THE COST OF DISEMPowerMENT

A report on an investigation into allegations of irregular withholding of payment of an emerging contractor by the Ekurhuleni Metropolitan Municipality (previously Benoni City Council)

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PUBLIC PROTECTOR
SOUTH AFRICA

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“"The Cost of Disempowerment”

A REPORT ON AN INVESTIGATION INTO A COMPLAINT AGAINST THE EKURHULENI METROPOLITAN MUNICIPALITY (PREVIOUSLY BENONI CITY COUNCIL) RELATING TO THE IRREGULAR WITHOLDING OF PAYMENT TO AN EMERGING CONTRACTOR
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Executive Summary

(i) "The Cost of Disempowerment" is my report as the Public Protector, issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and directives on remedial action following an investigation into a complaint against the erstwhile Greater Benoni City Council (the City Council) (now part of the Ekurhuleni Metropolitan Municipality) alleging unfair treatment, maladministration and prejudice relating to irregular withholding of payment to an emerging contractor, Mr M J Skhosana, of Skhomajo Building Contractors (the Complainant) in 2000.

(iii) The complaint was lodged with the Public Protector in 2001, but investigation was initially suspended without any findings being made because of an apparent settlement agreement between the City Council and the Complainant, and the lack of information, at the time, to support the Complainant’s version of the events. The Complainant recently reverted to the Public Protector to seek a conclusion of the matter and as a result, I directed that the matter be reviewed and further investigations be conducted.

(iv) The investigation process included consultations with the Complainant; scrutiny of written submissions by the City Council, Ekurhuleni Metropolitan Municipality (Ekurhuleni), as well as project documents seized from Ekurhuleni in terms of section 7(4) of the Public Protector Act. Provisions of relevant legislation and policies were analysed and applied. Upon completion of the investigation a notice in pursuit of section 7(9) of the Public Protector Act and a discretionary notice were issued to the Municipal Manager as well as the Executive Mayor of Ekurhuleni on 25 September 2014. Despite a
request for extension from Ekurhuleni, and a number of reminders sent to them, I have to date not received any formal response to the section 7(9) notices from either the Municipal Manager or the Executive Mayor.

(v) On analysis of the matter, the following issues were considered and investigated:

a) Whether an amount of R100 000.00 was improperly withheld by the Greater Benoni City Council / Ekurhuleni Metropolitan Municipality for work performed by the Complainant from March 2000 to June 2001 as a contractor to build Caretakers Quarters and Storerooms, and to upgrade the infrastructure at Sinaba Stadium in Daveyton?

b) Whether the Greater Benoni City Council / Ekurhuleni Metropolitan Municipality acted unfairly or unreasonably towards the Complainant as an emerging contractor, and if yes did such action accordingly constitute improper conduct and maladministration?

c) Whether the actions of the Greater Benoni City Council / Ekurhuleni Metropolitan Municipality caused the Complainant to suffer any prejudice?

vi) The standards used to assess the propriety of the conduct of the Greater Benoni City Council / Ekurhuleni Metropolitan Municipality principally involve analysis of laws, policies and prescripts regulating procurement. To determine whether the amount of R100 000.00 was improperly withheld by the City Council for work performed by the Complainant, and whether the Complainant was treated unfairly I relied on, inter alia, -

a) Policies and procedures aimed at the development and promotion of emerging contractors as embedded in section 217(3) of the Constitution. Government’s approach to the emerging contractor development was rooted in a comprehensive strategy outlined in the 1998 White Paper “Creating an Enabling Environment for Reconstruction, Growth and Development of the
Construction Industry" (the White Paper) as well as Government's Emerging Contractor Development Programme (ECDP).

b) Relevant to the present case are sections 33 and 195 of the Constitution which govern the manner in which officials in the public administration carry out their duties and perform their functions-

aa) In a lawful, fair and reasonable manner;

bb) in promoting and maintaining a high standard of professional ethics;

c) Based on these provisions, the Greater Benoni City Council / Ekurhuleni Metropolitan Municipality owed the compliant procedural and substantive fairness regarding the determination and payment of what was owed to him in connection with the work he performed for the City Council.

d) It is worth noting that none of the parties disputed that the signed contract value was R342 000, 00, and the amount paid to the Complainant over a period of time was R230 028, 48.

vii) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

a) Whether full payment was irregularly withheld by the City Council for work performed by the Complainant from March 2000 to June 2001 as a contractor to build Caretakers quarters and storerooms and to upgrade the infrastructure at Sinaba Stadium in Daveyton:
aa) On 18 February 2000 the Greater Benoni City Council appointed Mr MJ Skhosana of Skhomajo Building Contractors as an emerging contractor to build caretakers' quarters and storerooms and to upgrade the infrastructure at Sinaba Stadium in Daveyton at a contract price of R342 000, 00.

bb) Prior to the procurement process the Greater Benoni City Council had approved a budget of R430 423,00 for this project (including a contingency amount of R30 000,00 [10% of the contract price]), as well as administrative costs.

c) In July 2000, after the awarding of the contract and after the Complainant had already started with the project, the City Engineer acting on behalf of the Greater Benoni City Council, adjusted the contract amount in the pricing schedule payment certificates to an amount of R201 754, 39.

dd) An explanation provided later and after the fact, stated that the Consulting Engineer made an adjustment to the breakdown of the project costs to reserve the balance of the contract price as contingency costs because the project costs were not itemised in the Complainant's tender, and the Complainant apparently did not make allowance for contingencies or PC Sums in his contract price.

e) There is no record of any communication with the Complainant regarding the adjustment and the breakdown of the contract price. The evidence submitted by both parties that such a mistake could not have been due to carelessness or inattention on the part of the Complainant, but could [as experienced in the Government's Emerging Contractor Development Programme (ECDP)] rather be attributed to poor pricing, tendering, and contract documentation skills.
ff) The total amount paid to the Complainant amounted to R230,028, 48 and the balance of R111,971.52 was retained by the Greater Benoni City Council as a contingency amount to cover provisional cost sums for materials and goods required for the upgrading of the existing structures and facilities.

gg) The withholding of such payment was improper because-

aaa) it sought to penalise the Complainant, instead of assisting him in terms of the (ECDP) for failing to itemise the project costs in his tender documents and for failing to make allowance for contingencies or PC Sums in his contract price;

bbb) the City Council had previously condoned any deficiencies in the tendering documents and pricing during the procurement process by accepting and awarding the tender at a contract price of R342,000.00; and

ccc) the decision to unilaterally retain more than a R110,000.00 of the contract price as a contingency amount resulted in a unforeseen reduction of approximately 30% of the amount that the Complainant had expected and budgeted for to earn from the contract, and this left him destitute.

b) Whether the City Council acted unfairly or unreasonably towards the Complainant as an emerging contractor, and whether its action constitutes maladministration and improper conduct:

aa) There is no indication that the Greater Benoni City Council offered any information, advice and mentoring to the Complainant around the possible deficiencies in his tender documents; or that he had failed to itemise the project costs in his tender documents and that he failed to make allowance for contingencies or PC Sums in his contract price;
bb) The Greater Benoni City Council resolved to unilaterally correct the alleged deficiencies to their advantage by retaining a huge amount of the contract price as a contingency amount instead of considering alternatives that would not have had such a drastic impact on the Complainant; such as providing for contingencies from the project budget;

cc) The decision to allocate more than a R110,000,00 of the contract price as a contingency amount was taken after the awarding of the tender and after the work had already started, during the processing of interim payments and was arbitrarily and unilaterally taken without any prior notification to or consultation with the Complainant.

