

**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**



Report No: 111 of 2019/20

ISBN No: 978-1-928507-71-0

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION RELATING TO THE IRREGULAR AWARDING OF A
CONTRACT TO TRACKER NETWORK PTY (LTD) BY THE SOUTH AFRICAN
POLICE SERVICE**

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Executive Summary

- (i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and hereby published in terms of section 8 of the Public Protector Act, 1994.
- (ii) The report relates to an investigation into allegations of maladministration relating to the irregular awarding of a contract to Tracker Network Pty (Ltd) (Tracker) by the South African Police Service (SAPS).
- (iii) The complaint was lodged by Mr Niemesh Singh (the Complainant) on 19 August 2013. In essence the following allegations were made by the Complainant relating to a contract between Tracker and SAPS:
 - (a) That Tracker has enjoyed a favourable relationship with SAPS, since its establishment in 1995, as SAPS resources including police officials, police vehicles and police aircrafts are being utilised by Tracker, to track and recover stolen vehicles of Tracker clients. These Tracker clients pay installation and monthly fees to Tracker;
 - (b) That the relationship between SAPS and Tracker allows the latter to utilise state resources to fund their organisation, which results in significantly higher profit margins for Tracker, than if it were to pay for such resources itself;
 - (c) That SAPS has not benefited from the said relationship as, no fees, disbursements and expenses, such as fuel and vehicle maintenance costs, are borne by Tracker;
 - (d) That the practice is anti-competitive in that other tracking companies are prejudiced because Tracker is the only company utilising SAPS resources at no cost, leading to better returns and profits for Tracker when compared to its competitors;
 - (e) That the agreement between SAPS and Tracker has been previously renewed without following proper tender procedures and processes, that could have benefited other companies in the said business sector; and

- (f) That the agreement signed between SAPS and Tracker on 12 June 2008 and which was due to expire on 12 June 2013, was irregularly extended for a further three (3) months by the National Commissioner, to allow for the finalisation of the tender processes.
- (iv) On analysis of the complaint, the following issues were identified to inform and focus the investigation:-
 - (a) Whether the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in SAPS vehicles, was improper, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994; and
 - (b) Whether the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources, and if so, whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994
- (v) The investigation process commenced with a preliminary investigation, followed by a formal investigation which was conducted through the exchange of correspondence with SAPS as well as perusal of the relevant documents/correspondence received as well as the analysis and application of the relevant laws, policies and related prescripts. Section 7(9)(a) Notices were issued in terms of the Public Protector Act, 1994 to General Sithole, the National Commissioner of SAPS and Mr Wayne De Nobrega, the Chief Executive Officer of Tracker from whom responses thereto were received.
- (vi) SAPS responded to the section 7(9) notice only with respect of the first issue investigated the response has been considered in this report. SAPS did not make any submissions in respect of the second issue.
- (vii) Tracker was issued the section 7(9) notice to afford it an opportunity to respond to the allegations relating to the second issue that I investigated.

Tracker. However it made submissions on both the first and second issues, including submissions relating to the processes followed by SAPS in awarding the contracts to them and the subsequent extensions thereof. I have considered their response thereto, but have not included the submissions made on the first issue in this report, as my investigation focussed on the conduct of SAPS in the procurement process and not Tracker, *per se*. The findings I have made are also against the SAPS and not Tracker. Tracker's submissions made on the second issue have been included in this report.

(viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:-

(a) **Whether the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in SAPS vehicles, was improper, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994**

(aa) The allegation that the process followed by SAPS in concluding agreements with Tracker/Tracker Connect, for the provision of the vehicle tracking system in vehicles belonging to SAPS, were improper, is substantiated.

(bb) The process followed by SAPS in concluding the agreements with Tracker/Tracker Connect over the past 21 years, failed to meet the standards imposed by section 217 of the Constitution and section 2 of the PPPFMA and therefore amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) of the Public Protector Act, 1994.

(b) **Regarding whether the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994**

- (aa) The allegation that the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources is substantiated.
 - (bb) SAPS utilises its personnel, vehicles, infrastructures and police aircrafts in responding to the activation of a stolen or hijacked vehicles of a Tracker client.
 - (cc) The National Commissioner and respective SCM officials further failed to comply with section 38 and 57 of the PFMA in terms of their respective responsibilities.
 - (dd) The conduct of SAPS as referred to above therefore amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) of the Public Protector Act, 1994.
- (ix) The appropriate remedial action I am taking as envisaged in section 182(1)(c) of the Constitution is the following:
- a. **Whether the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in SAPS vehicles, was improper, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994**

The National Commissioner, SAPS

- (aa) To take note of my findings in respect of this report and my remedial action in paragraph (b) below prior to entering in any further vehicle tracking agreements;
- (bb) To ensure that if SAPS considers embarking on an appropriate competitive procurement process for this partnership in line with section 217 of the Constitution;

- (cc) The bidding process is conducted in accordance with the relevant procurement prescripts, more specifically that a proper assessment of bids is conducted to ensure competitiveness;
 - (dd) The specifications and mandatory requirements of the bid does not create an unfair exclusion of other service providers; and
 - (ee) Consider appointing a panel of service providers wherein partnership agreements are entered with more than one service provider and/or for shorter periods rather than five (5) years, to allow more service providers to benefit from such agreements.
- b. Regarding whether the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994.**

The National Commissioner, SAPS:

- (aa) To take note of this report and take into account the fact that SAPS does not incur any cost for the supply, installation and use of the devices, I therefore direct that SAPS fervently engage other service providers in this sector in order to prevent possible monopolistic circumstances by one over others.
- (bb) Such engagement should be undertaken to inform and guide service providers of their needs, specifically the technical specifications of the goods, works or services that is required. This would allow service providers to either acquire or develop their technologies to meet the needs of SAPS and enable them to also enter into such agreements with SAPS.
- (cc) The benefits of such agreement be canvased with other service providers, and that even though SAPS resources would be utilised, it

would be to the benefit of the vehicle owners from a wider spectrum and not just to Tracker/ Tracker Connect clients, by providing equal opportunity to a broader supplier market.

(dd) The National Commissioner to further consider establishing in-house capacity which will play a key role when SAPS enters into agreements with the panel of service providers in order not to compromise national security, and safeguard sensitive information relating SAPS Standard Operating Procedures, modus operandi, development/sophistication of crime and the change in geographical approach of criminals. This should be reflected in Service Level Agreement entered into with such service providers.

(ee) The National Commissioner to minimise the reliance of Tracker operators deployed at the 10111 centre to further address national security issues as referred to in paragraph above

(x) **MONITORING**

- a. The National Commissioner, SAPS must, within thirty (30) working days from the date of the issuing of this Report and for approval by the Public Protector, submit the implementation plan to the Public Protector indicating how the remedial action referred to in paragraph (ix) of this Report will be implemented.
- b. In line with the Constitutional Court judgment in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** [\[2016\] ZACC 11](#), and in order to ensure the effectiveness of Office of the Public Protector, the remedial actions prescribed in this Report are legally binding , unless set aside by a Court order.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION RELATING TO THE IRREGULAR AWARDING OF A CONTRACT TO TRACKER NETWORK PTY (LTD) BY THE SOUTH AFRICAN POLICE SERVICE

1. INTRODUCTION

- 1.1 This is my report 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 This report, specifically the findings therein, are submitted, in terms of section 8 of the Public Protector Act, to the following people:
 - 1.2.1 The National Commissioner of the South African Police Service, General Khehla Sithole;
 - 1.2.2 The Chief Executive Officer of Tracker, Mr Wayne De Nobrega; and
 - 1.2.3 The Complainant, Mr Niemesh Singh.
- 1.3 The report relates to an investigation into allegations of maladministration relating to the irregular awarding of a contract to Tracker Network Pty (Ltd) (Tracker) by the South African Police Service (SAPS).

2. THE COMPLAINT

- 2.1 The complaint was lodged by Mr Niemesh Singh (the Complainant) on 19 August 2013. In essence the following allegations were made by the Complainant relating to a contract between Tracker and SAPS as follows:
 - 2.1.1 That Tracker has enjoyed a favourable relationship with SAPS, since its establishment in 1995, as SAPS resources including police officials, police vehicles and police aircrafts are being utilised by Tracker, to track and recover stolen vehicles of Tracker clients. These Tracker clients pay installation and monthly fees to Tracker;

- 2.1.2 That the relationship between SAPS and Tracker allows the latter to utilise state resources to fund their organisation, which results in significantly higher profit margins for Tracker, than if it were to pay for such resources itself;
- 2.1.3 That SAPS has not benefited from the said relationship as, no fees, disbursements and expenses, such as fuel and vehicle maintenance costs, are borne by Tracker;
- 2.1.4 That the practice is anti-competitive in that other tracking companies are prejudiced because Tracker is the only company utilising SAPS resources at no cost, leading to better returns and profits for Tracker when compared to its competitors;
- 2.1.5 That the agreement between SAPS and Tracker has been previously renewed without following proper tender procedures and processes, that could have benefited other companies in the said business sector; and
- 2.1.6 That the agreement signed with between SAPS and Tracker on 12 June 2008 and was due to expire on 12 June 2013, was irregularly extended for a further three (3) months by the National Commissioner, to allow for the finalisation of the tender processes.

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:-

"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 further directs that the Public Protector has additional powers and functions prescribed by legislation.
- 3.4 In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) BCLR 618, the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect [at para 76]. The Constitutional Court further held that: *"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences"*.
- 3.5 In the above-mentioned matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others*, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:
- 3.5.1 Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.5.2 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**. (para 67);
- 3.5.3 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** (para 68);

- 3.5.4 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. (para 69);
- 3.5.5 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. (para 70);
- 3.5.6 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 investigation** and the **type of findings made**. (para 71);
- 3.5.7 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**; (para 71(a);
- 3.5.8 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (para 71(d));
- 3.5.9 "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 (para 71(e));
- 3.6 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 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;

- 3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);
- 3.6.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);
- 3.6.3 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(paragraph 100 and 101 of the judgment):
- a) Conduct an investigation;
 - b) Report on that conduct; and
 - c) To take remedial action.
- 3.6.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (paragraph 104 of the judgment);
- 3.6.5 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. (Paragraph 105 of the report). ;
- 3.6.6 The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108 of the Judgment);
- 3.6.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgment);
- 3.7 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and abuse or unjustifiable exercise

of power in the conduct of state affairs or an improper or dishonest act by any person in the employ of government at any level;

3.8 The SAPS is a national public entity and its conduct falls within the Public Protector's mandate to investigate; and

3.9 The Public Protector's powers and jurisdiction to investigate and take appropriate remedial action was not disputed by the SAPS.

4. THE INVESTIGATION

4.1 The Investigation Process

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.

4.1.3 The investigation process included an exchange of correspondence with the Department, interviews, analysis of relevant documentation, conducted research, and the consideration and application of relevant laws, regulatory framework and jurisprudence.

4.1.4 During the investigation process, notices in terms of section 7(9)(a) of the Public Protector Act dated 10 October 2019 were issued to General Sithole, the National Commissioner of SAPS and 14 October 2019 to Mr Wayne De Nobrega, the Chief Executive Officer of Tracker, to afford them an opportunity to respond to my provisional findings.

4.1.5 SAPS response to the section 7(9) notice received on 1 November 2019 has been considered in this report. SAPS did not make any submissions in respect of the second issue on the section 7(9) notice.

