

**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**



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION, TENDER IRREGULARITIES AS WELL AS FRUITLESS AND
WASTEFUL EXPENDITURE WITH REGARD TO THE PROCUREMENT OF A
SERVICE PROVIDER TO DESIGN AND DEVELOP AN INTEGRATED WEBSITE FOR
THE FREE STATE PROVINCIAL GOVERNMENT**

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Executive Summary

- (i) This is my closing report 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, 1994.
- (ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into allegations of maladministration, tender irregularities as well as fruitless and wasteful expenditure with regard to the procurement of a service provider to design and develop an integrated website for the Free State Provincial Government ("FSPG").
- (iii) Based on the analysis of the complaints lodged by various Complainants the following issues have been identified to inform the focus of my investigation:
 - (a) Whether there were any irregularities in the appointment of *Cherry Inkamva Juggernaut JV* by the Free State Provincial Government to design and develop an integrated website and if so; whether such conduct constituted maladministration and improper conduct;
 - (b) Whether the expenditure incurred for the design and development of an integrated website for the Free State Provincial Government was excessive, and if so; whether such an expenditure amounted to irregular, fruitless and wasteful expenditure thus constituting maladministration.
 - (c) Whether the former Free State Premier, Mr Ace Magashule due to his relationship with the Director of Chery Inkamva *Juggernaut JV*, Mr Tumi Ntsele, unduly influenced the awarding of a tender for the design, development, implementation and maintenance of a comprehensive and integrated website for the Free State Provincial Government departments,

municipalities and state owned entities to the company, thereby contravening the Executive Ethics Code

- (ix) The investigation was conducted by way of correspondence and interviews, an analysis of relevant documentation as well as the consideration and application of relevant laws, related prescripts and case law.
- (x) Key laws and policies taken into account to determine if there was any impropriety in the conduct of the FSPG as alleged in the complaint, were the following:
 - a. Section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which bestows upon 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.
 - b. Section 6(4) of the Public Protector Act, 1994, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.
 - c. Section 7(3) of the SITA Act, 1998, which provides that every department must, subject to subsection (4) of this Act procure all information technology goods or services through SITA.
- (xi) In addition, the following case law was used for the purpose of this investigation:
 - a. *Public Protector vs Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1 June 2011)*;

- b. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*¹,
 - c. *Minister of Home Affairs v The Public Protector of South Africa* (308/217) [2018] ZASCA 15 (15 March 2018); and
 - d. *President of the Republic of South Africa v 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);
- (xii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:
- (a) **Regarding whether there were any irregularities in the appointment of *Cherry Ikamva Juggernaut JV* by the Free State Provincial Government to design and develop an integrated website and if so; whether such conduct constituted maladministration and improper conduct.**
 - (aa) The allegation that there were irregularities in the appointment of *Cherry Ikamva Juggernaut JV* by the Free State Provincial Government to design and develop an integrated website, is **unsubstantiated**.
 - (bb) The engagements between SITA, AGSA and the FSPG were in line with section 7(3) of the SITA Act, as they resulted in an agreement that SITA will assist in respect of hosting and security of the website and not the design, develop, implement and maintain a comprehensive and integrated website for the Free State Province.

¹ [2016] ZACC 11

- (cc) However, the conduct of the BEC members by discussing the functionality scores and agreeing on the score to be allocated to each bidder is unacceptable as this undermined the five (5) principles as provided by section 217 of the Constitution.
- (dd) Notwithstanding the foregoing, I could not find that the conduct of the erstwhile Accounting Officers of the Department of the Free State Premier and COGTA consequently constitutes improper conduct as envisaged in section 182(1)(a) of the of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) **Regarding whether the expenditure incurred for the design and development of an integrated website for the Free State Provincial Government was excessive, and if so; whether such an expenditure amounted to irregular, fruitless and wasteful expenditure thus constituting maladministration.**
- (aa) The allegation that the expenditure incurred for the design and development of an integrated website for the Free State Provincial Government is irregular, is **unsubstantiated**.
- (bb) The FSPG approved and spent a total amount of R84 563 838.60 towards Cherry Ikamva *Juggernaut* JV which comprised of R64 567 318.10 in payments for the work done on the website and R19 996 521 50 for the cancellation fee, and not R140 million as alleged.
- (cc) I have considered the submission made by the FSPG, that no exclusive value for money audit was conducted in order to determine this issue, as the project ceased when the funds got exhausted. Therefore, taking into consideration the submissions by CSIR and the FSPG, I am unable to make a conclusive determination on whether or not the FSPG derived value for money on this project.

- (dd) Therefore, I could not determine if the conduct of the erstwhile Accounting Officers of the Department of the Free State Premier and COGTA in this regard would constitute improper conduct as envisaged by section 182(1)(a) of the of the Constitution and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act
- (c) **Regarding whether the former Free State Premier, Mr Ace Magashule due to his relationship with the Director of Chery Inkamva Juggernaut JV, Mr Tumi Ntsele, unduly influenced the awarding of a tender for the design, development, implementation and maintenance of a comprehensive and integrated website for the Free State Provincial Government departments, municipalities and state owned entities to the company, thereby contravening the Executive Ethics Code**
- (aa) The allegation that the former Premier Free State, Mr Ace Magashule unduly influenced the awarding of a tender to *Cherry Ikamva Juggernaut JV* due to his close relationship with its Director, Mr Tumi Ntsele thereby contravening the Executive Ethics Code, **could not be substantiated.**
- (bb) I have taken note that, in and around the Free State and/or Bloemfontein, it is widely said that Messrs Magashule and Ntsele are close friends. However, during the investigation, no one could produce tangible evidence of the alleged friendship and/or undue influence exerted by Mr Ace Magashule in the awarding of the tender to the above-mentioned company belonging to Mr Ntsele.
- (cc) Therefore, without a tangible evidence to support this allegation, I am unable without proof, to censure and find Mr Ace Magashule of having influenced the awarding of the tender to *Cherry Ikamva Juggernaut JV* for the design, development, implementation and maintenance of a comprehensive and

integrated website for the FSPG departments, municipalities and state owned entities.

(xiii) Recommendations

- (a) I have noted that some of the anomalies that were experienced during the implementation of the FSPG Integrated website, relate to the conduct of the Supply Chain Management officials and the members of the Bid Committees in the FSPG, and therefore recommend that the FSPG must within thirty **(30)** working days of the issuing of this report, ensure that all these officials, are trained on public procurement processes and procedures.
- (b) I have also noted the ambiguity pertaining to determining the issue of value for money as alluded to by both the CSIR and the FSPG, and therefore recommend that within thirty **(30)** working days of the issuing of this report, FSPG must ensure that a suitable ICT Specialist is appointed to conduct an audit to determine value for money of the FSPG Integrated website.
- (xiv) Based on the aforesaid conclusion, I am unable to take any remedial action as contemplated in section 182(1) (c) of the Constitution, save to advise that note should be taken of the recommendations I have made in paragraph 7 of this Report.

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, TENDER IRREGULARITIES AS WELL AS FRUITLESS AND WASTEFUL EXPENDITURE WITH REGARD TO THE PROCUREMENT OF A SERVICE PROVIDER TO DESIGN AND DEVELOP AN INTEGRATED WEBSITE FOR THE FREE STATE PROVINCIAL GOVERNMENT

1. INTRODUCTION

1.1 This is my closing report 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, 1994 (the 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 my investigation: -

1.2.1 Mr Kopung Ralikontsane;

1.2.2 Ms Elsabe Rockman;

1.2.3 Mr Ace Magashule;

1.2.4 Ms Patricia Kopane;

1.2.5 Mr Chris Huckle;

1.2.6 Mr K.T Tshiololi;

1.2.7 Ms Tanya Steenkamp;

1.2.8 Mr Francois Roets;

1.2.9 Mr Philip Machanik;

1.2.10 Mr Roy Stephen; and

1.2.11 Mr Glynn Erasmus.

2. THE COMPLAINT

2.1 The complaints were lodged by members of the public on 06 and 08 March 2013, following a media article published by the *Sowetan newspaper* on 4 March 2013

under the heading, *"Government spends R140 million to redesign websites"*. On 10 March 2013, a further complaint was received from a Democratic Alliance Member of Parliament, Ms Patricia Kopane, with a specific request for an investigation into allegations of a violation of the Executive Ethics Code by the former Premier of the Free State Province, Mr Ace Magashule (Mr Ace Magashule), in connection with the awarding of the contract to a consortium formed by *Ikamva ICT, Juggernaut Trading and Projects* as well as *Cherry Online Designs*, (Cherry Ikamva Juggernaut JV) that is amongst others, owned by *Letlaka Group*.

- 2.2 In essence, the allegations are that the Free State Provincial Government (FSPG) irregularly awarded a contract for the design and development of an integrated website to the above-mentioned consortium ostensibly owned, by Mr. Tumi Ntsele, allegedly a close friend of Mr Magashule.
- 2.3 It is alleged that the contract was awarded for an amount of R140 million without following proper procurement processes and procedures. In this regard, it is alleged that Mr Ace Magashule, the former Premier of the Free State, abused his position to improperly influence the award of the contract to his close friend, Mr Tumi Ntsele.
- 2.4 A further complaint was received from Mr Chris Huckle (Mr Huckle), a website developer. He alleged that the costs associated with the development of the websites were exorbitant and should be investigated by the Public Protector. According to Mr Huckle, he found it difficult to understand how the website could have taken three years to develop as well as how the alleged cost of R140 million could be justified. He thus suggested that the expenditure incurred by the FSPG amounted to fruitless and wasteful.
- 2.5 Further complaints were received from Ms Tania Steenkamp and Messrs KT Tshiololi, Philip Machanick, Francois Roets, Glynn Erasmus and Roy Stephen who requested that the Public Protector investigate the mismanagement of public funds

by the FSPG in the procurement of its integrated website development citing the exorbitant amounts involved in procuring the services.

2.6 On 4 March 2013, in the *Sowetan newspaper* article it was reported that:

"Free State director general Elzabe Rockman signed a three-year contract to redesign the websites in 2011. She had reportedly disputed the amount, claiming it was actually R40m. The agreement was signed with businessman Tumi Ntsele, who reportedly holds tenders with several other provincial departments. It was reported that the company was awarded the tender even though two other companies submitted significantly lower bids.

Etienne Bruwer, owner of web development company Jam Factory, told the newspaper the amount charged for the websites was "ridiculous". "The company that is working on that site is probably making R3.5 million profit a month," he said. Bruwer said the most paid for a websites was R12 million, by financial institutions which needed to protect sensitive information. Ntsele told the newspaper opposition parties had an agenda against black businessmen and that the websites' cost was fair."

2.7 With regard to the complaint lodged by Hon Patricia Kopane in terms of the Executive Members' Ethics Act, 1998, she alleged that:

"The Democratic Alliance believes that a number of violations of the code were incurred by Mr Magashule in the awarding of a Provincial Government websites contract to a consortium that is partly owned by the Letlaka Group.

The Premier's office awarded a contract to a consortium in which businessman Tumi Ntsele has a majority stake through his companies under the Letlaka Group umbrella... Bidders offering more competitive rates were not awarded the tender, the Sowetan reported on 4 March 2013.

The R40 million paid for the websites was not only excessive but it was also in exchange for an inferior product. The websites uses a basic wordpress template that has limited functionality and is freely available online for about R400."

- 2.8 She further alleged that the Premier's office misled the public by releasing a media statement claiming that the websites only cost R40 million, whereas an analysis of the tender by a technology researcher revealed a contract worth some R90 million. According to her, the actual tender documents suggest that the websites package cost R140 million.

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."

- 3.3 In ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and***

Others², the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

- 3.3.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;³
- 3.3.2 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;⁴
- 3.3.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints which was 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 that effect, if it is the best attempt at curing the root cause of the complaint;⁵
- 3.3.4 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;⁶
- 3.3.5 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;⁷

² CCT 143/15; CCT171/15 [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC); 31 March 2016.

³ Para [65].

⁴ Para [67].

⁵ Para [68].

⁶ Para [69].

⁷ Para [70].

- 3.3.6 The Public Protector's power to take appropriate 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 the investigation and the type of findings made;⁸
- 3.3.7 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 these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;⁹
- 3.3.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation;¹⁰
- 3.3.9 "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.¹¹
- 3.3.10 The remedial action taken by the Public Protector has a binding effect.¹² The Constitutional Court further held that: *"When remedial action is binding, compliance is not optional, and 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."*¹³
- 3.4 In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA***

⁸ Para [71].

⁹ Para [71(a)].

¹⁰ Para [71(d)].

¹¹ Para [71(e)].

¹² Para [76].

¹³ *Ibid* para [73].

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:

- 3.4.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution;¹⁴
- 3.4.2 The Public Protector is empowered to take binding remedial action that is capable of remedying the wrong in the particular circumstances. This must include directing or instructing members of the Executive, including the President, to exercise powers entrusted to them under the Constitution where that is required to remedy the harm in question;¹⁵
- 3.4.3 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;¹⁶
 - a) To investigate conduct that is alleged or suspected to be improper;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.4.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings;¹⁷
- 3.4.5 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;¹⁸

¹⁴ Para [79].

¹⁵ Para [82].

¹⁶ Para [100 – 102].

¹⁷ Para [104].

¹⁸ Para [105].

3.4.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct;¹⁹

3.4.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action;²⁰

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

3.4.9 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 power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4.10 The conduct of FSPG amounts to conduct in state affairs, and therefore, the matter falls within the ambit of the Public Protector's mandate.

