report titled *"Unsettled Settlement"*, were helpful. Key in this regard is that remedial action in terms of section 182 of the Constitution seeks to remedy injustice suffered due to improper conduct in state affairs and is not a remedy for breach of contract as envisaged in civil law. In this regard the absence of a contract or evidence of breach thereof is immaterial.
- 5.1.3.23 A further point made in this report, is that the process of awarding contracts, particularly contracts worth millions of rand, as is the case in point, through deviations must be discouraged as it is open to abuse. The award of contracts of huge financial value seems to be a growing and worrying trend. While the practice may not necessarily be unlawful, the use of this avenue in many of the circumstances, including the present, does not seem justified. Not only do such practices undermine fair competition, there is no doubt that there is a growing



negative impact on quality and cost effective pricing, and accordingly, the objectives of section 217 of the Constitution.

5.1.3.24 The issue regarding the registration of home builders is regulated by the Housing Consumers Protection Measures Act 95 of 1998.

5.1.3.25 In terms of section 10 (1) of the Housing Consumers Protection Measures Act, *"no person shall carry on the business of a home builder or receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home unless that person is a registered home builder. No home builder shall construct a home unless that home builder is a registered home builder"*.

5.1.3.26 In **Hubbard, Anne Christine v Cool Ideas 11866 CC (580/12)[2013] ZASCA 71(28 May 2013)** the court held that the intention of the legislature in this regard is very clear in that it is to protect the housing consumer and it further emphasizes the prohibition of a home builder from commencing the construction unless issued with a certificate. Even though Section 14A permits late enrolment this relaxation does not in any way find expression in the application of Section 10 of the Act. In this instance, the express prohibition by the legislation ought to have been carried out to the last letter by the Municipality.

5.1.3.27 Section 1 (b) of the Municipality's Supply Chain Management Policy provides, amongst other things, that the Municipality must implement the policy in a way that is fair, equitable, transparent, competitive and cost effective.

5.1.3.28 Section 36 (1) (a) further provides that the Accounting Officer may dispense with the official procurement processes established by this Policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only:



- (i) in an emergency;
- (ii) ...
- (iii) ...
- (iv) ...
- (v) *in any other exceptional case where all possible options have been explored, and it is still impractical or impossible to follow the official procurement processes.*

5.2. Regarding the alleged irregular use of funds from the conditional grant for building the top structure for internal services

5.2.1 Section 1 of the Municipal Finance Management Act, (MFMA) defines an unauthorized expenditure in relation to a municipality as an overspending of the total amount appropriated in the municipality's approved budget or expenditure of money appropriated for a specific purpose.

5.2.2 Section 114(1) of the Municipal Finance Management Act, (MFMA) provides that, *if a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality entity is approved, the Accounting Officer of the municipality or municipality must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality, of the reasons for deviation from such recommendation.*

5.2.3 Generally, from sections 1 to 6 of the Funding Agreement, the Municipality would apply for approval of the housing subsidy grant, and undertake the project in accordance with the policy guidelines as contained in the National Housing Code, 2009, (the Code). I



- 5.2.4 Section 5.1.3 of the Funding Agreement between the Department and the Municipality stipulates the duties of the Department relating to particularly the stages at which payments for the top structure have to be effected.
- 5.2.5 Section 6 of the Funding Agreement between the Department and the Municipality stipulates the duties and obligations of the Municipality which assumes the responsibilities of a developer as deemed in the Code, and for the installation of internal services and construction of the top structure of 1295 units. It also stipulates the terms and conditions of the disbursement of funds for the project in question.
- 5.2.6 Section 12 of the Code sets out the circumstances in which variations may be allowed. The agreement of variation must be in writing, allowing a variation of up to 15% to accommodate the extraordinary conditions of topography and geo physical conditions, and such conditions to be confirmed in the evaluation in terms of the minimal precautionary measures by a professional evaluator.
- 5.2.7 Section 36 (1)(a) of the Municipality's Supply Chain Management Policy provides that the Accounting Officer may dispense with the official procurement processes established by this Policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only:
- (i) in an emergency;
 - (v) in any other exceptional case where all possible options have been explored, and it is still impractical or impossible to follow the official procurement processes.
- 5.2.8 Section 38(1) the Municipality's Supply Chain Management Policy provides that the Accounting Officer must take all reasonable steps to prevent abuse of the supply chain management system.



