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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY ARMAMENTS CORPORATION OF SOUTH AFRICA SOC LTD IN THE ISSUING OF AN OUTCOME OF AN INVESTIGATION CONDUCTED BY FAIRBRIDGES WERTHEIM BECKER ATTORNEYS INTO ALLEGED TENDER IRREGULARITIES AND FAILURE BY ARMSCOR TO AWARD A PROJECT PACKAGE TENDER
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### List of Acronyms

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<td>Ms. Zodwa Dlamini.</td>
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<td>“ARMSCOR”</td>
<td>Armaments Corporation of South Africa Soc Ltd.</td>
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<td>“Steradian”</td>
<td>Steradian Energy (Pty) Ltd.</td>
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<td>“DoD”</td>
<td>Department of Defence.</td>
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<td>“BoD”</td>
<td>Board of Directors of ARMSCOR.</td>
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<td>“Volt Ampere”</td>
<td>Volt Ampere Electrical and Mechanical Engineering (Pty) Limited.</td>
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<td>Fairbridges Wertheim Becker Attorneys.</td>
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<td>Project Control Board</td>
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<td>“Investigation Team”</td>
<td>Public Protector’s investigation team.</td>
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<td>“RFP”</td>
<td>Request for Proposal.</td>
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<td>“DIP”</td>
<td>Defence Industrial Participation</td>
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<td>“BEC”</td>
<td>Bid Evaluation Committee</td>
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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY ARMAMENTS CORPORATION OF SOUTH AFRICA SOC LTD IN THE ISSUING OF AN OUTCOME OF AN INVESTIGATION CONDUCTED BY FAIRBRIDGES WERTHEIM BECKER ATTORNEYS INTO ALLEGED TENDER IRREGULARITIES AND FAILURE BY ARMSCOR TO AWARD A PROJECT PACKAGE TENDER

1. INTRODUCTION

1.1. This is my closing report issued in terms of section 182(1)(b) of the Constitution and section 8(1) of the Public Protector Act.

1.2. This report relates to my investigation into allegations of undue delay by ARMS COR in the issuing of an outcome of an investigation conducted by Fairbridges Attorneys into alleged tender irregularities and failure by ARMS COR to award a “Project Package” tender.

2. THE COMPLAINT

2.1. On 30 August 2017, I received a complaint from the Complainant, who is the Managing Director of Steradian.

2.2. In the complaint, the Complainant alleged the following:

2.2.1. That she submitted a bid to tender for the acquisition of a new mobile tactical power generator system for the DoD with a code name “Project Package” tender number EMSS/2008/430;
2.2.2. The above-mentioned tender was advertised on 12 December 2008, with a closing date of 4 March 2009. The closing date for the tender was extended to 15 May 2009;

2.2.3. The BoD recommended Steradian as the preferred bidder. However, ARMSCOR unduly delayed to award a tender, which led to its cancellation;

2.2.4. This was due to the fact that Volt Ampere lodged a complaint with the Head of Supply Chain Integration and the Secretary of Defence, DoD for onward transmission to ARMSCOR under reference number DS/ DSCI/ R/ 401/ 1, wherein Volt Ampere questioned ARMSCOR’s decision to recommend Steradian as the preferred bidder;

2.2.5. The Complainant alleged that ARMSCOR has on several occasions, previously awarded tenders relating to generator set/ generator upgrade to Volt Ampere, therefore Volt Ampere lodged the said complaint with an intention to have the award of the tender to Steradian cancelled, as it was not awarded to Volt Ampere as recommended by General Lambert Lehlohonolo Moloi, who unfortunately is now deceased, who was employed at the DoD;

2.2.6. General Moloi was a close associate of Mr Motumi, the erstwhile Acting DoD Secretary and the then acting Chief Executive Officer of ARMSCOR. General Moloi was a Shareholder and Chairperson of Volt Ampere, whereas the Acting Chief Executive Officer of ARMSCOR, Mr Sipho Mkhwanazi was alleged to be a silent partner of Volt Ampere;

2.2.7. The Complainant alleged further that Steradian had submitted a tender proposal which was far less expensive, with better technology than that of Volt Ampere. Due to the fact that ARMSCOR unduly delayed to award the “Project Package” tender to Steradian, the Complainant then raised a complaint with the BoD;
2.2.8. On 23 February 2015, the Complainant lodged a formal written complaint to the BoD relating to the irregular cancellation of the “Project Package” tender. Subsequently, ARMSCOR commissioned Fairbridges Attorneys to conduct a forensic investigation into the matter commencing from 2015 to 2017, and to issue an investigation report;

2.2.9. The Complainant lodged a request to ARMSCOR to be issued with the outcome of the above-mentioned investigation and ARMSCOR failed to issue it to her; and

2.2.10. She approached the Public Protector to intervene and investigate her complaint against ARMSCOR.

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

3.1. The Public Protector was established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs. 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 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) directs that the Public Protector has additional powers and functions prescribed by legislation.