(dd) The process for determining the amount owing to the Complainant was unfair as the City Council did not comply with the duty of care and the level of fairness, with the emphasis on openness, transparency, accountability and equity, envisaged in the policies and procedures aimed the development and promotion of emerging contractors as embedded in section 217(3) of the Constitution and the principles of good governance as envisaged in section 195 of the Constitution.

e) The actions of the City Council were accordingly improper and amounts to maladministration and improper conduct, which have not been cured by the passage of time from the date of the original event in 2000 up to this moment.

c) Whether the actions of the City Council caused the Complainant to suffer any prejudice:

aa) The Complainant was prejudiced by the actions of the City Council to withhold payment of the full contract price, not only leaving a shortfall of R110,000,00 owed to him, but also putting him in a position where he was actually "disempowered" because he was unable to carry over any
benefits from the project under discussion to future endeavours that could have assisted in his development as an emerging contractor.

bb) The Complainant continued to suffer severe financial hardship in the aftermath of this project, which affected his ability to establish himself as a contractor and to generate income from this mode of business.

viii) The appropriate remedial action to be taken in accordance with section 182(1) of the Constitution: is the following:

a) The Municipal Manager of the Ekurhuleni Metropolitan Municipality must provide the Complainant with a remedy as redress for the amount that was unlawfully withheld, and as consequences of the unsatisfactory manner in which the matter was dealt with by the City Council, including payment of an amount not less than R100,000.00 with moratory interest calculated from the date of the final payment certificate.

b) The Municipal Manager of Ekurhuleni, should write a letter of apology to the Complainant for the prejudice caused to him and his family within 30 days from the date of issuing of this report;

c) The Municipal Manager of Ekurhuleni and the Speaker of the Council must ensure that this report is submitted to the Council within 30 days from the date of issuing of this report.
REPORT ON AN INVESTIGATION INTO A COMPLAINT AGAINST THE EKURHULENI METROPOLITAN MUNICIPALITY (PREVIOUSLY BENONI MUNICIPALITY) RELATING TO THE IRREGULAR WITHHOLDING OF PAYMENT TO AN EMERGING CONTRACTOR

1. INTRODUCTION

1.1 "The Cost of Disempowerment" is my report as the Public Protector in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to the following people:

1.2.1 The Municipal Manager of the Ekurhuleni Metropolitan Municipality (Ekurhuleni); and

1.2.2 The Executive Mayor of Ekurhuleni.

1.3 A copy of the report is also provided to the Complainant.

1.4 The report relates to an investigation following a complaint against the erstwhile Greater Benoni City Council (the City Council) (now Ekurhuleni Metropolitan Municipality) alleging unfair treatment, maladministration and prejudice relating to the irregular withholding of payment to an emerging contractor, Mr MJ Skhosana, of Skhomajo Building Contractors (the Complainant).
1.5 The Complainant had been pursuing the matter endlessly since the occurrence of the event and even though the matter was escalated to the Executive level within Ekurhuleni, previous attempts by my predecessor failed to resolve this matter.

1.6 The matter was initially dealt with by my predecessor in 2001, but no resolution to the matter could be found, partly because of a lack of cooperation from the Consulting Engineer on the project and a lack of documents with the Complainant. The Complainant recently reverted to me to seek a conclusion of the matter and as a result, I directed that the matter be reviewed and further investigation be conducted. My investigation is conducted in terms of the provisions of section 182(1) of the Constitution of the Republic of South Africa, 1996, and the Public Protector Act, 1994.

2. THE COMPLAINT

2.1 The Complainant originally approached the Public Protector in 2001. He alleged that he had successfully tendered for the contract to build Caretakers' quarters and storerooms and to upgrade existing infrastructure at Sinaba Stadium in Daveyton.

2.2 He stated that he completed the project and satisfied his contractual obligations, but he was not paid the full contracted amount of R342 000,00 by the Greater Benoni City Council (the City Council). He alleged that an amount of about R110 000,00 was still owed to him.

2.3 The Complainant, furthermore, alleged that the project was intended to advance the interests of emerging building contractors but has left him financially crippled to the extent that (up to today), he has not been able to
recover or develop any opportunity to build a business as a building contractor.

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

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

3.2 Section 182(1) of the Constitution provides that the Public Protector has the power 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; to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

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

3.4 In terms of section 6(4) of the Public Protector Act, the Public Protector has the power to investigate, on own his or her own initiative or on receipt of a complaint, amongst other things, any alleged maladministration in connection with the affairs of government at any level and abuse of power or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct by a person performing a public function, or an act or omission by a
person performing a public function, which results in prejudice to any other person.

3.5 Ekurhuleni Metropolitan Municipality (and its predecessors in law) are organs of state and its conduct amounts to conduct in state affairs, and as a result this matter falls within the ambit of the Public Protector's mandate.

3.6 This report seeks to communicate my findings based on the evidence gathered during the earlier investigations of my predecessor as well as new evidence obtained in my subsequent enquiries that was not available when the Public Protector decided to suspend the initial investigation because a settlement agreement had purportedly been reached between the parties.
4. THE INVESTIGATION

4.1 Methodology

4.1.1 The rationale of this report is to identify possible maladministration by the City Council, to determine if the Complainant was prejudiced, and to direct remedial action to remedy the identified maladministration and prejudice, if any is found.

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

4.1.3 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct of maladministration.

4.2 Approach to the investigation

4.2.1 When the Public Protector conducts an investigation, the mandate given to her requires of her to conduct an enquiry on the merits of the complaint that transcends lawfulness and include considerations of equity, good administration and proper conduct.

4.2.2 As with every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1 What happened?

4.2.2.2 What should have happened?

4.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, and

4.2.2.4 In the event of maladministration what would it take to remedy the wrong or place the Complainant as close as possible to where he would have been but for the maladministration or improper conduct?
4.2.3 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. This includes:

   a) verification of the facts by obtaining responses to the allegations as well as information and evidence on the events, conduct or decisions that led to the complaint; and
   b) establishing proof on a balance of probabilities, achieved through document and explanation requests, interviews or hearings, forensic investigation and expert opinions, where appropriate.

4.2.4 The enquiry what should have happened focusses on the law or rules which regulate the standard that should have been met by the organ of state to prevent maladministration and prejudice.

4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for correcting maladministration and redressing its consequences. Where a Complainant suffered prejudice, the idea is to place him or her as close as possible to where they would have been, had the organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3 Limitations to the investigation

4.3.1 During the initial stages of the investigation in 2000, the project manager of the City Council provided conflicting responses to the issues raised by first stating that the Complainant had failed to complete the contract and that the amount of R100 000,00 was retained to appoint another contractor to complete the job. Later on he advised that the amount was retained in terms of a settlement agreement reached with the Complainant. The efforts to verify the information
against the relevant records were frustrated by challenges with the level of cooperation by, *inter alia*, the Consulting Engineers.

4.3.2 The City Council represented by the Consulting Engineers was adamant that a settlement agreement had been reached with the Complainant and that the matter was resolved.

4.3.3 The relationship between the Complainant and the City Council had broken down completely and the level of animosity between the parties proved to be an obstacle in obtaining full and relevant information.

4.3.4 Despite the purported agreement and the remuneration for the construction work, the Complainant remained adamant that he was still entitled to the balance of the contract price. A round table meeting was subsequently requested with the Project Manager. Ekurhuleni however did not want to engage on the matter any further and was satisfied that it had been resolved.

4.3.5 Efforts were also unsuccessfully made to escalate the matter to senior management level within Ekurhuleni. It was explained by Ekurhuleni that with the amalgamation of the various Councils into one Metropolitan Municipality, record keeping was a challenge and that the records would have had to be retrieved from the Consulting Engineer, who had since passed away.