- 4.1.6 The section 7(9) notice issued to Tracker was to afford it an opportunity to respond to the allegations relating to the second issue that I investigated. Tracker however, made submissions on both the first and second issues, including submissions relating to the processes followed by SAPS in awarding the contracts to Tracker and the subsequent extensions thereof.
- 4.1.7 I have considered their response, but have not included the submissions made on the first issue in this report, as my investigation focussed on the conduct of the SAPS in the procurement process and not Tracker, *per se*. The findings I have made are also against SAPS and not Tracker. The submissions made on the second issue have been included in this report.
- 4.1.8 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.
- 4.1.9 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating the matter. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. It is axiomatic that I have to identify special circumstances using my discretion should I decide to entertain such a complaint.
- 4.1.10 In this case, I submit that the initial appointment of Tracker which occurred more than a decade ago, the subsequent extensions and other contracts

awarded by SAPS to Tracker over the years gives a perception of not only flouting the public procurement ethos as enshrined in section 217 and 195 of the Constitution but also creating a monopolistic business environment.

4.1.11 The investigation required that I explore the initial and subsequent contracts awarded to Tracker, in order to determine how the initial and subsequent partnership arrangements were established to allegedly benefit one service provider to the exclusion of other companies in the market. I accordingly decided to exercise my discretion in favour of this complaint. Alive to all these reasons, I conclude that it is in the interests of justice to investigate and determine the merits or demerits thereof.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or impropriety, what would it take to remedy the wrong or to place the Complainant as close as possible to where he/she would have been but for the maladministration or improper conduct?

4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on the issues raised in the complaint.

4.2.1.6 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been complied with by the Department, to prevent any irregularities, maladministration and improper conduct.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration.

4.3 On analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.3.1 Whether the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in SAPS vehicles, was improper, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994; and

4.3.2 Whether the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

4.4 The key sources of information

4.4.1 Documents received and considered:

4.4.1.1 Complaint by Mr Niemesh Singh, to the Public Protector on 19 August 2013;

4.4.1.2 Unsigned submission dated 21 November 2001, made by the Manager: Radio Technical Services to Logistics: Procurement Administration regarding the technical evaluation of tender RT 1415 KA;

4.4.1.3 Memorandum of Agreement entered into between SAPS and Tracker signed on 6 December 2002;

- 4.4.1.4 Submission from the Section Head, Radio Technical Services, Director GM Bosman on 15 October 2007 to the Divisional Commissioner, SCM;
- 4.4.1.5 Copy of the "*Stolen Vehicle Recover Agreement specification*";
- 4.4.1.6 Submission dated 31 October 2007, from Sub Section Head: Acquisition Management: Radio, IT and Stationary, Superintendent RE Mulders (Supt. Mulders) to the Chairperson of the Bid Adjudication Committee (BAC);
- 4.4.1.7 Information Note with reference number Q/19/4/10, submitted on 14 January 2008 by Supt. Mulders, to Section Head: Acquisition Management: Moveable Government Property and Services, Director F. Mashika (Dir. Mashika);
- 4.4.1.8 Copy of notes indicating deliberations that took place on 10 April 2008; regarding the specifications of the bid;
- 4.4.1.9 Submission made on 10 April 2008 a submission to the BAC requesting approval to advertise a bid;
- 4.4.1.10 SAPS advertisement of BID 19/1/9/1/116 TR (07) in the Government Tender Bulletin on 18 April 2008;
- 4.4.1.11 Bid documents for BID 19/1/9/1/116 TR (07) ;SBD 6.1 of the bid documents;
- 4.4.1.12 "*SPECIFICATION SAPS 13/2008*", describing the specifications of the tender;
- 4.4.1.13 Register of bids received;
- 4.4.1.14 BEC Evaluation Report with attendance list attached and signatures of the BEC members with the date 26 May 2008 appended to each signature;
- 4.4.1.15 Submission by Supt. Mulders on 6 June 2008 to the Chairman of the BAC, to obtain approval of the bid;
- 4.4.1.16 Bid award published in the Government Tender Bulletin dated 11 July 2008;

- 4.4.1.17 The Memorandum of Understanding between SAPS and Tracker concluded on 11 December 2008 for a period of five (5) years;
- 4.4.1.18 Letter from Mr Ron Knott-Craig (Mr Knott-Craig), the Director: Operations at Tracker, submitted to General Cele, the then National Commissioner of SAPS and General Lebeya the Deputy National Commissioner on 20 July 2011;
- 4.4.1.19 Information note to the Deputy National Commissioner: Crime Detection on 15 August 2011 from Lieutenant General JT Molefe (Lt.Gen Molefe), the Executive Legal Officer;
- 4.4.1.20 Information and a letter from Lt. Gen Molefe submitted to the Head, SCM: Acquisition Management 17 August 2011;
- 4.4.1.21 Email from Mr Knott-Craig to Brigadier Johan Smit on 22 August 2011;
- 4.4.1.22 Submission from the Section Commander: Bid Administration dated 23 August 2011 to the Chairperson of the BAC;
- 4.4.1.23 Submission from the Divisional Commissioner: Detective Services, Lieutenant General V. Moonoo to the Divisional Commissioner: SCM on 23 March 2013;
- 4.4.1.24 Advertisement of tender number 19/1/9/1/114 TR (13) in the Government Tender Bulletin on 22 November 2013;
- 4.4.1.25 Bid documents for tender number 19/1/9/1/114 TR (13);
- 4.4.1.26 SBD 6.1 of the bid documents for tender number 19/1/9/1/114 TR (13);
- 4.4.1.27 Specifications of tender number 19/1/9/1/114 TR (13);
- 4.4.1.28 Submission by Brigadier F. Mashika the Section Head: Acquisition Management MGP & Services, made a submission to the Chairperson of the BAC to obtain approval of the BAC for the award of Bid No 19/1/9/1/114 TR (13) on 4 February 2014;

- 4.4.1.29 SAPS communication to bidder and Revised submission dated 19 March 2014 made to the BAC, detailing the response from bidder;
- 4.4.1.30 Report by the Chief Procurement Officer, Mr Kenneth Brown of National Treasury on 27 May 2014 to the National Commissioner;
- 4.4.1.31 Report by the Major Gen. DT Nkosi, the Chief Audit Executive to the Deputy National Commissioner (date unclear); and
- 4.4.1.32 Information note submitted by the Divisional Commissioner: SCM to the National Commissioner on 21 July 2014.

4.4.2 Correspondence sent and received:

- 4.4.2.1 Letter to General MV Phiyega (Gen. Phiyega), the former National Commissioner, SAPS from the Public Protector requesting information dated 11 December 2013;
- 4.4.2.2 Letter from Lieutenant General CN Mbekela to the Public Protector requesting extension, dated 30 December 2013;
- 4.4.2.3 Letter to General MV Phiyega (Gen. Phiyega), the former National Commissioner, SAPS from the Public Protector dated 3 January 2014;
- 4.4.2.4 Response to the allegations dated 02 February 2014 from General MV Phiyega (Gen. Phiyega), the former National Commissioner, SAPS;
- 4.4.2.5 Acknowledgement of receipt of response from the Public Protector to General MV Phiyega (Gen. Phiyega), the former National Commissioner, SAPS dated 18 February 2014;
- 4.4.2.6 Letter from Public Protector to General Sithole, the National Commissioner, SAPS dated 15 February 2018 requesting documentation;
- 4.4.2.7 Letter from General Sithole, the National Commissioner, SAPS to Public Protector dated 20 March 2018;

- 4.4.2.8 Subpoena issued to the National Commissioner, SAPS on 23 April 2019;
- 4.4.2.9 Letter from General Sithole, the National Commissioner, SAPS dated 07 May 2019, requesting rescheduling of subpoena meeting; and
- 4.4.2.10 Response received from the Lieutenant General FN Vuma, the Deputy National Commissioner dated 24 May 2019.

4.4.3 Notices issued and responses received:

- 4.4.3.1 Notice in terms of section 7(9)(a) of the Public Protector Act dated 10 October 2019 were issued to General Sithole, the National Commissioner, SAPS ;
- 4.4.3.2 Notice in terms of section 7(9)(a) of the Public Protector Act dated 14 October 2019 to Mr Wayne De Nobrega, the Chief Executive Officer of Tracker;
- 4.4.3.3 Response to section 7(9)(a) Notice from SAPS dated 31 October 2019; and
- 4.4.3.4 Response to section 7(9)(a) Notice from Tracker dated 1 November 2019.

4.4.4 Interviews Conducted:

- 4.4.4.1 Interview between the Public Protector and General Khehla Sithole (Gen. Sithole), the National Commissioner, SAPS on 29 May 2019;

4.4.5 Legislation and other prescripts:

- 4.4.5.1 The Constitution of the Republic of South Africa, 1996;
- 4.4.5.2 The Public Protector Act No 23 of 1994;
- 4.4.5.3 The Public Finance Management Act, 1999 (PFMA);
- 4.4.5.4 National Treasury Regulations;
- 4.4.5.5 Preferential Procurement Regulations, 2011;
- 4.4.5.6 The Preferential Procurement Policy Framework Act, Act No, 5 of 2000 (PPPFA);
- 4.4.5.7 Implementation Guide: Preferential Procurement Regulations 2011

4.4.6 Case law:

- 4.4.6.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) BCLR 618;
- 4.4.6.2 *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); and
- 4.4.6.3 *Allpay Consolidated Investment Holding (PTY) Ltd v Chief Executive Officer of the South African Social Security Agency* (No 1) (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC);
- 4.4.6.4 *Minister of Transport v Prodiba (Pty) Ltd* (20028/2014) [2015] ZASCA 38 (25 March 2015)

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 the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in SAPS vehicles, was improper, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994**

Common Cause Issues

- 5.1.1 It is common cause that SAPS entered into an agreement with Tracker, for the supply of vehicle tracking-systems in vehicles belonging to SAPS, in order to track and recover stolen vehicles.
- 5.1.2 The issue for my determination is whether or not the agreements entered into between SAPS and Tracker for the provision of the vehicle tracking systems in SAPS vehicles, were irregular.

Issues in dispute

- 5.1.3 The allegations made by the Complainant are that, SAPS did not follow proper processes in concluding the agreements with Tracker, as well as the subsequent extensions thereof.
- 5.1.4 In a letter of response to the allegations dated 02 February 2014, General MV Phiyega (Gen. Phiyega), the former National Commissioner, submitted evidence to my office relating to the processes SAPS followed over the years in concluding the agreements with Tracker. Further information was received from SAPS during the meeting held with the General Khehla Sithole (Gen. Sithole), the National Commissioner on 29 May 2019.
- 5.1.5 In the said response Gen. Phiyega submitted that I should take cognisance of the following background information on the matter:
- 5.1.5.1 She submitted that on the evening of 27 March 2013, SAPS and Tracker were involved in the tracking of a stolen vehicle. At the crime scene, the Complainant, who is a police reservist became involved in an altercation with an employee of Tracker. The Tracker employee subsequently laid a criminal charges of assault and *crimen injuria* against the Complainant;
- 5.1.5.2 Within hours after the case was registered, the Complainant, sent an email to Gen. Phiyega's office requesting information regarding SAPS relationship with Tracker. The complainant further informed her that "*certain issues will be placed before the Nascom, the Minister of Safety and Security, The Police Parliamentary Portfolio Committee and The Public Protectors Office*";
- 5.1.5.3 On 4 June 2013 Pather and Pather Attorneys, acting on behalf of the Complainant wrote a letter to the National Deputy Information Officer requesting certain records in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 of SAPS pertaining to the relationship between SAPS and Tracker, and that the request was being dealt with by the

Deputy Information Officer in conjunction with the Supply Chain Management and Legal Services;

5.1.5.4 She further submitted that the Complainant's determination and possible vindictiveness was evident from his communication to her as well as to the Minister of Finance and the Competition Commission of South Africa.