3.4.11 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4 THE INVESTIGATION

4.1 The Investigation Process

4.1.1 The approach to the investigation included an exchange of documentation between the Public Protector and the complainants as well as the Premier of the Free State, the Director-General of the Province, Free State Provincial Treasury,

¹⁹ Para [107 – 108].

²⁰ Para [112].

State Information Technology Agency, Council for Scientific and Industrial Research and the Special Investigating Unit.

4.1.2 All relevant documents and correspondence were obtained, analysed against the relevant laws, policies, related prescripts were considered and applied throughout the investigation.

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

4.1.3.1 Whether there were any irregularities in the appointment of *Cherry Inkamva Juggernaut JV* by the Free State Provincial Government to design and develop an integrated website and if so; whether such conduct constituted maladministration and improper conduct;

4.1.3.2 Whether the expenditure incurred for the design and development of an integrated website for the Free State Provincial Government was excessive, and if so; whether such an expenditure amounted to irregular, fruitless and wasteful expenditure thus constituting maladministration; and

4.1.3.3 Whether the former Free State Premier, Mr Ace Magashule due to his relationship with the Director of Chery Inkamva *Juggernaut JV*, Mr Tumi Ntsele, unduly influenced the awarding of a tender for the design, development, implementation and maintenance of a comprehensive and integrated website for the Free State Provincial Government departments, municipalities and state owned entities to the company, thereby contravening the Executive Ethics Code.

4.1.4 **The Key Sources of Information**

4.1.5 **Documents**

- 4.1.6 Communication from the Premier's Office in response to the enquiries by the Public Protector, dated 15 July and 14 August 2013 respectively;
- 4.1.7 The Supply Chain Management Policy of the Free State Department of the Premier, approved on 30 March 2007;
- 4.1.8 The Annual Performance Plan of the Premier's Office with budget and MTEF Projections for the years 2011/2012 to 2013/2014;
- 4.1.9 Premier's Office Needs Analysis in respect of the proposed integrated websites project, dated 30 April 2011;
- 4.1.10 Premier's Office Bid Adjudication Committee (BAC) memorandum, dated 22 September 2011 recommending the appointment of a service provider to be responsible for the websites development, redesign, implementation and maintenance thereof;
- 4.1.11 An Request For Proposal (RFP) advertisement for the websites development, redesign, implementation and maintenance published in the *Sowetan* newspaper on 13 June 2011 and a Tender Bulletin advertisement of 10 June 2011 as well as advertisements placed in *The Weekly publication* and *Free State News*, which ran from 10 – 17 June and 10 – 16 June 2011 respectively;
- 4.1.12 The proposal submitted by Cherry Ikamva *Juggernaut* in respect of the redesign / relaunch of a comprehensive and integrated websites under reference number RFP 2011/06/21 dated 4 July 2011;
- 4.1.13 Copies of procurement documents, including reports from the Bid Evaluation Committee (BEC) and BAC;
- 4.1.14 A copy of a request to the SSA for the determination of the security status of the prospective service provider dated 30 August 2011;

- 4.1.15 A copy of the National Treasury Memorandum to Accounting Officers in respect of the application of National Treasury Practice Note Number 5 of 2009/2010 dated 3 July 2009, providing guidance on the procedures to be followed when procuring Information Communication Technology related goods and/or services through the State Information Technology Agency (SITA);
- 4.1.16 A copy of an invoice from Cherry Online Designs dated 8 November 2012;
- 4.1.17 A copy of a project implementation plan;
- 4.1.18 Copies of the proof of payments made to the service provider dated 15 November 2012 and 5 February 2013;
- 4.1.19 A copy of a Service Level Agreement entered into by and between the Department, COGTA and Cherry Ikamva *Juggernaut* joint venture, signed on 12 and 13 January 2012, respectively;
- 4.1.20 A copy of a report commissioned by the National Treasury and prepared by JGL Forensic dated 14 December 2012 in connection with the assessment of compliance in respect of the appointment of Letlaka Media CC as a service provider to the office of the Free State Premier and other Provincial Departments;
- 4.1.21 Copies of responses by SITA to the enquiries by the Public Protector including the Service Level Agreement entered into between SITA and the Department for the hosting of the websites service signed on 14 and 15 May 2012 respectively; and
- 4.1.22 A copy of the Auditor General's report on the deviations from SCM prescripts issued on 5 December 2013.
- 4.1.23 Vodacom Cell phone data report, dated 29 August 2017.

4.1.24 Correspondence including electronic mail was exchanged with;

- 4.1.25 The Complainants, on 5, 7, 8, 12, 13, 14 and 21 March 2013;
- 4.1.26 President J G Zuma, dated 12 March 2013;
- 4.1.27 Ms Patricia Kopane, MP dated 11 March 2013;
- 4.1.28 Mr Kopung Ralikontsane, the former ADG of the Department of the Premier, dated 20 June 2013;
- 4.1.29 Mr Sello Martins the former SCM official in Department of the Premier, dated 14 August 2013;
- 4.1.30 Mr. L Maree, the Regional Manager of State Information Technology Agency in the Free State Province, dated 29 November 2013.
- 4.1.31 Letter from Mr AJ Venter, Head : Corporate Administration-FSPG, dated 8 May 2015;
- 4.1.32 Letter to Mr T Mokoka, Project Co-ordinator-IT FSPG, dated 11 May 2015;
- 4.1.33 Letter to Ms M S Tladi, the CFO –FS COGTA, 11 May 2015;
- 4.1.34 Letter to Mr Kopung Ralikontsane, DG FSPG dated 11 May 2015;
- 4.1.35 Letter to Mr SS Ntsele, the MD of Cherry Ikamva dated 23 June 2015;
- 4.1.36 Letter to Mr Kopung Ralikontsane, DG of Free State PG, dated 21 August 2015;
- 4.1.37 Letters to Mr Ace Magashule, former Free State Premier, dated 24 June 2015 and 12 August 2015;
- 4.1.38 Letter to Public Protector from Mr Ace Magashule dated 27 July 2015;
- 4.1.39 Letter to Dr Setumo Mohapi, Chief Executive Officer-SITA, dated 29 February 2016
- 4.1.40 Notices issued in terms of section 7(9) of the Public Protector Act, 1994 to:**
- 4.1.41 Notice to the Department of the Premier, Mr Kopung Ralikontsane, dated 19 June 2019.
- 4.1.42 Notice to Ms Elsabe Rockman, former DG in the Free State Premier's office, 26 November 2019,

4.1.43 Response to the notice in terms of section 7(9) of the Public Protector Act, 1994, from:

4.1.44 Response to the Notice by the FSPG from the Director General of the Department of the Premier, Mr Kopung Ralikontsane, dated 19 July 2019.

4.1.45 Response to the Notice by Ms Elsabe Rockman, dated 31 January 2020

4.1.46 Interviews and meetings

Interviews (including telephonic interviews) were conducted with:

4.1.47 The former Chief Financial Officer (CFO) of the Department of the Premier, Mr Godfrey Mahlatsi, held on 13 August 2013. Mr Mahlatsi is currently the Chief Executive Officer of the Free State Provincial Treasury;

4.1.48 Mr Sello Martins, the Deputy Director Budget Management of the Department of the Premier's held on 14 August 2013;

4.1.49 Mr Kopung Ralikontsane, the former Head of Department (Department of Cooperative Government and Traditional Affairs (COGTA) in the Free State held on 14 August 2013. He was also interviewed in his capacity as the Acting Director General (ADG) of the Department of the Premier at the time;

4.1.50 Ms Elzabe Rockman, the former Director General (DG) of the Department of the Premier held on 14 August 2013. She has since assumed the position of The Member of the Executive Council (MEC) of the Free State Provincial Government responsible for the Provincial Treasury.

4.1.51 Meeting with Mr T Mokoka, Project Co-Ordinator-IT FSPG held on 28 May 2015;

4.1.52 Meeting with Mr S Ntsele, MD of Cherry Ikamva held on 9 July 2015;

4.1.53 Transcripts of Members of the BEC, namely: M T Mokoena; Mr W.H Boshoff; Mr T Makweya; Mr R S Kau on 7 June 2017 and Mr T Makweya on 23 June 2017.

4.1.54 PPSA's meeting with CSIR officials, held on 30 April 2019

4.1.55 Legislation and other prescripts

4.1.55.1 *The Constitution of the Republic of South Africa, 1996;*

4.1.55.2 *The Public Protector Act, 23 of 1994;*

4.1.55.3 *The Executive Members' Ethics Act 1998; and*

4.1.55.4 *The Executive Ethics Code*

4.1.56 Case Law

4.1.56.1 *Public Protector vs Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1 June 2011);*

4.1.56.2 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*²¹,

4.1.56.3 *Minister of Home Affairs v The Public Protector of South Africa (308/217) [2018] ZASCA 15 (15 March 2018); and*

4.1.56.4 *President of the Republic of South Africa v 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);*

²¹ [2016] ZACC 11

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 Whether there were any irregularities in the appointment of *Cherry Ikamva Juggernaut JV* by the Free State Provincial Government to design and develop an integrated website and if so; whether such conduct constituted maladministration and improper conduct;**

Common Cause issues

It is not disputed that:

- 5.1.1** On 23 September 2011, *Cherry Ikamva Juggernaut JV* was appointed by the Free State Provincial Government to design and develop an integrated website “*subject to provisions of the State Information Technology Agency Act of 1998 (Act 88 of 1998) and the Regulations as well as the conclusion of the service level agreement*”.
- 5.1.2** To give effect to the appointment of *Cherry Ikamva Juggernaut JV*, a Service Level Agreement (SLA) was signed by the Director-General of the Free State Provincial Government, Ms. EC Rockman, the Head of the Department of Cooperative Governance and Traditional Affairs, Mr KF Ralikontsane and one of the Directors of *Cherry Ikamva Juggernaut JV*, Mr Tumi Ntsele on 12 and 13 January 2012.

Issues in dispute

- 5.1.3** The issue for my determination is whether or not there were any irregularities in the appointment of *Cherry Ikamva Juggernaut JV* by the Free State Provincial

Government to design and develop an integrated websites for provincial departments, municipalities and other state owned entities in the Free State.

- 5.1.4 On 30 April 2011 a needs analysis process was conducted by the FSPG and it was determined that there was a need for an integrated website that would accommodate all the departments, municipalities and other state owned entities in the Free State Provincial Government.
- 5.1.5 The Needs Analysis made reference to an assessment that had been conducted which indicated that the Free State Provincial Government had to formulate an improved and integrated strategy that would ensure that it optimally utilises the websites and potential of social media to enhance the revised communication tools that were already in operation. Based on this assessment, the Provincial Government decided that its departments and provincial entities have not been able to successfully utilise the potential of its online presence for a broad range of purposes. It was recommended that:
 - 5.1.5.1 An integrated website project, in which all Departments, municipalities and provincial public entities are incorporated, be initiated;
 - 5.1.5.2 The structure of the websites of respective Departments be standardised and aligned to ensure uniformity and promotion of the corporate image of the FSPG;
 - 5.1.5.3 The structure of the websites should make provision for amongst others standard strategic information, corporate governance documentation (to be readily accessible to all interested parties, both internal and external to the participating body), media statements and vacancies;
 - 5.1.5.4 The structure should however also make adequate provision for Department specific information on applicable facilities, services programs and/or projects;

- 5.1.5.5 The inconsistency in the design and development of all websites as well as the common problem of the lack of updated and relevant information as required in terms of the DOC guidelines were said to be additional factors motivating for the standardisation of the online presence of the broader government sector and the initiation of an integrated website project;
- 5.1.5.6 Compliance with MFMA requirements is an area that should be incorporated into the scope of an integrated website project, as this would directly assist municipalities to improve compliance with legislation as required and contribute positively to the achievement of improved audit outcomes;
- 5.1.5.7 Another major weakness identified was the lack of availability of strategic corporate governance information, that could also supplement the existing vacuum of institutional memory that is evident in many local municipalities;
- 5.1.5.8 One of the major identified weaknesses related to the failure to continuously generate and update information and content. The integrated website project should ideally address the major weakness and find innovative ways in which government communicators could be assisted to ensure ongoing content generation and update of relevant websites;
- 5.1.5.9 The fact that FSPG, municipalities and entities do not utilise any social media platforms was a particular weakness that must be addressed as reaching and targeting the youth sector is one of the stated government priorities. Given the limitations of operating social media platforms through SITA, and the inexperience of government communicators to utilise these new media tools, consideration should be given to link the integrated website with social media platforms;
- 5.1.5.10 Another aspect that should be considered was the declared intent to further support community media, specifically community radio stations;

- 5.1.5.11 This aspect of the communication turnaround strategy had not been implemented as possible co-operation with the Department of Communication and MDDA have been explored but has not produced tangible results; and
- 5.1.5.12 Effective participation of all stakeholders should be encouraged and promoted to ensure the successful implementation of the project.
- 5.1.6 It was envisaged that the integrated website project will ensure that it not only promotes awareness of government activities and programs, but also promotes good corporate governance principles and ensuring that information is available on all available platforms to enhance service delivery.
- 5.1.7 On 23 May 2011, the Director-General of the Free State Provincial Government, Ms Elsabe Rockman communicated with the Chief Executive Officer of the Free State Provincial Treasury, Mr H L Kgomongwe informing him of the provincial government's intentions to initiate a project for the re-design and the re-engineering of the Free State Provincial Government's website as budgeted for in the 2011/12 financial year.
- 5.1.8 To enable the province to commence with the project, she enquired with Provincial Treasury whether it currently had a contractor who is rendering any form of website services. She further requested that individual departments should be prohibited from proceeding to contract or develop individual websites or website related services until such time that a consultation process with regard to the project is concluded.
- 5.1.9 The Provincial Treasury responded and informed Ms Rockman that there was no contractual agreement, but that it had three (3) departmental officials who were responsible for the Departmental website. On 8 June 2011, Ms Rockman communicated with them again, informing the Provincial Treasury that the Free State Provincial Government was ready to proceed with the implementation of the project. She made reference to a National Treasury Instruction Note issued

on 31 May 2011 by the Accountant General and confirmed having complied with it.