4.3.6 At that time the matter was finalised not in favour of the Complainant and on the basis of the available evidence. Communication with the Complainant and efforts to obtain further evidence on the issues in dispute did not yield the desired results as he was not in possession of any of the tender documents required to resolve the issues in dispute. The Complainant however remained committed to his view of the situation and that an amount of at least R100 000, 00 was still owed to him.

4.3.7 When the matter came to my attention, I reviewed the file and formed the view that certain crucial issues were missed during the initial investigation and I directed that these issues be followed up.
4.3.8 After several attempts to engage Ekurhuleni on senior management level, and even the office of the Municipal Manager, a notice was issued by my Office in terms of section 7(4)(a)(b) of the Public Protector Act, 1994 and the relevant officials were directed to appear before a designated Manager in my Office.

4.3.9 Only the Manager: Supply Chain Management and the then Project Manager showed up at the meeting. After these discussions, further efforts to locate the “lost” records proofed successful and these documents were then seized by my Office in terms of section 7A(1) of the Public Protector Act.

4.3.10 In deciding to conclude the matter by means of a final report so long after the occurrence of the event, I had to consider the risk that the rights of the parties could be infringed in some way, or that some prejudice could be caused if I went ahead, as well as my Constitutional obligation to exercise my power and perform my functions without fear, favour or prejudice.

4.3.11 When I decided to proceed with the report in terms of section 182(1)(b) of the Constitution and sections 7(1)(a) and 8(1) of the Public Protector Act I took into account a number of factors, including-

a) the nature of the complaint, the reasons for the Complainant’s grievance and the redress being sought;

b) *prima facie* indication or suspicion of improper conduct in state administration and of continued un-remedied prejudice to the Complainant;

c) The likelihood of concluding the matter due to the delay having regard to the nature of the allegations;

d) The availability of information, evidence and records, the obligations of an organ of State to manage and maintain its records properly, keeping
in mind that a remedy for an administrative injustice could be denied or compromised as a result of incorrect or lack of authentic records or failure to retrieve records;

e) The provisions of the Public Protector Act vis-a-vis the Prescription Act 68 of 1969, which does not apply as a statutory limitation to matters referred to the Public Protector for investigation and determination, in line with the principle established in most jurisdictions with Ombudsman institutions that maladministration and the injustice suffered as a result thereof cannot prescribe;¹ and

f) The fact that in the matter at hand, a finding was never made and the outcome or the suspension of the investigation was not communicated to the parties in terms of section 8(1) of the Public Protector Act.

4.3.12 I also concluded that it would be in the public interest to highlight this case with the view to contribute to the debate around the challenges faced by emerging contractors and the duties of the relevant role players in the construction industry towards emerging construction contractor development.

4.4 On analysis of the matter, the following issues were considered and investigated:

a) Whether full payment was irregularly withheld by the City Council for work performed by the Complainant from March 2000 to June 2001 as an emerging contractor to build Caretakers quarters and storerooms and to upgrade the infrastructure at Sinaba Stadium in Daveyton?

b) Whether the City Council acted unfairly or unreasonably towards the Complainant as an emerging contractor, and if yes did such action accordingly constitute improper conduct and maladministration?

c) Whether the actions of the City Council caused the Complainant to suffer any prejudice?

4.5 Key sources of information

4.5.1 Interviews conducted

4.5.1.1 Several personal interviews with the Complainant;

4.5.1.2 Interview with Mr J Hutton, Project Manager at Ekurhuleni on 9 January 2014; and

4.5.1.3 Interview with Ms L Yende, Manager: Supply Chain, Management at Ekurhuleni on 9 January 2014.

4.5.2 Correspondence

4.5.2.1 Correspondence between the Complainant and the City Council in March 2001;

4.5.2.2 Correspondence from the Complainant dated 29 March 2001; and

4.5.2.3 Correspondence and information initially submitted by the City Council in response to requests from the Public Protector, dated 28 August 2002, 13 September 2002 and 8 November 2002.
4.5.3 Documents

4.5.3.1 The project file obtained from Ekurhuleni, containing all the relevant procurement documents, reports, invoices and payments made on this specific project, including:

a) Adjudication reports prepared and submitted by consulting engineers involved in the project, for the evaluation and approval of quotations.

b) Minutes of City Council meetings and resolutions taken on the approval of the project, the procurement processes to be followed, the appointment of consulting engineers, and the appointment of individual emerging contractors.

c) Minutes and resolutions of the Eastern Services Council Finance and Tender Committee (the Finance Committee)

4.5.4 Legislation and other prescripts

4.5.4.1 The Constitution of the Republic of South Africa, 1996;

4.5.4.2 The Public Protector Act, 1994;

4.5.4.3 Local Government Transition Act, 1993; and

5. **STANDARDS THAT SHOULD HAVE BEEN COMPLIED WITH**

5.1 **Introduction**

5.1.1 The Legal and regulatory frameworks determine what should have happened and are used as benchmarks for standards that should have been complied with by the state institution or public authority.

5.1.2 The considerations include the following Constitutional provisions, legislation, policies and other prescripts, as well as sector and international good practice.

5.2 **The Constitution**

5.2.1 The City Council’s conduct was guided by the legislation and prevailing principles that, at the time, regulated issues around public-sector procurement and contract management, including the Constitution. Section 217 of the Constitution provides that organs of state (and this includes municipalities and municipal entities\(^2\)) must contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

5.2.2 Municipalities and municipal entities may, however, implement a procurement policy that provides for categories of preference in the award of contracts and the advancement of persons or categories of persons disadvantaged by unfair discrimination. Such preferential procurement policy must be in accordance with national legislation that provides a framework for its implementation.

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\(^2\) See s 217(1) which refers to organs of state in the national, provincial and local sphere of government. See also s 239 of the Constitution for the definition of an organ of state.
5.2.3 Section 152 of the Constitution is also relevant insofar as it states that the objects of local government are, *inter alia* to

"(a) to provide democratic and accountable government for local communities;
(b) ... 
(c) to promote social and economic development;"

5.2.4 The principles contained in sections 33 and 195 of the Constitution are aimed at ensuring that officials in the public administration carry out their duties and perform their functions -

aa) In a lawful, fair and reasonable manner;
bb) in promoting and maintaining a high standard of professional ethics;
cc) to be development-oriented and accountable; and
dd) to foster transparency by providing the public with timely, accessible and accurate information.

5.2.5 The relevant provisions of the Constitution obliged the Greater Benoni City Council to initiate and support programmes aimed at promoting development opportunities for members of the local community. The Greater Benoni City Council was furthermore required to ensure that its decisions and actions in the determination and payment of what was owed to the Complainant in connection with the work he did for the City Council, were procedurally and substantively fair.

5.3 The Local Government Transition Act, 1993 ³

5.3.1 The issues relating to the procurement of the Complainant’s services and the management of the contract must be evaluated against the provisions of the erstwhile Local Government Transition Act, 1993. This Act placed an

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³ As amended and later repealed in 2008
obligation on Councillors and officials of a Municipality, as trustees of public funds, to ensure that resources are managed in the most efficient and effective manner possible. A determining factor in meeting this obligation is ensuring that when an organ of State, including Municipalities, procured goods and services, it did so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.  

5.3.2 Notwithstanding the preceding paragraph, a Municipality may, in accordance with a framework prescribed by national legislation, in awarding contracts, give preference to the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, and shall make the granting of such preferences public in the manner determined by the Council.  

5.3.3 The Local Government Transition Act, 1993 therefore allowed the Greater Benoni City Council to allocate the required resources to initiatives such as the programme in question, aimed at giving preference to the protection or advancement of historically disadvantaged persons such as the Complainant.  