5.3 Regarding whether the Municipality improperly allocated insufficient funds for work done on top structure for each housing unit

5.3.1 Section 38 of the PFMA provides that the Accounting Officer must ensure an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

5.3.2 Paragraph 3.4.1 of National Treasury Practice Note 8 of 2007/2008 provides that the accounting officers should invite competitive bids for all procurement above R 500 000".

5.3.3 Section 12 of the Code sets out the circumstances in which variations may be allowed. The agreement of variation must be in writing, a variation of up to 15% to accommodate the extraordinary conditions of topography and geo physical conditions, and such conditions be the confirmed evaluation in terms of the minimal precautionary measures by a professional evaluator.

5.3.4 Section 38(1) of the Municipality's SCM Policy provides that the Accounting Officer must take all reasonable steps to prevent abuse of the supply chain management system.

6. EVIDENCE AND INFORMATION OBTAINED

6.1. Regarding the award of a tender for the construction of RDP houses in Area 9 and 10 in Uitenhage, Port Elizabeth to the Contractor

6.1.1 The Municipality conceded that it gave the impugned tender to the Contractor, which was not a registered home builder and accordingly did not qualify for the tender.



- 6.1.2 In its defence, the Municipality submitted that it cured the disqualification of non-registration through agreeing with it that it would subcontract with qualifying subcontractors. Below I deal with the legality of such arrangement:
- 6.1.3 The specification for the tender to build the RDP houses in question did not have the NHBRC standard in terms of the Housing Act.
- 6.1.4 The engineering company that was awarded the tender was not registered with the NHBRC.
- 6.1.5 The Adjudication Committee Meeting Supplementary Agenda specifically recognizes that the top structure of the houses would be constructed by subcontractors because the Contractor is not registered with the NHBRC.
- 6.1.6 In terms of the Report by the Executive Director: Housing and Land Adjudication Committee, the Contractor submitted the required information and was considered responsive and scored the second highest number of points in terms of the Municipality's Supply Chain Management Policy.
- 6.1.7 The Contractor obtained the highest score since it was the only company considered in terms of the Municipality's Procurement Policy which possessed the required CIDB grading.
- 6.1.8 It is submitted that the non-compliance with the provisions of the Housing Act rendered the award of the tender irregular.
- 6.1.9 With regard to the non-compliance relating to the NHBRC registration on the specification, in contravention of the prescript in the Housing Consumer Protection Measures Act, the Municipality mitigated such by recognizing that the main



contractor would subcontract construction to compliant companies for building the top structure.

6.1.10 The Contractor was at the time not registered.

6.2. Regarding the use of funds from the conditional grant for building the top structure for internal services

- 6.2.1 The Municipality in a letter dated 10 September 2014 denied using the conditional grant for internal services which was not the purpose for which it had been sought and awarded, the purpose being top up funds for the top structure.
- 6.2.2 It is common cause that the Municipality received a conditional grant from the Department of Human Settlements (the Department) for the housing project in question as regulated in the Funding Agreement.
- 6.2.3 The conditional grant stipulated the extent and when payments would be effected for the top structure, and the allocation of the amounts for the internal services and the top structure.
- 6.2.4 It is common cause that the funding to the amount of **R65 725 151, 58 (vat @zero rate)** was the contract price of the project.
- 6.2.5 It is common cause that the funding for the project was accessed from a conditional grant for housing and was distributed accordingly as follows

Scope of work = R62, 582, 966.16 (vat excl)

Serviced stand= R18, 531.25

Top structure = R55, 706.00



6.2.6 The Municipality's denial of using funds allocated for the top structure for internal services is contradicted by evidence in my possession, specifically the sample of the invoices and payment schedule which are presented in tables (a) and (b)

(a) Below is a sample of the schedule of invoices paid by the Municipality.

