



PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness

MOSIRELETSI WA SETŠHABA • MOŠIRELETŠI WA SETŠHABA
MUSIRHELELI WA VANHU • MUTSIRELEDZI WA TSHITSHAVHA
OPENDARE BESKEMER • UMKHUSELI WOLUNTU • UMWIKELI WOMPHAKATHI
UMVIKELI WEMPHAKATSI • UMWIKELI WESITJHABA

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Mr. MM Tsatsimpe
Municipal Manager
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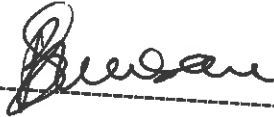
Dear Mr. Tsatsimpe

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

1. Please find the attached a copy of my Report No 2 of 2018/2019 on allegations of improper awarding of a tender 6/2012 for the provision of security to Ikgodiseng Business Consulting CC by the Ga-Segonyana Municipality.

2. Your attention is specifically directed to the remedial action contained in paragraph 7 of the report.

Bes wishes



ADV. BUSISIWE MKHWEBANE

PUBLIC PROPECTOR OF THE REPUBLIC OF SOUTH AFRICA

DATE: 16/04/2018



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Mr. Gibson Anthony

The Mayor

Ga-Segonyana Local Municipality

Private Bag x1522

KURUMAN

8460

kuruman@ga-segonyana.gov.za


Dear Mr Anthony

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

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Mr. BG. Vass

MEC of COGHSTA

JS du Plooy Building

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KIMBERLEY

8300

Dear Mr. BG Vass

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

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Mr. Mpho Oss
P.O. Box 1763
KURUMAN
8460

Dear Mr. Oss

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

1. Please find the attached a copy of my Report No 2 of 2018/2019 on allegations of improper awarding of a tender 6/2012 for the provision of security to Ikgodiseng Business Consulting CC by the Ga-Segonyana Municipality.

2. Your attention is specifically directed to the remedial action contained in paragraph 7 of the report.

Best wishes.



ADV. BUSISIWE MKHWEBANE

PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA

DATE: 16/09/2018

**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**

***“Allegations of maladministration by the Ga-Segonyana Municipality
(Northern Cape) in the awarding of a security tender: 6/2012 to Ikgodiseng
Business Consulting CC”***

Report number 2 of 2018/19

ISBN No 978-1-928366-58-4

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR AND
IMPROPER AWARDING OF A SECURITY TENDER NUMBER: 6/2012 TO
IKGODISENG BUSINESS CONSULTING CC BY GA-SEGONYANA
MUNICIPALITY**

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Executive Summary

- (i) This is my report as the Public Protector issued in terms of section 182(1)(b) of the *Constitution of the Republic of South Africa, 1996 (the Constitution)* and section 8(1) of the *Public Protector Act 23 of 1994*.
- (ii) The report communicates my findings and appropriate remedial action I am taking in terms of section 182(1)(c) of the *Constitution* following an investigation into the alleged irregular and improper awarding of a security tender: 6/2012 to Ikgodiseng Business Consulting CC by the Ga-Segonyana Municipality (the Municipality).
- (iii) The Complainant is Mr Mpho Oss, a Director of Kgomongwe Security Services (the Complainant's Company). The Complainant lodged a complaint on 07 September 2012 on behalf of his company alleging that the Municipality did not follow proper procurement procedures in that it awarded a tender to Ikgodiseng Business Consulting CC (IBC) for a period of 36 months despite the fact that IBC's bid was non-responsive in that IBC submitted copies of a tax clearance certificate instead of original documents, and PRISA and BBBEE Status Level certificates which were not certified.
- (iv) In the main, the Complainant alleged that:
 - (a) On 21 July 2012 the Municipality advertised a tender: Tender Number 06/2012, for the provision of security services and the closing date was 03 August 2012. The Complainant's Company was amongst the companies that submitted tender bids;
 - (b) The Municipality did not adhere to the Preferential Procurement Policies in the awarding of this tender;

- (c) In the advert it was indicated that a valid Tax Clearance Certificate must be submitted in the original form at the time of closure of the bid and that bidders were required to submit original and valid B-BBEE Status Level Certificates or certified copies thereof to substantiate their B-BBEE rating claims;
- (d) Bidders who did not submit their B-BBEE Status Level Verification Certificates or certified copies did not qualify for preference points for B-BBEE, but would not be disqualified from the bidding process;
- (e) The Municipality failed to render IBC's bid non-responsive. IBC should not have been shortlisted and should have instead been disqualified;
- (f) According to the Pre-Evaluation Report, ten (10) bids were received and evaluated on the 90/10 principle. Preferential points were awarded in terms of the B-BBEE scorecards. In terms of the 90/10 principle, 90 points are allocated for price and 10 points are allocated for preference procurement. The points allocated for Kgomongwe Security Services CC (Complainant) in terms of this principle were 96.75 and points allocated to IBC were 94.59;
- (g) The Bid Adjudication Committee (BAC) held its meeting on 31 August 2012 and recommended that IBC be appointed as a successful bidder despite the fact that the Complainant's Company had obtained the highest score and that the Bid Evaluation Committee (BEC) had recommended that no bidder be appointed pending the report from the State Security Agency (SSA) of all bidders who submitted their bids;
- (h) During the evaluation and adjudication of this tender, the Complainant and other bidders were unfairly assessed on the basis of their failure to submit screening reports to the Municipality together with tender documents; and