5.1.6 General Phiyega's response related to the following:

The First Agreement

5.1.6.1 The historical development of the relationship between SAPS and Tracker, was outlined in Gen Phiyega's response:

5.1.6.2 She submitted that the former State Tender Board, was responsible for the first two (2) bids in 1996 and 2002, and that all documentation in respect of these bids have been destroyed in accordance with archive instructions. She further attached an affidavit by Mr RS Roelofse, of National Treasury confirming such. Affidavits from officers from SAPS Supply Chain Management (SCM), were submitted, to indicate that unavailability of certain files at SCM.

5.1.6.3 She stated that in the late 1980's and early 1990, South Africa began to experience serious problems with vehicle theft. As such stakeholders began to consider alternatives to curb vehicle theft since gear locks and car alarms were no longer considered as sufficient;

5.1.6.4 During 1990 the Lojack system was demonstrated to SAPS officials and in 1994 SAPS members again visited the United States of America (USA) to evaluate the Lojack system;

5.1.6.5 Several communications between the State Attorney, the Department of State Expenditure (State Tender Board) , SAPS Logistics , Legal Services and the Detective Services Vehicle Crime Unit were carried out, to introduce the system into SAPS as a tool to address vehicle crime;

- 5.1.6.6 The State Tender Board after following an open tender process, subsequently awarded a contract to Tracker for the *“supply of a joint venture operation of a nationwide vehicle-tracking system with the SAPS , in terms of tender RT 8878 SA”*;
- 5.1.6.7 The first formal agreement between SAPS and Tracker was entered into on 4 March 1996 for a period of five (5) year and could at the request of SAPS and subject to the State Tender Board approval be extended for another five (5) years;
- 5.1.6.8 On 26 September 1996, SAPS and Tracker concluded a Protocol Agreement that supplemented the original agreement to address practical procedures to achieve the objectives of the original agreement; and
- 5.1.6.9 During March 2000 a submission was made to the then National Commissioner by Detective Services and Legal Services to sign an agreement between SAPS and Tracker to accommodate Tracker Repeater Units at SAPS sites/premises, in line with the clause 10 of the original agreement whereby it was stated that, *“assistance would be rendered by SAPS to Tracker to establish Tracker Radio Network at SAPS communications sites”*. This discretion was vested solely in the National Commissioner.

The Second Agreement

- 5.1.7 According to evidence submitted by SAPS , an unsigned submission dated 21 November 2001, made by the Manager: Radio Technical Services to Logistics: Procurement Administration, the technical evaluation of tender RT 1415 KA, involved the evaluation of four (4) bid offers. Two (2) companies were disqualified as their offers had failed to show full compliance to the specification in terms of a demonstration system.
- 5.1.8 It was recorded on the submission that the company Netstar did not comply with substantial portion of the specification, as the Netstar equipment was not

“non-intrusive” as required by SAPS. It was however recommended that SAPS be permitted to negotiate a contractual relationship with Netstar that would “implement operational co-operation procedures and use of Netstar equipment on a small scale”.

- 5.1.9 The submission further recorded that Tracker fully complied with the specification and it was recommended that the offer from Tracker be accepted.
- 5.1.10 The Memorandum of Agreement entered into between SAPS and Tracker was signed on 6 December 2002 for a period of five (5) years.

The Third Agreement

- 5.1.11 According to the evidence submitted by SAPS, a submission was made from the Section Head, Radio Technical Services, Director GM Bosman on 15 October 2007 to the Divisional Commissioner, SCM, wherein it was stated that Detective Services had requested that a new contract be established as the contract with Tracker was to expire in the near future.
- 5.1.12 Further thereto a copy of the *“Stolen Vehicle Recover Agreement specification”*, was attached to the submission for the bid to be advertised, and it was requested that a specification meeting be convened with the key stakeholders.
- 5.1.13 On 31 October 2007, the Sub Section Head: Acquisition Management: Radio, IT and Stationary, Superintendent RE Mulders (Supt. Mulders) made a submission to the Chairperson of the Bid Adjudication Committee (BAC), requesting approval of the BAC to extend the contract between SAPS and Tracker, TR 1415 KA on a month to month basis until a new agreement can be issued and negotiated. The submission contained a stamped approval of the BAC dated 11 April 2008.
- 5.1.14 Further evidence indicates that an Information Note with reference number Q/19/4/10, was submitted on 14 January 2008 by Supt. Mulders, to Section Head: Acquisition Management: Moveable Government Property and

Services, Director F. Mashika (Dir. Mashika), requesting approval of the panel of members for the specification meeting and Bid Evaluation Committee (BEC) for the "Stolen Vehicle Recovery (Tracker) Contract". The submission was approved by Dir. Mashika on 15 January 2008.

5.1.15 The following evidence was submitted to indicate the deliberations that took place on 10 April 2008 regarding the specifications of the bid:

- Sgt Paula / Kenny
TRACKER BID
- 1) If the submission is approved on 11/4/08 for the five year period.
 - 2) Please send an advertisement through to Government Printer to advertise the bid in the G.T.B of 2008/04/18. with a closing date of 2008/05/12
 - 3) If the Bid is been advertised please ensure that bid documents are given to the prospective bidders as indicated by RTS.
 - 4) Please forward also application forms to the Bidders for registration on the Suppliers Data Base otherwise will experiencing problems.

Berg S/Sgt
10/04/08

Description for advertisement.

The South African Police Service requires a national partnership with a vehicle tracking company. to combat vehicle theft and hijacking by tracking stolen or hijacked vehicles. through
Required by the S A P S.

Berg S/Sgt
10/04/08

Please obtain ICN codes for items from Coarna.

Thnx.

Berg S/Sgt
10/04/08



TRACKERSpecial Conditions of Contract.

Refer that

- 1) The SARS requires a national partnership with a vehicle tracking company for a period of 5 years from date of approval.
- 2) This requirement is for an unlimited amount of equipment and quantities cannot be guaranteed.
- 3) Mandatory Requirements
Your attention are drawn to all the paragraphs in the specification which is marked as a mandatory requirement. Failure to comply with this requirement will invalidate your bid.
- 4) Evaluation Criteria I will suggest the following: Please clarify with Freno (Interim) and SARS what is required for SARS to be able to use the system. (I contacted SARS on 11/10/2019 and 12/10/2019 - no response.)
The bid will be evaluated on the following:
90 - ^{consisting out of} points for functionality
10 points for price
10 points - HQL, Women & Disability.
There will be a pre mandatory phase which will consist of part of the following.
PHASE 1
a) PRICE - The equipment must be supplied by the successful bidder at no cost to the SARS.
b) ICASA Certificate per 1.8 of the specification
c) Test to technical standards and SARS requirements per 1.9 of the specification, and
d) The equipment must be rendered countrywide
PHASE 2
Evaluation for functionality - will be evaluated on



all the other mandatory paragraphs are highlighted in the specification out of a total of 80 points.

- 5) The bid will be adjudicated to the bidder who scored the highest points as indicated above.
- 6) The bid ^(items 1-6) will be adjudicated as a whole to one successful bidder.
- 7) The ^{equipment and services} must be ~~provided~~ ^{by the SARS} ~~countrywide~~ ^{countrywide}

Part of 5 Full compliance

5.1.16 On 10 April 2008 a submission was made to the BAC requesting approval to advertise a bid for the *"supply, delivery and installation for stolen vehicle recovery agreement for the SAPS countrywide for a of five (5) years term contract"*. The submission was approved by the BAC on 11 April 2008.

5.1.17 SAPS advertised BID 19/1/9/1/116 TR (07) in the Government Tender Bulletin on 18 April 2008 with a closing date of 12 May 2008. The description of the bid in the advertisement read as follows *"The South African Police Services requires a national agreement with a vehicle tracking company to combat vehicle theft and hijacking by tracking stolen or hijacked vehicles"*.

5.1.18 According to the evidence submitted by SAPS SBD 6.1 of the bid documents, described the points allocated for the bid. SBD 6.1 is shown below :

1.2. The value of this bid is estimated to exceed/not exceed R500 000 and therefore the 90/10 system shall be applicable.

1.3. Preference points for this bid shall be awarded for:

- (a) Price; and functionality
- (b) Specific contract participation goals, as specified in the attached forms.

1.3.1. The points for this bid are allocated as follows:

	POINTS
1.3.1.1. PRICE AND; FUNCTIONALITY	10
1.3.1.2. SPECIFIC CONTRACT PARTICIPATION GOALS	80
(a) Historically Disadvantaged Individuals:	
(i) who had no franchise in national elections before the 1983 and 1993 Constitutions	5
(ii) who is a female	3
(iii) who has a disability	2
(b) Other specific goals (goals of the RDP - plus local manufacture):	
(i)	
(ii)	
(iii)
(iv)

Total points for Price, HDI's and Other RDP Goals must not exceed 100

Separate Preference Points Claim Forms will be used for the promotion of the specific goals for which points have been allocated in paragraph 1.3.1.2 (b) above.

5.1.19 The bid document further contained thirteen (13) pages marked as “SPECIFICATION SAPS 13/2008”, which described the specifications of the tender.

5.1.20 Section 1 of the “SPECIFICATION SAPS 13/2008” contained the bid conditions relating to completion of the bid documents, acceptance of tender, alternative offers, completeness of documentation received by the bidder, scheduling of items, deviations from specifications, track record, certificate of approval, test to technical standards and SAPS requirements, indemnification, configuration of tender, assumption made by bidders, telephonic enquires, demonstration.