5.1.10 On 20 June 2011, the Chief Executive Officer of the Free State Provincial Treasury, Mr H L Kgomongwe responded and stated that according to the National Treasury Instruction Note of 31 May 2011, bids in excess of R10 million should be referred to the Provincial Treasury for checking and verification of compliance.

5.1.11 A Request for Proposals (RFP) with specifications for the design and the development of the integrated website was compiled and published in the Tender Bulletin of 10 June 2011 with a closing date of 06 July 2011. The tender was further advertised in the *Sowetan newspaper* of 13 June 2011, the *Weekly newspaper* of 10 to 17 June 2011 and the *Free State News* of 10 to 16 June 2011 also with a closing date of 06 July 2011. On 15 June 2011 a briefing session was held. Bids were received from the following bidders:

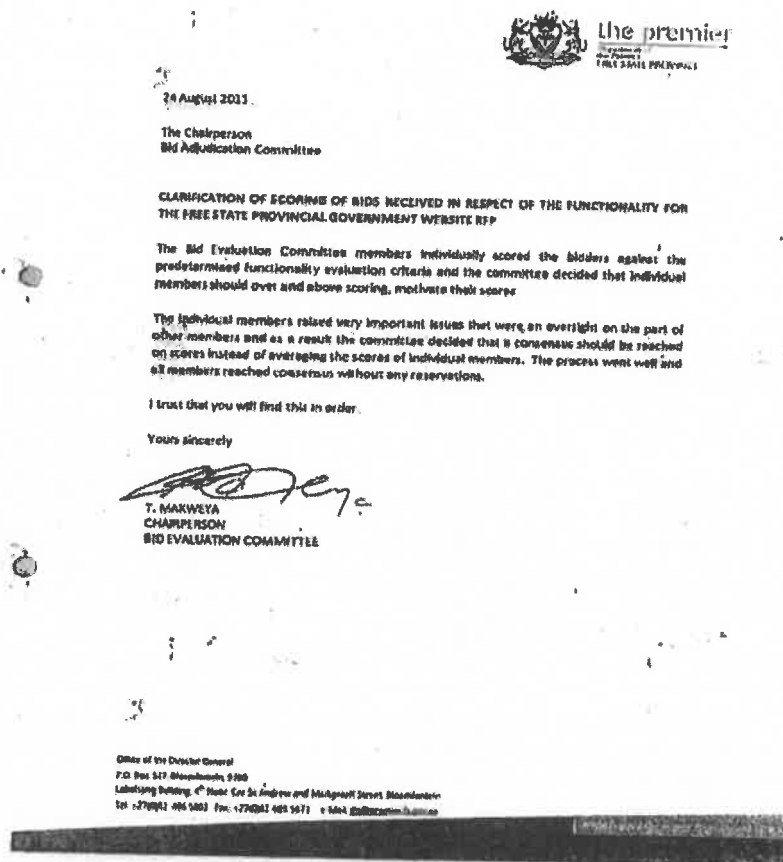
- 5.1.11.1 Khomo ya Maphura General Trading;
- 5.1.11.2 Matsapa Trading & Tawana Business Project JV;
- 5.1.11.3 O2 Information Technology;
- 5.1.11.4 Jonizo Joint Trading;
- 5.1.11.5 TAD Consulting and service;
- 5.1.11.6 IOX Consulting;
- 5.1.11.7 LOC IT Solutions;
- 5.1.11.8 Cherry Ikamva *Juggernaut* Joint Venture;
- 5.1.11.9 C-Squared Consumer Connectedness;
- 5.1.11.10 Mamello Trading 786CC T/A Promavent; and
- 5.1.11.11 Intsika Business Consultants.

5.1.12 During my office's investigation, it was established that *Cherry Ikamva Juggernaut JV* attached to its tender document three (3) Tax Clearance Certificates for Messrs. *Cherry Online, Ikamva ICT and Juggernaut Trading and*

Projects. The expiry dates for the tax clearance certificates were 10 August 2011, 2 September 2011 and 23 June 2012, respectively.

- 5.1.13 Following receipt of the bids, the Free State Provincial Government appointed Messrs. Open Water Advanced Risk Solutions (Pty) Ltd to conduct due diligence thus verifying details of the bidders.
- 5.1.14 During my office's investigation, it was however noted that there was no register containing the names of the bidders who submitted their bids by the closing date, which is also the day of opening of the tender box.
- 5.1.15 On 11 July 2011, the Director-General of the Province, Ms Elsabe Rockman and the Head of the Department of Cooperative Governance and Traditional Affairs, Mr Kopung Ralikontsane appointed a Bid Evaluation Committee (BEC) to evaluate the bids received in respect of the intended contract for the design and the development of the integrated website for the Free State Provincial Government (FSPG).
- 5.1.16 The Committee consisted of the following members, Mr T. Makweya (Chairperson); Ms M Mogopodi (Member); Mr R.S Kau (Member); Mr T Motiki (Member); Mr M Mvambi (Member); Pastor J Botes (Member); Mr WH Boshoff (Member); Mr T Mokoena (Member); Mrs M Finger (Secretariat); Mr M Mateba (Secretariat); and Ms A Hattingh (Secretariat).
- 5.1.17 Further thereto, a Bid Adjudication Committee (BAC) consisting of the following members was appointed, Mr MNG Mahlatsi (Chairperson); Mr AI Tihasedi (Secretariat); Mr T Moses (Secretariat); Mr D Hattingh; Mr BC Mokomela; Dr K Mahlatsi; and Mr N Mokhesi;
- 5.1.18 Bids were evaluated on 22 and 23 August 2011 by the BEC and three bidders, *Matsapa Trading & Tawana Business Project JV*, *IOX Consulting* and *Cherry Ikamva Juggernaut JV* were shortlisted with the rest, disqualified. On 24 August

2011, the BEC made enquiries with the FSPG as per the correspondence depicted below:



5.1.19 The bids were evaluated and the three shortlisted entities were scored as follows:



Table (a) the outcome on the evaluation of functionality was as follows:

CRITERIA FOR FUNCTIONALITY									
Names of the Bid Evaluation Committee	Proposed Framework of content			Business Plan outlining project proposal, implementation of project and initiative.			Technical capacity		
Tsekiso Mokoena	2	2	13	0	2	8	4	2	8
Mondli Mvambi	3	3	13	1	2	8	3	2	8
Matiro Mogopodi	3	3	13	1	2	8	4	2	8
J A Botes	3	3	13	1	2	8	4	2	8
Thabo Makweya	3	3	13	1	2	8	4	2	8
Tshepo Motiki	3	3	13	1	2	8	4	2	8
W H Boshoff	3	3	13	1	2	8	4	2	8
R S Kau	3	3	13	1	1	8	4	3	8

Matsapa Trading and Joint Venture

IOX Consult

Cherry Ikamva Juggernaut

- 5.1.20 On 25 August 2011, the BEC adopted its Bid Evaluation report. The report clearly sets out the process the committee followed in evaluating the bids. It is stated in the report that eleven (11) bids were received for a bid under reference number RFP 2011/06/21. The committee met on 22 to 23 August 2011 and the meeting was attended by all members of the committee.
- 5.1.21 According to the report, the committee agreed to hear all presentations from the bidders and that, the evaluation would be carried out in three (3) stages being:
- 5.1.21.1 Stage One: Compliance
 - 5.1.21.2 Stage Two: Functionality
 - 5.1.21.3 Stage Three: Price and Specific Goals
- 5.1.22 In the end, the committee recommended, *Cherry Ikamva Juggernaut JV* as a preferred service provider to be awarded the contract for the redesign, development, implementation and maintenance of the website for the broader Free State Provincial Government.
- 5.1.23 According to the BEC, the reasons for recommending *Cherry Ikamva Juggernaut JV* as a preferred service provider was because, the entity submitted a comprehensive, creative and innovative response to the Request for Proposals which addressed the following key components:
- 5.1.23.1 The Free State Online concept, including what it is and the objectives thereof:
 - 5.1.23.2 The technical approach, including a detailed implementation approach and plan which outlines the project management plan with implementation phases and timeframes;

-
- 5.1.23.3 The content development and management, including the information architecture and homepage, which includes, amongst others, features such as a profile of the Free State Province, the Free State Provincial and Local government sectors, public entities, legislation and regulations, career and business opportunities in the public sector and a youth page etc;
- 5.1.23.4 The utilisation of social media and mobility, including links to Facebook, Twitter, RSS, blogs and You Tube, Facebook and Twitter to keep in touch with the public on service delivery issues, key government programs and other priorities as well as the use of a Mobi site;
- 5.1.23.5 The involvement of community radio stations in the continuous development, management, broadcast and distribution of information;
- 5.1.23.6 The integration of website functionality with existing systems and processes;
- 5.1.23.7 The management approach, including structures such as steering committee, project management committee and focused sub-committees as well as the role and responsibilities of each of these structures during the different phases of the project and the human resource capacity.
- 5.1.23.8 A detailed research and analysis of the current status of websites of provincial departments, the local government sector and provincial public entities;
- 5.1.23.9 A demonstration of concept websites that illustrated functionality, as well as the professionalism and capacity of bidders.
- 5.1.24 **According to the report the total bid price was broken down per annum as follows:**
- 5.1.24.1 In 2011/2012 the amount payable was R 37 518 151.80

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- 5.1.24.2 In 2012/2013 the amount payable was R 41 081 040.00 (excluding annual escalation of 7.5% per annum to be negotiated); and
- 5.1.24.3 In 2013/2014 the amount payable was R 41 081 040.00 (excluding annual escalation of 7.5% per annum to be negotiated)
- 5.1.25 In conclusion, the BEC recommended that a detailed scope of the services to be rendered and the pricing structure should be set out in a Service Level Agreement to be concluded, noting that a provision should be made for the impact that existing contractual arrangements, if any, may have on the scope of service, pricing structure and implementation plan of the project.
- 5.1.26 The BEC recommended the appointment of *Cherry Ikamva Juggernaut JV* to design and develop the website and handed its report dated 25 August 2011 to the BAC. On 26 August 2011, the Bid Adjudication Committee (BAC) considered the report of the BEC and satisfied itself with the accuracy and completeness of the documents presented and thus unanimously accepted the recommendations of the BEC that *Cherry Ikamva Juggernaut JV* be appointed to redesign and/or re-launch a comprehensive and integrated website for the FSPG.
- 5.1.27 The total budget allocated by the Provincial Treasury for the integrated websites project for a three years period amounted to R67 861 000 (*sixty seven, million eight hundred and sixty one thousand*) as approved in the correspondence from the Chief Executive Officer (CEO) of the Provincial Treasury, Mr. HL Kgomongwe to the DG of the Department of Premier (Office of the Premier), Ms. EC Rockman on 20 June 2011.
- 5.1.28 On 23 September 2011, an appointment letter was issued to *Cherry Ikamva Juggernaut JV* confirming the awarding of the contract for the re-design and/or re-launch a comprehensive and integrated website for the FSPG.

5.1.29 The correspondence below is a copy of the appointment letter that was sent to Cherry Ikamva Juggernaut JV:



the premier

 I am pleased to see that the Province of Free State Province

TO: THE MANAGER
 Cherry Ikamva Juggernaut Joint Venture
 Unit 10, Genius Loci Office Park
 Cnr CP Hengenhout & Marens Roads
 Langenhovenpark
 Bloemfontein

Fax: 051 – 446 4723

Dear Sir/Madam

APPOINTMENT AS SERVICE PROVIDER: RE-DESIGN AND RE-LAUNCH OF WEBSITE: YOURSELVES: RFP NO. 2011/06/21

1. Kindly be advised that approval has been granted for your appointment as service provider for the re-development / re-design and re-launch of a comprehensive and integrated website.
2. This approval and appointment is subject to the provisions of the State Information Technology Act and the Regulations issued in terms thereof as well as the conclusion of a Service Level Agreement in accordance with paragraph 10 of the specifications, upon which only, any rights, which you may have, will vest.
3. Kindly contact Mr G Mahlatsi (Tel. 051 – 405 4017), CFO in the Department of the Premier, who will further engage with you in regard to this matter.

Yours faithfully


 Ms EC ROCKMAN
 Director General

Date: 23.09.2011


 Mr KF RALIKONTSANE
 Head: COGTA

Date: 23.09.2011

Department of the Premier
 PO Box 117, Bloemfontein, 9300
 Laboratory Building, 1st Floor, Cnr St Andrew and Hengenhout Streets, Bloemfontein
 Tel: +27(0)51 405 4000 Fax: +27(0)51 405 4050 e-mail: goan@premier.gov.za

5.1.30 However, I also established that on 7 September 2011, a date which was prior to the award of the contract to *Cherry Ikamva Juggernaut JV*, Ms Rockman communicated with the CEO of the Provincial Treasury requesting consensus for the FSPG to proceed with the award of the contract for the redesign, development, implementation and maintenance of the website for the broader provincial government sector.