INVOICE NUMBER	INVOICE AMOUNT	INVOICE DATE
1a	R 1,894,014.00	18 January 2010
13a	R4,285,236.22	20 August 2010
25a	R 953, 258.62	16 May 2011
32a rev	R 5, 020, 286.08	06 July 2012
13	R 627, 857.54	04 April 2013
33a	R 1,564, 618.98	04 April 2013
34a	R 325,974.74	04 April 2013
35a	R 1,108,800.00	22 October 2013
37a	R 1,358,400.00	25 November 2013
38a	R 1,451,434.44	03 February 2014

(b)

PROGRESS CLAIM		SUB-CONTRACTORS CERTIFICATE		NO.		69331/1	
SUB-CONTRACTORS CERTIFICATE		1	DATE	2009/12/08	Must we cancel cheque crossing	Yes/No No	Pay By
AS AT OUR CERTIFICATE NO:		1	DATE	2009/11/26			
GOBO GCORA CONSTRUCTION/ WILLIE GREEF TRUST JV							
CHEQUE IN FAVOUR OF:		AS ABOVE					
OUR CONTRACT NAME:		KWANOBUHLE AREA 10					
DESCRIPTION		QUANTITIES			TOTAL TO DATE	RATE	AMOUNT
		MEASUREMENTS					

	UNIT	PREVIOUS	PRESENT			
STAGE 1: RAFT FOUNDATIONS	NO	-	50.00	50.00	15 140.00	757 000.00
STAGE 2: TOP STRUCTURE	NO	-	-	-	20 860.00	-
STAGE 3: PLASTER	NO	-	-	-	5 000.00	-
STAGE 4: ROOF	NO	-	-	-	12 000.00	-
STAGE 5: PLUMBING, CEILING, DOORS, WINDOWS	NO	-	-	-	12 000.00	-
STAGE 6: COMPLETE	NO	-	-	-	8 670.00	-

- 6.2.7 There is a clear breakdown of amounts for specific work done.
- 6.2.8 The Complainant conceded that R17 million was for infrastructure and R44 million was meant for top structure with rough foundation.
- 6.2.9 The evidence adduced relating to accessing the conditional grant for this housing project clarifies how the scope of work is costed and should be accounted for.
- 6.2.10 In terms of the conditions, it is anticipated that the funds for building the top structure may be utilised for internal services, but limited to a specific amount.
- 6.2.11 The basic funding for the internal services was stipulated as R18 531.25 up to R22 162.00. However, the Municipality allowed a deviation of up to R27 000.00 a stand. The contention of the Municipality is that the amount was in respect of P&Gs and this is not verifiable on the schedule of payments made to the Contractor.
- 6.2.12 If the schedule of payments made to the Contractor were specific, i.e. the amounts of P&Gs, the Contract Price Adjustment on the Bill of Quantities, it would be ascertainable how much of these were for the top structure and be accounted for in terms of the conditions of the grant.



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- 6.2.13 It therefore follows that the Municipality ought to have reasonably foreseen that the construction companies were parties with interest and end users for the funding of the top structure and therefore should have accounted accordingly.
- 6.2.14 The sample provided by the Municipality does not specify what was dispensed as work done on the internal services and top structure; however the payments were effected by the Municipality.
- 6.2.15 The Complainant's version seems to be the one more probable in the circumstances.
- 6.3 Regarding alleged allocation of insufficient funds for work done on the top structure for each housing unit**
- 6.3.1 The Municipality conceded that the houses which were built were not according to the specification and that it had applied for funding from the Department for the Contract Price Adjustment (CPA) and same was confirmed in a letter dated 26 March 2009 from the Head of the Department.
- 6.3.2 It is also common cause that the drawings for the building of the RDP houses in question were not in accordance with the norm specification.
- 6.3.1.1 In areas 9 and 10, houses are plastered inside and outside. In 2012, the MEC approved monies for internal plaster. The Complainant argues that the money was paid as a variation order and the internal plaster was part of the internal project.
- 6.3.12 The Complainant contends that the drawing for building the houses upon implementation necessitated deviation from the specification for the work to be done in the top structure, and in agreement with the Contractor built the houses out of the specification.