5.1.21 Section 2 of the “SPECIFICATION SAPS 13/2008” contained the requirements relating to the scope of the requirement as described below:

2.	REQUIREMENTS	
2.1	<p data-bbox="379 1077 662 1108">SCOPE OF REQUIREMENT</p> <p data-bbox="379 1144 1054 1339">The South African Police Service requires partnership with vehicle tracking companies. The purpose of the partnership is to combat vehicle theft and hijacking by tracking stolen or hijacked vehicles through technical means, to arrest suspects involved, and to ensure that the crimes committed in this regard, are optimally investigated by assisting police officials to find the vehicles after such crime has occurred.</p> <p data-bbox="379 1375 1054 1637">The functions of the partner that the SAPS seeks are as follows: To market vehicle tracking modules to the public that can be tracked by SAPS personnel. To activate these modules remotely once it is confirmed that a crime involving the vehicle has occurred, and that tracking the vehicle will result in solving the crime. To supply to the SAPS equipment to track vehicles. To instal, operate and maintain an activation infrastructure and control centre. The equipment and services must be supplied at no cost to the SAPS.</p>	<p data-bbox="1082 1077 1348 1108">STATE: _____</p>

5.1.22 Section 2 further detailed the equipment that was required under the following subheading, including *inter alia*:

5.1.22.1 Stolen/Hijacked vehicle Module;

5.1.22.2 Vehicle/Aircraft mounted direction finding equipment ;

- 5.1.22.3 Activation infrastructure;
 - 5.1.22.4 Coverage;
 - 5.1.22.5 Direction Finding Infrastructure;
 - 5.1.22.6 Time scale for deployment of high site based direction finding and mapping system;
 - 5.1.22.7 Services;
 - 5.1.22.8 Procedures; and
 - 5.1.22.9 Liability.
- 5.1.23 On the closing date, four (4) companies namely; EWC Vehicle Communication, SMS Fleet, Digicore Fleet Management and Tracker, submitted their offers for the bid.
- 5.1.24 The BEC Evaluation Report submitted by SAPS, indicates that the BEC comprised of five (5) members that technically evaluated the bid offers for compliance and two (2) other members from SCM, who did not form part of the scoring process. The attendance list attached to the Evaluation Report has signatures of the BEC members with the date 26 May 2008 appended to each signature.
- 5.1.25 According to the BEC Report, the panel members then visited the suppliers that had passed the initial technical compliance, for a demonstration of the equipment to be supplied, and subsequently made a final decision regarding the successful bidder.
- 5.1.26 The following is extracts of the BEC Report

Bidder no1, EW Cop, scope of requirement is to market tracking modules to the public, which the SAPS will track when stolen. This supplier does not have a marketing capacity and expects the SAPS assist them to sanction their product and thus assist them to market the modules. The paragraph 2.2.1.9 requires "The module shall function on a frequency with propagation characteristics suitable for tracking over ranges up to 100km from an aircraft at an altitude below 300m above the ground, and that will allow the installation of direction finding arrays on the limited antenna space on police aircraft and helicopters." A propagation study was done by RTD and this indicates that at the frequency offered, this paragraph cannot be complied with, since the propagation characteristics of this suppliers equipment at that frequency will not comply. Par 2.2.2.7 calls for "The equipment shall receive signals directly from the stolen vehicle internal equipment and shall not rely on infrastructure such as cellular technology that covers less than 100% of the surface of the country." The suppliers offer relies partly on GSM technology, and is therefore non-compliant.

Bidder no 2, SMS Fleet (Pty) Ltd, failed to complete their specification, and was disqualified in terms of par. 1.11.1. This paragraph requires that all documents including the specification must be complete.

Bidders no 3, Digicore Fleet Management (Pty) Ltd, do not comply with the specification, as indicated in their demonstration to the panel. The supplier deviates on a number of paragraphs, but only the critical ones are discussed. The supplier does not have an ICASA certificate, a mandatory requirement (par. 1.8). "A certificate of approval from ICASA (Independent Communications Authority) as of compliance to section 1.8 with respect to the tracking modules offered." This supplier has no such certificate. This supplier also indicates non-compliance to par 2.2.1.9, as discussed above. Par.2.2.4. requires Direction Finding Infrastructure; the supplier indicates non-compliance, this is a mandatory requirement and non compliance is critical, since not pin pointing a stolen vehicle's position leads to wasting resources (SAPS vehicles) looking for a vehicle in a general and not specific location.

Bidder no 4, Tracker Networks (Pty) Ltd, is according to specification. The panel is unanimous in its decision to award this bid to Tracker Networks (Pty) Ltd.

A short introduction was given by Sr Supt HW de Lange, reminding the panel that although the SAPS has a long standing agreement with Tracker Networks, it must be borne in mind that all suppliers technical offers should be perused to check that alternative or other technology has arisen that the SAPS should come up to date with. After the evaluation this new technology can be researched and acquired if necessary via another requirement. The panel feels that the SAPS are not precluded from entering into another agreement with alternative suppliers, covering not only stolen vehicle tracking, but also stolen property tracking.

The panel is of the opinion that all other role players and suppliers of tracking equipment should be approached to enter into partnerships with the SAPS to increase the exposure of other tracking technologies and systems.

The members of the panel then affixed their signatures on the report, in agreement with the decision to award the bid to Tracker Networks (Pty) Ltd.

5.1.27 On 6 June 2008 Supt. Mulders made a submission to the Chairman of the BAC, to obtain approval of the bid, subject to the *"drawing up of an apart legal Memorandum of Understanding between SAPS and Tracker Networks, (Pty) Ltd"*.

- 5.1.28 Paragraph 3.2 of the submission stated that the bid was evaluated on a 90:10 points basis, with 80 points allocated for functionality, 10 points for Historically Disadvantaged Individual (HDI) and 10 points for price, since *“the bids were issued at a mandatory no cost to SAPS”*.
- 5.1.29 The BEC evaluation process undertaken, was detailed in paragraphs 3.3 to 3.9 of the submission. Two (2) companies namely, SMS Fleet Management and Digicore were disqualified during phase one (1) of the evaluation process, as these bidders did not meet the mandatory requirements of the special conditions of the tender. Tracker and EWC Vehicle Communication proceeded to phase two (2) of the evaluation process, wherein their bids were evaluated for functionality based on the sixty two (62) requirements contained in the special conditions of the tender.
- 5.1.30 Subsequently, the BEC conducted visits to Tracker and EWC Vehicle Communication, in order for the required demonstration of the equipment, to be conducted. The submission recorded the evaluation process conducted at the visits as follows:

- 3.5 Bidder no. 1, EW Cop and bidder no.4, Tracker Networks (Pty) Ltd complied with the first phase and went through to phase 2. The two suppliers were visited in order that the demonstration required by the specification could be viewed by the panel. The bid would be awarded to the bidder with the highest points, be adjudicated as a whole, (all eight items) for an unlimited amount of equipment and quantities are not guaranteed.
- 3.6 Bidder no. 1, EW Cop did not comply with one or more of the Sixty two paragraphs of mandatory requirements in phase two. The bidder indicated compliance to these paragraphs (2.2.1.9 and 2.2.2.7), in his bid response, but during the demonstration given, it became obvious that the offering is not compliant.

Bidder	Specified	Comment on non-compliance
EW Cop	Par 2.2.1.9 – the module shall function on a frequency with propagation characteristics suitable for tracking over ranges of up to 100km from an aircraft at an altitude below 300m above the ground and that will allow the installation of direction finding arrays on the limited antenna space on police aircraft and helicopters.	A propagation study was done by Radio Technical Services and this indicates that at the frequency offered, this paragraph cannot be complied with, since the propagation characteristics of this suppliers equipment at that frequency will not comply
	Par 2.2.2.7 – the equipment shall receive signals directly from the stolen vehicles internal equipment and shall not rely on infrastructure such as cellular technology that covers less than 100% of the surface of the country.	The suppliers offer relies partly on GSM technology and is therefore non-compliant.

040/5

Bidder no. 4, Tracker Network (Pty) Ltd was also visited for a demonstration. In the bid document, eight different items were requested. Tracker Network (Pty) Ltd responded only on items one to five, and had no response to item six to eight. The non-response from Tracker Network (Pty) Ltd on these three items is as a result of technological advancements made to the latest tracking unit to be used by Tracker Network (Pty) Ltd. The last three items are simply no longer necessary, since they are incorporated in the first five items called for. Trackers system relies on tracking from a vehicle and not from a control room as specified.

Although Tracker Network (Pty) Ltd did not respond to item six to eight, the offer is still according to specification (even better than specification) and acceptable. Therefore Tracker Network (Pty) Ltd is the only bidder who fully complies with the specification and went through to the next phase.

- 3.8 Phase three: Tracker Network (Pty) Ltd scored 80 points for functionality 10 points for price and 5 points for HDI, which gave a total score of 95 points.
- 3.9 During evaluation, it became obvious that large technological advancements have taken place not only in the Stolen Vehicle Tracking environment, but also in the tracking of stolen property of any sort. These technologies will be investigated by the scoring members of the panel to determine requirements outside of the mandate of this specific requirement, and the results of this investigation will be reported back to the Bid Adjudication Committee.

5.1.31 The submission was approved by the BAC on 11 June 2008, and SAPS published the bid award to Tracker in the Government Tender Bulletin dated

11 July 2008. The Memorandum of Understanding between SAPS and Tracker was concluded on 11 December 2008 for a period of five (5) years.

- 5.1.32 The evidence submitted by SAPS indicates that on 20 July 2011, Mr Ron Knott-Craig (Mr Knott-Craig), the Director: Operations at Tracker submitted a letter to General Cele, the then National Commissioner of SAPS and General Lebeya the Deputy National Commissioner, informing them of the developments within Tracker.
- 5.1.33 Mr Knott-Craig stated in his letter that Tracker is a wholly owned subsidiary of Tracker Investment Holdings (Pty) Ltd (Tracker Holdings) and that Tracker Holdings is in the process of concluding a sale agreement that will result in a change in shareholding of Tracker Holdings and a sale of the entire business from Tracker to Tracker Connect (Pty) Ltd (Tracker Connect).
- 5.1.34 He further stated that Tracker Connect will conduct its operations from the same premises as Tracker, with the same management team and employees and without any change to the current standard operating procedures and/or protocols that has been agreed with SAPS.
- 5.1.35 Mr Knott-Craig requested SAPS consent, in terms of the current agreement that SAPS had with Tracker, to assign the rights and obligations under the agreement to Tracker Connect.
- 5.1.36 On 15 August 2011, Lieutenant General JT Molefe (Lt.Gen Molefe), the Executive Legal Officer, submitted an information note to the Deputy National Commissioner: Crime Detection, informing him that *"It is clear from the submission by Tracker that the proposed changes result from what amounts to a restructuring of the Tracker Group of Companies and that the changes are based on business/commercial considerations, which have no adverse effect on the services to be provided to the SAPS for the outstanding portion of the contract period.....It is accordingly recommended that the necessary consent be provided"*. It was further recommended that the request from Mr Knott-Craig be submitted to SCM for a recommendation to be made to the BAC for approval.

5.1.37 On 17 August 2011 Lt. Gen Molefe submitted the information and a letter to the Head, SCM: Acquisition Management informing them of the above legal position and recommendation of Legal Services.

5.1.38 On 22 August 2011 Mr Knott-Craig sent an e-mail to Brigadier Johan Smit requesting SAPS *to grant their consent for the proposed changes to the ownership structure of Tracker, name change and assignment of agreements permission* “, on or before 31 August 2011.

5.1.39 He indicated in his e-mail that the reasons for the urgent request were as follows :

1. In terms of the shareholder transaction a number of conditions precedent had to be met for the transaction to go ahead. The deadline for the fulfillment of the conditions precedent is 31 August 2011 failing which the transaction is cancelled.
2. One of the conditions precedent was that the SAPS had to agree to the assignment by Tracker Network (Pty) Ltd of its rights and obligations to Tracker Connect (Pty) Ltd.
3. Tracker lodged this request with Lieutenant General Lebeya's office on 22 July 2011.
4. All the conditions precedent have been fulfilled thus far except for the SAPS consent.
5. This shareholder transaction is one of the most significant private equity transactions in South Africa during the past ten years.

In the light of the above, it would be appreciated if the Bid Adjudication committee could urgently consider Tracker's request for consent and confirm same as soon as possible, but in any event before 31 August 2011.

5.1.40 A submission from the Section Commander: Bid Administration dated 23 August 2011 detailing the above information, was addressed to the Chairperson of the BAC. Gen. Cele's signature was appended on the last page of the request letter sent by Mr Knott-Craig, granting consent to the terms set out in the letter.