5.1.31 I further established from a legal opinion received by the Department prepared by Adv. A J Venter of the State Law Advisors in the Free State dated 14 September 2011, that the provincial government sought a legal opinion from the State Law Advisors on:

5.1.31.1 Whether SITA needs to be involved in the procurement of services to re-design and/or re-launch the website for the Free State Provincial Government; and;

5.1.31.2 Whether paragraph 3.4.2 of the National Treasury Instruction Note on Enhancing Compliance, Monitoring and Improving transparency and accountability in Supply Chain Management issued on 31 May 2011, is applicable.

5.1.32 On 14 September 2011 Adv. A J Venter of the State Law Advisors in the Free State submitted the legal opinion to Ms Rockman and Mr Ralikontsane. In providing the opinion, ADV Venter made reference to the provisions of the SITA Act 88 of 1998 in particular section 7(3) and section 7(4) read with section 7(1) of the Act.

5.1.33 **Adv Venter pronounced that:**

5.1.33.1 *"The scope of work, as set out in the bid document, does not require the successful service provider to acquire any information technology goods or services or hardware as it is commonly referred to. In this instance, section 7(3) of the Act does not apply to the services, which are procured in terms of this bid.*

5.1.33.2 *The question remains whether a service, which the Department wishes to procure in terms of the bid, falls within the scope of the services as set out in section 7(1)(b) of the Act. In this context it is important to note that the main thrust of the scope of work refers to the re-development and/or re-design of*

an existing website, search engine optimization, design and content optimization, management optimization and the maintenance and/or operations thereof, which also include fresh content strategy.

- 5.1.33.3 *If the entire scope of work is considered against those services mentioned in section 7(1)(b), it would rather appear as if it would fall outside those services. As such, it is inconceivable that section 7(4)(b) should find application.*
- 5.1.33.4 *With regard to whether paragraph 3.4.2 of the National Treasury Instruction Note, issued on 31 May 2011, is applicable, the question should be considered against the interpretation of information technology as set out above. Adv Venter was of the view that paragraph 3.4.2 of the National Treasury Instruction Note, issued on 31 May 2011 only applies where information communication technology is procured.*
- 5.1.33.5 *He concluded his opinion by stating that, in view of the fact that no technology or "**hardware**" would be procured, paragraph 3.4.2 of the National Treasury Instruction Note, issued on 31 May 2011 does not apply and Provincial Treasury did not have to confirm the issues referred to in the paragraph".*
- 5.1.34 On 16 September 2011, Ms Rockman communicated with the CEO of SITA confirming that the work that needed to be done was in relation to the re-configuration of existing websites into a comprehensive and integrated website for all the departments, municipalities as well as public entities in the Free State Province. She thus requested to engage the services of SITA to advise the Provincial Government on the technical details of the qualifying bids and also requested SITA to provide her with a proposal for the hosting of the website.
- 5.1.35 On 20 September 2011, Ms Rockman addressed correspondence to the CEO of the Provincial Treasury. She copied the Head of the Department of Cooperative Governance and Traditional Affairs, Mr Kopung Ralikontsane as well as the CEO of SITA in the Free State Province, Mr Louwrence Maree.

5.1.36 In her correspondence to the aforesaid, she made reference to consultations that the parties had with State Law Advisers with regard to the project for the re-design, development, implementation and maintenance of the website for the broader Provincial Government sector which were held on 14 and 15 September 2011 respectively.

5.1.37 According to Ms Rockman, at the said consultations, the parties agreed that:

“

(a) The hosting of the website will be done by SITA and SITA is in the process of preparing the necessary cost proposal in this regard. The hosting of the website will therefore not be included in the scope of work to be rendered by the recommended service provider and the cost implications will therefore be reduced. The details of this will be clarified once we commence engagement with the recommended service provider which we have not done pending the outcome with our engagement on this matter with Provincial Treasury.

(b) SITA will be responsible for ensuring compliance with the relevant prescribed norms and standards and will be a key participant and stakeholder in the governance, monitoring and evaluation structure(s) that will oversee all phases of the project implementation for the duration of the contract period.

(c) A Service Level Agreement will be formalized between the Department of the Premier and SITA that will detail, inter alia, the scope of services to be undertaken by SITA and the responsibilities of the parties for the execution of this project.”

5.1.38 The Provincial Treasury responded on 21 September 2011 and referred Ms Rockman to the National Treasury Practice Note 5 of 2009/10 and stated *inter alia* that:

"Please note that the intention of the new National Treasury SCM Instruction Note is to do away with the concurrent awarding and therefore the Department does not need Treasury approval on this matter."

5.1.39 The purpose of the National Treasury Practice Note 5 of 2009/2010 is to provide guidance to Accounting Officers on the procedures to be followed on procuring ICT related goods and/or services through the State Information Technology Agency (SITA) It basically states that when procuring ICT related goods and services, organs of state are obliged to procure such services through SITA.

5.1.40 On 12 January 2012, the FSPG, duly represented by the Director General, Ms Elsabe Rockman and Head of the Department of Cooperative Governance and Traditional Affairs, Mr Kopung Ralikontsane entered into a Service Level Agreement with *Cherry Ikamva Juggernaut JV* to re-design, develop and re-launch a comprehensive and integrated website for the Free State Provincial Government.

5.1.41 In the agreement, the duties of the service provider are divided into 7 phases which are *inter alia* the following:

5.1.41.1 Phase 1: Planning, conceptualization research and information development of websites;

5.1.41.2 Phase 2: Design of websites;

5.1.41.3 Phase 3: Development and creation of websites;

5.1.41.4 Phase 4: Testing of websites;

-
- 5.1.41.5 Phase 5: Implementation of websites;
 - 5.1.41.6 Phase 6A: Maintenance of websites;
 - 5.1.41.7 Phase 6B: Content generation and management of websites;
 - 5.1.41.8 Continuous maintenance , review and updating of the design;
 - 5.1.41.9 Continuous reviewing and updating of the websites, as well as generation and management of content of the websites;
 - 5.1.41.10 Search engine optimization:
 - 5.1.41.10.1 Create links to related internet sites and researched and approved by the contracting authority; and
 - 5.1.41.10.2 Create various on-site services and features which may include links to search engines, a site index and site map.
 - 5.1.41.11 Keyword analysis and linking;
 - 5.1.41.12 Design and content optimization;
 - 5.1.41.13 Design site layouts and content framework – develop the hypertext structure and organizing the content for ease of use;
 - 5.1.41.14 A cohesive graphics design (visual theme, colour scheme, etc.);
 - 5.1.41.15 Adapt any existing promotional materials (logos, colour scheme, etc.) to create the site's graphic design;

-
- 5.1.41.16 Design site navigation tools – buttons, menu bars, icons, etc;
- 5.1.41.17 Target market;
- 5.1.41.18 Provide active content which may include animation, ensuring browser compatibility, especially with Netscape and Explorer browsers;
- 5.1.41.19 Management optimization;
- 5.1.41.20 Adapt forms, manuals, etc., already in use to the new website; and
- 5.1.41.21 Transfer of existing site content to new site.
- 5.1.42 It was a material term of the agreement that the Free State Provincial Government shall give the service provider the necessary support and it was agreed that SITA would host the website.
- 5.1.43 It was also a material term of the agreement that the contract shall terminate at the termination date, in the event that the provincial government lacked funds to proceed with the project and/or in the event that the contractor was unable to deliver the service.
- 5.1.44 On 20 June 2013, I made enquiries with the FSPG and requested relevant documentation relating to the procurement of the services of *Cherry Ikamva Juggernaut JV* to re-design, develop and re-launch a comprehensive and integrated website for the Free State Provincial Government.
- 5.1.45 Mr Kopung Ralikontsane on behalf of the FSPG responded on 15 July 2013 and provided the requested documents. Initially, he advised me that the contract and the expenditure incurred for the re-design, develop and re-launch of a comprehensive and integrated website for the FSPG by *Cherry Ikamva Juggernaut JV* was a subject of an audit by the Auditor General.

- 5.1.46 Subsequently, on 29 November 2013, I enquired from SITA regarding a requisite role that they played in the procurement of *Cherry Ikamva Juggernaut JV* to design, develop and maintain a comprehensive and integrated website for the FSPG. SITA responded on 7 February 2014. The agency commenced its response by citing its mandate as provided for in sections 6 and 7 of its enabling legislation, the SITA Act 88 of 1998.
- 5.1.47 According to SITA, the agency was not involved in the development of the specification and/or evaluation of the development, re-design, implementation and maintenance of the FSPG website other than the provision of the hosting facility of the website. It stated that the request for hosting of the website was received from the FSPG on 16 April 2011 and the agency entered into a service level agreement with the provincial government in connection therewith.
- 5.1.48 On 28 May 2015, I held a meeting with Mr. Maree of SITA who was in the company of Adv. A J Venter. At the meeting, Adv. Venter explained that the integrated websites is more of content-driven process and as a result SITA indicated that they do not deal with content. Mr. Maree confirmed that this was true. Mr.
- 5.1.49 I have also been able to establish from the recording of the BEC meeting held on 22- 23 August 2011 that the committee members discussed functionality. After discussions, the committee would discuss and decide what score should be allocated to a bidder.
- 5.1.50 I made enquiries on 12 August 2015, with the FSPG regarding the termination of the contract between the FSPG and *Cherry Ikamva Juggernaut JV*. Mr Kopung Ralikontsane, the current Director-General of the FSPG responded on 17 September 2015 and confirmed that during the annual audit by the Auditor General, it became apparent that there was a risk of the expenditure incurred for the project being declared as *irregular expenditure* and as a consequence

thereof, the service provider was requested not to proceed with further implementation of the agreement. Apparently the suspension of the implementation of the project was communicated orally. He also stated that the work of the project team that was established to oversee the implementation of the project was suspended.

- 5.1.51 However, Mr Ralikontsane confirmed that the FSPG took the necessary steps to preserve what had already been done by the service provider, and to comply with statutory obligations until there was clarity regarding the regularity or not of the contract between the FSPG and *Cherry Ikamva Juggernaut JV*. According to Mr Ralikontsane, payments to SITA for the hosting of the website were not suspended.
- 5.1.52 Mr Ralikontsane further stated that, during the implementation of the project by the service provider, reports were received on progress made. These were verified against the invoices submitted and the actual services delivered before payments were made to the service provider. He stated that since the suspension of the work, no progress reports and invoices were received from the service provider.
- 5.1.53 Mr Ralikontsane concluded his correspondence by stating that payments which were made to the service provider were in full and final settlement in respect of the invoices submitted but not as a result of the termination of the contract.
- 5.1.54 It was stated that the contract was suspended until the Auditor General would make a determination and pronounced itself on the process followed in the appointment of the service provider as well as pending the outcome of the investigation by the Public Protector.
- 5.1.55 Finally, Mr Ralikontsane confirmed that the FSPG met with the Director of *Cherry Ikamva Juggernaut JV*, Mr Tumi Ntsele and agreed that the maximum amount for which the FSPG could be liable will not be more than R 19.3million.

- 5.1.56 It was further agreed that he would submit proof of the work that had already been performed, and on receipt thereof, the FSPG would assess that against the obligations and tariffs as set out in the SLA as well as information on the respective websites to determine the possible liability of government.

Evidence presented by Mr Mahlatsi during his interview

- 5.1.57 On 13 August 2013, interviews were conducted with Mr Mahlatsi, the former CFO of Department of the Premier. In the interview Mr Mahlatsi indicated that as he was the CFO at the time in question he was therefore responsible for the supply chain management process. He indicated that the needs assessment were identified by the end-user (communication unit);
- 5.1.58 He said that the design and development of an integrated website involved 38 websites, municipalities, provincial departments and government entities;
- 5.1.59 He indicated that since the need was identified by the Communications unit, ICT unit was requested to provide inputs. Communication needed a website that is interactive, that could accommodate other platforms like social media and is interactive. A website that will be updated regularly and that will link to all other departments, entities and municipalities;
- 5.1.60 He said that the main idea was that the websites' bigger component was content management. Whoever was going to manage the websites would be able to interact and when people feed information through questions or whatever communication, the municipalities, departments and entities will be able to facilitate responses as well;
- 5.1.61 He submitted that the reason for advertising it as an RFP was because they wanted to allow people to come up with creativity. According to him they wanted to get the best solution which meant something that was current in the media platforms, and this was going to be possible though the briefing session.

5.1.62 Further that on the appointment of committees, the FSPG did not want to use their normal bid committee members. It decided to consider people from other entities so that they could be able to evaluate the bids and draw conclusions whether the integrated website solution was appropriate or not for their needs as well. Furthermore so that the service provider's appointment will also be accepted by all the parties involved.

5.1.63 He submitted that the BEC made a recommendation to the BAC, and they approved the recommendation as they were because they agreed with them based on the documentation at their disposal.

Evidence presented by Mr Kopung Ralikontsane during his interview

5.1.64 On 14 August 2013, interviews were conducted with Mr Ralikontsane, the former HOD of COGTA, who is currently the DG of the Department of the Premier.

5.1.65 During the interview he submitted, that his role was to represent the municipality's interest in the process as well as the local government, while the DG of the Department of the Premier was representing the interest of the provincial government and other entities.