- (i) The Complainant's Company tendered at a lesser amount than IBC, however, IBC was awarded the tender.
- (v) The investigation was conducted in terms of section 182 of the *Constitution* which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on such conduct and to take appropriate remedial action; and in terms of section 6(5) of the *Public Protector Act* that regulates the manner in which the power conferred by section 182 of the *Constitution* may be exercised in respect of government at any level.
- (vi) In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that:
- "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."*²
- (vii) On analysis of the complaint, the following issues were identified and investigated:
- (a) Whether the Municipality unduly failed to follow proper procurement processes when appointing IBC and whether such conduct constitutes maladministration.

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
² *Supra* at para [73].

- (b) Whether the Complainant suffered prejudice as a result of the Municipality's failure to follow proper procurement processes when appointing IBC.
- (viii) Upon completion of the investigation, a Notice was issued in terms of section 7(9) of the Public Protector Act addressed to the Municipal Manager of the Municipality.
- (ix) After careful examination of the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by the Municipality, I make the following findings:
- (a) Regarding whether the Municipality unduly failed to follow proper procurement processes when appointing IBC and if so, does such failure constitute maladministration:**
- (aa) The allegation that the Municipality unduly failed to follow proper procurement processes when appointing IBC is substantiated.
- (bb) The Municipality appointed IBC despite the fact that IBC submitted copies of a Tax Clearance Certificate instead of originals and also submitted copies of B-BBEE Status Level Verification and PRISA certificates instead of certified copies.
- (cc) The Municipality also appointed IBC despite recommendations by the Municipality's BEC that no bidder be appointed pending the report from SSA of all bidders who submitted bids and despite IBC scoring less points than the Complainant's Company.
- (dd) The Municipality's conduct was in violation of section 2(1) of the *Municipality Supply Chain Management Policy*, section 2(1) of the *Preferential Procurement Policy Framework Act, 2000* and section

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

(b) Regarding whether the Complainant suffered prejudice as a result of the Municipality's failure to follow proper procurement processes when appointing IBC:

- (aa) The allegation that the Complainant suffered prejudice as a result of the Municipality's failure to follow proper procurement processes when appointing IBC is substantiated.
 - (bb) The Complainant suffered prejudice by virtue of the fact that because the Municipality did not comply with the legislative prescripts, his company could not fairly compete and was thus unfairly eliminated from the bidding process i.e. evaluation stage.
 - (cc) The Complainant suffered further prejudice by virtue of the fact he incurred costs amounting to R2 350.00 in preparation for the bid because of improper conduct of the Municipality.
- (x) The appropriate remedial action the Public Protector is taking in pursuit of section 182(1)(c) of the *Constitution* with a view of placing Kgomongwe Security Services as close as possible to where it would have been had the improper conduct or maladministration not occurred: The Municipal Manager to:
- (aa) Take appropriate steps, within 30 days from receiving this report, to ensure that all Municipal officials involved in Supply Chain Management are properly trained in the MFMA with particular

reference to following proper procurement processes, applicable policies and legislative prescripts;

- (bb) Issue a written apology to the Complainant within 30 days of the issuing of this report for the Municipality's failure to follow proper procurement processes in the appointment of the service provider;
- (cc) Consider taking appropriate disciplinary action, within 30 days from receiving my report, against all the BAC members who were responsible for exposing the Municipality to acts of maladministration and financial risk in violation of the municipal supply and procurement processes and procedures in relation to the appointment of IBC;
- (dd) Compensate the Complainant an amount of R2 530.00 being costs he incurred in preparing the bid tender documents;
- (ee) Submit an Action Plan to the Public Protector, within 15 days of the issuing of the final report, indicating how the remedial action will be implemented; and

The Municipal Council to:

- (ff) within 30 days of receipt of this report, consider taking the necessary criminal action against Mr Elias Ntefang, the Municipal Manager at Ga-Segonyana Municipality, for failing to take action after being advised by the Provincial Treasury to take the necessary remedial steps/corrective measures to cancel the bid and re-advertise the tender due to irregularities in the awarding of the tender to IBC;
- (gg) within 30 days of receipt of this report, investigate the irregular expenditure and consider instituting criminal action, for financial

misconduct in terms of section 171 and 173(1)(a)(iii) of the MFMA respectively, against Mr Elias Ntefang; and

- (hh) recover irregular expenditure from the person liable for that expenditure, unless the expenditure is, after investigation referred in paragraph 7.1.6.2 above, certified by council as irrecoverable and written off by council.