5.4.1 During the time when this incident occurred, the Department of Public Works (the Department) were championing a range of initiatives and had co-ordinated the development of a comprehensive construction industry development policy as part of its contribution to the national project of reconstruction, growth and development.

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4 Section 10G(5)(a)  
5 Section 10G(5)(b).
5.4.2 Therefore, the Department’s approach to the emerging contractor development\(^6\) included measures to address specific problems facing emerging contractors such as the Complainant through programmes designed to:

a) "Develop a stable delivery environment…;"

b) Enhance industry performance through measures centred on procurement strategies to promote work process transformation and to effect best practice;

c) Promote new industry capacity and the emerging sector through affirmative action in support of historically disadvantaged individuals and enterprises.

e) Develop the capacity and role of the public sector to support enabling programmes and improved public sector infrastructure delivery."

5.4.3 On 12 April 2000 the Director General of the Department\(^7\) highlighted some of the principles and objectives of the Government’s ECDP, of which the following are relevant to the matter at hand:

a) Opportunity and support based approach;

b) Public sector support;

c) Promotion of access to

i) information, advice and mentoring

ii) Entrepreneurial and skills training

iii) Finance and credit

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\(^6\) 1998 White Paper "Creating an Enabling Environment for Reconstruction, Growth and Development of the Construction industry"

\(^7\) Director General of the Department presented Government’s Emerging Contractor Development Programme (ECDP) to Parliament’s Public Works Portfolio Committee (the Committee)Date of Meeting: 12 Apr 2000, Minutes: EMERGING CONTRACTOR DEVELOPMENT PROGRAMME PUBLIC WORKS PORTFOLIO COMMITTEE
5.4.4 It was noted in the ECDP that some of the hurdles confronting emerging contractors could be attributed to the lack of business administration skills. The Department reported that the implementation of the ECDP required the Construction Industry Sector to develop organisational capacity at local, provincial and national level in order to create "a viable and self-sustaining organisation able to support and promote public and private sector initiatives." The Inter-Ministerial Task Team on Construction Industry Development reiterated the need for creating an enabling industry environment for the emerging sectors and highlighted the following issues relevant to the manner in which contracts and payments to emerging contractors should be managed.

a) The development of an industry endorsed set of principles for model forms of contract as the basis for standardisation and simplification of contracts.

b) Alternative dispute resolution clauses in public sector contracts.

c) Improved procedures for interim payment and the processing of final accounts on public sector contracts.”

5.4.4 The policies and procedures aimed at the development and promotion of emerging contractors in the Government’s ECDP and related support programmes therefore envisaged that the state entities responsible for the implementation of these programmes would assume a duty of care and adopt a level of fairness to ensure that individuals and entities emerge from the programmes as viable and self-sustaining contributors to the economy of the Country. The policies and procedures required a commitment to the principles of openness, transparency, accountability and equity that goes beyond merely creating tender opportunities, but to actively assist participants in overcoming challenges attributed to poor pricing, tendering, and contract documentation skills as well as a lack of management and business expertise.
6. EVIDENCE OBTAINED DURING THE INVESTIGATION

6.1 Whether full payment was irregularly withheld by the City Council for work performed by the Complainant from March 2000 to June 2001 as a contractor to build Caretakers’ quarters and storerooms and to upgrade the infrastructure at Sinaba Stadium in Daveyton:

6.1.1 The Complainant’s case

6.1.1.1 The Complainant stated that on 18 February 2000 a contract was awarded to him by the City Council and the Eastern Gauteng Services Council (the Services Council), to the amount of R 342 000,00 (Three Hundred and Forty Two Thousand Rand). The contract was awarded for Project No CEP 7107 (A) Sinaba Stadium - Phase 2: Construction of a New Combined Caretakers Cottage, Store Room and Upgrading of the Existing Structures & Facilities.

6.1.1.2 The site was handed over on 21 February 2000 and he commenced with the foundation work on 26 February 2000. On 14 March 2000 and 4 April 2000 he submitted claims for the payment of R41 585, 00 and R2 938, 00 for material and labour respectively. On 26 May 2000 he submitted another claim for brick work up to roof level.

6.1.1.3 On 12 June 2000 the Complainant had a meeting with the Project Manager and the Consulting Engineers, on the payment of the balance of the contract price, which amounted to R100 000,00. The Complainant was advised that the amount that was quoted by him, and for which the contract
was awarded, included an amount for “PC sums”\footnote{A Prime Costing or provisional sum that is included in the contract amount to “cover contingencies or the purchase of goods, work, materials, or services, the need for which had been anticipated by the employer or the engineer but the exact quantities or amounts could not be determined at the date tenders were called for.” Guide to the Use of FIDIC Conditions of Contract for Electrical and Mechanical Works (3rd Edition).} that were set aside to cover contingencies and was only payable if he had been instructed by the Consulting Engineer to utilise such sums. (own emphasis added)

6.1.4. The Complainant was then informed that his tender would have been disqualified if the PC Sums had not been included. He was also advised that he did not fulfil all the requirements of the tender by not submitting the tender breakdown and rates.

6.1.5. The Complainant was advised at this meeting that an acceptable market related price for the building would be determined and agreed on with him. The fair building cost for the New Caretakers’ Quarters and Storeroom was subsequently estimated to be in the region of approximately R230 000,00 (two-hundred-and- thirty-thousand-rand-only). It was furthermore resolved that the price for the material was going to be approximately R100 000, 00 – which left the Complaint with an amount of R130 000 (to cover his overheads and labour). It was noted at the meeting that the Complainant could “still make a good profit on the basis of the suppliers estimate”.

6.1.6. In terms of the Complainant’s understanding this would have amounted to an incorrectly low tender price with the net effect that it was impossible for him to make any profit because the contract amount could not even cover project costs.

6.1.2. The City Council’s case

6.1.2.1. Ekurhuleni initially explained that an amount was apparently retained because the Complainant did not fulfil all his contractual obligations, and
that another contractor had to be employed to complete the job for the
construction of combined caretakers' quarters, store room and upgrading of
existing structures at the Sinaba Sport Stadium.

6.1.2.2 After further consultation with the Complainant, where he denied that he
had failed to complete all the stages of the project, the matter was also
pursued with the Consulting Engineer and the following information was
obtained:

a) Letter dated 18 February 2000 from the Consulting Engineers, informing
the Complainant that his tender for the project in question was approved
by the City Council and the Services Council "to the amount of
R342 000.00 (Three Hundred Thousand Rand Only)."

b) A copy of a payment certificate from the Consulting Engineers to the
City Council dated 14 March 2000 to approve a direct payment to a
hardware shop;

c) A valuation schedule dated 14 March 2000 was enclosed with the
payment certificate, reflecting the contract amount at R300 000.00;

d) Minutes of a meeting dated 12 June 2000 between the Complainant, the
Project Manager and the Consulting Engineers;

e) A letter dated 20 June 2000 from the Complainant to the City Council;

f) A claim from the Complainant for the payment of R16 000,00 for wages;

g) A payment certificate from the Consulting Engineer to the City Council
dated 1 February 2001, reflecting the contract sum at R201 754,39, the
contract value at R208 952.74 and the amount due to the Complainant as R 29 925.00; and

h) A letter from the Consulting Engineers to the Complainant dated 12 March 2001, advising him that his claim for the purposes of purchasing materials could not be approved as the amounts had already been advanced to him.

6.1.2.3 According to the Project Manager it became clear during a meeting with the Complainant in June 2000 that he was under the impression that the contract amount was for the construction of the new building only. This was not the case as it also included provisional cost sums for materials and goods required for the upgrading of the existing structures and facilities.