The Fourth Agreement

5.1.41 The evidence submitted by SAPS indicates that on 23 March 2013, the Divisional Commissioner: Detective Services, Lieutenant General V. Moonoo made a submission to the Divisional Commissioner: SCM, recommending that tenders be invited in order to assess the latest technology and to procure the use of one or more tracking systems for use by the SAPS, as the tender

awarded to **Tracker Connect PTY (Ltd)** was to expire on 12 June 2013. According to the submission dated 13 March 2014 from SCM: Acquisition Management to the BAC, the request to advertise the tender was approved on 7 October 2013, by the Divisional Commissioner: SCM.

- 5.1.42 The evidence provided further indicates that, SAPS advertised tender number 19/1/9/1/114 TR (13) in the Government Tender Bulletin on 22 November 2013, and the closing date for the submission of the bids was 22 January 2014. The description of the bid in the advertisement read as follows *“Procurement of tracker for stolen or hijacked vehicles crime investigation for the division: Detective Services”*. The advertisement further stated that a compulsory briefing session will be held on 9 December 2013.
- 5.1.43 According to the evidence submitted by SAPS, points allocated for the bid were described in SBD 6.1 of the bid documents, which stated that the bid will be evaluated on the 90/10 preferential point system, whereby 90 points will be allocated for price and 10 points for B-BBEE status level contribution.
- 5.1.44 The bid document further contained the same thirteen (13) pages which described the specifications of the tender, as detailed in the 2008 tender. On the closing day of the tender, Crime Tech Laboratories (CTL) and Tracker Connect Pty submitted their bid offers in response to the advertised tender.
- 5.1.45 On 4 February 2014 Brigadier F. Mashika the Section Head: Acquisition Management MGP & Services, made a submission to the Chairperson of the BAC to obtain approval of the BAC for the award of Bid No 19/1/9/1/114 TR (13).
- 5.1.46 The submission stated that *“the evaluation criteria for the bid was based on the compliance of the Bidders to Special Condition and Mandatory requirement and Specification of the bid. The bidder with the highest points will be recommended for acceptance”*.
- 5.1.47 It was further stated that in terms of the evaluation process , bid documents were distributed amongst panel members to check whether the bidder is

compliant with the mandatory and special conditions of the bid as well as whether they are in accordance with the specification of the bid.

- 5.1.48 It was noted on the submission that the offer submitted by CTL was disqualified, as the bidder failed to attach the ICASA certificate for the tracking equipment in the bid documents and that the bidder was the actual manufacturer of the equipment and failed to submit the letter to confirm supplying arrangements from the supplier. Only Tracker Connect proceeded to the next stage of the evaluation process, and was found to be fully compliant with the mandatory and special conditions of the bid.
- 5.1.49 The BAC referred the submission back, with an instruction to obtain the ICASA certificate from CTL. The evidence at my disposal indicates that despite SAPS communication to obtain the ICASA certificate from CTL, CTL was unable to supply such to SAPS, as ICASA had requested further documentation from CTL, before they could issue the certificate.
- 5.1.50 A revised submission dated 19 March 2014 was made to the BAC, detailing the response from CTL. The submission was approved by the BAC on 19 March 2014 and ratified by Gen. Phiyega on 28 March 2014.
- 5.1.51 SAPS submitted that the National Commissioner requested that the process followed leading to the evaluation and adjudication of the tender be subjected to a review by both National Treasury and the Internal Audit division of SAPS, before the award is communicated to the appointed bidder.
- 5.1.52 The report submitted by the Chief Procurement Officer, Mr Kenneth Brown of National Treasury on 27 May 2014 to the National Commissioner, concluded that the disqualification of CTL was justified as valid reasons were submitted for passing over the bid. No adverse findings/conclusions were made in the report.
- 5.1.53 The report submitted by the Major Gen. DT Nkosi, the Chief Audit Executive to the Deputy National Commissioner (date unclear), noted *inter alia* the following :

3. COMMENTS

3.1 Not all the necessary documents required for evaluation of the process followed when appointing the service provider who will partner with South African Police Service in tracing and recovering hijacked and stolen vehicles as per Bid No: 19/1/9/1/114TR(13) were provided to us. The following documents were not provided to us:

- a. The register signed by bidders when collecting the bid documents;
- b. The attendance registers for compulsory briefing sessions by the prospective bidders; and
- c. The signed appointment letter of the Bid Evaluation Committee (BEC).

3.2 Although key personnel involved in the bid evaluation process alleges that the BEC was appointed in writing and it was recorded as such in the BEC minutes for the

1 of 2

30th January 2014. However, from an audit perspective we could not be provided with conclusive evidence that the BEC was appointed in writing. Therefore, we could not verify whether the persons who conducted the evaluation had appropriate authority. This contravenes Section 44 and 56 of the PFMA (Assignment of powers and duties). The absence of the approved BEC appointment may void the results of the evaluation.

3.3 The advertisement of the bid as per tender bulleting 2801 dated 22 November 2013 did not communicate clearly that the SAPS required a national partnership with vehicle tracking companies. Instead the bid was advertised as a procurement of tracker for stolen or hijacked vehicles for the section: Vehicle Crime Investigation: Division Detective Services. Moreover, the advertisement contradicts the heading of the specifications as contained in the bid documents which clearly indicates that the SAPS required a vehicle recovery partnership.

5.1.54 The Internal Audit report concluded that based on the audit procedures performed, the process followed by the SCM division from advertisement to evaluation was fair and consistent with applicable procurement prescripts, apart from the absence of the appointment letter of the BEC which might nullify the results of the evaluation.

5.1.55 On 21 July 2014 the Divisional Commissioner: SCM submitted an information note to the National Commissioner, recommending that the National Commissioner take note of the reports from National Treasury and Internal Audit, and grant approval for SAPS to conclude the contract 19/1/9/1/114 TR (13) with Tracker Connect. Gen. Phiyega approved the submission on 6 August 2014. The contract was signed with SAPS and Tracker Connect on 11 August 2014.

5.1.56 Interview with Gen. Sithole, the National Commissioner SAPS, on 29 May 2019

- 5.1.56.1 In response to my subpoena issued on 25 April 2019, Gen. Sithole appeared for an interview before me on 29 May 2019 accompanied by senior officials from SAPS Legal Services and SCM.
- 5.1.56.2 SAPS stated that in the early 1990's a product by the name of "Lockjack" was investigated to assist the police to recover motor vehicles and following that process, the State Tender Board issued out a request for the supply of the vehicle recovery systems, which was subsequently awarded to Tracker. It was reiterated that the first two processes were administered by the State Tender Board and that through the lapse of time, those documents have since been destroyed.
- 5.1.56.3 With regards to the 2008 process, it was stated that the contract was awarded following a competitive process. The Vehicle Crime Theft Unit was responsible for the drafting of the specifications for the 2008 tender which was advertised and awarded to Tracker following an evaluation of the bids.
- 5.1.56.4 It was further stated that SAPS currently has a contract with Tracker and indicated the process followed by SAPS in awarding the 2014 contract to Tracker, was subjected to a review by National Treasury and the SAPS Internal Audit.
- 5.1.56.5 It was stated that in the 2014 tender process, consideration was given to; the specifications wherein the previous specifications were used as guidelines for the new 2014 tender, participation to allow for any company to take part in the tender, coverage of the service to include the whole country and that prior to SAPS reacting to the activation of a stolen vehicle signal, certain processes need to be undertaken by the service providers.
- 5.1.56.6 SAPS confirmed that two (2) offers were received, and that CTL was disqualified as the bidder did not have ICASA certificate to confirm that they

can conduct business on a certain radio frequency. It was further stated SAPS did not receive any complaints from any of the bidders regarding the process.

- 5.1.56.7 I then asked Gen. Sithole and his team about the cost of the service offered by Tracker and the benefits that Tracker receives from SAPS with regard to the resources and marketing of the company. In response SAPS stated that it cannot answer as to why Tracker offered the bid for “*zero rands and zero cents*” or to the benefits that Tracker was receiving.
- 5.1.56.8 Gen. Sithole also stated that SAPS does receive services from Tracker which is an operational requirement, and that if SAPS does not receive the said service it is unable to respond adequately to vehicle theft crimes.
- 5.1.56.9 General Sithole further stated that it is unavoidable that Tracker has an unfair advantage, indicating that when Tracker works with SAPS they are exposed to the Standard Operating Procedures of SAPS, the *modus operandi*, development/sophistication of crime and the change in geographical approach of criminals. He added that Tracker is conversant as to what the necessary changes are in the requirements and specifications, and when this is added to the specification documents by SAPS Tracker is often aware of it.
- 5.1.56.10 Gen Sithole also stated that when he started working at SAPS, SAPS did not have a Contract Management Strategy, but that they are now working on establishing a Contract Management Strategy by reviewing the entire contract management process. He stated that the Tracker contract will also be looked into, and would appreciate recommendations from my office. He further stated that the contract management scrutiny process would also entail looking into the history of the Tracker contracts in order to provide SAPS direction in terms of future contracts.
- 5.1.56.11 SAPS stated that Tracker did have the RF frequency equipment in their vehicles as well as its own recovery teams that works closely with SAPS

officials in the recovery process of stolen vehicles. SAPS could not confirm the number of recovery teams and/or personnel that Tracker employed or if Tracker owned any air crafts that were used in the recovery process.

5.1.56.12 SAPS stated that there is a call centre that assists with the activation, and that Tracker operators are deployed at the 10111 centre, where they liaise with their personnel and SAPS. SAPS indicate that Tracker is using the infrastructure of SAPS for this function.

5.1.56.13 SAPS stated that in the future, plans are underway to improve and adapt the system as the industry has moved away from RF frequency into the Global System for Mobile Communications (GSM) technology and that plans are to be put in place to explore the technology and the requirements of SAPS, to ensure that SAPS is not reliant on Tracker alone, but that other service providers can also form partnerships with SAPS.

5.1.56.14 SAPS indicated that in terms of the current contract with Tracker which was due to expire in August 2019, an extension of the current contract will most probably be requested as they are already out of time to call for bids.

5.1.56.15 SAPS further stated that it is in the process of drafting the new specifications for the new contract and that Technology Management Services (TMS) will also be engaged to advise if SAPS has the capability to develop its own device to provide it with required service.

5.1.57 **SAPS Response to the section 7(9) notice dated 31 October 2019**

5.1.57.1 In response to the section 7(9) notice SAPS stated that the 2008 did contain evaluation criteria for functionality as stipulated on the SBD 6.1 that 80 points will be awarded for functionality. However it did not agree with my observation pertaining to the 2014 tender as this tender did not contain functionality as part of the evaluation criteria, as stated in paragraph 3 of the Special Requirements and Conditions of the Contract.