4. Section 6(9) of the Public Protector Act grants the Public Protector 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.

5. Admittedly, in terms of section 6(9) of the Public Protector Act, the Public Protector is 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.

5.1. The DoD and ARMSCOR are organs of state and their conduct amount to conduct in state affairs, as a result the complaint fall within the ambit of the Public Protector’s mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.
5.2. The office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be exercised ‘without fear, favour or prejudice’. Those words are not mere rhetoric, as such words are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose.

6. THE INVESTIGATION

6.1. Methodology

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

6.1.2. 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.

6.1.3. The issues raised by the Complainant were mediated in line with section 6(4)(b) of the Public Protector Act. A Subpoena hearing session was held with ARMSCOR on 10 December 2018 and an Alternative Dispute Resolution (ADR) session was held on 29 April 2019 with the DoD, ARMSCOR and Complainant, but all these endeavours did not yield any positive outcome.

6.1.4. On 10 July 2020, I received an email from the Complainant wherein she indicated that she wishes to withdraw her complaint against ARMSCOR with immediate effect, based on the reasons she submitted to me. At the time of finalisation of the investigation of this complaint, I had not received any reasons for her withdrawal of the complaint.

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1 Section 181(2) of the Constitution.
6.1.5. Notwithstanding the foregoing, I am empowered by section 6(5)(a) of the Public Protector Act to exercise my discretion to proceed with the investigation of this complaint against ARMSCOR as a state entity, which I am exercising by proceeding to issue this final report.

6.2. **Approach to the investigation**

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

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?
- In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the maladministration or improper conduct?

6.3. 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. In this particular case, the factual enquiry principally focused on the roles played by the ARMSCOR during the issuing of an outcome of an investigation conducted by Fairbridges Attorneys into alleged tender irregularities and its cancellation of the “Project Package” tender.

6.3.1. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of ARMSCOR and DoD.
6.3.2. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he would have been had the institutions concerned complied with the regulatory framework setting the applicable standards for good administration.

6.4. **Discretionary Notice issued in terms of rule 42(1) of the Rules Relating to Investigations by the Public Protector**

6.4.1. During the investigation process, I issued a Discretionary Notice\(^2\) in terms of rule 42(1) of the Rules Relating to Investigations by the Public Protector (Notice) to the Complainant on 21 May 2020, to afford her an opportunity to respond to my provisional findings. Complainant was to respond within 10 working days after receipt of the Notice.

6.4.2. I received a written response dated 10 June 2020 from the Complainant. The submissions received in response to the Notice were fully considered in this report.

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

6.6. Whether ARMSCOR unduly delayed to issue an investigation report to the Complainant dated February 2018, conducted by Fairbridges Attorneys relating to the irregularities and failure by ARMSCOR to award a project package tender.

6.7. Whether ARMSCOR failed to award a “Project Package” tender to Steradian after it was recommended as the preferred bidder, resulting in the Complainant’s prejudice.

\(^2\) Dated 21 May 2020
6.8. **The Key Sources of information**

6.8.1. **Documents**


6.8.1.2. Copy of a letter dated 8 June 2009 from the Acting Senior Manager, Defence Industrial Participation, ARMS COR, Mr. PD Burger addressed to the Senior Manager, Miscell & Landward Systems of ARMS COR, Mr. Leon du Preez.


6.8.1.4. Copy of a letter dated 17 September 2009, from Volt Ampere addressed to ARMS COR.

6.8.1.5. Copy of a letter from DoD dated 2 October 2009, addressed to ARMS COR.

6.8.1.6. Copy of a letter from DoD dated letter dated 8 October 2009, DoD to ARMS COR.

6.8.1.7. Copy of a letter dated 12 October 2009 from ARMS COR addressed to DoD.

6.8.1.8. Copy of a letter dated 23 October 2009, from Volt Ampere addressed to Mr. PM Teffo, the erstwhile Senior Manager, ARMS COR Legal Services.