6.1.2.4 When it was disputed by the Complainant at the meeting that the contract price included provisional cost sums, the Project Manager reportedly reminded him of discussions held prior to the bidding process, where the tender process and advertisement for the project were discussed. He was advised that he should have qualified his tender to exclude PC sums.

6.1.3 *Evidence obtained independently*

6.1.3.1 The tender file and contract documents were seized by the Public Protector as evidence in this matter. The documents revealed the following information in respect of the procurement process for the appointment of emerging contractors for the upgrading of the sport stadium buildings, structures and services at the Sinaba stadium:

6.1.3.2 The minutes of a meeting of the Services Council on 26 November 1997, indicated that the Council approved the acceptance of quotations from
emerging contractors for work valued between R70 001,00 and R210 000,00 for the upgrading of the sport stadium buildings, structures and services at the Sinaba stadium, at Wattville and at Willowmoore Park. It was resolved that tenders would not be called for “as the use of emerging contractors require a protected climate for which tenders are dispensed with”.

6.1.3.3 On 18 December 1997 the City Council appointed a Consulting Engineer to facilitate the procurement of the services of building contractors for a project relating to the upgrading of the Sinaba Sport Stadium in Daveyton.

6.1.3.4 On 23 July 1999 the City Council invited tenders for the construction of combined caretakers’ quarters, store room and upgrading of existing structures at the Sinaba Sport Stadium (which is the subject of this complaint).

6.1.3.5 Ten (10) bids were received in response to the advertisement and but only four (4) were below the amount provided for the project, and these were then considered. The amount tendered by the Complainant was R342 000, 00 and was the second lowest of the bids that were considered. (The Consultant’s estimate for the project was R425 000, 00).

6.1.3.6 According to the adjudication report the Complainant’s bid met all “the requirement[s] prescribed in the new tender procurement policy and scored the second highest points when evaluated against the new tender procurement policy”. The report also indicated that the Complainant was well equipped for a contract of this nature, had experience in similar contracts and produced good quality work in respect of the previous contracts.
6.1.3.7 The bidder with the lowest price and highest points was not recommended for appointment as the contractor was regularly off site during a previous project at Sinaba Stadium and did not perform well.

6.1.3.8 The following extract from the adjudication report reflects the recommended budget for the project:

![Adjudication Report Image]

6.1.3.9 On 12 October 1999 the Executive Committee of the City Council supported the recommendation in the adjudication report for the appointment of the Complainant as contractor for this project and the recommendation was submitted to the Finance Committee.

6.1.3.10 The Finance Committee met on 28 January 2000 and accepted the recommendations for the appointment of the Complainant "at a fixed cost of
R342 000 (reclaimable VAT and escalation excluded, but contingencies, professional and supervision fees, non-reclaimable VAT and contract price included).” The Finance Committee also resolved that ten percent (10%) of each of the contractor’s payment certificate should be withheld “as retention in lieu of providing a bank guarantee certificate”. (When the decision of the Finance Committee was communicated to the City Council on 14 October 1999, this percentage was reflected as five percent (5%) of each payment certificate)

6.1.3.11 On 18 February 2000 the Complainant was advised by means of a letter (extract below) that his tender of R342 000, 00 had been accepted.

February 18, 2000

[Letter]

Schoenjo Building Construction
P.O. Box 10382
The Falls
Northmead
1522

For Attention: Mr. Johannes Skosana

Project No.: CEP 7197 (A) - Sinaba Stadium - Phase 2: Construction of a New Combined Caretakers Cottage, Store Room and Upgrading of the Existing Structures & Facilities: Letter of Appointment and Contract Commencement.

We hereby wish to confirm, that your tender in respect of the abovementioned contract has been accepted and approved by the Greater Benoni City Council and the Eastern Gauteng Services Council, to the amount of - R 342,000.00 (Three Hundred and Forty Two Thousand Rand Only)

Subsequent to our previous correspondence to yourselves, we hereby wish to make the following arrangements in respect of the abovementioned contract / project:

1 Site Hand Over Meeting/Contract Commencement - Date: February 21, 2000
Time: 15:00
Venue: On site

6.1.3.12 After the site handover, the Complainant proceeded with the work and submitted claims for work performed. From the available documents it appears that he had an arrangement with a supplier from a hardware store,
which allowed him to purchase the required material, who then submitted
the invoice directly to the Consulting Engineer for authorisation and
payment. In each case the Complainant provided written authorisation for
such direct payments. Other claims were processed and paid in terms of
payment certificates issued by the Consulting Engineers. The payment
certificates reflected the following information:

<table>
<thead>
<tr>
<th>Certificate number and date</th>
<th>Contract value (R Excl VAT)</th>
<th>Total (max) Retention amount (R)</th>
<th>Current retention (R)</th>
<th>Amount certified for payment (R)</th>
<th>Beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) 14 March 2000</td>
<td>300 000, 00</td>
<td>36478, 61</td>
<td>-</td>
<td>41585, 00</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>2) 14 April 2000</td>
<td>300 000, 00</td>
<td>37500, 00</td>
<td>368, 28</td>
<td>2938, 87</td>
<td>Contractor</td>
</tr>
<tr>
<td>3) 5 May 2000</td>
<td>300 000, 00</td>
<td>37500, 00</td>
<td>633, 85</td>
<td>14235, 80</td>
<td>Contractor</td>
</tr>
<tr>
<td>4) 5 May 2000</td>
<td>300 000, 00</td>
<td>37500, 00</td>
<td>-</td>
<td>5058, 11</td>
<td>Contractor</td>
</tr>
<tr>
<td>5) 14 July 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>16245, 07</td>
<td>Contractor</td>
</tr>
<tr>
<td>6) 22 August 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>12242, 25</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>7) 19 October 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>13501, 09</td>
<td>5866, 53</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>8) 19 October 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>9280, 14</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>9) 21 November 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>3348, 48</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>10) 21 November 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>2455, 39</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>11) 6 December 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>5745, 74</td>
<td>10139, 00</td>
<td>Contractor</td>
</tr>
<tr>
<td>12) 6 December 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>835, 00</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>13) 23 January 2000</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>3750, 00</td>
<td>29925, 00</td>
<td>Contractor</td>
</tr>
<tr>
<td>14) 26 March 2001</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>467, 14</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>15)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16) 14 May 2001</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>3122, 26</td>
<td>7507, 71</td>
<td>Material Supplier</td>
</tr>
<tr>
<td>17) 22 June 2001</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>26119, 09</td>
<td>2032, 79</td>
<td>Contractor</td>
</tr>
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<td><strong>Total amounts certified for payment at competition of project according to certificate 17</strong></td>
<td></td>
<td></td>
<td>26119, 09</td>
<td>211 762, 74</td>
<td></td>
</tr>
<tr>
<td>18) 13 September 2001</td>
<td>201 754, 39</td>
<td>26119, 09</td>
<td>-</td>
<td>1827, 5 / 4 (Release from retention)</td>
<td>Contractor</td>
</tr>
</tbody>
</table>
6.1.4 Independent evaluation

6.1.4.1 In my understanding "contingencies" or Prime or Provisional Cost Items (PC items) are items that either have not been selected or whose price is not known at the time the contract is entered into, and for which the cost of supply and delivery the contractor usually makes allowance for in the contract price. These costs should be stated and itemized within a tender. Even though PC items may be costed within a tender, they are not fixed costs, and the actual cost management of these items remains the responsibility of the client. The client would also be in a well-informed position to allocate more funds to a PC/PS item if he/she opted to do so.9

6.1.4.2 It is common cause that the Complainant submitted a tender for the amount of R342 000, 00 inclusive of VAT.

6.1.4.3 In the adjudication report the "tendered" financial commitment was reflected as R362 175, 00 which consisted of the tendered amount of R300 000, 00 (excluding VAT), including professional fees and an EGSC levy. The Consulting Engineer would have been aware that the costs were not itemised in the Complainant's tender and that the Complainant did not make allowance for contingencies or PC Sums in his contract price. This was not recorded or noted as a concern or grounds for disqualification in the adjudication report, the minutes of the Executive Committee meeting, or

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the minutes of the Finance Committee meeting. (own emphasis added) In fact the Consulting Engineer added a contingency amount of R30 000, 00 (10% of the contract price), as well as administrative costs, without any proposed adjustment of the tender price. As a result, an additional amount of R88 378, 00 was added to the tender price to bring the proposed financial commitment to R 430 378, 00.