- 5.1.57.2 SAPS further stated that in terms of National Treasury Implementation Guide on the Preferential Procurement Regulations, 2011, supported by National Treasury Instruction Note, dated 3 September 2010, not all bids should be invited on the basis of functionality as a criterion. Further that the need to invite and evaluate bids on the basis of functionality depends on the nature of the commodity or service, and that SAPS has the option to decide whether the specific bid must be evaluated in terms of functionality or not.
- 5.1.57.3 SAPS indicated that phase two of the evaluation consisted of the functionality evaluation of all bids which passed the phase one evaluation. These bids were evaluated on all the sixty two (62) mandatory requirements as highlighted in the specification out of a point of 80, and that failure to meet any one of the mandatory requirements would lead to invalidation of the bid, as not being an “acceptable tender” as defined in terms of the PPPFMA, 2000.
- 5.1.57.4 SAPS stated that the 62 mandatory requirements carried the same weight, were critical of nature and bidders were made aware of this through the Special Conditions of the Bid.
- 5.1.57.5 SAPS further contended that, in respect of the 2008 tender, I was incorrect in my observation that bids should first be evaluated on functionality and then in terms of the 90/10 points system, as this method only became effective in 2010 and was therefore not applicable to the 2008 tender. It stated that at the time the Preferential Procurement Regulations, 2001, read together with the “*Guide for Accounting Officers*” (February 2004), issued by National Treasury, determined the legislative Framework for the evaluation criteria to be used to evaluate bids that contained functionality as a criterion. SAPS stated that in terms of this, the percentage obtained for functionality is therefore added to the percentage obtained for price to obtain a percentage out of 100 which in turn should be converted to points out of 90 in terms of Regulation 8 of the PPP Regulation, 2001.
- 5.1.57.6 The amended guidelines in respect of bids that include functionality as a criterion for evaluation was only communicated by National Treasury

Instruction Note 3 September 2010, and was therefore not used in the adjudication of the 2008 tender.

5.1.57.7 SAPS further reiterated that the 2014 tender did not contain functionality as part of the evaluation criteria and that the bid was evaluated and awarded in terms of the PPP Regulation, 2011. SAPS stated that the BEC members acted objectively during the evaluation process and the offers received were evaluated against the bid specification and other mandatory requirements.

5.1.57.8 SAPS contended that it had followed an open, fair, transparent, competitive and cost effective procurement process as required by section 217 of the Constitution, and applied the correct preferential point system at the time of evaluating and awarding of the respective 2008 and 2014 bids, as contemplated by the PPPFA, the PP Regulations, 2001 and 2011.

5.1.58 **Tracker's response to the section 7(9) notice dated 1 November 2019.**

5.1.58.1 In response to the section 7(9) notice, Tracker indicated that it was entitled to information relating to the processes followed by SAPS in respect of the first issue that was investigated and the alleged defects in the procurements process, to allow Tracker a reasonable opportunity to respond thereto, and that the non-disclosure of the alleged defects in SAPS processes would compromise Tracker's ability to make meaningful and informed representation on the preliminary findings. It further contended that as a "counterparty" in the contracts concluded with SAPS over the years, that it had an interest in any findings that I may make in respect of the propriety of SAP's procurement processes, and that it was insufficient for the alleged discrepancies and inaccuracies to be disclosed to SAPS only.

5.1.58.2 Tracker further referred to section 6(9) of the Public Protector Act, stating that the complainant in the matter was submitted some 17 years, 11 years and 5 years respectively after the 1996, 2002, and 2008 contracts were concluded, and that there was no good reason for me to permit the extremely late lodging of the complainant in respect of those processes.

5.1.58.3 As indicated earlier in this report, I have investigated the conduct of the SAPS in the procurement process and not Tracker because the latter is a private entity thus falling outside my remit. The findings that I have consequently made are also made against SAPS and not Tracker and therefore the contentions made by Tracker are baseless and therefore dismissed. I have also detailed my justification for investigating the complaint and do not wish to elaborate further on Tracker's response thereto.

Application of the relevant Law

The Constitution

5.1.59 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 (PFMA)

5.1.60 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 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.

National Treasury Regulations

5.1.61 In terms of section 76(4) (c) of the PFMA, 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 (supply chain management

framework) which is in keeping with the dictates of Section 217(1) of the Constitution.

Regulation 16A3.2 (d) provides that:

"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) ...;*
- (c) ...;*
- (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."*

The Preferential Procurement Policy Framework Act, Act No. 5 of 2000 (PPPFA)

5.1.62 Section 2(1) of the PPPFA states that an organ of state must determine its preferential procurement policy and implement it within the following framework:

- (a) A preference point system must be followed;*
- (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as*

contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

(c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d);

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and (g) any contract awarded on account;

(g)”

5.1.63 Section 2 (2) states that any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance.

Preferential Procurement Regulations, 2011

5.1.64 The Preferential Procurement Regulations, 2011, defines "*functionality*" as "*the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the*

quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer."

Implementation Guide: Preferential Procurement Regulations 2011

- 5.1.65 The Preferential Procurement Regulations, 2011, defines "functionality" as *"the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer"*.
- 5.1.66 In terms of Paragraph 5 of the Implementation Guide: Preferential Procurement, 2011¹, prior to the invitation of bids Accounting Officers are required to properly plan for the provision of services, works or goods in order to ensure that the resources that are required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price, place and that the quantity and quality will satisfy those needs.
- 5.1.67 As far as possible, accurately estimate the costs for the provision of the required services, works or goods. This is in order to determine and stipulate the appropriate preference point system to be utilised in the evaluation and adjudication of the bids and to ensure that the prices paid for the services, works and goods are market related.
- 5.1.68 Estimated costs can be determined by conducting an industry and commodity analysis whereby prospective suppliers may be approached to obtain indicative market related prices that may be utilised for benchmarking purposes. Based on the findings, the relevant preference point system (80/20 or 90/10) to be utilised for the evaluation of the bid must be stipulated in the bid documents.

¹ Pertaining to the Preferential Procurement Policy Framework Act, Act No, 5 of 2000

5.1.69 In terms of Paragraph 6.2 of the Implementation Guide on Preferential Procurement, when an institution invites a bid that will also be evaluated on the basis of functionality as a criterion, the Accounting Officer must clearly specify the following aspects in the bid documents:

(a) *“Evaluation criteria for measuring functionality:*

The evaluation criteria may include criteria such as the consultant’s relevant experience for the assignment, the quality of the methodology; the qualifications of key personnel; transfer of knowledge etc.

(b) *Weight of each criterion:*

The weight that is allocated to each criterion should not be generic but should be determined separately for each bid on a case by case basis.

(c) *Applicable value:*

The applicable values that will be utilised when scoring each criterion should be objective. As a guide, values ranging from 1 being poor, 2 being average, 3 being good, 4 being very good and 5 being excellent, may be utilised”.

Applicable relevant Case Law

5.1.70 The case of *Minister of Transport v Prodiba (Pty) Ltd (20028/2014) [2015] ZASCA 38 (25 March 2015)*, which deals *inter alia* with the award of a single tender in 1997 to one service provider, the court found that it was incumbent on the Accounting Officer of the Department, “*to have regard to Constitutional principles, the provisions of the sub-section set out above and other statutory prescripts. The high court erred by not having sufficient regard to constitutional norms and statutory requirements and concluding that the decision to produce the new licenses in-house could only have been facilitated by an extension of Prodiba’s contract and that a competitive bid would not have been viable where the supply of services would have been for a very limited duration. The high court ignored the very extensive period during which Prodiba enjoyed a*

monopoly and did not properly appreciate that the five year extension period was not of very limited duration. More importantly, the agreement was one in respect of which Prodiba was required to provide a new service dealing with new technology in respect of which potential competitors were not engaged."

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

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

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

5.1.72 The Court further held that:

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

Conclusion

5.1.73 I was unable to make a determination with regards to the process followed by the former State Tender Board when it concluded the 1996 and 2002 agreements between SAPS and Tracker, due to the absence of documentation dating as far back as then.

5.1.74 I have further noted that in 2008 and 2014 SAPS endeavoured to follow a competitive process by advertising an open tender, however certain

discrepancies and inaccuracies were noted in the processes that were followed that are detailed hereunder as my observations.

5.1.75 OBSERVATIONS

- 5.1.75.1 I have observed that the 2008 and 2014 bid documents contained criteria that were used to determine the functionality of the goods and services to be supplied. However, the evaluation criteria in the invitation to tender did not contain any scoring/weights, or applicable values, as well as the minimum qualifying score for functionality and therefore did not meet the requirements of the PPPFMA.
- 5.1.75.2 I have also observed that in the 2008 tender, SAPS allocated 10 points for price, 80 points for functionality and 10 points HDI as shown in paragraph.
- 5.1.75.3 Although in my section 7(9) notice I observed that the PPPFMA required bids to be first evaluated on functionality, and bids that meet the minimum qualification score for functionality are then further evaluated in terms of price and preference points wherein the 90/10 or 80/20 preference point system is applied, I accept the submissions by SAPS that at the time the Preferential Procurement Regulations, 2001, read together with the *“Guide for Accounting Officers”* (February 2004), issued by National Treasury, determined the legislative Framework for the evaluation criteria to be used to evaluate bids that contained functionality as a criterion.
- 5.1.75.4 It must however still be pointed out that even if the above legislative framework was applied to the evaluation of the bids, the bid in actual fact would only be awarded on HDI points, for the following reasons :
- 5.1.75.5 All bidders that met the mandatory requirements would score 80 points for functionality; and
- 5.1.75.6 Points awarded for price would be constant, as SAPS had called for the bidder to supply the equipment at no cost, which would make pricing a *“non-issue”* when applied to the formulae.

- 5.1.75.7 It cannot therefore be accepted that this bid was competitive if the award was based only on equity criteria (HDI).
- 5.1.75.8 I have further observed that the 2014 bid document stated 90 points would be allocated for price and 10 points for B-BBEE status level contribution.
- 5.1.75.9 SAPS response to the section 7(9) notice that not all bids should be invited on the basis of functionality as a criterion and that the need to invite and evaluate bids on the basis of functionality depends on the nature of the commodity or service, as SAPS has the option to decide whether the specific bid must be evaluated in terms of functionality or not, is confounding.
- 5.1.75.10 The bid specifications in the 2014 tender were in fact functionality criteria that considered *inter alia* factors relating to “the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer”, as specified by the definition of functionality in the PPPFMA Regulation 2011. There was no indication as to how bids would be evaluated to determine which bids meet the minimum qualification score for functionality or specifications that were contained in the bid.
- 5.1.75.11 SAPS stated in the tender documents that, the offer should be at no cost to SAPS, it can therefore be concluded that that if more bids had met the specifications of the tender, then all those bids would in fact only be evaluated on B-BBEE points, when the applicable values are placed into the formulae, as the points awarded for price would be constant.
- 5.1.75.12 Therefore the technical evaluation conducted by the BEC lends itself to a process that is not fair, as the BEC members would apply subjective methods during the evaluation process and disqualify bidders from proceeding further in the process.
- 5.1.75.13 In light of the above observations, I conclude that the evaluation process followed by SAPS in the 2008 and 2014 tenders, would not have been completely fair, equitable and competitive as required by Section 217 of the Constitution. The preferential points system used in the bid documents did not conform to the requirements of section 2 of the PPPFMA.

5.2 Whether the contracts entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

Common Cause Issues

- 5.2.1 It is common cause that the SAPS vehicles are fitted with vehicle tracking equipment supplied by Tracker, and that Tracker does not attach any price for the supply and fitment of the said equipment to SAPS.
- 5.2.2 It is also common cause that upon activation of the signal, and other operational protocols, SAPS resources such as vehicles, officials, air crafts are utilised to recover the stolen and hijacked vehicles.
- 5.2.3 The issue for my determination is whether the contracts entered into between SAPS and Tracker consequently results in Tracker's deriving improper benefits from the use state resources.