- 6.3.13 In view of the findings of the mediation which ensued between the Contractor and the Municipality, the Complainant was not reimbursed for the costs incurred relating to the top structure.
- 6.3.14 The Municipality had altered the specifications in line with the request from the Department as stipulated in letter already referred to.
- 6.3.15 The Bill of Quantities from the Municipality for the top structure then was never adjusted according to the new specifications as contained in the drawings.
- 6.3.2 A resolution was made by the then City Manager. Dr L Msengana, on 6 June 2013 to derogate from its SCM Policy prescripts when it requested additional funding for additional work which was alleged to be within the threshold of 20% of the original contract and therefore justifying the Municipality to reappoint the same Contractor.
- 6.3.3 In terms of the Mediation Agreement dated 22 October 2011 between the Municipality and the Contractor for the projects in question, Opinion 1 relates to contract price adjustment (CPA) and re-measurement of quantities in the housing section of the Bill of Quantities. It states that the CPA will be applied to all the certificates and that if the Municipality wanted a non-re-measurable lump sum price it should have been explicit, and there could have been no Bill of Quantities.
- 6.3.4 The Mediator's Initial Observations between the Municipality and the Contractor in relation to construction of top structures in Kwa-Nobuhle Area Contract Price Adjustment and Re-measurement of quantities in the Housing Section of the Bill of Quantities: Report dated August 2011 between the Municipality and the Contractor on behalf of the Complainant states that the top structures of the houses in question were subject to re-measurement of the work done.



6.3.5 The Municipality responded to the notice issued in terms of Section 7(9) of the Public Protector Act, 1994 wherein it agreed with the Public Protector, and expressed its intention to remedy the maladministration and the prejudice suffered by the Complainant.

7. MEASURING CONDUCT AGAINST THE RULES

7.1 Whether the tender for the construction of RDP houses in Areas 9 and 10 in Uitenhage, Port Elizabeth to the Contractor was irregularly awarded

7.1.1 Having concluded that NMMM awarded the tender for the construction of the top structure of RDP houses in areas 9 and 10 Uitenhage, to an engineering company, the matter to be adjudicated was whether or not NMMM's conduct in appointing the Contactor was in contravention of its SCM Policy and applicable national prescripts.

7.1.2 To arrive at a fair answer, I had to test the manner in which the tender processes were implemented by NMMM against the requirement of a fair, equitable, transparent, competitive and cost-effective process.

7.1.3 The appointment was made following an open and competitive bidding process, therefore, section 217 of the Constitution, section 19(1) of NMMM SCM Policy 2010/11, section 115 (b) of the Municipal Financial Management Act 56 of 2003 and section 38 (1) of the Municipal Supply Chain Management Regulations 30 May 2005 applied.

7.1.4 The compliance framework I considered appropriate to the processing of the bids was section 114(1) which regulates deviation in implementing the supply chain management policy of a municipality and section 115 (1) of the Municipal Financial Management Act 56 of 2003 which regulates the implementation and separation of



duties in supply chain management and section 19(1) of NMMM's own SCM Policy on bid administration.

- 7.1.5 In terms of Section 10(1) of the Housing Consumers Protection Measures Act "*no person shall carry on the business of a home builder or receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home unless that person is a registered home builder.*"
- 7.1.6 The process stipulated in the MFMA, regarding deviation from procurement prescripts does not find an expression in the merits of this complaint in that the tender in question was the one that was recommended. The municipality, therefore misdirected itself in relying on this prescript to justify this unlawful procurement and award of this tender.
- 7.1.7 My reading of this provision is that the Municipality was prohibited from awarding a construction tender to a builder that is not a registered home builder. In the case of *Hubbard, Anne Christine v Cool Ideas* it was held that the intention of the legislature in this regard is very clear in that it is to protect the housing consumer and it further emphasises the prohibition of a home builder from commencing the construction unless issued with a certificate. Even though Section 14A permits late enrolment, this relaxation does not in any way find expression on the application of Section 10 of the Act. *In casu*, the express prohibition by the legislation ought to have been carried out to the last letter by the Municipality.
- 7.1.8 Moreover, Section 1(b) of the Municipality's Supply Chain Management Policy provides that the Municipality must implement the policy in a way that is fair, equitable, transparent, competitive and cost effective. This provision is in line with section 217 in the Constitution and section 38(a)(iii) of the PFMA. It is my considered view that a fair, competitive and cost-effective process includes



ensuring that the winning bid is one that complies with the law and tender specifications.

- 7.1.9 Section 195(1) of the Constitution provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

"(a)...