6.8.1.9. Copy of a letter dated 28 October 2009, from Senior Manager, Legal Services at ARMS COR, Mr MP Teffo addressed to Senior Manager, Landwards Systems, ARMS COR, K Joubert.


6.8.1.11. Copy of a letter dated 6 November 2009, Mr. JM Joubert, Acting Senior Manager, ARMS COR to Mr MP Teffo, Senior Manager, Legal Services, ARMS COR.

6.8.1.12. Copy of a submission dated 2 December 2009 from Acting General Manager Acquisition, ARMS COR, Mr D Griesel addressed to the BoD of ARMS COR.

6.8.1.13. Copy of a letter dated 2 January 2010 from DoD addressed to ARMS COR.

6.8.1.15. Copy of a letter from ARMSCOR dated 14 January 2010, from Mr JS Mkhwanazi to the BoD of ARMSCOR.


6.8.1.17. Copy of a letter from Steradian addressed to Mr. Sam Mahlangu, Procurement Secretariat, ARMSCOR dated 16 March 2010.


6.8.1.22. Copy of the minutes of the PCB meeting held on 22 July 2010.


6.8.1.25. Copy of a letter from the Divisional Manager, Landward System Division Acquisition Department, ARMSCOR, Mr MA Magagula addressed to Manager, Procurement Secretariat dated 23 August 2010.


6.8.1.27. Public Protector Complaint form completed by the Complainant dated 30 August 2017.


6.8.1.29. A document entitled “Final Amended (February 2018) Forensic Investigation into the circumstances surrounding the cancellation of the tender for the Acquisition of New Mobile and Tactical Power Generation Systems for the South African Defence Force under tender reference EMSS/2008/430 known as “Project Package” from Fairbridges Attorneys to ARMSCOR.”
6.8.2. **Correspondence sent and received**

6.8.2.1. Letter from Public Protector addressed to Mr. Kevin Wakeford, the erstwhile Chief Executive Officer, of ARMSCOR dated 9 October 2017.
6.8.2.2. Response letter received from the erstwhile Chief Executive Officer, of ARMSCOR, Mr Kevin Wakeford dated 16 October 2017.
6.8.2.3. Letter from the Public Protector addressed to the erstwhile Chief Executive Officer of ARMSCOR dated 29 January 2018.
6.8.2.4. Letter from the erstwhile Chief Executive Officer of ARMSCOR, Mr Kevin Wakeford dated 30 January 2018.
6.8.2.5. Letter from the Public Protector to the erstwhile Chief Executive Officer of ARMSCOR, Mr Kevin Wakeford dated 26 June 2018.
6.8.2.6. Letter from the erstwhile Chief Executive Officer of ARMSCOR, Mr Kevin Wakeford dated 1 August 2018.
6.8.2.7. Letter from the Public Protector to the Complainant dated 24 April 2019.
6.8.2.9. Email from Ms. Mampe Kumalo, Company Secretary, ARMSCOR dated 28 October 2019.
6.8.2.10. Letter from the Public Protector, addressed to Dr. SM Gulube, the Secretary for Defence dated 25 November 2019.
6.8.2.11. Letter from the DoD addressed to the Public Protector dated 14 February 2020.

6.8.3. **Legislation and other prescripts**

6.8.4. **Case Law**


6.8.4.2. Wolgroeiers Afslaers (Edms) Bpk v Munusipaliteit van Kaapstad 1978 1 All SA 369 (A)

7. **THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS**

7.1. **Whether ARMSCOR unduly delayed to issue an investigation report to the Complainant dated February 2018 conducted by Fairbridges Attorneys relating to the irregularities and failure by ARMSCOR to award a project package tender.**

   *Common cause issues:*

   7.1.1. It is common cause that the Complainant lodged a complaint with the BoD on 23 February 2015, relating to allegations of irregular cancellation of the “Project Package” tender.

   7.1.2. Consequently on 7 July 2015, ARMSCOR commissioned Fairbridges Attorneys to conduct an investigation into circumstances surrounding the cancellation of the “Project Package” tender.

   7.1.3. It was not disputed that Fairbridges Attorneys issued a preliminary report with findings against certain officials of ARMSCOR. The report in question was presented to the BoD on 31 August 2017. The BoD resolved that it be provided
with an opinion as to the feasibility of implementing some of the recommendations contained in the report.