FINAL REPORT

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR AND IMPROPER AWARDING OF A SECURITY TENDER: 6/2012 TO IKGODISENG BUSINESS CONSULTING CC BY THE GA-SEGONYANE MUNICIPALITY

1. INTRODUCTION

- 1.1 This is a report of the Public Protector 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 23 of 1994 (the Public Protector Act)*;
- 1.2 The report is submitted in terms of section 8(3) of the *Public Protector Act* to:
 - 1.2.1. The Mayor of Ga-Segonyana Local Municipality, Mr Gibson Anthony.
 - 1.2.2. The Municipal Manager of Ga-Segonyana Local Municipality, Mr. MM Tsatsimpe.
 - 1.2.3. The Complainant, Mr. Mpho Oss.
- 1.3 The report relates to an investigation into allegations of irregular and improper awarding of a security tender: 6/2012 to Ikgodiseng Business Consulting CC by the Ga-Segonyana Municipality.
- 1.4 On 10 October 2017 a Section 7(9) Notice was sent to Mr Ntefang, the Municipal Manager of Ga-Segonyana Municipality to enable him to respond to provisional findings on substantiated allegations. No response was received from the Municipal Manager.

2. THE COMPLAINT

- 2.1. The Complainant is Mr Mpho Oss, a Director of Kgomongwe Security Services (the Complainant's Company). The Complainant lodged a complaint on 07 September 2012 on behalf of his company alleging that Ga-Segonyana Municipality did not follow proper procurement procedures in that it awarded a tender to Ikgodiseng Business Consulting CC (IBC) for a period of 36 months despite the fact that IBC's bid was non-responsive in that IBC submitted copies of a tax clearance certificate instead of original documents, and PRISA and BBBEE Status Level certificates which were not certified.
- 2.2. In the main, the Complainant alleged that:
- 2.2.1. On 21 July 2012 the Municipality advertised a tender: Tender Number 06/2012, for the provision of security services and the closing date was 03 August 2012. The Complainant's Company was amongst the companies that submitted tender bids;
 - 2.2.2. The Municipality did not adhere to the Preferential Procurement Policies in the awarding of the tender;
 - 2.2.3. In the advert it was indicated that a valid Tax Clearance Certificate must be submitted in the original form at the time of closure of the bid and that bidders were required to submit original and valid B-BBEE Status Level Verification Certificates or certified copies thereof to substantiate their B-BBEE rating claims;
 - 2.2.4. Bidders who did not submit their B-BBEE Status Level Verification Certificates or certified copies did not qualify for preference points for B-BBEE, but would not be disqualified from the bidding process;

- 2.2.5. The Municipality failed to render IBC's bid non-responsive. IBC should not have been evaluated on functionality and should have instead been disqualified;
- 2.2.6. According to the Pre-Evaluation Report, ten (10) bids were received and evaluated on the 90/10 principle. Preferential points were awarded in terms of the B-BBEE scorecards. In terms of the 90/10 principle, 90 points are allocated to points for price and 10 points are allocated for preference procurement. The points allocated for Kgomongwe Security Services CC (Complainant) in terms of this principle were 96.75 and points allocated to IBC were 94.59;
- 2.2.7. The Bid Adjudication Committee (BAC) held its meeting on 31 August 2012 and recommended IBC to be appointed as a successful bidder despite the fact that the Complainant's Company had obtained the highest score and that the Bid Evaluation Committee (BEC) had recommended that no bidder be appointed pending the report from State Security Agency (SSA) of all bidders who submitted their bids;
- 2.2.8. During the evaluation and adjudication of this tender, the Complainant and other bidders were unfairly assessed on the basis of their failure to submit screening reports to the Municipality together with tender documents; and
- 2.2.9. The Complainant's Company tendered at a lesser amount than IBC, however, IBC was awarded the tender.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

- 3.1. The Public Protector is an independent institution, established under section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2. Section 182(2) 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. Section 182(2) of the *Constitution* states that the Public Protector has additional powers and functions prescribed by national legislation.
- 3.4. The Public Protector is further mandated by the *Public Protector Act* to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5. In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.³ The Constitutional Court further held that:
- "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the*

³ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

remedial action taken against those under investigation cannot be ignored without any legal consequences.”⁴

3.6. The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector's mandate.

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

4. THE INVESTIGATION

4.1 Methodology

4.1.1. The investigation was conducted in terms of section 182 of the *Constitution* and sections 6 and 7 of the *Public Protector Act*.

4.1.2. The *Public Protector Act* confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the *Public Protector Act* gives the Public Protector the authority to resolve a matter through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The investigation process included written correspondence and a meeting with officials of the Municipality, Ikgodiseng Business Consulting CC, the Northern Cape Provincial Treasury (Provincial Treasury), the State Security Agency (SSA) and the Complainant; and the perusal of documents

⁴ *Supra* at para [73].

received. An attempt to resolve the matter through ADR means failed. The Constitution and applicable legislation were also analysed and applied.

4.2. Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened? If there is a discrepancy, does the conduct amount to improper conduct or maladministration? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation and making a determination on a balance of probabilities. In this particular case, the factual enquiry focused on whether the Complainant suffered any prejudice as a result of maladministration by the Municipality in awarding security tender: 6/2012 to IBC.