(b) *Efficient, economic and effective use of resources must be promoted.*"

- 7.1.10 The question that arises, is whether there was a law or prescript that allowed the Municipality to deviate or at the very least if the deviation was not material in that it made no difference whether there was compliance or not.
- 7.1.11 I will start with the possibility of a law or prescript permitting the deviation. In its submission, the Municipality has sought to rely on Section 36(1) of the Municipal Supply Chain Management Policy, which provides that *"the Accounting Officer may dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only in an emergency or in any exceptional case where all possible options have been explored and it is still impractical or impossible to follow the official procurement processes"*.
- 7.1.12 Firstly, this provision does not deal with appointing unqualified contractors but rather with relaxing the procurement process. Secondly, and, more importantly, a policy is inferior to legislation and cannot assume legislative responsibility.
- 7.1.13 I must say that I am shocked that the Municipality is apparently unaware of the hierarchical relationship between the Constitution, law and policy, which places the



Constitution at the top and policy and other administrative regulatory instruments at the bottom of the pecking order.

7.1.14 I am accordingly unable to accept the Municipality's submission that its policy allowed it to act unlawfully.

7.2 Regarding alleged irregular use of funds from the conditional grant for building the top structure for internal services

7.2.1 Section 38 of the PFMA creates an obligation upon the Accounting Officer of the Municipality to account for expenditure of funds entrusted to it. In this instance, to discharge this obligation relating to the funds for building the top structure of the houses the accounting officer would have to engage the end user of the funds, in this case, the Complainant.

7.2.2 The Municipality has a responsibility under section 12(4)(a)(b) of the Housing Act 107 of 1997 to utilize and account for conditional grant funds in accordance with the purpose for which such grant was sought and approved.

7.2.3 In a letter dated 20 March 2009 the Provincial Head of Department of Human Settlements (then Housing) stipulated the circumstances in which funds for the top structure may be utilized for internal services, which in a nutshell, the ceiling was R22 162.00 per stand.

7.2.4 I am accordingly unable to accept the Municipality's submission that it used R27 000.00 per housing unit for internal services instead of R22 162. 00

7.3 Regarding whether the Municipality improperly allocated insufficient funds for work done on the top structure for each housing unit



- 7.3.1 Section 38 of the PFMA creates an obligation upon the Accounting Officer of the Municipality to account for expenditure of funds entrusted to it. In this instance, to discharge this obligation relating to the funds for building the top structure of the houses the accounting officer would have had to engage the end user of the funds, in this case, the Complainant.
- 7.3.2 I am accordingly unable to accept that the Municipality has properly allocated sufficient funds for the top structure.
- 7.4 Regarding whether or not the Complainant suffered prejudice as a result of the Municipality's conduct**
- 7.4.1 The Municipality has not denied that it received more than it paid for and that the shortfall on the top structure was borne by the Complainant.
- 7.4.2 It is common cause that it is not the Complaint's responsibility to build RDP housing for the people but a responsibility of government, in this case represented by the Municipality. It certainly cannot be proper for the Municipality and, ultimately, government, to benefit at the expense of a private citizen who is trying to eke out a living for himself/herself simply because its officials failed to follow the rules regarding the execution of variation orders in writing. That there was no contractual relationship, is equally irrelevant as the issue at hand is whether or not the Complainant suffered prejudice which could have been prevented by the Municipality eschewing improper conduct or maladministration.
- 7.4.3 The prejudice or injustice suffered by the Complainant was compounded by the failure to resolve the dispute expeditiously. It has taken about five years for the Municipality to admit that it wronged the Complainant and is prepared to remedy the injustice suffered.



8. FINDINGS

Having regard to the evidence, the relevant regulatory framework determining the standards the Municipality should have complied with, and the impact on the Complainant, I make the following findings:

8.1. Whether the tender for the construction of RDP houses in Areas 9 and 10, Uitenhage, Port Elizabeth was irregularly awarded

8.1.1 The allegation that the tender to build the RDP houses was irregularly awarded is substantiated.

8.1.2 Section 114(1) of the MFMA, and paragraph 36(1) of the Municipal Supply Chain Management Policy do not permit Municipalities to deviate from procuring services from suitably qualified service providers. These only permit process deviations in specified circumstances, which include emergencies and single source suppliers.