7.1.4. It was also not disputed that upon completion of the said investigation, Fairbridges Attorneys issued a final amended investigation report to ARMS COR 28 February 2018 which detailed the outcome of the investigation and recommendations thereof.

7.1.5. The issues before me for determination was whether ARMS COR unduly delayed to issue an investigation report to the Complainant dated 28 February 2018 conducted by Fairbridges Attorneys relating to the irregularities and failure by ARMS COR to award a “Project Package” tender.

Issues in dispute:

7.1.6. In a letter dated 16 October 2017, ARMS COR confirmed that it received a complaint from the Complainant relating to irregular cancellation of the “Project Package” tender in 23 February 2015.

7.1.7. The BoD appointed an ad hoc committee of its members to consider the complaint. Following a report presented to the said committee, on 24 June 2015, a decision was taken by the BoD to institute an in-depth investigation in order to consider the merits of the Complainant’s allegations. For this purpose, Fairbridges Attorneys was commissioned.

7.1.8. ARMS COR submitted further that Fairbridges Attorneys issued a preliminary report with findings made against ARMS COR employees and other external entities in relation to the “Project Package” investigation report.

7.1.9. The said report was presented to the BoD on 31 August 2017, and the BoD resolved that it be provided with an opinion relating to the feasibility of implementing some of the recommendations contained in the report.
7.1.10. ARMSCOR submitted that the BoD of ARMSCOR met on 20 September 2017 and resolved as follows:

(a) “The Chairman of the Board of Directors at the time be requested to give evidence on the factual findings contained in the report.”

(b) “Subsequent to the evidence of the former Chairman of the Board, a consolidated report be provided to the affected employees to enable them to exercise their right of reply; and

(c) “A final report be submitted to the Board for its consideration.”

7.1.11. ARMSCOR mentioned that a process was underway and its BoD had not concluded its investigation as the Complainant alleged in her complaint. ARMSCOR mentioned further that the investigation into allegations of irregular cancellation of the “Project Package” tender was not complete.

7.1.12. ARMSCOR highlighted that it has taken a view that it should assess all the findings pertaining to the investigation as well as the likely risk impact thereof and avenues available to ARMSCOR once an investigation into the irregularities in the cancellation of a “Project Package” tender is complete.

7.1.13. ARMSCOR conceded that the processes of an investigation into the irregularities in the cancellation of a “Project Package” tender was prolonged due to the following factors:

3.2.1 “The sheer volume of documents involved in the investigation;
3.2.2 Co-operation (or lack of it) by all affected parties; and
3.2.3 The need to act with caution and procedural rigor in order not to taint the investigation and its outcomes.”
7.1.14. ARMSCOR concluded that the final investigation report relating to the irregular cancellation of the “Project Package” tender and ARMSCOR’s response to it will be made known to the Complainant and my office.

7.1.15. In a letter dated 1 August 2018, ARMSCOR mentioned that Fairbridges Attorneys submitted an investigation report into circumstances surrounding the cancellation of the “Project Package” tender to ARMSCOR. The investigation report recommended that the conduct of two (2) senior managers of ARMSCOR should be subjected to a disciplinary action.

7.1.16. ARMSCOR mentioned further that the premature release of the report may prejudice the preliminary enquiry under the ARMSCOR disciplinary code, which provides that should an allegation of misconduct by an employee arise, a preliminary enquiry must be conducted to ascertain whether a prima facie case exists. The enquiry undertaken by Fairbridges Attorneys was not a preliminary enquiry under ARMSCOR’s disciplinary code.

7.1.17. ARMSCOR submitted that it would revert to the Public Protector once the disciplinary processes taken under the ARMSCOR disciplinary code has been completed.

7.1.18. On 10 December 2018, I held a Subpoena hearing session with ARMSCOR and the Chief Executive Officer (Mr. Wakeford), who provided me with a final amended investigation report issued by Fairbridges Attorneys to ARMSCOR relating to the irregular cancellation of a “Project Package” tender dated 28 February 2018.