5.1.66 Mr Ralikontsane said that the needs identification was discussed in the Premier's Coordination Forum, which is constituted by the MEC's, Mayors, Municipal Managers, Heads of Departments and the Premier chairs the said meeting.

5.1.67 He confirmed that there was an assessment of what the scope of the project would be, the budget was also linked to the project. He said the COGTA was responsible for payment on behalf of 24 Local Municipalities while the Department of the Premier paid for the other 14 departments and public entities.

- 5.1.68 According to him there was no deviation, request for proposals was done and they followed a tender process of advertising in the media and on their website, did the evaluation and the adjudication.
- 5.1.69 Mr Ralikontsane indicated that meetings were held with SITA 16 September 2011 and it was agreed that SITA will host the website. He indicated that SITA is in the business of maintenance, website information update and content development is not their business. SITA does hard-core IT. He added that SITA has not established the capacity to configure annual reports, reporting, monitoring and evaluation as it is not designed for this.

Evidence presented by Ms Elzabe Rockman during her interview

- 5.1.70 On 28 October 2013, interviews were held with Ms Elzabe Rockman, the former DG of the Department of the Premier, and is currently the MEC of the FSPG.
- 5.1.71 Ms Rockman submitted that there was a needs assessment that was conducted which basically looked at the current status of the websites of all departments, municipalities and public entities.
- 5.1.72 She said that the intended website was to focus on content as it was a struggle to find information on the current system, moreover there was no point in having a website which is outdated or irrelevant. The current website, she said, was about building institutional memory in information management.
- 5.1.73 Ms Rockman said that she told Mr Ralikontsane and Mr Mahlatsi (CFO) that they needed to make sure that the tender is dealt with strictly in line with the new Instruction Note. Subsequently, National Treasury had exempted all departments on compliance with the Instruction Note as this had its own implications.

- 5.1.74 She conceded that the FSPG followed the Instruction Note as this was the first tender that was issued in the FSPG to implement in line with the referred Instruction Note. The National Treasury Instruction Note she said was about the fact that the project had to be in the APP and budgeted for.
- 5.1.75 She indicated that initially they had included hosting in the RFP, but when they engaged with Adv. Venter, the State Law Advisor, Provincial Treasury and SITA. It was thus agreed that SITA will be hosting as it was in line with the SITA Act. Further that the FSPG was persuaded that hosting the website was a compulsory service that is why ultimately hosting was excluded before the tender was awarded.

Evidence presented by Mr Thabo Makweya during his interview

- 5.1.76 On 23 June 2017, the Chairperson of the BEC, Mr Thabo Makweya (Mr Makweya) was interviewed. At the time of his appointment to lead the BEC for this project, Mr Makweya was in the employ of the Free State Development Corporation (FSDC), in the capacity of an Acting Chief Executive Officer.
- 5.1.77 At the interview, Mr Makweya stated that he was approached by the DG of the Province, Ms Elsabe Rockman to head the BEC and the instruction was for the committee to evaluate *inter alia* the functionality of what should be the main driving and the main determining factor in the evaluation of the bid. He then explained the evaluation process that they followed starting from inviting bidders to make presentations before the committee.
- 5.1.78 During the evaluation of the bids, the issue of pricing was not a major determining factor he said. According to Mr Makweya, he was of the view that there could have been foul play in that it is possible that there may have been a predetermined bidder. He however, confirmed that the instruction to the BEC was to come up with a suitable service provider who would deliver the best product.

5.1.79 He stated that bidders were not adequately prepared but the successful bidder was well prepared. He indicated that the suspicions that the *Cherry Ikamva Juggernaut JV* seemed to have been over-prepared than other bidders were discussed but the committee resolved that if they are better prepared what can be done about it.

5.1.80 He admitted that the scoring of points could have been discussed by the BEC Members and that it would not have been possible that people would all score the same. Further that understandably, a conclusion could be drawn that scores were discussed from merely looking at the score sheets of the BEC members as the points allocated were similar.

Application of the relevant laws and prescripts

General Procurement Legislation

5.1.81 Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

5.1.82 The key instrument regulating procurement *in the public sector* is the PFMA, the purpose of which is set out in the preamble to the Act, which reads as follows:

"To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith."

5.1.83 *Section 45 of the PFMA regulates the responsibilities of other officials and provides that an official in a department, trading entity or constitutional institution—*

- (a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;*
- (b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;*
- (c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*
- (d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 44; and*
- (e) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.*

5.1.84 Section 76(4)(c) of the PFMA provides that the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning, *inter alia*, the determination of a framework for an appropriate procurement and provisioning system which is in keeping with the dictates of Section 217(1) of the Constitution (supply chain management {SCM} framework).

5.1.85 The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all Constitutional institutions (see Regulation 16A2.1 (b)).

5.1.86 The Treasury Regulations apply to all constitutional institutions, but only to the extent as indicated in regulations 1 to 22.

5.1.87 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A.3.2 which reads as follows:

"16A 3.2 A supply chain management system referred to in paragraph 16A.3.1 must –

- (a) be fair, equitable, transparent, competitive and cost effective;*
- (b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
- (c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*
- (d) provide for at least the following: –*

- (i) demand management;*
- (ii) acquisition management;*
- (iii) logistics management;*
- (iv) disposal management;*
- (v) risk management; and*
- (vi) regular assessment of supply chain performance."*

5.1.88 According to Treasury Regulation 16A4.1 under the heading *"Establish of supply chain management units"* The accounting officer or accounting authority must establish a separate Supply Chain Management Unit within the office of that institutions Chief Financial Officer, to implement the institution's supply chain management system.

5.1.89 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A6 which reads as follows:



"16A6.1 Procurement of goods and services either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

16A6.2 A supply chain management system must, in the case of procurement through a bidding process, provide for-

- (a) The adjudication of bids through a bid adjudication committee;*
- (b) The establishment, composition and functioning of bid specification, evaluation and adjudication committees;*
- (c) The selection of bid adjudication committee members;*
- (d) Bidding procedures; and*
- (e) The approval of bid evaluation and/or adjudication committee recommendations.*

16A6.3 The Accounting Officer or Accounting Authority must ensure that-

- (a) Bid documentation and the general conditions of a contract are in accordance with-*
 - (i) The instruction of the national Treasury; or*
 - (ii) The prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry;*
- (b) Bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000(Act No.5 of 2000) and the Broad Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003);*
- (c) Bids 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 or accounting authority may determine;

(d) Award are published in the Government Tender Bulletin and other media by means of which the bids were advertised;

16A6.4 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."

5.1.90 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A8 which reads as follows:

"16A8 Compliance with ethical standards

16A8.1 All officials and other role players in a supply chain management system must comply with the highest ethical standards in order to promote –

- (a) mutual trust and respect; and*
- (b) an environment where business can be conducted with integrity and in a fair and reasonable manner.*

16A8.2 The National Treasury's Code of Conduct for Supply Chain Management Practitioners must be adhered to by all officials and other role players involved in supply chain management.

16A8.3 A supply chain management official or other role player –

- (a) must recognise and disclose any conflict of interest that may arise;*
- (b) must treat all suppliers and potential suppliers equitably;*

- (c) *may not use their position for private gain or to improperly benefit another person;*
- (d) *must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act;*
- (e) *must be scrupulous in their use of public property; and*
- (f) *must assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system.*

16A8.4 If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –

- (a) *disclose that interest; and*
- (b) *withdraw from participating in any manner whatsoever in the process relating to that contract.*

16A8.5 An official in the supply chain management unit who becomes aware of a breach of or failure to comply with any aspect of the supply chain management system must immediately report the breach or failure to the accounting officer or accounting.”

5.1.91 Regulation 11(a) of the Regulations issued in terms of the Preferential Procurement Policy Framework Act, 2000, provides that an organ of state must, prior to making an invitation for tenders properly plan for and as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made.

Supply Chain Management Guide for Accounting Officers

5.1.92 In February 2004, the National Treasury, issued a document entitled "Supply Chain Management: A Guide for Accounting Officers/Authorities" (SCM Guide). The purpose of the SCM Guide was to give guidance to accounting officers in fulfilling their roles within the SCM framework.

5.1.93 Paragraph 3 of the SCM Guide sets out guidelines in regard to demand management and reads as follows:

"Demand management

3.1 Introduction

*3.1.1 Demand management is the first phase of SCM. The objective is to ensure that the resources required to **fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs.** As part of this element of SCM, a total needs assessment should be undertaken. This analysis should be included as part of the strategic planning process of the institution and hence will incorporate the future needs.*

*3.1.2 It is vital for managers to understand and utilise sound techniques to assist them in their planning, implementation and control activities. **As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be clearly analysed.** This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, etc." (Emphasis added)*

5.1.94 This document is applicable to all accounting officers and contains the following principles:

- (a) The identification of a need is the initiating trigger to a procurement process.
- (b) The fulfilment of the need should form part of the strategic objectives of the department and a needs analysis should therefore be part of the strategic planning process.
- (c) Sound techniques should be utilised in conducting the needs analysis.
- (d) The need should be linked to the budget.

5.1.95 Paragraph 1.3.2.2 of the SCM Guide states that Demand Management is the beginning of the supply chain where:

- 5.1.95.1 A Needs Assessment is done to ensure that goods or services are acquired in order to deliver the agreed service;
- 5.1.95.2 Specifications are precisely determined;
- 5.1.95.3 Requirements are linked to the budget; and
- 5.1.95.4 The Supplying Industry has been analysed.

5.1.96 Planning therefore plays an integral part in supply chain management.

The Acquisition process

- 5.1.97 SITA was not included in the acquisition process. Section 7 of the SITA Act 88 of 1998 regulates the duties and powers of the State Information Technology Agency.
- 5.1.98 Section 7(3) of the Act provides that every department must, subject to subsection 4 of this Act procure all information technology goods or services through SITA.
- 5.1.99 Section 7(4) provides that a department that wishes to acquire a service contemplated in subsection (1) (a), must;



-
- (i) *acquire that service from the Agency in accordance with business and service level agreements concluded in terms of section 20; or*
 - (ii) *procure that service through the Agency in terms of subsection (3) if the Agency indicates in writing that it is unable to provide the service itself;*
 - (a) *subsection (1) (b), must either—*
 - (i) *acquire that service from the Agency in accordance with business and service level agreements concluded in terms of section 20; or*
 - (ii) *procure that service through the Agency in terms of subsection (3).*
 - (1) *A public body may—*
 - (a) *acquire a service contemplated in subsection (1) (a) or (b) from the Agency;*
and
 - (b) *procure any information technology goods or services through the Agency.*
 - (2) *The Agency—*
 - (a) *must set standards regarding*
 - (i) *the interoperability of information systems between departments, subject to the approval of the Minister; and*
 - (ii) *a comprehensive information systems security environment for departments, subject to the approval of the Minister and the Minister of Intelligence;*
 - (b) *must certify every acquisition of any information technology goods or services by a department for compliance with those standards;*

(c) may—

- (i) *despite anything to the contrary in any other law, exclusively subject to subsection (7) sell or provide authentication products or services for all departments;*
 - (ii) *on request of any public body, sell or provide authentication products or services for that public body; and*
 - (iii) *apply to the relevant authority for the accreditation of such authentication products or services in terms of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002); and*
 - (iv) *may carry out research regarding the use of information technology to improve the efficiency of the public administration.*
- (3) *If the Agency decides not to provide authentication products or services for a department or public body in terms of subsection (6) (c), the department or public body must procure through the Agency those products or services from a preferred authentication service provider referred to in section 28 (2) of the Electronic Communications and Transactions Act, 2002.*

The National Treasury Practice Note No 5 of 2009/2010

- 5.1.100 The National Treasury Practice Note No. 5 of 2009/2010 seek to provide guidance to Accounting Officers of government departments and constitutional institutions and to accounting authorities of public entities listed in Schedule 3A and 3C to the PFMA, 1999 on the procedure to be followed when procuring ICT related goods and/or services through SITA.
- 5.1.101 The Practice Note also seek to alert these Accounting Officers of the prescribed SCM processes and procedures to be followed by SITA on behalf

of government departments, constitutional institutions and public entities listed in Schedule 3A and 3C to the PFMA, 1999.

5.1.102 Paragraph 3.1 of the Practice Note provides that: "In terms of the SITA Act, 1998, a distinction is made between certain services that **must** be provided by SITA and certain services that **may** be provided by SITA."

5.1.103 Paragraph 3.2 thereof provides that "SITA ***must*** provide the following services to national and provincial Departments:

5.1.103.1 *provide and maintain a private telecommunication network or a value added network;*

5.1.103.2 *provide and maintain transversal or Departmental specific information systems;*

5.1.103.3 *provide data-processing or associated services for transversal or Departmental specific information systems;*

5.1.103.4 *provide IT (Information Technology) for Government;*

5.1.103.5 *set standards for interoperability;*

5.1.103.6 *set standards for ISS (Information security standards);*

5.1.103.7 *set standards for Certification of IT acquisition;*

5.1.103.8 *certify all acquisitions for standard compliance;*

5.1.103.9 *eliminate duplication; and*

5.1.103.10 *leverage economies of scale."*

5.1.104 Further thereto, paragraph 3.3 of the Practice Note provides that,



"Departments are required to acquire these services from SITA in accordance with business or service level agreements. Should SITA indicate in writing that it is unable to provide the services itself, SITA will act as the procurement agent to acquire such services on behalf of Department."