8.1.3 The Municipality awarded the tender to build RDP houses to a Contractor that was not registered with the National Home Builders Registration Council (NHBRC) in violation of section 10(1) of the Housing Consumers Protection Measures Act No 95 of 1998.

8.1.4 The Municipality's awarding of the tender to build RDP houses to a Contractor not registered with the NHBRC in violation of section 10(1) of the Housing Consumers Protection Measures Act No. 95 of 1998 constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

8.1.5 The Municipality's awarding of the tender to build RDP houses to a Contractor that did not comply with section 10(1) of the Housing Consumers Protection Measures



Act No. 95 of 1998 is also in violation of sections 195(1)(b) and 217 of the Constitution, section 38(a)(iii) of the PFMA and section 1(b) of its SCM Policy. The Municipality's conduct in this regard also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

8.2 Regarding the alleged irregular use of funds from the conditional grant for building the top structure for internal services:

8.2.1 The allegation that the Municipality irregularly used funds from the conditional grant for building the top structure for internal services, a purpose for which it was not intended for is substantiated.

8.2.2 The Municipality failed to comply with the directive dated 20 March 2009 from the Provincial Department of Human Settlements, that the Municipality should utilise R 22 162.00 per stand from the funds of the top structure, but it utilised R27 000.00;

8.2.3 The Municipality's conduct in this regard constitutes and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

8.3 Regarding whether the Municipality improperly allocated insufficient funds for work done on the top structure for each housing unit

8.3.1 The allegation that the Municipality improperly allocated insufficient funds for work done on the top structure for each housing unit is substantiated.

8.3.2 The Municipality failed to regulate the discrepancy between the drawings of the top structure for the houses and the bill of quantities. Such failure constitutes improper



conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

8.3.3 The Municipality also failed to show how the Contract Price Adjustment was applied to the top structure. Such failure also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

8.4 Whether the Complainant suffered prejudice due to the conduct of the Municipality in the circumstances

8.4.1 The Complainant, who is a small business person, suffered enormous prejudice in that it was left out of pocket after using its own money to fill the gap arising from the Municipality's funding shortfall after the latter wrongly used for internal purposes, the grant money meant for the top structure construction.

8.4.2 The Complainant's prejudice was exacerbated by the fact that it has taken five (5) years for the Municipality to accept its wrongdoing and agree to remedy the injustice suffered by the Complainant.

8.4.3 The prejudice suffered by the Complainant includes interest that could have been earned and opportunities he could have taken had the money been received instantly as well as emotional pain and suffering as he sought to claim his money in the five (5) year journey.

9. REMEDIAL ACTION

9.1 The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where it would have been had the improper conduct or maladministration not occurred,



while addressing systemic Supply Chain Management deficiencies in the Municipality, is to require the Municipality:

- 9.1.1 In consultation with the Complainant, to reconcile payments made to the Complainant for the top structure and pay the **Complainant the deficit, with interest** within 30 days thereof.
- 9.1.2 To audit works done as per the drawings of the houses that would have given rise to adjustments in the bill of quantities, and pay the Complainant accordingly those relating to the construction of the top structure.
- 9.1.3 To issue a written apology to the Complainant and its directors.
- 9.1.4 To ensure that in circumstances where deviation is reasonably foreseeable, it puts in place specific systems to regulate the effects of the deviation in the operational issues that may adversely affect its accountability for the expenditure.
- 9.1.5 To ensure that all its officials involved in Supply Chain Management are properly familiarized with the MFMA, with particular reference to permissible deviations in terms of Chapter II of the MFMA.

10. MONITORING

- 10.1 The Municipal Manager is to submit an Action Plan to the Public Protector indicating the Municipality's intentions regarding the implementation of the remedial action referred to in paragraphs 9.1 to 9.3 above within 30 days of the issue of this report.



- 10.2 A final report confirming satisfactory payment of all money due to the Complainant and a report on the systemic remedial steps taken to improve SCM in the Municipality is to be submitted within 60 days of the issue of this report.

A handwritten signature in black ink, appearing to be "Thuli N. Madonsela", enclosed within an oval shape.

**ADV THULI N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA**

DATE: 29 January 2016

Assisted by: Eastern Cape Provincial Office