4.2.3 The question regarding what should have happened, on the other hand, focuses on the rules and standards that the conduct in question should have been complied with by the Municipality to prevent maladministration and prejudice. In this particular case, the question focused on whether the awarding of the security contract to IBC complied with the substantive and procedural requirements of the law and related prescripts. Key in this regard

was whether the Municipality failed to follow proper procurement processes in awarding a security tender to IBC. The law was consulted to determine whether the awarding of the tender to IBC by the Municipality was fair, equitable, transparent, competitive and cost effective.

4.2.4 The question regarding the remedial action seeks to redress the consequences of maladministration. Where the Complainant has suffered prejudice the intention is to restore the Complainant as close as possible to where he or she would have been had the Municipality complied with the regulatory framework setting the applicable rules and standards for good administration.

4.3 Key sources of information:

4.3.1 Correspondence

4.3.1.1 Written and telephonic communication with Mr. Ntefang, the Municipal Manager, Mr. Sechogela, the Manager, Supply Chain Management and Mr. Tsatsimpe the Director of Cooperative Services, from the Municipality.

4.3.1.2 Telephonic and written communication with Mr. Woodbreigt of the SSA on 15 August 2013 and 19 September 2013.

4.3.1.3 Telephonic and written communication with the Complainant on various dates.

4.3.2 Meetings

4.3.2.1 Meeting with the Municipal Manager, Mr. E Ntefang, the Director of Cooperative Services, Mr. Tsatsimpe and the Manager Supply Chain Management, Mr. B Sechogela on 10 September 2013.

4.3.2.2 ADR meeting with the Municipal Manager, Mr. E Ntefang, the Manager Supply Chain Management, Mr. B Sechogela, the Complainant, Mr. M Oss and the Representative for Ikgodiseng Business Consulting CC, Mr. Ntsabo on 29 October 2013.

4.3.3 Documents

- 4.3.3.1 A complaint letter and supporting documents submitted by the Complainant.
- 4.3.3.2 A copy of a response letter from the Municipal Manager dated 14 March 2013.
- 4.3.3.3 Copies of the Minutes of the Bid Evaluation and Bid Adjudication Committee meetings received on 2 May 2013.
- 4.3.3.4 A copy of a letter from the SSA dated 16 August 2013.
- 4.3.3.5 A copy of a letter from the Municipality dated 2 October 2013.
- 4.3.3.6 A copy of a Report from the Northern Cape Provincial Treasury (Provincial Treasury) dated 17 October 2013.
- 4.3.3.7 An email from Ikgodiseng Business Consulting CC dated 6 November 2013.

4.3.4 Legislation and other prescripts

- 4.3.4.1 The relevant provisions of the following legislation and other prescripts were considered and applied where appropriate:
 - (a) *The Constitution of the Republic of South Africa, 1996;*
 - (b) *The National Strategic Intelligence Act 39 of 1994, as amended;*
 - (c) *The Implementation Guide: Preferential Procurement Regulations 2011;*
 - (d) *The Preferential Procurement Policy Framework Act 5, of 2000;*
 - (e) *The Municipal Supply Chain Regulations; and*
 - (f) *The Ga-Segonyana Municipality Supply Chain Management Policy.*

5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW PRESCRIPTS AND THE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH BY THE GA-SEGONYANA MUNICIPALITY

5.1. Regarding whether the Municipality unduly failed to follow proper procurement processes when appointing IBC and whether such conduct constitutes maladministration:

Common cause Issues

- 5.1.1 It is common cause that on 21 July 2012 the Municipality advertised a tender: Tender Number 06/2012 and the closing date was 03 August 2012.
- 5.1.2 It is also common cause that the Complainant's Company was amongst the companies that submitted tender bids for the provision of security services at Ga-Segonyana Municipality; and
- 5.1.3 Further, it is common cause that Ga-Segonyana Municipality awarded the tender to Ikgodiseng Business Consulting for a period of 36 months.

Issues in dispute

- 5.1.4 It is in dispute whether the Municipality followed proper procurement procedures when awarding the tender for the provision of security services to IBC.

- 5.1.5 The Complainant alleged that Ga-Segonyana Municipality did not follow proper procurement procedures in that it awarded a tender to IBC for a period of 36 months despite the fact that IBC's bid was non-responsive in that IBC submitted copies of a tax clearance certificate instead of original documents, as well as PRISA and B-BBEE Status Level certificates which were not certified.
- 5.1.6 The Complainant further alleged that during the adjudication of this tender, his company and other bidders were unfairly disqualified on the basis of a vetting report which was not their responsibility to submit as part of the bid.
- 5.1.7 The Municipality, on the other hand, contended the following in a letter dated 14 March 2013:
- 5.1.7.1 That it invited prospective bidders for the provision of security services bid. This was done in accordance with the security needs of the Municipality and because the contract with the service provider at that time was coming to an end;
- 5.1.7.2 That the bid was awarded to IBC on the basis that at the time of the adjudication, it was the only bidder which had submitted the suitability check certificate obtainable from the SSA, which was one of the returnable documents needed from the bidders. The bidder had conformed to all other returnable documents needed for the bidder to be considered responsive;
- 5.1.7.3 That during the tenure of the previous service provider, the Municipality endured massive losses due to the break-ins at its sites as a weekend before the expiry of that particular contract there was also a burglary at one of its premises (the Traffic Department);