The National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management

- 5.1.105 The Instruction Note was issued by the Accountant General on 31 May 2011 and its primary purpose is to improve accountability and provide SCM directives to Accounting Officers of departments, constitutional institutions and to Accounting Authorities of public entities listed in Schedule 3A and 3C to the PFMA, 1999.
- 5.1.106 Paragraph 3 of the Instruction Note provide guidelines on measures to be taken to enhance compliance monitoring and improve accountability and transparency. Sub-paragraph 3(4) regulates information relating to bids in excess of R10 million including all applicable taxes.
- 5.1.107 Paragraph 3.4.2 provides that, the relevant Treasury must, for all ICT bids that exceed R10 million;
- (a) Confirm adherence to Treasury Regulation 17.3.1 which requires that departments and constitutional institutions may not amend or institute new computerised systems that will affect financial administration without the prior written approval of the National Treasury;
 - (b) Confirm that sufficient funds are available in the institution's approved budget;

- (c) Determine whether the acquisition is through a finance or operating lease and whether the lease complies with the relevant prescripts; and
- (d) Confirm (in writing), after consulting with SITA, that there is no duplication of the same or any similar ICT and/or licensing contracts in order to prevent fruitless and wasteful expenditure.

5.1.108 Paragraph 3.4.3 provides that, contracts above the value of R10 million (all applicable taxes included) may only be awarded with the concurrence of the relevant Treasury.

5.1.109 The relevant Treasury must ensure that the contract is awarded within the budgetary provision and aligned with the targets/outputs indicated in the strategic plan of the institution.

The Preferential Procurement Policy Framework Act (PPPFA)

5.1.110 The PPPFA, 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.

5.1.111 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;

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) the specific goals may include:

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) 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.

(2) *Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance."*

5.1.112 Tax clearance certificate in accordance with the Preferential Procurement Regulations of 2001

Paragraph 16 provides that *"No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service ("SARS") certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS".*

The Supply Chain Management Policy of the Free State Department of the Premier

5.1.113 The policy was adopted on 30 March 2007 and its purpose is to give effect to the provisions of the constitution and the PFMA with a view to transforming the procurement and provisioning practices in the Department into an integrated Supply Chain Management function.

5.1.114 It also provides for roles and responsibilities of key senior departmental officials involved in procurement such as the Accounting, Chief Financial Officer as well as the SCM Unit of the Department.

5.1.115 Chapter 2, Paragraph 7 of the policy regulates, the framework for the Supply Chain Management and provides the following systems, which are provided for in Chapter 16.A3.2 of the Treasury Regulations:

5.1.115.1 Demand Management

5.1.115.2 Acquisition Management

5.1.115.3 Logistics Management

5.1.115.4 Disposal Management

5.1.115.5 Risk Management and;

5.1.115.6 Regular Assessment of Supply Chain Performance.

5.1.116 Part 2, paragraph 2 of the policy regulates the Acquisition Management and provides for a system of acquisition management. Paragraph 6 regulates competitive bidding and provides that goods and services above a transaction value of R100 000 (VAT included) must be procured through a competitive bidding process save for emergency cases which are regulated in paragraph 4.3.1.

5.1.117 Chapter 3, Part 2, of the policy regulates departmental monetary threshold values for goods, services and assets procurement methods and provides in paragraph 3 therefore that procurement for goods and services with monetary value above R2 000 000.00 per case including VAT must be done through competitive bidding unless written approval to do otherwise is obtained from the Director General.

Conclusion

5.1.118 Based on the application of the relevant law to the facts of the matter, I am inclined to conclude that there were no irregularities in the manner in which the FSPG procured the services of *Cherry Ikamva Juggernaut JV* to design, develop, implement and maintain a comprehensive and integrated website for all government departments, municipalities and state owned entities in the Free State.

5.2 Whether the expenditure incurred for the design and development of an integrated website for the Free State Provincial Government was excessive, and if so; whether such an expenditure amounted to irregular, fruitless and wasteful expenditure thus constituting maladministration.

Common Cause issues

It is not disputed that:

- 5.2.1 On 23 September 2011, *Cherry Ikamva Juggernaut JV* was appointed by the FSPG to design and develop an integrated website "*subject to provisions of the State Information Technology Agency Act of 1998 (Act 88 of 1998) and the Regulations as well as the conclusion of the service level agreement*" at a cost to the state of approximately, R119 320 231.80.

Issues that are in dispute

- 5.2.2 The issue for my determination is whether or not in incurring the expenditure for the design, development, implementation and maintenance of an integrated and comprehensive website for the provincial departments, municipalities and the state owned entities in the province, the FSPG derived value for money and/or the expenditure so incurred was excessive. Further thereto, I have to determine whether the expenditure was not in any way irregular, fruitless and wasteful thus constituting maladministration and reckless use of public funds.
- 5.2.3 The total cost to the FSPG for procuring the services of *Cherry Ikamva Juggernaut JV* to design, develop, implement and maintain an integrated and comprehensive website for the provincial departments, municipalities and state owned entities in the province was alleged to be an amount of R119 320 231.80. This was despite the fact that the FSPG had a budget of R67 861 000.00 allocated towards the project.
- 5.2.4 During the investigation, it was established that the total amount that was actually paid to the service provider is an amount of R64 567 318.10 excluding the cancellation fee of R19.3 million. The table below illustrates the amounts paid by the Departments of the Premier, as well as Cooperative Governance and Traditional Affairs.

Institution	Date of invoice	Amount	Date of payment	Approved by
COGTA	13/03/2012	R20 440 200.00	23/03/2012	KF. Ralikontsane
COGTA	08/11/2012	R14 836 951.80	27/11/2012	L. Becker
DP	13/03/2012	R9 293 644.80	05/02/2013	Unknown
DP	06/12/2016	R5 896 759.84	06/12/2016	T Matabane
COGTA	20/12/2016	(R3 999 990.74) (R10 099 770.79) R14 099 761.71	20/12/2016 22/05/2017	Unknown
Total		R64 567 318.10		

5.2.5 According to the bid documents, in tendering for the contract, prospective bidders quoted as follows:

NAME OF BIDDER	YEAR 1	YEAR 2	YEAR 3	TOTAL
Khomo ya Maphura General Trading	R13 210 000 in respect of web design and development as well as R31 966 66.67 representing maintenance and support	R31 966 66.67 for maintenance and support	R31 966 66.67 for maintenance and support	R228 000 00
Matsapa Trading & Tawana Business Projects JV	R1 129 200.00 for website development	R4 609 946.67	R4 609 946.67	R9 219 894.47
O2 Information Technology	R57 000 00 for web design, R228 000 for the banner theme modification R11 856 for domain renewal R296 400 for hosting fees, R4 560 000 for maintenance and R133 000 for	R228 000 for the banner theme modification R11 856 for domain renewal R296 400 for hosting fees, R4 560 000 for maintenance	R228 000 for the banner theme modification R11 856 for domain renewal R296 400 for hosting fees, R4 560 000 for maintenance	R17 017 768

	training an administrator			
Jonizo Joint Trading	R20 590 00 for web development and R1 971 800 in respect of maintenance and hosting	R1 971 800 for maintenance and hosting	R1 971 800 for maintenance and hosting	R7 974 400
Tad Consultancy & Services	R7 550 645.00 in respect of redesign and R6 678 954.48 for maintenance	R7 382 462.16 for maintenance	R8 092 365.24 for maintenance	R29 704 426.88
IOX Consulting	R1 350 000 for web design, R1 050 000 for web design again and R5 400 for hosting	R1 050 000 for web design again and R5 400 for hosting	R1 050 000 for web design again and R5 400 for hosting	R4 516 200
LOC IT Solutions	R15 401 508.00 for web design and development and R4 199 497.33 in respect of training and maintenance	R15 401 508.00 for web design and development and R4 199 497.33 in respect of training and maintenance	R15 401 508.00 for web design and development and R4 199 497.33 in respect of training and maintenance	R58 803 015.99
Cherry Ikamva Juggernaut JV	R39 125 598.00	R39 125 598.00	R39 125 598.00	R117 376 794.00
C-Squared Consumer Connectedness	R606 480.00 which is a once off payment and R265 392 representing maintenance	R291 919.20 in respect of maintenance		R1 163 791.20
Promavent	R718 666.67	R718 666.67	R718 666.67	R2 156 000.01
Intsika Business Consultants	R257 946.00 for web design and development	R168 527.00 representing operation, maintenance and support	R168 527.00 representing operation, maintenance and support	R595 000.00

5.2.6 *Cherry Ikamva Juggernaut JV* was the successful bidder that was awarded a contract to design, develop, implement and maintain an integrated and comprehensive website for the FSPG departments, municipalities and state owned entities. During the investigation it was established that its bid was the highest in price as its bid quoted an amount of **R117 376 794.00** for the three (3) year cycle with the lowest bidder quoting **R595 000.00**.



- 5.2.7 In a letter from the Acting National Accountant General dated 31 July 2013 addressed to the Provincial Accountant General titled, *"Commitment Website"*, it is stated that:

"Based on the fact that this is onerous contract, meaning that the cost of meeting the obligations in the contract may exceed the economic benefits expected to be received under it (meaning that government may pay more for the website than what it is worth or the service potential to be derived from it). In this case the department will disclose a provision which will reflect the unavoidable net loss arising from the contract (meaning the cost of exiting the contract). This will be the lower of:

- (a) the cost of fulfilling the contract; and*
- (b) any compensation or penalties arising from failure to fulfil the contract.*

Based on the content of the contract there no real penalties, if the department wants to exit the contract, they must only pay for the services that have been rendered to date of termination.

Therefore, the department will disclose the lower of R40 million or 0 (assuming that work done to reporting date is fully paid up)."

- 5.2.8 In determining whether the FSPG derived value for money in contracting with *Cherry Ikamva Juggernaut JV* at the quoted price, I made enquiries to SITA about websites that the entity developed for different government departments as well as the related costs. The table below illustrates websites that SITA had developed and maintained, including costs related thereto;

Name of the municipality	Provisional Website Developed	Cost	URL
UD476 Fetakgomo-Greater Tlokweng Local Municipality	Site Internal	R 82 990.33	http://www.fetm.gov.za
Lepelle Krumpt Local Municipality	Site Internal	R 47 799.34	http://www.lepelle-krumpt.gov.za
Ephraim Mogale Local Municipality	Site Internal	R 80 115.10	http://www.ephraimmogaleim.gov.za
Vhembe Local Municipality	Site Internal	R 77 549.20	http://www.vhembe.gov.za
Umpopo department of Treasury	Site Internal	R 99 344.78	http://www.umpopo.gov.za
Makhuduthamaga	Site Internal	R 59 896.34	http://www.makhuduthamaga.gov.za/

Website list developed and maintained by SITA					
Client	URL	Development platform	Service Level Agreement for maintenance 2016-2017		Proposal for development
			Hours	Value	Value
DEA-EGIS	www.egis.environment.gov.za	Drupal			R 161 026.80
DEA	www.environment.gov.za	Drupal	360	R 201 686.40	R 209 052.07
IPID - Internet	www.ipid.gov.za	Drupal	360	R 201 686.40	R 274 693.80
IPID - Intranet		Drupal			R 322 054.80
NPA	www.npa.gov.za	Drupal	2100	R 1 176 504.00	R 857 478.82
NPA Intranet		SharePoint			
IFMS	www.ifms.gov.za	Drupal	360	R 201 686.40	R 355 207.50
IFMS Readiness	http://ifmsreadiness.devcentral.co.za/	Microsoft MVC 5			
Etender	www.etenders.gov.za	Drupal			R 265 386.16
Mamusa	www.mamusa.gov.za	Drupal			
SITA Internet	www.industry2013.sita.za	Classic ASP & old HTML			
SITA Intranet	intranet.sita.co.za	Drupal			
G-Fleet	www.gfleet.gov.za	HTML	200	R 122 020.27	R 165 051.60
DPCI Judge	www.dpcijudge.gov.za	Drupal	360	R 214 899.67	R 275 394.00
MP DEDT	www.mpumalanga.gov.za/dedt	ASP			R 200 000.00
MpuDSD - Internet	www.dsdmpu.gov.za	Drupal	160	R 67 228.80	R 227 334.82
MpuDSD - Intranet		Drupal			R 342 794.08
CSP - Civilian Secretariat	www.policesecretariat.gov.za	PHP	360	R 214 899.67	
CSP - Intranet		Drupal			
DHS	www.dhs.gov.za	Drupal	360	R 201 686.40	
PPSA	www.publicprotector.org	ASP	360	R 201 686.40	R 235 200.80
OPSC	www.opsc.gov.za	ASP	360	R 201 686.40	R 201 686.40
NCC	www.thencc.gov.za	Drupal	200	R 119 331.12	R 227 334.82
DAC Intranet		Drupal			
DAC Internet	www.dac.gov.za	Drupal			R 9 745 270.21
DAC NARSSA	www.nationalarchives.gov.za	Drupal and Alfresco			
DTPS - CyberSecurity	www.cybersecurityhub.gov.za	Joomla	280	R 167 063.57	

5.2.9 I also noted that all the other bids were far less in price than that of *Cherry Ikamva Juggernaut JV*.

5.2.10 On 12 July 2018 the Council for Scientific and Industrial Research (CSIR) was also approached by my investigation team to assist in determining whether, the integrated website-

5.2.10.1 Was properly functional;

5.2.10.2 Was developed in accordance with the specifications provided;

5.2.10.3 The payments made were commensurate with the work done and completed;

- 5.2.10.4 The Free State Provincial Government derived value for money; and
5.2.10.5 To provide a comprehensive and detailed report of the findings made.