Issues in dispute

- 5.2.4 The Complainant alleges that the utilisation of SAPS resources for the recovery of stolen or hijacked vehicles, is benefiting Tracker financially, resulting in significantly higher profit margins for Tracker, than if it were to pay for such resources itself.
- 5.2.5 Further, that Tracker clients pay Tracker for installation costs and monthly fees for the vehicle tracking systems, and that SAPS has not benefited from the relationship as, no fees, disbursements and expenses, such as fuel and vehicle maintenance costs, are borne by Tracker.
- 5.2.6 In response to the allegation, Gen Phiyega submitted that the allegation is unfounded as the relationship between SAPS and Tracker has resulted in a decrease in vehicle related crime and that the vehicle tracking system is a tool needed by SAPS to combat such crime.

- 5.2.7 SAPS also submitted correspondence dated 20 August 2014 from the Competition Commission addressed to Brig. Smit with the title *"MR NIEMESH SINGH V TRACKER NETWORK AND/OR THE SOUTH AFRICAN POLICE SERVICE('SAPS'): 2013SEP0450."*
- 5.2.8 The correspondence indicated that the Competition Commission received a complaint on 5 September 2013, had concluded its investigation and has decided *"based on the information available, not to refer the matter to the Competition Tribunal for determination"*. Further the Competition Commission indicated that *"it is of the view that the arrangement between Tracker and SAPS is unlikely to substantially lessen or prevent competition on the market for stolen vehicle recover, as required in terms of section 5(1) of the Act"*.
- 5.2.9 In the said correspondence the Competition Commission stated that despite the above conclusion, *"the Commission is concerned that in the long-run the arrangement between Tracker and the SAPS may raise competition concerns. In this regard, the Commission is of the view that it would be in the best interest of competition of the SAPS were to structure its tenders in such a way that a sufficient number of credible bidders are able to respond to the invitations of tender. This could assist to avoid awarding of tenders to a single entity, as is the case in the current matter"*.
- 5.2.10 The Complainant submitted various extracts from the Tracker website to substantiate his allegation that Tracker is benefitting from the said relationship, and is abusing state resources to fund and market its business. The extracts provided are shown below:

Tracker SA | Tracker Credentials | Ownership | Culture at Tracker

Tracker's credentials

- **Invented the industry** - - Tracker's technology brought mainstream vehicle tracking to the world in the United States in 1986.
- **Largest vehicle tracking company** - - Globally, there are some 2-million Trackers fitted to vehicles throughout 30 countries. In South Africa, Tracker's technology is fitted to more than 800 000 vehicles.
- **Partnership with the SAPS** - Tracker is the only vehicle tracking company in South Africa to benefit from a formal partnership with the South African Police Service, having just recently won its fourth consecutive five-year contract with the police. The Tracker-SAPS partnership is widely considered the most successful private-public sector collaboration ever seen in South Africa.
- **Largest recovery fleet** - The partnership with the SAPS means that Tracker has some 1300 vehicles and almost 50 aircraft in its recovery arsenal - by some margin the largest recovery fleet on the continent.
- **Most recoveries in the world** - Tracker's technology has recovered almost 300 000 stolen and hijacked vehicles throughout the world. In South Africa alone, Tracker has recovered some 62 357 vehicles in only 16 years. More than any other car tracking company in Africa.
- **Most arrests** - Tracker's vehicle recoveries in South Africa alone have resulted in over 11 481 arrests - significantly more than any other vehicle tracking company on the continent. Tracker's technology is currently responsible for an average of 100 arrests a month in South Africa.
- **Global power** - Tracker frequently exchanges intelligence with partners in crime-ravaged countries such as Columbia, Brazil, Argentina and Mexico to ensure that our technology remains one step ahead of the world's most sophisticated vehicle crime syndicates. Similar relationships exist with international crime fighting organisations, including the likes of Interpol.
- **National recovery network** - In addition to its GSM and GPS networks, Tracker owns its own radio-satellite recovery network which covers almost 98% of SA's population.
- **National installation capabilities** - In addition to a network of Tracker-approved fitment centres throughout the country, Tracker offers clients mobile installations at a time and place convenient to the customer.
- **Established track record with insurers** - Tracker has earned the respect of all major insurance companies, many of whom offer discounted premiums and excess waivers to customers whose vehicles are protected by Tracker.
- **Leading edge technology** - Tracker's technology is some of the most sophisticated in the world. Tracker SkyTrax is, in fact, the technology behind the insurance industry's breakthrough "Pay as you Drive" offering.
- **Extended recovery capabilities** - Tracker has recovery capabilities in Mozambique, Swaziland and Lesotho - the latter of which boasted a recovery rate of 100% for almost a decade.

1

Tracker South Africa

Tracker is a **vehicle tracking company** who's technology not only invented mainstream vehicle tracking in the United States in 1986 (through its partner, LoJack), but it is responsible for the recovery of more than 300 000 stolen and hijacked vehicles throughout the world.



History of tracker

Since **Tracker South Africa** was established in 1996, the company has recovered 62357 stolen and hijacked vehicles which has resulted in over 11481 arrests – the most, on either score, of any **vehicle tracking company** on the continent.

Following its merger with MobileData in 2007 (which brought the SkyTrax range of products into Tracker), the Tracker of today is a highly sophisticated technology company offering leading edge location based services and Fleet Monitoring/Telematics solutions to both individuals and companies throughout Southern Africa.

Tracker's SVR technology is currently in use in 30 countries including the United Kingdom, France, Russia, Italy, Columbia, Brazil, Mexico and Argentina.

Tracker is also the only **vehicle tracking company in South Africa** to benefit from a formal partnership with the South African Police Service, having just won the partnership contract with the SAPS, to combat vehicle theft and hijacking for another five years. This means that **Tracker South Africa's** recovery technology is fitted to some 1300 vehicles and some 50 aircraft ensuring that Tracker is not only able to operate with the 'power of arrest', but that it has the largest recovery arsenal in the country. The Tracker-SAPS partnership is widely considered the most successful private-public sector collaboration ever seen in South Africa.

Tracker's technology is currently installed in 750 000 vehicles throughout South Africa – making it the largest vehicle tracking company on the continent.

ANNEXURE P03-3

SAPS Partnership



In partnership with the SAPS

At Tracker, we believe that crime should be addressed at grassroots – which means involvement from every sector of society. It means empowering communities and individuals, but, importantly, it also means close collaboration between the private and public sectors.

Through a 15 year formal contract with the South African Police Service (SAPS), Tracker's recovery technology has been fitted to more than 50 SAPS aircraft and over 1300 SAPS vehicles, including vehicles in units such as Anti-Hijack, Highway Patrol, Flying Squad, etc. Widely considered to be SA's most successful private-public sector collaboration, Tracker has worked closely with the SAPS to help arrest 11481 criminals and recover 62357 vehicles.

This means that Tracker customers benefit from the SAPS' power of arrest, massive infrastructure and expertise, and in turn, the SAPS is provided with the world's most successful tracking technology for the recovery of stolen and hijacked vehicles.

In addition to this substantial partnership, we also have highly skilled recovery teams of our own in our arsenal.



Did you know?

- Tracker's unique partnership with the SAPS currently nets approximately 100 criminals a month. We help recover more vehicles and arrest more criminals than any other vehicle tracking company in Africa.
- Curtailing vehicle crime is hugely beneficial to all South Africans. Vehicle crime is often at the centre of many other forms of violent crime such as murder, rape, cash heists and other armed robberies. A single arrest of a violent criminal may well mean that we have prevented future murders and rapes. With 11481 arrests, it's difficult to comprehend just how many future crimes we are preventing.

How close do the Tracker teams have to be to the unit to pick up a signal?

The range of the signal will vary depending on the area. In city centres, the range could be up to five kilometres, however, in the open countryside, it can be up to 12 kilometres. Police aircraft, which are also fitted with Vehicle Tracking Units (VTUs), have picked up Tracker signals in excess of 100 kilometres.

Do I need to give an approximate location of the stolen vehicle when notifying Tracker of the theft?

No – once the unit is activated, the signal is broadcast nationwide. If a stolen vehicle with an activated Tracker unit moves within tracking range of any Vehicle Tracking Units (VTU), an alarm will sound and the Tracker team will be notified. The vehicles or aircraft concerned will be able to track the stolen or hijacked vehicle.

How will my car be returned to me?

Return of the vehicle is by arrangement between the SAPS and Tracker's National Secure Operating Centre. Any vehicle that has been stolen or involved in a hijacking will have to go to a SAPS pound. You would then collect your vehicle from the pound. [Click here](#) to find out more about our Vehicle Recovery process.

How many recovery teams do you have?

Thanks to Tracker's unique partnership with the SAPS, we have a powerful national footprint, with over 1 300 vehicles and 50 aircraft in our recovery arsenal. We also have our own dedicated recovery teams situated all over the country.

Do the SAPS have the time and resources to be involved in the recovery of so many vehicles?

The Tracker system ensures that the stolen vehicle actually identifies itself to the police, which means the police don't have to waste time and resources looking for the stolen vehicle. Once the vehicle is in range of the Vehicle Tracking Unit (VTU), the SAPS (and our own recovery teams) can track and recover

the vehicle. It is common for several police vehicles to be involved in a recovery as it increases the probability of an arrest being made.

5.2.11 Tracker's response to the section 7(9) notice

- 5.2.11.1 In response to the issue Tracker stated that the allegation that it enjoys an unfair advantage in the tender process was misplaced.
- 5.2.11.2 It contended that its competitors also have insight into the manner in which SAPS operates and to trends in criminal activity as well as its processes and procedures, and they work closely with SAPS in retrieving stolen vehicles. It added that a number of persons employed by their competitors and/or their outsourced service providers are former policemen with knowledge as to SAPS needs and functioning.
- 5.2.11.3 Tracker indicated that SAPS tender specifications for vehicle-tracking and recovery have not changed significantly over the years, that is since 1996, and that Tracker's competitors are aware of these specifications, and that

their competitors may have failed to develop technology that meets the specifications, and as such does not give rise to any unfairness.

- 5.2.11.4 Tracker state that the collaborative relationship between SAPS and Tracker assists SAPS in discharging its constitutional and statutory duty to prevent, combat and investigate crime, and that over the years the relationship has contributed significantly to the speedy resolution of vehicle theft and hijacking cases and related forms of crime. Tracker indicated that as at 30 September 2019, Tracker's activities with SAPS has resulted in the recovery of 98 247 vehicles , 18 525 arrests and 991 firearm recoveries and that their joint efforts with SAPS greatly assists in combatting crime to the benefit of not only Tracker customers but also to the broader South African Society and the economy.
- 5.2.11.5 Tracker contended that it did not view the benefit it received from its agreement with SAPS as problematic, as all suppliers of goods and services to government receive a benefit from doing so, normally in the form of payment. Since Tracker does not charge SAPS for the provision of the vehicle-tracking equipment or the related services, as it charges its own customers who install Tracker devices in their vehicles.
- 5.2.11.6 Tracker further stated that it commits significant financial and personnel resources to performing under the SAPS contract, as it is responsible for equipping the SAPS vehicles and aircrafts with the necessary technology and provides related infrastructure, equipment and personnel. In addition Tracker maintains the equipment and provides training to SAPS members on the use of the vehicle tracking equipment. Tracker stated further that is has continued to invest in technology and equipment to improve SAPS effectiveness and efficiency to recover vehicles.
- 5.2.11.7 Tracker disputed that the Tracker vehicle-tracking systems installed in SAPS vehicles only benefitted Tracker customers, and stated that not only does the use of its equipment by SAPS contribute to the broader fight against crime, but also results in the recovery of vehicles of persons who

are not Tracker customers, during recovery operations where a vehicle theft syndicate is apprehended.