6.1.4.4 On 28 January 2000 the Finance Committee approved an adjusted financial commitment of R446 025, 00 (VAT was recalculated), which also reflected the contingency amount of R30 000, 00 in addition to the tendered amount of R300 000, 00.

6.1.4.5 The Consultant’s estimate for the project was R425 000, 00.

6.1.4.6 In the acceptance letter to the Complainant there was no indication that his contract price or costing was adjusted to include contingencies or PC Sums.

6.1.4.7 In payment certificates 1 to 3, the contract amount certified by the Consulting Engineer also reflected the contract amount as R300 000, 00. However, from payment certificate 4 and further, the contract amount had been adjusted to R201 754, 39 without any recorded reasons. (own emphasis added) This happened after the awarding of the contract and after the Complainant had already started with the project. There is no indication in the available records that this adjustment was ever communicated to the Complainant or that he was consulted in this regard. According to the Complainant’s testimony he was not aware of and did not agree to such an adjustment.

6.1.4.8 On the balance of probabilities I conclude that –
a) The Complainant was appointed by the City Council on 18 February 2000 as an emerging contractor for the construction of a combined caretaker's quarters, store room and the upgrading of existing structures at the Sinaba Sports Stadium.

b) The Complainant submitted a bid to the amount of R342 000 (including VAT) in response to the tender advertisement. He was appointed as he met all the tender requirements.

c) On 11 November 1999 the City Council approved a budget of R430 423 for this project (including a contingency amount of R30 000, 00 [10% of the contract price]), as well as administrative costs, without any proposed adjustment of the tender price.

d) A valuation schedule enclosed with a payment certificate, dated 14 March 2000 reflected the contract amount at R300 000, 00 (excluding VAT).

e) Later payment certificates from the Consulting Engineer to the City Council, including a certificate dated 1 February 2001, reflected a different contract price to the amount of R201 754, 39 (excluding VAT).

f) None of the parties disputed that the signed contract value was R342 000,00 and that the amount paid to the Complainant over a period of time was only R230 028, 48.

g) An amount of approximately R110 000,00 on the initial contract price of R300 000 (excluding VAT), was retained by the City Council as an contingency amount to cover provisional cost sums for materials and goods required for the upgrading of the existing structures and facilities.
6.2 Whether the City Council acted unfairly or unreasonably towards the Complainant as an emerging contractor, and if yes did such action accordingly constitute improper conduct and maladministration?

6.2.1 Complainant's case

6.2.1.1 The Complainant maintains that he did not understand why the City Council had not paid him the full tender amount of R300 000, 00 for the work that he had done. According to him there was no indication in any of the tender documents or communications to him that the tender price included a contingency amount to cover provisional cost (PC) sums for materials and goods required for the upgrading of the existing structures and facilities, and was only payable if he had been instructed by the Consulting Engineer to utilise such sums.

6.2.1.2 On 20 June 2000 the Complainant addressed a letter to Consulting Engineer, stating, inter alia, as follows:

I made a claim to you, … of R100,000-00 and I have not received a response from you from 12/6/2000. I got a phone call … to say that I must come to a meeting … When I got there I found that there were four men at the meeting who I don't know and did not know what was going on. You said to me in the meeting that you are not going to give me this money for this job, that you are only going to give me R230,000-00 or I must take R7000-00 and leave the job. Mr … also said that I have no witness because you have the tender document. I asked for a copy of the tender document and you did not want to give it to me, I would just like to inform you that what you said during the meeting I don't agree with."

6.2.1.3 In February 2001 he submitted a final claim to finish the work. On 12 March 2001 he received a letter from the Consulting Engineer advising him that the amounts that he was claiming for the purchasing of materials had
already been advanced to him during the payment of previous claims. He was informed that he was expected to pay the suppliers directly and that he should "proceed with the work as per the terms of the contract and fulfil (his) contractual obligations."

6.2.1.4 On 28 March 2001 the final claim was not yet processed and he was called to the office of the Consulting Engineer, who informed him that he had to sign written authorisation for a direct payment of an amount of R112 000,00 to a sub-contractor. He stated that he did not know the sub-contractor and he refused to sign the document.

6.2.1.5 The Complainant is convinced that he completed the project and satisfied his contractual obligations, and that he was entitled to the full contracted amount of R342 000,00.

6.2.2 The City Council’s case

6.2.2.1 According to the City Council the Complainant was advised that he did not fulfil all the requirements of the tender by failing to submit tender breakdown and rates. The Project Manager had to request a breakdown and rates.

6.2.2.2 The Project Manager furthermore, advised that they were aware of the fact that the Complainant would not have been able to complete the work as tendered for unless a solution was found to assist him. If however, they excluded the PC sums from the tender price, the City Council would have had to bear the additional costs, the contract amount would have become too expensive for the construction of the buildings only, and the contractor would not have been awarded the tender.

6.2.2.3 On the other hand, the inclusion of the PC items would have made it impossible for the Complainant to complete the work as he did not budget
for the PC sums. According to the Project Manager an agreement was therefore reached between Ekurhuleni and the Complainant that an acceptable, market-related price would be determined for the value of the work performed for the construction of the buildings, and that this amount would be paid to the Complainant.

6.2.2.4 The balance of the contract amount would have been retained for the PC sums. This would have ensured that the contractor received fair payment for the work performed and was still able to make a profit on the cost of the materials on the basis of the supplier's estimate.

6.2.2.5 At the time there had also been a serious breakdown in the relationship between the Complainant and the Officials concerned, with allegations of threatening and intimidating behaviour by the Complainant. However, this issue was resolved in the meeting between the parties and the Complainant reportedly apologised for his behaviour.

6.2.3 *Independent evaluation*

6.2.3.1 It is not in dispute that the project for which the Complainant was appointed, fell under the auspices of an emerging contractor development programme initiated by the Services Council and implemented by the City Council.

6.2.3.2 The Complainant did not include any costing for contingencies or PC sums in the original tender price.

6.2.3.3 The City Council accepted the tender even though it contained a number of deficiencies that reflected potential poor pricing, tendering, and a lack of contract documentation skills on the part of the Complainant, and awarded
the tender without querying or raising any concern that the costs were not itemized.

6.2.3.4 The tender price of R300 000,00 (excluding VAT) was accepted and approved by the City Council and the Finance Committee, without any adjustment to the contract price for contingencies or PC sums.

6.2.3.5 The approved budget for this project made provision for contingencies to the amount of R30 000, 00 in addition to the contract price.

6.2.3.6 The amount of approximately R100 000, 00 that was withheld by the City Council was three times (33%) more than the proposed contingency that was approved (and provided for) by City Council.

6.2.3.7 There is no evidence to suggest that the amount withheld by the City Council was linked to or calculated on the basis of specific items that had not been selected or which price was not known at the time the contract was entered into.