5.2.11 The CSIR made the following findings;

- 5.2.11.1 **On functionality:** it was found that the websites fairly met the requirements of the Service Level Agreement. On its own, it is relevant and includes most of the deliverables that were agreed on in the Service Level Agreement. With regards to functionality on three (3) Free State Provincial Entities, twenty three (23) Municipalities and nine (9) Free State Provincial Government Departments, the CSIR found that:
- 5.2.11.2 In connection with the **three (3) Free State Owned Entities**, only two (2) met the requirements of the Service Level Agreement and one (1) fairly met the requirements;
- 5.2.11.3 In connection with the **twenty three (23) Free State Municipalities**, fifteen (15) partially met the requirements of the Service Level Agreement, five (5) fairly met the requirements, whilst two (2) were under construction and one (1) had not been constructed at all.
- 5.2.11.4 In connection with the **nine (9) Free State Provincial Government Departments**, only one (1) met the requirements of the Service Level Agreement, seven (7) partially met the requirements and there was only one (1) department which fairly complied with the requirements.
- 5.2.11.5 **On Usability:** It was found that the websites are not easy for a user to find information, they are very slow to load pages, search functions do not work on other websites and they are not secure.

- 5.2.11.6 **On content and readability:** The CSIR found that the websites are not concise and useful, the content is difficult to find, and most of the content is irrelevant to the reader.
- 5.2.11.7 **On Aesthetics:** It was found that the websites' style are not appealing and attractive, there is a lot of space waste and information is not in order.
- 5.2.11.8 **On Search Engine Optimization and Social Networking** it was found that the websites do not have site maps, the labels are not user-friendly and there is no effective use of the social networking.
- 5.2.12 In conclusion, the CSIR found that the Free State Online website does not meet the requirements of the Service Level Agreement. Most content and features on the website are not positioned as specified by the agreement.
- 5.2.13 According to the CSIR, the website developers (*Cherry Online Design*) could not be found on the internet. The entity only had a Facebook page that was founded on 12 August 2011 which states that "*We do web design, graphic design and software development*". Other than that, there was no other information that could be found that the entity had done any other similar work other than they had done, besides what they had done for the Free State Province. Therefore, the quality of their work could not be determined with certainty as there was no previous work done that it could be evaluated against.
- 5.2.14 The CSIR further concluded that the website's overall design was not pleasing at all. The choice of colours used was not appealing to the user. There were many navigation tabs that had been included in most of the websites, thus making it not user friendly.
- 5.2.15 With the exception of a few colour changes to differentiate between various departments and entities, all the websites appeared to have the same look and feel. However, the overall layout and information provided was similar in most

cases. Also, the information provided in most of the websites was outdated and not relevant to the current times. The websites were not regularly updated. This was evident in the navigation tabs such as Resource Centre and Media Room which did not have the relevant or updated information which a user would expect.

5.2.16 According to the CSIR, most of the websites were still under development as there were daily changes to the user interface. Another concern was that, the social media aspects of the websites were not maintained or used effectively. There was a lot that could be done with these platforms to engage with the public, but they were not utilised at all and a few or no updates were made. It was further stated that *Hlasela TV* featured prominently in 90% of the websites though it did not exist. No information could be found about it and the links to it were not working.

5.2.17 In closing, the CSIR stated that the Free State websites did not utilise the web's interactive possibilities to capture user interest, they did not invite frequent visit and did not bring ease of usability for the target audience.

5.2.18 I have taken note of the CSIR's findings, but I did so cautiously as the CSIR's evaluation occurred several years after the launch of the website as well as the termination of the FSPG's contract with the service provider.

Application of the relevant laws and prescripts

The Constitution, 1996

5.2.19 Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

The Public Finance Management Act, 1999 (The PFMA)

- 5.2.20 The PFMA is the main legal instrument that regulates financial management and procurement in the public service. Its objectives are to regulate financial management in the national and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments.
- 5.2.21 The evidence discussed above when assessed and analysed against applicable legislation, attest to the fact there were no irregularities in the manner in which the FSPG procured the services of *Cherry Ikamva Juggernaut JV* to design, develop, implement and maintain a comprehensive and integrated website for all government departments, municipalities and state owned entities in the Free State.
- 5.2.22 **Unauthorized expenditure means—**
- (a) overspending of a vote or a main division within a vote;
 - (b) expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division.
- 5.2.23 Section 64 regulates directives having financial implications and provides that;
- “
- (1) *Any directive by an executive authority of a department to the accounting officer of the department having financial implications for the department must be in writing.*
 - (2) *If implementation of the directive is likely to result in unauthorised expenditure, the accounting officer will be responsible for any resulting unauthorised expenditure unless the accounting officer has informed the executive authority in writing of the likelihood of that unauthorised expenditure.*



- (3) *Any decision of the executive authority to proceed with the implementation of the directive, and the reasons for the decision, must be in writing, and the accounting officer must promptly file a copy of this document with the National Treasury and the Auditor-General, and if a provincial department is involved, also with the relevant provincial treasury."*

5.2.24 In terms of section 76(4)(c) of the PFMA, the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning, *inter alia*, the determination of a framework for an appropriate procurement and provisioning system which is in keeping with the dictates of Section 217(1) of the Constitution (supply chain management {SCM} framework).

Treasury Regulations

5.2.25 The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all organs of state (see Regulation 16A2.1 (b) but only to the extent as indicated in regulations 1 to 22. The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A.3.2 which provides that:

"16A 3.2 A supply chain management system referred to in paragraph 16A.3.1 must –

...

- (e) be fair, equitable, transparent, competitive and cost effective;*
- (f) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
- (g) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*
- (h) provide for at least the following: –*



- (vii) demand management;
- (viii) acquisition management;
- (ix) logistics management;
- (x) disposal management;
- (xi) risk management; and
- (xii) regular assessment of supply chain performance."

Conclusion

Based on the application of the relevant law to the facts of the matter, I am persuaded to conclude that by procuring the services of *Cherry Inkamva Juggernaut JV* to design, develop implement and maintain a comprehensive and integrated website for the Free State Province at R119 680 231.80, but which in the end cost R84 563 838, 60 it cannot be irrefutably regarded as the FSPG not having derived value for money from the project.

- 5.3 **Whether the former Free State Premier, Mr Ace Magashule due to his relationship with the Director of Chery Inkamva Juggernaut JV, Mr Tumi Ntsele, unduly influenced the awarding of a tender for the design, development, implementation and maintenance of a comprehensive and integrated website for the Free State Provincial Government departments, municipalities and state owned entities to the company, thereby contravening the Executive Ethics Code**

Common cause issues

Issues not in dispute

- 5.3.1 It is not disputed that a tender for the establishment of a website for the FSPG was awarded to *Cherry Inkamva Juggernaut JV* whose Director is Mr Tumi Ntsele.

- 5.3.2 The issue for my determination is whether or not the former Premier Free State, Mr Ace Magashule unduly influenced the awarding of this tender due to his close relationship with Mr Ntsele, the Director of the company, thereby contravening the Executive Ethics Code.

Issues that are in dispute

- 5.3.3 In an interview held on 13 August 2013 with Mr Ralikontsane, he explained that the decision for introducing the integrated website in the Free State province had been arrived at during a meeting of the Premier's forum which included all the MEC's, Mayor's, Municipal Managers and Provincial Heads of Department, including the Premier Mr Ace Magashule. However, the minutes of that meeting were not provided to my office.
- 5.3.4 In a letter dated 27 July 2015 addressed to me, Mr Ace Magashule conceded that he did receive a brief on the need to procure a service provider for an integrated websites for the FSPG but he disputed the allegations against him.
- 5.3.5 He further stated that since he was not involved in the selection process which led to the appointment of the successful bidder, so he could not have influenced the appointment of the service provider.
- 5.3.6 Mr Ace Magashule further disputed that there is an existing relationship between himself and Mr Tumi Ntsele.
- 5.3.7 In an interview held with Mr Tumi Ntsele on 9 July 2015, he stated that although he occasionally meets and greets Mr Ace Magashule at the golf course. He denied having a close relationship with him.
- 5.3.8 I also subpoenaed cellphone records of Mr Ace Magashule and those of Mr Tumi Ntsele from cellphone network providers, and also approached Special Investigation Unit (SIU) to conduct a conversation link between the two (2)



parties for a period spanning from June 2010 to December 2011. The SIU only found one (1) communication that was an outgoing call made from Mr Ace Magashule's cellphone number to Mr Tumi Ntsele's cellphone number on 21 September 2014 which lasted for about 19:15:57 minutes.

- 5.3.9 Although the above cellphone records indicate that there was a communication between the two parties, the exchange was outside the period of the tender under my investigation. The needs analysis was conducted on 30 April 2011 and the appointment of Mr Tumi Ntsele was on 23 September 2011, this therefore does not assist in proving whether at that time there was a relationship between the Premier and Mr Tumi Ntsele which could have influenced the tender awarding.
- 5.3.10 I also issued a discretionary notice to the EMEA Complainant, Ms Patricia Kopane, MP in terms of section 7(9) of the Public Protector Act 23 of 1994 dated 19 June 2019 to provide me with more substantive information to corroborate the allegation of undue influence in the awarding of the tender by Mr Ace Magashule, due to his alleged relationship with Mr Ntsele.
- 5.3.11 However, Ms Kopane did not respond to my discretionary notice issued to her on 20 June 2019, thereby making it difficult for me to make a final determination relating to the allegation she had made against Mr Ace Magashule.
- 5.4 **A response to my section 7(9) notice dated 19 June 2019 by the FSPG**
- 5.4.1 A section 7(9)(a) notice in terms of the Public Protector Act, was issued to the Director General of the Department of the Premier thus affording him a further opportunity to respond and convince me against making adverse findings against the FSPG.
- 5.4.2 In its response dated 19 July 2019, to the notice issued the FSPG maintained as follows:

At paragraph 5 of the response

- 5.4.3 The FSPG submitted that my finding relating to the effect that the procurement was in violation of section 7 of the SITA Act, which provides that all organs of state and constitutional institutions must procure all ICT related goods and services through SITA, is unfair.
- 5.4.4 They argued that I am well aware of the existence of the report by the AGSA relating to this tender, and that should I not be in possession of the aforesaid report, the FSPG would provide a copy to me. The above mentioned findings that I arrived at are wholly incorrect and without merit.
- 5.4.5 The FSPG argued that some of the paragraphs of the Instruction Note No. 2 of the National Treasury dated 31 May 2011 was suspended due to uncertainty and problematic implementation by supply chain management.
- 5.4.6 During the process of my investigation into the complaint, I obtained a copy of the AGSA's report relating to the integrated website of the Free State Province from the AGSA on 9 March 2017. Therefore, I was in possession of the AGSA report when I arrived at my findings, although I relied on the evidence that I independently obtained and interviews I conducted with witnesses during the process of investigation of this complaint. Therefore, it was not material for me to have obtained the AGSA report from the FSPG.
- 5.4.7 The evidence at my disposal indicates that the FSPG on 8 June 2011 informed the Provincial Treasury of its readiness to proceed with the implementation of the project, making reference to National Treasury Instruction Note No.2 issued on 31 May 2011 by the Accountant General and confirmed having complied with it.

At paragraph 6 of the response

- 5.4.8 The FSPG maintained that in terms of paragraph 8.1 of the AGSA report, the Auditor General made a finding that the expenditure in relation to the contract for the design and development of the website should not be reported in the Management Report of the 2013/14 financial year as non-compliance and irregular expenditure. The reason being that notwithstanding the provisions of section 7(3) of the SITA Act, SITA in the Free State Province indicated during a meeting with AGSA that SITA does not do content management and a major part of the contract related to content management.
- 5.4.9 During the aforesaid meeting, the Chief Director of SITA agreed that the security and hosting of the website was within the scope of SITA, therefore SITA had to be involved. However when it was realised by the FSPG that SITA had to be involved, it was agreed that part of the contract relating to the hosting and security of the website, that falls within the ambit of SITA's mandate would be taken over by SITA.
- 5.4.10 The reason provided by the FSPG was that the major portion of the Contract, the design and the development of the website was outside of the competence of SITA, therefore the findings made in paragraph 18.2 of my section 7(9) notice is wholly incorrect and should be withdrawn.
- 5.4.11 The evidence at my disposal showed that an opinion was received by the FSPG and SITA was consulted which was evident from the discussions with the AGSA. This resulted in the hosting and security features of the contract being allocated to SITA, as such the function of hosting and security features was not part of the work tendered for, nor paid for.
- 5.4.12 The FSPG argued that it complied with the National Treasury Practice Note 5 of 2009/10 which required that state institutions must use SITA for SITA



functions. SITA was involved in the hosting and security of the website, as such this functions were not paid for by the FSPG.

5.4.13 The FSPG maintained that SITA was unable to design and develop the integrated website for the Free State Provincial Government. SITA could only provide the hosting and security function. This was qualified by an opinion obtained from Adv Venter and the discussions the FSPG held with the AGSA, hence the SLA entered with the service provider in relation to pricing was altered accordingly.