- 5.1.7.4 That at this time the working relationship with the previous service provider was not good. The Municipality then felt that the contract with that service provider could not be extended, and by then only one bidder met all the requirements;
- 5.1.7.5 That the Municipality was under pressure to acquire the services of a service provider who would safeguard its assets and premises as the contract of the previous service provider was coming to an end in August 2012 and they needed a new service provider to commence on 01 September 2012. It was thus on this basis that this company was appointed;
- 5.1.7.6 Further, that during the previous administration, the Municipality had never advertised a bid where the stipulation of taking service providers for security clearance was made. Some of the members were new to the Bid Committees, and the Municipality was under immense pressure due to the security risks that were posed by the previous security company; and
- 5.1.7.7 The Bid Evaluation Committee recommended based on the Pre-Evaluation Report that no bidder should be appointed pending the report from SSA on all bidders who submitted bids. It was noted that Ikgodiseng Business Consulting CC submitted an SSA screening report.
- 5.1.8 The Minutes of the Bid Adjudication Committee held on 31 August 2012 indicate the following:
- (a) IBC met the requirements of the bid;
 - (b) That all returnable documents for IBC were submitted, in particular that IBC was the only company that had submitted the SSA screening report;

- (c) The committee resolved that the bidders were afforded an opportunity to submit all the required returnable documents as per bid documents to be considered as responsive;
- (d) On the basis of the above the committee found that IBC was the only responsive bidder, and recommended that they be appointed; and
- (e) It is clear from the above that all these committees were focused on the submission of this screening report which in actual fact was not the responsibility of the bidders to have submitted, and overlooked the fact that IBC did not submit the correct documentation e.g. an original tax clearance, etc.

5.1.9 During the investigation the Public Protector made an enquiry with the SSA to confirm the position whether it is the responsibility of the client (Municipality) and not of the contractor to obtain a suitability check report from the SSA. The SSA responded by indicating the following:

- 5.1.9.1 That in this particular case it would be the responsibility of the Municipality to forward any screening requests to the SSA for screening purposes and not that of any service provider; and
- 5.1.9.2 That the screening of service providers is merely a tool utilized by the SSA to fulfil its counter intelligence (CI) mandate and to advise client institutions accordingly of any CI threats as contained in the *General Intelligence Laws Amendment Act* of July 2013. Additionally the screening process by the SSA is not a requirement for the appointment of service providers within organs of state. Further, that it remains the responsibility of any institution to comply with Treasury and Public Finance Management Regulations in terms of conducting pre-suitability and credibility checks on any prospective service providers.

5.1.10 During the investigation it was also established that the Northern Cape Provincial Treasury conducted an investigation on the awarding of the tender and a copy of the Provincial Treasury Report was provided to the Public Protector. The following was noted from the report:

- 5.1.10.1 That a complaint was received from Kgomongwe Security Services, Mr. M. G Oss objecting to the award of Tender No: 06/2012;
- 5.1.10.2 That the Provincial Treasury investigates all written complaints as part of transparency in Supply Chain Management processes;
- 5.1.10.3 That Tender documents for the tender for the provision of security services were requested from Ga-Segonyana Municipality and perused. The following was established:
- a) The appointed bidder IBC's price was incorrectly calculated and was in fact R10 682 712 (the total price is R260 300 + VAT R36 44= R296 742 x 36 months and not R9 370 700.72= R10 682 712. All taxes must be included for comparative purposes;
 - b) The Tax Clearance Certificate was not original, it is a copy - only original Tax Clearance Certificate could be accepted as valid;
 - c) It was required in the bid specification that the PSIRA certificates must be certified. The service provider's PSIRA certificate was not certified. It is clear the bid would have been deemed invalid;
 - d) The letter of good standing of the Compensation Commissioner expired on 30 November 2010 – the bid was awarded in August/September 2012;
 - e) The B-BBEE level certificate in the bid document is a copy and not certified - the prescripts are that it must be either original or certified.
 - f) The tender of Ikgodiseng Business Consulting CC should have been regarded as non-responsive; and

- g) A serious breach of confidentiality was observed in the Ikgodiseng Business Consulting CC tender. The vetting report of the SSA was a confidential document between COGHSTA and the SSA. This document may not be handed to a service provider. The Provincial Treasury would launch a full investigation about the issuing of the report.

5.1.10.4 The Provincial Treasury concluded the investigation by indicating that if the Complainant did take the matter further he would have a strong factual case.

Application of the law

- 5.1.11 Section 195(1)(a) of the *Constitution* provides among others, that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that the principle of a high standard of professional ethics must be promoted and maintained. According to Section 195(2) of the *Constitution* these principles are applicable to the administration in every sphere of government.
- 5.1.12 Section 217(1) of the *Constitution* states that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 5.1.13 The Municipality awarded this bid to IBC on the basis that at the time of the adjudication, it was the only bidder which had submitted the suitability check certificate obtainable from the SSA (which was one of the returnable documents needed from the bidders) and disqualified all other bidders based on non-submission whereas it was not their responsibility to have provided such.