6.2.3.8 There is no indication how the amount of R100 000, 00 was calculated by the City Council.

6.2.3.9 The argument that the PC sums had to be included in the contract price, otherwise the project price would have become too expensive, is contradicted by the evidence that the contract price (excluding the PC sums) was within the project manager's estimation, as well as within the total budget approved for the project.

7. MEASURING CONDUCT AGAINST THE RULES

7.1 Whether full payment was irregularly withheld by the City Council for work performed by the Complainant from March 2000 to June 2001 as a
contractor to build Caretakers’ quarters and storerooms and to upgrade the infrastructure at Sinaba Stadium in Daveyton:

7.1.1 Section 217 of the Constitution provides that organs of state (and this includes municipalities and municipal entities) must contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

7.1.2 Government’s approach to the emerging contractor development was embedded in the comprehensive strategy outlined in the 1998 White Paper "Creating an Enabling Environment for Reconstruction, Growth and Development of the Construction industry" (the White Paper) as well as Government’s Emerging Contractor Development Programme (ECDP). In this context, measures to address specific problems facing emerging contractors, including the lack of business administration skills, were reinforced.

7.1.3 A framework of co-operation established by the Inter-Ministerial Task Team on Construction Industry Development work was also in progress to deliver a number of outputs aimed at creating an enabling industry environment for both the established and emerging sectors with the view to, inter alia,

(i) "...develop an industry endorsed set of principles for model forms of contract as the basis for standardisation and simplification of contract; and

(ii) improve procedures for interim payment and the processing of final accounts on public sector contracts “

7.1.4 In the matter at hand there is no indication that the Complainant knew or, as a reasonable person (emerging contractor), ought to have known that he had to submit a bill of quantities and had to include Provisional Costing Sums in the price that he had quoted in his tender documents. Such an error was never picked up by the City Council in the bid evaluation and adjudication process. It
was evident from the evidence submitted by both parties that such a mistake could not have been due to carelessness or inattention on the part of the Complainant, but could (as experienced in the ECDP) rather be attributed to his poor pricing, tendering, and contract documentation skills. No assistance was provided to the Complainant in terms of pricing of contracts and the compilation of accounts or invoices as envisaged in terms of the implementation of the ECDP.

7.1.5 There is no indication that the Complainant benefited from any efforts by the City Council to assess his level of development and to facilitate access to support mechanisms such information, advice and mentoring, bridging finance, credit, guarantees or retention, as well as entrepreneurial and skills training as envisaged in the policies and procedures aimed at the development and promotion of emerging contractors.

7.1.6 Any additional amount that was required for contingencies for PC items, had to be borne from the additional contingency amount provided for in the approved project budget, and not from the contract price.

7.1.7 The City Council's actions to unilaterally "correct" the alleged error on the contract price by adjusting the contract amount from R300 000,00 in the first payment schedule in March 2000 to an amount of R201 754,39 in payment certificates 4 etc., without any notification to or consultation with the Complainant, fell far short of the measures and standards required by the Government's strategy and policies for emerging contractor development and the level of procedural and substantive fairness owed to him by virtue of sections 33 and 195 of the Constitution.
7.2 Whether the City Council acted unfairly or unreasonably towards the Complainant as an emerging contractor, and if yes did such action accordingly constitute improper conduct and maladministration?

7.2.1 At the outset, the City Council and the Services Council should be commended for their commitment at the time to initiate and establish capacity building programmes for emerging contractors.

7.2.2 However, as reflected in the discussion above, the quality and effectiveness of such development programmes required more than just providing an opportunity for emerging contractors to participate in the mainstream economy through “affirmative” or “targeted” procurement initiatives.

7.2.3 The effective and comprehensive development of emerging contractors’ capability and capacity was (and still is) central to the implementation of the Government’s ECDP. In recognising the challenges facing emerging contractors as a result of a lack of technical, financial, contractual, and managerial skills, the ECDP spelled out the Government’s role and responsibilities on all levels of Government, with clear contractor development outcomes.

7.2.4 In as far as deficiencies in the Complainant’s tender documents might have contributed to the dilemma; it is clear that there were no efforts to correct this in line with the principles and objectives of the support programmes that were envisaged in terms of the Government’s ECDP – to the benefit of the Complainant.

7.2.5 The City Council accepted the tender even though it contained a number of deficiencies that reflected potential poor pricing, tendering, and contract documentation skills on the part of the Complainant, and as a result tacitly condoned the fact that the costs were not itemized and PC sums were not costed within the Complainant’s tender.
7.2.6 The manner in which the Complainant’s objections and concerns relating to the reduction in the contract price were dealt with, reflected a measure of disregard for the policies and procedures that sought to promote and protect the interest of emerging contractors in the construction industry, aimed at creating an environment conducive to the development and promotion of emerging contractors.

7.2.7 In explaining the Government’s role and responsibilities to Parliament at the dawning of the ECDP, the Director General noted that “success, in this regard, will be measured by the extent in which emerging contractors emerge.”

7.2.8 In terms of the Government’s own yardstick to measure the success of its Emerging Contractor Development Programme, not only did the Complainant not “emerge”, from this project, but he was actually disempowered by the actions of the City Council because of the effect of the non-payment of the full contract amount on his future business ventures.

7.2.9 It is clear that the City Council did not properly discharge their duty and responsibility to provide the necessary support to the Complainant to deal with the matter in a constructive manner which would have contributed to the development of his capability and capacity in respect of pricing, tendering, and contract documentation.

7.2.10 The lack of proper communication pertaining to the adjustment of the contract price and the purported reasons, flouted the basic values and principles of state administration provided for in section 195 of the Constitution, with the emphasis on the duty to act fairly, and in a transparent manner. This contributed to the deterioration of the relationship between the parties.

7.2.11 Even after the dispute arose and my predecessor endeavoured to resolve the matter with Ekurhuleni, the lack of interest shown by the relevant authority (Member of the Mayoral Council) and senior officials in the Administration to consider and respond to the complaint and grievances by the Complainant and
the Public Protector’s enquiries, in a meaningful way, reflected a total lack of accountability as envisaged in section 195(1)(f) and (g) of the Constitution. In this regard the Constitutional Court recently emphasised that “section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues.”

7.3 If the Complainant suffered prejudice, what it would take to place the Complainant as close as possible to the position in which he would have been, had the City Council acted properly?

7.3.1 On face value the prejudice might be quantified as the sum of money that was withheld by the City Council namely approximately R100 000, 00.

7.3.2 The reality of the situation is however, that as a result of the shortfall on the payment to him, the Complainant could not cover some of the incidental expenses that he incurred during the completion of the project or honour all his financial commitments arising from this tender. He did not only suffer a significant personal financial setback, but his personal credit record as well as that of his business deteriorated to such an extent that he has not yet been able to do or tender for other work or to carry any start-up expenses that might have been required in other projects.

7.3.3 This matter is not just about money that might be owed to the Complainant. It struck me that the Complainant became so disillusioned through his experience in this matter and the challenges that he faced as an emerging contractor that it smothered all his aspirations to build on the projects that he had successfully completed or to succeed in the building industry as an established contractor.

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18 Khumalo and Another v MEC For Education KwaZulu Natal, Case CCT 10/13(2013) ZACC 49. Decided on 13 December 2013
7.3.4 The impact of the events is therefore reaching beyond the personal circumstances of the Complainant. As an empowerment exercise aimed at opening up work opportunities to historically disadvantaged construction enterprises and providing a vital platform for the sector's growth, the Complainant ended up being more disenfranchised as before. This limited his experience as well as his contribution to the realisation of the Constitutional promise of a better life for all.