5.4.14 Therefore, my preliminary finding with regard to the allegation that there were irregularities in the procurement of the services of the *Cherry Ikamva Juggernaut JV* integrated website by the FSPG to design, develop and maintain a comprehensive and integrated website for the government departments, municipalities and state owned entities in the Free State, has been sufficiently rebutted by the FSPG's explanation provided for in the response to my section 7(9) Notice.

At paragraph 7 and 8 of the response

5.4.15 The FSPG submitted that my finding relating to the fact that they violated paragraph 3, of Part 2 of the Department of the Premier's Supply Chain Management Policy which regulates the monetary threshold values for goods, services and assets procurement above R2 000 000.00, the tender was advertised with a RFP method instead of a competitive bidding method.

5.4.16 This preliminary finding was to the effect that there was no written approval from the Director-General of the FSPG authorising deviation from normal procurement processes as contained in the policy. Therefore, the finding was based incorrectly on the fact that the so called request for proposal (RFP) was published on the front page of the invitation to bid but the entire document, particularly from page two (2), it was clear that the document was an invitation



to bid as required by the Department of the Premier's Supply Chain Management Policy.

5.4.17 The specification document contained all the features of a request for bidders to bid in a tender. The specification document called for a competitive bidding process, as such it was a call for a competitive bidding process.

5.4.18 The FSPG submitted that an approval from the Director-General for deviation was not required as the FSPG had embarked on a competitive bidding process. As such, the maximum threshold of R2 000 000 did not apply.

5.4.19 I have considered the above submission made by the FSPG and accept the clarification provided.

At paragraph 9, 10 and 11 of the response

5.4.20 In respect of my finding with regards to the amount budgeted for by the FSPG, it submitted that the finding was incorrect and out of context as the FSPG was entitled to terminate the SLA at its own discretion or temporarily suspend all of the services based on the following paragraph 13.3 in the SLA which provided as follows:

"It is also agreed that should funds no longer be available to pay for the execution of the services, the FSPG may terminate this Agreement in its own discretion or terminate suspend all or part of the services by notice to the service provider who shall immediately make arrangements to stop the performance of the services and minimise further expenditure- provided that the service provider shall thereupon be entitled to payment in full for the services delivered up to the date of termination or suspension."

- 5.4.21 The FSPG's contention that it did not exceed its budget due to the inclusion of the above paragraph in the SLA is sound, as it was meant to ensure that it does not exceed the initial approved budget.

At paragraph 12, 13 and 14 of the response

- 5.4.22 In respect of my findings with regard to the evaluation of the bids, the members of the BEC discussed the scores and agreed on the score to be awarded to a bidder as a consequence of which the Committee members awarded the bids the same scores.
- 5.4.23 The FSPG further submitted that the BEC members individually scored the bidders against the predetermined functionality evaluation criteria and the committee decided that individual members should over and above scoring motivate that score.
- 5.4.24 The FSPG contended that the minutes and recording from the BEC meeting that I am in possession of demonstrate that the evaluation process was not collusive but rather a constructive engagement by the members of the BEC which resulted in a fair evaluation of the bid.
- 5.4.25 Below is an extract from the transcript of the BEC meeting:

PUBLIC PROTECTOR

FREE STATE WEBSITE FUNCTIONALITY DISCUSSION

UNIDENTIFIED MALE SPEAKER: 4, let's score them 4

MR. BOTES: And then the management approach. What they do, is they allocate responsibilities to different people, from the project manager, the business analyst, the web designer and developer and the content liaison, and that is the management approach which again doesn't say how, it just say, contact liaison, main role will liaise with the client and collect and prepare the content for the website. They don't say which clients where. There is - then if you look at the rest of the things, we would like, how this project is going to be managed and rolled out, it doesn't say. So, again I can't give them more than a - well, I'm influenced now, but it's a 3 or a 4.

10 UNIDENTIFIED MALE SPEAKER: 3UNIDENTIFIED FEMALE SPEAKER: 3MR. BOTES: 3. 11 points. So, they are disqualified on the basis of theUNIDENTIFIED MALE SPEAKER: ScoringCHAIRPERSON: Which number?10 MR. MARATHA: 2011/08/21MR. BOTES: That is bid number 2011/08/21

(EVERYBODY SPEAKING SIMULTANEOUSLY AMONG EACH OTHER AND HAVING THEIR OWN PERSONAL DISCUSSIONS)

MR. BOTES: The next one, please?

20 UNIDENTIFIED MALE SPEAKER: The next one is IQX Consulting. In terms of the - we follow the same routine as we have followed with the first one. 3, also - can you verify? Just sir, who does the verifying?

UNIDENTIFIED MALE SPEAKER: Anyone.UNIDENTIFIED MALE SPEAKER: Anyone that is sitting next to you?20 CHAIRPERSON: Sitting next to you.HELD ON
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14

PUBLIC PROTECTOR

FREE STATE WEBSITE FUNCTIONALITY DISCUSSION

15 of 14, I would go for a 13.

CHAIRPERSON: Agreed.MR. BOTES: Do you agree?UNIDENTIFIED MALE SPEAKER: 14, Chairperson.1 MR. BOTES: You don't like 13?MR. BOSMAN: As close as possible to 15.

UNIDENTIFIED MALE SPEAKER: To be quite frank, even look at - sometimes you look at the presentation itself. From the outline perspective of it, you will see that where it's been put into the whole thing... (Intervention)

0 MR. BOTES: Okay, that we - ja, okay. So, which one do we - is there support for 13 or support for 14? Just please indicate.

CHAIRPERSON: 13.UNIDENTIFIED MALE SPEAKER: I support 13 as well.MR. BOTES: So, it seems that 13 is carried.15 UNIDENTIFIED MALE SPEAKER: Okay.MR. BOTES: Agreed?UNIDENTIFIED MALE SPEAKER: Agreed.

MR. BOTES: In terms of the business plan, except for the same things that I've mentioned now, I can't seem to fault them on anything else besides the fact that

20 (Indistinct) that is contesting for my title as biggest (Indistinct). [Laughter] But the business plan is a (Indistinct), explain to us exactly what is done. One problem that I have - that we have identified also, is the financial breakdown to a very low level. Financial breakdown for me is too high a level. For us to evaluate cost to government, but also the value for money for each different achievable delivery is not

25 easy, I can't measure it. So, that is also criticism about this. In terms of the CVs, the

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5.4.26 I have listened to the recordings of the minutes of the BEC meeting which are in my possession. From these recordings and the transcripts provided above, it is evident that the BEC members did not evaluate and score the bids independently as it can be heard from their amiable discussions during the evaluation process.

5.4.27 Paragraph 5.9.5.2 of the Supply Chain Management, A Guide for Accounting Officers/ Authorities of February 2004, provides that *"Each panel member should after thorough evaluation award his/ her own value to every criterion without discussing any aspect of any bid with any of the other members"*.

5.4.28 I therefore do not agree with the FSPG's contention that the BEC members conducted themselves in a fair and transparent manner as the so called *"constructive engagement"* was not merely members sharing their views and thoughts but rather a process to ensure that there was agreement on the scores awarded to bidders which further undermined the process as required by section 217 of the Constitution.

At paragraph 15, 16, 17, 18, 19 and 20 of the response

5.4.29 The FSPG submitted that the tax clearance certificate of two (2) entities which formed the joint venture of Cherry *Ikamva Juggernaut JV* was valid at the time of the award of the tender and in accordance with paragraph 16 of the Preferential Procurement Regulations of 2001.

5.4.30 My finding was based on the application of PPPFA regulations of 2011 that only came into effect in December 2011, while the tender was awarded in September 2011. Having considered the clarification provided by the FSPG I therefore accept their submissions in this regard.

At paragraph 21, 22, 23, and 24 of the response

5.4.31 The FSPG submitted that they did not simply accept an exorbitant quote, however the quote or bid was judiciously evaluated by the Adjudication and Evaluation Committee.

5.4.32 Although the FSGP received different bids which were evaluated, however, I do not accept that the bids were judiciously evaluated, as I have observed above the fact that the BEC members had failed to independently evaluate the tender as required.

At paragraphs 25-40 of the response

5.4.33 I have considered the FSPG's submission that the price comparison between the successful bid at approximately R119 million and the unsuccessful bid at R595 000.00 was not a correct evaluation of whether there was an *over-spent* or *over-valuation* of the tender.

5.4.34 The FSPG submitted that the CSIR observations were subjective in that they did not take into account the integrated manner in which the FSPG dealt with the project. It contended that *Cherry Ikamva Juggernaut JV* was advised to curtail the project and did not roll out the project to its completion for one to be able to compare what would have been done for the bid price with what was actually done with a reduced price.

5.4.35 I have therefore considered the submission by the FSPG that no exclusive value for money audit was conducted in order to determine this issue which I find to be rational. Therefore, taking into consideration the submissions by CSIR and the FSPG I am unable to make a conclusive determination on whether or not the FSPG derived value for money on this project.



6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, including the response to the section 7(9) notice, I now make the following findings:

- 6.1 **Regarding whether there were any irregularities in the appointment of *Cherry Ikamva Juggernaut JV* by the Free State Provincial Government to design and develop an integrated website and if so; whether such conduct constituted maladministration and improper conduct.**
 - 6.1.1 The allegation that there were irregularities in the appointment of *Cherry Ikamva Juggernaut JV* by the Free State Provincial Government to design and develop an integrated website, is **unsubstantiated**.
 - 6.1.2 The engagements between SITA, AGSA and the FSPG was in line with section 7(3) of the SITA Act, and it resulted in an agreement that SITA will assist in respect of hosting and security of the website and not the design, develop, implement and maintain a comprehensive and integrated website for the Free State Province.
 - 6.1.3 However, the conduct of the BEC members by discussing the functionality scores and agreeing on the score to be allocated to each bidder is unacceptable as this undermined the five (5) principles as provided by section 217 of the Constitution.
 - 6.1.4 Notwithstanding the foregoing, I could not find that the conduct of the erstwhile Accounting Officers of the Department of the Free State Premier and COGTA consequently constitute improper conduct in terms of section 182(1)(a) of the of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

- 6.2 Regarding whether the expenditure incurred for the design and development of an integrated website for the Free State Provincial Government was excessive, and if so; whether such an expenditure amounted to irregular, fruitless and wasteful expenditure thus constituting maladministration.**
- 6.2.1** The allegation that the expenditure incurred for the design and development of an integrated website for the Free State Provincial Government is irregular, is **unsubstantiated**.
- 6.2.2** The FSPG approved and spent a total amount of R84 563 838.60 towards Cherry Inkamva Juggernaut JV which comprised of R64 567 318.10 in payments for the work done on the website and R19 996 521 50 for the cancellation fee and not R140 million as was alleged.
- 6.2.3** I have considered the submission made by the FSPG, that no exclusive value for money audit was conducted in order to determine this issue, as the project ceased when the funds got exhausted. Therefore, taking into consideration the submissions by CSIR and the FSPG, I am unable to make a conclusive determination on whether or not the FSPG derived value for money on this project.
- 6.2.4** Therefore, I could not determine if the conduct of the erstwhile Accounting Officers of the Department of the Free State Premier and COGTA in this regard would constitute improper conduct as envisaged by section 182(1)(a) of the of the Constitution and maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act.
- 6.3 Regarding whether the former Free State Premier, Mr Ace Magashule due to his relationship with the Director of Chery Inkamva Juggernaut JV, Mr Tumi Ntsele, unduly influenced the awarding of a tender for the design, development, implementation and maintenance of a comprehensive and integrated website for the Free State Provincial Government departments,**



municipalities and state owned entities to the company, thereby contravening the Executive Ethics Code

- 6.3.1 The allegation that the former Premier Free State, Mr Ace Magashule unduly influenced the awarding of a tender to *Cherry Ikamva Juggernaut JV* due to his close relationship with its Director, Mr Tumi Ntsele thereby contravening the Executive Ethics Code, **could not be substantiated.**
- 6.3.2 I have taken note that, in and around the Free State and/or Bloemfontein, it is widely said that Messrs Magashule and Ntsele are close friends. However, during the investigation, no one could produce tangible evidence of the alleged friendship and/or undue influence exerted by Mr Ace Magashule in the awarding of the tender to the above-mentioned company belonging to Mr Ntsele.
- 6.3.3 Therefore, without a tangible evidence to support this allegation, I am unable without proof, to censure and find Mr Ace Magashule of having influenced the awarding of the tender to *Cherry Ikamva Juggernaut JV* for the design, development, implementation and maintenance of a comprehensive and integrated website for the FSPG departments, municipalities and state owned entities.

7 RECOMMENDATIONS

- 7.1 I have noted that some of the anomalies that were experienced during the procurement of the FSPG Integrated website, relate to the conduct of the Supply Chain Management officials and the members of the Bid Committees in the FSPG, and therefore recommend that the FSPG must within thirty (30) working days of the issuing of this report, ensure that all these officials, are trained on public procurement processes and procedures.



- 7.2 I have also noted the ambiguity pertaining to determining the issue of value for money as alluded to by both the CSIR and the FSPG, and therefore recommend that within thirty (30) working days of the issuing of this report, FSPG must ensure that a suitable ICT Specialist is appointed to conduct an audit to determine value for money of the FSPG Integrated website.

8 REMEDIAL ACTION

- 8.1 Based on the above conclusion, I am unable to take any remedial action as contemplated in section 182(1) (c) of the Constitution, save to advise that note should be taken of the recommendations I have made in paragraph 7 of this Report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 15 / 06 / 2020

Assisted by: Ms Pfunzo Mhelembe (Senior Investigator)