- 5.1.14 According to the SSA state organs should approach the SSA with requests to do screening or vetting on service providers and the SSA will provide the client (being the state organ) with the screening or vetting report after having conducted the screening or vetting. In the circumstances, the conduct of the Municipality in awarding this bid to IBC was improper and in contravention of the constitutional provision of fair, equitable, transparent, competitive and cost effective bidding.
- 5.1.15 Sub-paragraph 3.1 of the *Implementation guide: Preferential Procurement Regulations* 2011 states that the *Preferential Procurement Regulations*, 2011 are applicable to organs of state as contemplated in section 1(iii) of the PPPFA and all public entities listed in schedules 2, 3A, 3B and 3D to the PFMA and municipal entities.
- 5.1.16 Sub-paragraph 4.1 states that bidders are required to submit original and valid B-BBEE Status Level Verification Certificates or certified copies thereof together with their bids, to substantiate their B-BBEE rating claims.
- 5.1.17 Sub-paragraph 4.2 states that bidders who do not submit B-BBEE Status Level Verification Certificates or certified copies thereof are non-compliant contributors to B-BBEE and do not qualify for preference points for B-BBEE but should not be disqualified from the bidding process. They will score points out of 90 or 80 for price only and zero (0) points out of 10 or 20 for B-BBEE.
- 5.1.18 Paragraph 13.2 provides for the calculation of points for B-BBEE status level of contributor. If the B-BBEE Status Level of Contributor of a Bidder is 3 the score will be 8 in the 90/10 system.
- 5.1.19 The Bids were evaluated on a 90/10 principle, in terms of which 90 points are allocated to points for price and 10 points are allocated for preference

procurement. The points allocated to Kgomongwe Security Services in terms of this principle were 96.75 and points allocated to IBC were 94.59.

- 5.1.20 The *Treasury Investigation Report* indicated that the B-BBEE level certificate for IBC in the bid document is a copy and not certified, however, IBC has a B-BBEE Status Level of 3 and was scored 8 preference points out of 10 for B-BBEE.
- 5.1.21 The conduct of the Municipality in scoring IBC on preference points constitutes a clear contravention of sub-paragraphs 4.1 and 4.2 of the *Implementation guide: Preferential Procurement Regulations 2011*, in that the B-BBEE level certificate for Ikgodiseng Business Consulting CC in the bid document was a copy and not certified, however the Municipality scored IBC (which has a B-BBEE Status Level of 3) 8 preference points out of 10 for B-BBEE.
- 5.1.22 The Returnable Document Check-List indicated that Kgomongwe Security Services submitted all returnable documents, however IBC did not submit a B-BBEE Verification Certificate but referred to a letter from an accountant which was a response of the Independent Regulatory Board for Auditors (IRBA) and the UIF Certificate as required. The Vetting/Screening Report column was left unchecked for all bidders.
- 5.1.23 Section 6(4) of the *Preferential Procurement Policy Framework Act 5 of 2000* states that only the tender with the highest number of points scored may be selected.
- 5.1.24 The points allocated for Kgomongwe Security Services in terms of this principle were 96.75 and points allocated to IBC were 94.59.
- 5.1.25 Section 16 states 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 the taxes of that person to be in order or that suitable arrangements have been made with SARS.

5.1.26 The Compliance Check-List indicated that IBC did not submit an original Tax Clearance Certificate. This is a shared observation in terms of the Treasury report. The Compliance Check-List also indicated that Kgomongwe Security Services submitted the correct documents as required and therefore complied with all requirements in terms of returnable documents. However, IBC did not submit an original Tax Clearance Certificate.

5.1.27 In the case of *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality (937/2012) [2013] ZASCA 186 (29 November 2013)*, the Supreme Court of Appeal held that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an 'acceptable tender' as envisaged by the *Procurement Act* and did not pass the so-called 'threshold requirement' to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside - as was held by this court in *Sapela Electronics*.⁵ On this basis the appellants were perfectly entitled to disqualify the first respondent's tender as they did.

5.1.28 Section 29(6) of the *Municipal Supply Chain Regulations* provides that the accounting officer may at any stage of a bidding process refer any recommendation made by the evaluation committee or the adjudication committee back to that committee for reconsideration of the recommendation.

⁵ Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA) para 11.