7.3.5 The primary objective of considering appropriate remedial action is to determine if a Complainant was prejudiced, financially or otherwise, and to consider what kind of redress is appropriate to restore him/her to the position where he would have been, had the alleged maladministration not taken place. The second part of this enquiry relates to the question if the consequences of the alleged maladministration cannot be reversed, whether or not the prejudice can be quantified in terms of Ombudsman principles (which differ from the approach taken by a court of law in respect of a delictual action or a claim for damages or specific performance).

7.3.6 In reflecting on the appropriate remedial action in this matter, I also took into consideration the guidelines that have been developed by Ombudsman offices in the UK and Ireland to determine financial redress for injustice resulting from maladministration, which include the provision of the following "special payment categories":

7.3.6.1 Interest for delay may be payable in cases where delay amounted to, or resulted from, maladministration. Consideration can be given to special payments following delay in the payment of benefit and/or benefit arrears.

7.3.6.2 Actual financial loss should be considered where maladministration has resulted in an individual incurring additional expenditure or losing entitlement to benefit (loss of statutory entitlement).
7.3.6.3 Consolatory payments are considered where the individual (or a third party) has suffered injustice or hardship arising from maladministration. A consolatory payment should be considered regardless of whether or not any other form of financial redress has been/is to be made. In deciding the level of payment in respect of individual cases, consideration should be given to the circumstances of the individual and the impact any maladministration has had on them.

7.3.7 One can only speculate on what the position of the Complainant would have been if he had been able to "emerge" in a situation where he benefitted financially as well as in terms of capacity and capabilities, from the project in question. I am of the view that it is fair that the Complainant should be entitled to the amount that was unlawfully withheld from him, together with interest, as redress for the consequences of the unsatisfactory manner in which the matter was dealt with by the City Council, including distress and inconvenience.

8. FINDINGS

8.1 Whether full payment was irregularly withheld by the City Council for work performed by the Complainant from March 2000 to June 2001 as a contractor to build Caretakers quarters and storerooms and to upgrade the infrastructure at Sinaba Stadium in Daveyton:

8.1.1 On 18 February 2000 the Greater Benoni City Council appointed Mr MJ Skhosana of Skhomajo Building Contractors as an emerging contractor to build caretakers' quarters and storerooms and to upgrade the infrastructure at Sinaba Stadium in Daveyton at a contract price of R342 000, 00.

8.1.2 Prior to the procurement process the Greater Benoni City Council had approved a budget of R430 423 for this project (including a contingency
amount of R30 000, 00 [10% of the contract price]), as well as administrative costs.

8.1.3 In July 2000, after the awarding of the contract and after the Complainant had already started with the project, the City Engineer acting on behalf of the Greater Benoni City Council, adjusted the contract amount in the pricing schedule payment certificates to the amount of R201 754, 39.

8.1.4 An explanation provided later and after the fact, stated that the Consulting Engineer made an adjustment to the breakdown of the project costs to reserve the balance of the contract price as contingency costs because the project costs were not itemised in the Complainant’s tender and because the Complainant did not make allowance for contingencies or PC Sums in his contract price.

8.1.5 There is no record of any communication with the Complainant regarding the adjustment or the breakdown of the contract price. The evidence submitted by both parties is that such a mistake could not have been due to carelessness or inattention on the part of the Complainant, but could [as experienced in the Government’s Emerging Contractor Development Programme (ECDP)] rather be attributed to his poor pricing, tendering, and contract documentation skills.

8.1.6 The total amount paid to the Complainant amounted to R230 028,48 and the balance of R111 971.52 was retained by the Greater Benoni City Council as a contingency amount to cover provisional cost sums for materials and goods required for the upgrading of the existing structures and facilities.

8.1.7 The withholding of such payment was improper because-

8.1.7.1 The Greater Benoni City Council sought to penalise the Complainant instead of assisting him in terms of the (ECDP) for failing to itemise the project costs in his tender documents and for failing to make allowances for contingencies or PC Sums in his contract price;
8.1.7.2 The Greater Benoni City Council had condoned any deficiencies in the tendering documents and pricing during the procurement process by accepting and awarding the tender at a contract price of R342 000,00, and

8.1.7.3 The decision to unilaterally retain more than a R110 000 of the contract price as a contingency amount resulted in a unforeseen reduction of approximately 33% of the amount that the Complainant had expected and budgeted for to earn from the contract, and left him destitute.

8.2 Whether the City Council acted unfairly or unreasonably towards the Complainant as an emerging contractor, whether its action constitutes maladministration and improper conduct:

8.2.1 There is no indication that the Greater Benoni City Council offered any information, advice and mentoring to the Complainant around the possible deficiencies in his tender documents or his failure to itemise the project costs in his tender documents and for failing to make allowances for contingencies or PC Sums in his contract price;

8.2.2 The Greater Benoni City Council resolved to unilaterally correct the alleged deficiencies to their own advantage by retaining a huge amount of the contract price as a contingency amount instead of considering alternatives that would not have had such a drastic impact on the Complainant; such as providing for contingencies from the project budget;

8.2.3 The decision to allocate more than a R110 000 of the contract price as a contingency amount was taken after the awarding of the tender and after the work had already started, during the processing of interim payments. It was arbitrarily and unilaterally taken without any prior notification to or consultation with the Complainant.
8.2.4 The process for determining the amount owing to the Complainant was unfair as the City Council did not comply with the duty of care and the level of fairness, with the emphasis on openness, transparency, accountability and equity, envisaged in the policies and procedures aimed at the development and promotion of emerging contractors as embedded in section 217(3) of the Constitution and the principles of good governance as envisaged in section 195 of the Constitution.

8.2.5 The actions of the City Council were accordingly improper and amounts to maladministration and improper conduct, which have not been cured by the passage of time from the date of the original event in 2000 up to this moment.

8.3 **Whether the actions of the City Council caused the Complainant to suffer any prejudice:**

8.3.1 The Complainant was prejudiced by the actions of the City Council to withhold payment of the full contract price, not only leaving a shortfall of R110 000, 00 owed to him, but also putting him in a position where he was actually “disempowered” because he was unable to carry over any benefits from the project under discussion to future endeavours that could have assisted in his development as an emerging contractor.

8.3.2 The Complainant continued to suffer severe financial hardship in the aftermath of this project, which affected his ability to establish himself as a contractor and to generate income from this mode of business.
9. **REMEDIAL ACTION**

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, is the following:

9.1 The Municipal Manager of Ekurhuleni Metropolitan Municipality (as the successor in law of the Greater Benoni City Council), must provide the Complainant with a remedy as redress for the amount which was unlawfully withheld, and as consequences of the unsatisfactory manner in which the matter was dealt with by the City Council, including payment of an amount not less than R100 000,00 with interest calculated from the date of the final payment certificate.

9.2 The Municipal Manager of Ekurhuleni, should write a letter of apology to the Complainant for the prejudice caused to him and his family within 30 days from the date of issuing of this report;

9.3 The Municipal Manager of Ekurhuleni and the Speaker of the Council must ensure that this report is submitted to the Council within 30 days from the date of issuing of this report.

10. **MONITORING**

10.1 The Municipal Manager of Ekurhuleni must submit an action plan in respect of the implementation of the remedial action referred to in paragraph 9.1 above, to the Public Protector within 14 days of the date of this report.

10.2 The Municipal Manager of Ekurhuleni must submit a report within 30 days, as of the date of the report, to the Public Protector on the progress made with
the implementation of the remedial action referred to in paragraph 9.2 and 9.3 above.

ADV. THULI N MADONSELA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 20/07/2015

Assisted by Adv E De Waal, Senior Manager: AJSD