5.2.11.8 Tracker further submitted five reasons as to why my intended finding that Tracker improperly benefits from the use of state resources is mistaken, as follows :

5.2.11.8.1 At all times during the recovery process, SAPS personnel operate the SAPS vehicles and aircrafts , in accordance with SAPS command structure, and that Tracker simply provides the vehicle tracking and recovery equipment and services to SAPS at no cost to SAPS, enabling SAPS fulfil its duty. SAPS does not act as Tracker's agent as provided in Tracker's consumer terms and conditions which states:

"The police act in an official capacity only.

When the police are involved in locating a stolen or hijacked vehicle, they are acting in their official capacity. Although we and the police may co-operate with each other to locate a stolen or hijacked vehicle, they are not our representatives or employees"

5.2.11.8.2 Tracker state that there was nothing untoward in the fact that Tracker personnel are deployed at the 10111 centre, as this deployment facilitates the speedy activation of vehicle thefts and hijackings in order for SAPS to be more effective and efficient. Further that the installation of the vehicle recovery equipment and repeater units at SAPS premises does not amount to improper use of SAPS infrastructure, given that the equipment is installed at these premises to facilitate the vehicle tracking by SAPS in collaboration with Tracker.

5.2.11.8.3 Tracker contended that its customers do not enjoy priority in respect of the allocation of police resources as recorded in the MOU between SAPS and Tracker :

"this MOU does not impose on SAPS or its personnel :

(i) A legal duty of care; or

- (ii) *Confer on TRACKER's clients/customers a right or entitlement,*
- (iii) *Greater than, or different from that which is already owed to the public."*

5.2.11.8.4 Tracker has a significant number of its own vehicle recovery units that work alongside or in parallel to SAPS in affecting vehicle recovery. Tracker submitted that it has sixty six (66) in-house vehicle recovery units and one hundred and thirty eight (138) private outsourced vehicle recovery units, which was significantly larger than the vehicle recovery team of Tracker competitors.

5.2.11.8.5 Other companies also collaborate with SAPS in recovering vehicles, by sharing vehicle tracking data, often in real time with SAPS personnel via mobile phones. Tracker submitted that this collaboration was evidenced by submitting extracts sourced from the website of Netstar and Matrix as well as a media report relating to a vehicle recovery with Cartrack.

5.2.11.9 Tracker submitted that the relationship it has with SAPS does not give it a competitive advantage in terms of securing customers, suggested in my section 7(9) notice and that this suggestion was speculative. Tracker contended that if it indeed did have any competitive advantage, which it disputed, this was earned by the virtue of Tracker's market leading position in the mid 1990's in collaborating with law enforcement authorities, its subsequent success in the various tender processes and its investment in the arrangement with SAPS over the years, and as such was not improper.

5.2.11.10 Tracker further submitted its Tracker's relationship with SAPS is not exclusive, and that nothing precludes SAPS from having similar relationships with other vehicle-tracking companies pursuant to the requisite process. It stated that there was nothing wrong and untoward in Tracker marketing its relationship with SAPS, or any organ of state, on its website and marketing material, as it was proud of their partnership and the meaningful impact it has in curbing vehicle thefts, hijackings, and other crime in South Africa

*Application of the relevant Law**The Constitution*

- 5.2.12 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 (PFMA)

- 5.2.13 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 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.
- 5.2.14 Section 38(1)(a) prescribes that the Accounting Officer must ensure that a department had, and maintained, effective, efficient and transparent systems of financial and risk management and internal control.
- 5.2.15 Section 38(1)(b) noted that the Accounting Officer of a department is responsible for the effective, efficient, economical and transparent use of the resources of the department.
- 5.2.16 Section 38(1)(c) said the Accounting Officer must take appropriate and effective steps to manage available working capital efficiently and economically. Overall, the Accounting Officer should ensure that the whole department complied with the provisions of the PFMA, as the responsibility for the proper management of the Department's resources fell with the Accounting Officer.

5.2.17 Section 57 of the PFMA entrusts other officials of the entity with responsibilities and provides that an official of a public entity:

“

- (a) ...;
- (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 irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*
- (d) ...; 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.”*

Conclusion

5.2.18 I am not averse to the national importance of combatting vehicle related crimes or the security risks that are envisaged if vehicle tracking systems are not installed in the SAPS vehicles. There is no uncertainty that the SAPS has a duty to combat vehicle related crime, and in doing so it requires the relevant equipment and technology to track stolen and hijacked vehicles, and I have taken note of Tracker's submissions in this regard.

5.2.19 Even though the agreement between SAPS and Tracker/Tracker Connect is in the interests of combatting vehicle related crime, the agreement is however benefitting Tracker/Tracker Connect.

5.2.20 Tracker/Tracker Connect itself has submitted in their bid documents the large number of clients it has acquired, and the “*strategic partnership with SAPS ...*”. It therefore, cannot be overlooked that Tracker/Tracker Connect would enter into such agreements with SAPS without any benefit for it or its clients.

- 5.2.21 Although it is argued that SAPS does not incur any costs for the supply, installation and use of the vehicle tracking-systems by Tracker/Tracker Connect, the vehicle tracking-systems only benefits Tracker/Tracker Connect clients whose vehicles are fitted with the tracking units.
- 5.2.22 It is not disputed that when the vehicle tracking system is activated by a Tracker/Tracker Connect client, the device triggers a chain of events wherein SAPS, vehicles personnel, and aircrafts (if necessary) are deployed to recover the stolen or hijacked vehicle.
- 5.2.23 I have not conducted an investigation into the number of vehicles, personnel and/or aircrafts that Tracker/Tracker Connect deploys when a tracking unit is activated as compared to SAPS vehicles, personnel and/or aircrafts. However the competitive advantage that Tracker /Tracker Connect enjoys in respect of SAPS resources being available to their clients, cannot be ignored.
- 5.2.24 Apart from Tracker/Tracker Connect benefitting from SAPS resources, it also benefits from marketing the exclusive agreement that it has with SAPS since 1996, to its clients.
- 5.2.25 It is also evident that from its twenty one (21) years of engagement with SAPS, Tracker/Tracker Connect has obtained significant information on the operational procedures and processes of SAPS, and would therefore always have a competitive advantage when it competes in a tender process for a partnership agreement, as compared to other service providers contrary to the ethos of section 217 of the Constitution. I have also noted that the sensitive information relating operational procedures and processes of SAPS that is available to Tracker/Tracker Connect has the potential to compromise national security. Gen. Sithole has also conceded to this and has welcomed any recommendation from me that would assist SAPS in its endeavours.
- 5.2.26 Section 38(b) and (c) of the PFMA also places a responsibility on the Accounting Officers to ensure the effective, efficient, economical and transparent use of the resources of the department. It is therefore essential that the use of SAPS vehicles, personnel and/or aircrafts in recovering stolen

and hijacked vehicles of Tracker/Tracker Connect clients be assessed, monitored and managed accordingly.

6 FINDINGS

Having considered the evidence received during the investigation, the regulatory framework determining the standard that should have been complied with, I make the following findings:

6.1 Regarding whether the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in SAPS vehicles, was improper, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

6.1.1 The allegation that the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in vehicles belonging to SAPS, were improper, is substantiated.

6.1.2 The process followed by SAPS in concluding the third and fourth agreements with Tracker/Tracker Connect, failed to meet the standards imposed by section 217 of Constitution and section 2 of the PPPFMA and therefore amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) of the Public Protector Act, 1994.

6.2 Regarding whether the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

6.2.1 The allegation that the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources is substantiated.

- 6.2.2 SAPS utilises its personnel, vehicles, infrastructures and police aircrafts in responding to the activation of a stolen or hijacked vehicles of a Tracker client.
- 6.2.3 The National Commissioner and respective SCM officials further failed to comply with section 38 and 57 of the PFMA in terms of their respective responsibilities.
- 6.2.4 The conduct of SAPS as referred to above therefore amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) of the Public Protector Act, 1994.

7 REMEDIAL ACTION

In light of the above, and having taken into account evidence before me, the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution are the following:

- 7.1 Regarding whether the process followed by SAPS in concluding agreements with Tracker, for the provision of the vehicle tracking system in SAPS vehicles, was improper, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994**

The National Commissioner, SAPS:

- 7.1.1 To take note of my findings in respect of this report and my remedial action in paragraph 7.2 below prior to entering in any further vehicle tracking agreements;
- 7.1.2 To ensure that if SAPS considers embarking on an appropriate competitive procurement process for this partnership it is in line with section 217 of the Constitution;

- 7.1.3 The bidding process is conducted in accordance with the relevant procurement prescripts, more specifically that a proper assessment of bids is conducted to ensure competitiveness;
- 7.1.4 The specifications and mandatory requirements of the bid does not create an unfair exclusion of other service providers; and
- 7.1.5 Consider appointing a panel of service providers wherein partnership agreements are entered with more than one service provider and/or for shorter periods rather than five (5) years, to allow more service providers to benefit from such agreements.

7.2 Regarding whether the agreements entered into between SAPS and Tracker results in Tracker improperly benefiting from the use state resources, and if so whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

The National Commissioner, SAPS:

- 7.2.1 To take note of this report and taking into account the fact that SAPS does not incur any cost for the supply, installation and use of the devices, I therefore direct that SAPS fervently engage other service providers in this sector in order to prevent possible monopolistic circumstances by one over others.
- 7.2.2 Such engagement should be undertaken to inform and guide service providers of their needs, specifically the technical specifications of the goods, works or services that is required. This would allow service providers to either acquire or develop their technologies to meet the needs of SAPS and enable them to also enter into such agreements with SAPS.
- 7.2.3 The benefits of such agreement be canvased with other service providers, and that even though SAPS resources would be utilised, it would be to the benefit of the vehicle owners from a wider spectrum and not just to Tracker/ Tracker Connect clients, by providing equal opportunity to a broader supplier market.

- 7.2.4 The National Commissioner to further consider establishing in-house capacity which will play a key role when SAPS enters into agreements with the panel of service providers in order not to compromise national security, and safeguard sensitive information relating SAPS Standard Operating Procedures, modus operandi, development/sophistication of crime and the change in geographical approach of criminals. This should be reflected in Service Level Agreement entered into with such service providers.
- 7.2.5 The National Commissioner to minimise the reliance of Tracker operators deployed at the 10111 centre to further address national security issues as referred to in paragraph above.

8 MONITORING

- 8.1 The National Commissioner, SAPS must, within thirty (30) working days from the date of the issuing of this Report and for approval by the Public Protector, submit the implementation plan to the Public Protector indicating how the remedial action referred to in paragraphs 7.1, 7.2 and of this Report will be implemented.
- 8.2 In line with the Constitutional Court judgment in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** [\[2016\] ZACC 11](#), and in order to ensure the effectiveness of Office of the Public Protector, the remedial actions prescribed in this Report are legally binding , unless set aside by a Court order.



ADV. BUSISIWE MKHWEBANE

PUBLIC PROTECTOR OF

THE REPUBLIC OF SOUTH AFRICA

DATE: 13 / 01 / 2020