- 5.1.29 The Municipality had an opportunity to remedy the oversight regarding the responsiveness of the bid from IBC after receiving the recommendation from the Bid Evaluation Committee. In addition to this, the accounting officer had an opportunity to remedy the recommendations of the Bid Adjudication Committee when evaluating the recommendations from the evaluation committee in regard to the screening report.
- 5.1.30 Section 45(2)(a) of the *Ga-Segonyana Municipality Supply Chain Management Policy*, 2003 states that an official or other role player involved in the implementation of the Policy-
- (a) must treat all providers and potential providers equitably; and
 - (b) must assist the accounting officer in combating fraud, corruption, favouritism and unfair and irregular practices in the supply chain management system.
- 5.1.31 Section 49(1)(a)(i)(ii) of the *Ga-Segonyana Municipality Supply Chain Management Policy* states that the accounting officer must appoint an independent and impartial person, not directly involved in the supply chain management processes-
- (a) To assist in the resolution of disputes between the municipality and other persons regarding:
 - (i) Any decisions or actions taken in the implementation of the supply chain management system; or
 - (ii) Any matter arising from a contract awarded in the course of the supply chain management.
- 5.1.32 The Municipality did not use this remedy to address the concerns the Complainant raised with them regarding the awarding of this tender.
- 5.1.33 Section 2(2)(c) of the *National Strategic Intelligence Act* 39 of 1994, as amended, states the function of the SSA as to gather departmental

intelligence at the request of any interested department of State, and, without delay to evaluate and transmit such intelligence and any other intelligence at the disposal of the Service and which constitutes departmental intelligence, to the department concerned and to NICOC.

5.1.34 Section 2A(1)(b)(i) of the *National Strategic Intelligence Act* provides that the relevant members of the National Intelligence structures may conduct a security screening investigation in the prescribed manner to determine the security competence of a person if such a person is rendering a service or has given notice of intention to render a service to an organ of state which service may give him or her access to classified information and intelligence in the possession of the organ of state.

Conclusion

5.1.35 Based on the evidence before the Public Protector, it is evident that IBC should have been disqualified from evaluation on functionality due to its failure to submit an original tax clearance certificate.

5.1.36 Elimination of the Complainant due to failure to submit the SSA clearance certificate was irregular and improper, as it was the responsibility of the Municipality to obtain the security clearance from the SSA. The bid should not have been awarded to IBC and instead IBC's bid should have been regarded as non-responsive.

5.1.37 The BEC also recommended that no bidder should be appointed pending the Report from the State Security Agency of all bidders who submitted bids.

5.1.38 The conduct of the Municipality in awarding this bid to IBC on the basis that at the time of the adjudication, it was the only bidder which had submitted the suitability check certificate obtainable from the SSA and disqualifying all other bidders who could not submit such, was not only improper but was

also in contravention of the constitutional provision of fair, equitable, transparent, competitive and cost effective bidding in terms of section 217 of the *Constitution*.

5.1.39 The Municipality should have upheld the recommendation made by the BEC and waited for the SSA to provide them with the Screening Reports, then only after obtaining such, qualify the responsive bid and award this tender accordingly.

5.2 Regarding whether the Complainant suffered prejudice as a result of the Municipality's failure to follow proper procurement processes when appointing IBC:

Common cause issues

5.2.1 It is common cause that the Municipality awarded a tender to IBC for a period of 36 months for the provision of security services to the Municipality.

Issues in dispute

5.2.2 It is in dispute whether the Complainant suffered prejudice as a result of the Municipality's failure to follow proper procurement processes when appointing IBC.

5.2.3 The Complainant alleges that he suffered prejudice by virtue of the fact the Municipality did not comply with the legislative prescripts and as a result, his company could not fairly compete and was thus unfairly eliminated from the tender process.

5.2.4 The Complainant further alleges that this irregular appointment of IBC caused him to suffer financial prejudice to the tune of R9 153 789.84 i.e. for the 3 year duration of the tender. In addition, he further alleged that he

incurred costs to the amount of R2 530.00 being costs he incurred in preparing the tender documents.

5.2.5 The Municipality, on the other hand, contended that at time the bid was awarded to IBC on the basis that it was the only bidder who had submitted the suitability check certificate obtainable from the SSA, which was one of the returnable documents needed from the bidders. The bidder had conformed to all other returnable documents needed for the bidder to be considered responsive.

Application of the relevant law

5.2.6 Section 33(1) of the *Constitution* provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

5.2.7 In terms of section 62 of the *Municipal Finance Management Act* 56 of 2003 (the MFMA), the accounting officer is responsible for managing the financial affairs of the Municipality and he must, for this purpose, *inter alia*:

- a) Take all reasonable steps to ensure that unauthorised, irregular, fruitless and wasteful expenditure and other losses are prevented; and
- b) Ensure that disciplinary or, when appropriate, criminal proceedings are instituted against any official or councillor of the Municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15 of the MFMA.

5.2.8 The payments to IBC, subsequent to its appointment, constitute an irregular expenditure, as this expenditure is contrary to the *Municipal Finance Management Act*, the *Municipal Systems Act* (Act No.32 of 2000), and or is in contravention of the Municipality supply chain management policy.

- 5.2.9 In terms of the MFMA, any official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure, is liable for that expenditure.
- 5.2.10 Notwithstanding the BEC recommendation, the BAC resolved at its meeting of 31 August 2012 to recommend to the Municipal Manager to award the tender to IBC.
- 5.2.11 The Municipality did not disqualify IBC despite the fact that IBC submitted a Tax Clearance Certificate which was a copy and not an original as well as copies of B-BEE Status Level Verification and PRISA certificates instead of certified copies.
- 5.2.12 Any unjustifiable failure by the Municipality to follow due processes when awarding the tender to IBC resulted in prejudice to the Complainant.
- 5.2.13 The evidence obtained and the application of the relevant legal prescripts to the established facts as discussed above, do indicate that the Municipality caused the Complainant to suffer prejudice. It further indicates that the Municipality failed to execute its constitutional obligations in terms of section 33(1) of the Constitution.
- Conclusion
- 5.2.14 The decision to award IBC the tender was expected to be lawful and comply with legal prescripts regulating procurement processes by the Municipality.
- 5.2.15 Failure by the Municipality to act lawfully in terms of the *Constitution* in the appointment of the IBC caused the Complainant to suffer financial prejudice.

6 FINDINGS

Having regard to the evidence, the regulatory framework determining the standard the Municipality should have complied with and the impact on the Complainant, the Public Protector is making the following findings against the Municipality:

6.1 Regarding whether the Municipality unduly failed to follow proper procurement processes when appointing IBC and whether such conduct constitutes maladministration:

- 6.1.1 The allegation that the Municipality unduly failed to follow proper procurement processes when appointing IBC is substantiated.
- 6.1.2 The Municipality appointed IBC despite the fact that IBC submitted copies of a Tax Clearance certificate instead of originals and also submitted copies of B-BBEE Status Level Verification and PRISA certificates instead of certified copies.
- 6.1.3 The Municipality also appointed IBC despite recommendations by the Municipality's BEC that no bidder should be appointed pending the report from the SSA of all bidders who submitted bids and despite IBC scoring less points than the Complainant's Company
- 6.1.4 The Municipality's conduct was in violation of section 2(1) of the *Municipality Supply Chain Management Policy*, section 2(1) of the *Preferential Procurement Policy Framework Act, 2000* and section 217 of the *Constitution*.
- 6.1.5 Such conduct constitutes improper conduct as envisaged in section 182(1) of the *Constitution* and maladministration as envisaged in section 6(4)(a)(i) of the *Public Protector Act*.

6.2 Regarding whether the Complainant suffered prejudice as a result of the Municipality's failure to follow proper procurement processes when appointing IBC:

6.2.1 The allegation that the Complainant suffered prejudice as a result of the Municipality's failure to follow proper procurement processes when appointing IBC is substantiated.

6.2.2 The Complainant suffered prejudice by virtue of the fact that because the Municipality did not comply with the legislative prescripts, his company could not fairly compete and was thus unfairly eliminated.

7. REMEDIAL ACTION

The appropriate remedial action that the Public Protector is taking in accordance with section 182(1) of the *Constitution* and section 6(4)(c)(ii) of the *Public Protector Act*, is as follows:

7.1 The Municipal Manager to:

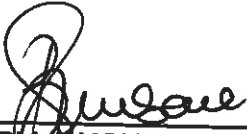
7.1.1 Take appropriate steps, within 30 days of receiving my report, to ensure that all Municipal officials involved in the Supply Chain Management are properly trained in the MFMA with particular reference to following proper procurement processes, applicable policies and legislative prescripts;

- 7.1.2 Issue a written apology to the Complainant within 30 days of the issuing of the final report for the Municipality's failure to follow proper procurement processes in the appointment of the service provider;
- 7.1.3 Consider taking appropriate disciplinary action, within 30 days from receiving my report, against all the BAC members who were responsible for exposing the Municipality to acts of maladministration and financial risk in violation of the municipal supply chain and procurement processes and procedures in relation to the appointment of IBC;
- 7.1.4 Compensate the Complainant an amount of R2 530.00 being costs he incurred in preparing the bid tender documents;
- 7.1.5 Submit an Action Plan to the Public Protector, within 15 days of the issuing of the final report, indicating how the remedial action will be implemented; and
- 7.1.6 The Municipal Council must:
- 7.1.6.1 within 30 days of receipt of this report, consider taking the necessary criminal action against Mr Elias Ntefang, the former Municipal Manager at Ga-Segonyana Municipality, for failing to take action after being advised by the Provincial Treasury to take the necessary remedial steps/corrective measures to cancel the bid and re-advertise the tender due to irregularities in the awarding of the tender to IBC;
- 7.1.6.2 within 30 days of receipt of this report, investigate the irregular expenditure and consider instituting criminal action, for financial misconduct in terms of section 171 and 173(1)(a)(iii) of the MFMA respectively, against Mr Elias Ntefang; and

- 7.1.6.3 recover irregular expenditure from the person liable for that expenditure, unless the expenditure is, after investigation referred in paragraph 7.1.6.2 above, certified by council as irrecoverable and written off by council.

8. MONITORING

The Public Protector will require the Municipal Manager to provide a quarterly progress report on the implementation of the remedial action and will monitor the progress made in this regard over regular intervals.


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

DATE: 16 / 04 /2018

Assisted by

Mr. NML Khanya, Provincial Representative, Northern Cape Provincial Office