7.1.19. In support thereof, Mr. Wakeford also provided me with a copy of a letter dated 28 February 2018 from Fairbridges Attorneys. In terms of this letter, Fairbridges Attorneys issued a final amended investigation report to ARMSCOR into the

7.1.20. During the said Subpoena hearing session, it appeared that there might have been irregularities in the cancellation of the “Project Package” tender because there were disciplinary hearings conducted against implicated senior officials of ARMSCOR who were involved in the project. The aforesaid investigation report concluded as follows:

“1.9 The cancellation of the tender under which Steradian (the Complainant’s company) was adjudicated to be the preferred bidder was facilitated by the conduct of Armscor officials. This failure was ultimately to the benefit of Volt Ampere. The manner, timing and delays in finalizing the process rendered the probity of the adjudication and cancellation of the tender unfair.

...;

1.12 Mr Mkhwanazi failed to execute an instruction of the Board, which failure was deliberate and in so doing unnecessarily delayed the procurement of Project Package which was to the direct prejudice of Steradian and ultimate benefit of a party that was not an offeror, namely Volt Ampere. Mr Mkhwanazi and Mr Griessel deliberately withheld and did not refer to the legal opinion received on 20 April 2010 when making representations to the Board on 05 May 2010 on this matter”

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3 Page 57-58 of Final amended (February 2018) Forensic Investigation into the circumstances surrounding the cancellation of the tender for the acquisition of new mobile and tactical power generation system for the South African Defence Force under tender reference EMSS/2008/430 known as “Project Package”
Application of the relevant law

7.1.21. Section 195(1)(d) of the Constitution provides that services must be provided impartially, fairly and without delay, and is relevant to the issue being dealt with.

7.1.22. Section 237 of the Constitution similarly, provides that all constitutional obligations must be performed diligently and without delay.

7.1.23. Section 33(1)(2) of the Constitution states that “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair and everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

7.1.24. The White Paper on Transforming Public Service Delivery issued by the Government in 1997 identified eight (8) Batho Pele Principles for transforming public service delivery. Some of the principles relevant to the present complaint are:

“Courtesy: Citizens should be treated with courtesy and consideration; and

Redress: If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response”.

Application of the relevant case law

7.1.25. Our courts have also emphasized that administrative decision-making should reach finality without delay. In Wolgroeiers Afslaers (Edms) Bpk v Munusipaliteit
van Kaapstad\(^4\) the court held that “[i]t is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after unreasonable long period of time has elapsed – […]”\(^5\)

7.1.26. The evidence discussed above indicates that the Complainant lodged a complaint with the BoD on 23 February 2015 relating to the allegations of irregular cancellation of the “Project Package”\(^*\) tender. The BoD appointed an ad hoc committee which consisted of its members. Following a report presented to the BoD by the ad hoc committee on 24 June 2015, Fairbridges Attorneys was commissioned on 7 July 2015 to investigate the Complainant’s complaint.

7.1.27. Consequently, Fairbridges Attorneys issued a preliminary report which was presented to the BoD on 31 August 2017. However, due to the fact that there were findings against the officials of ARMSCOR, the BoD could not issue a report to the Complainant since this might have prejudiced the implicated officials and preliminary enquiries had to be conducted under the ARMSCOR’s disciplinary code.

7.1.28. The BoD took a resolution on 20 September 2017 that its Chairperson should be afforded an opportunity to give evidence on the factual findings of the preliminary report. At that time, the investigation into the complaint was not yet completed.

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\(^4\) 1978 (1) All SA 369 (A). This case was reported in Afrikaans, and the translation of the relevant portion of the judgment was taken from Gqwetha v Transkei Development Corporations Ltd & Others [2005] ZASCA 51; 2006 (2) SA 603 (SCA) paragraph [22], in which the relevant portion was quoted by Nugent JA in delivering the majority judgment. In this judgment the court dealt with the question whether the court should grant an application to set aside a decision by an administrator if the application was brought three and a half years after the Administrator gave permission for the subdivision of a property, upon certain conditions.

\(^5\) Page 386.
7.1.29. In the meantime, ARMSCOR had instituted disciplinary hearings against its implicated officials who were mentioned in the preliminary report. Due to the volume of documents involved in the investigation, which evidence was submitted to me by ARMSCOR on 10 December 2018, ARMSCOR conceded that the investigation was prolonged.

7.1.30. ARMSCOR submitted a final amended investigation report to me on 10 December 2018 relating to allegations of irregular cancellation of the “Project Package” tender, nine (9) months after Fairbridges Attorneys had issued the report to ARMSCOR.

Conclusion:

7.1.31. ARMSCOR unduly delayed to issue the final amended investigation report to the Complainant as required by section 195(1)(d), section 237 and 33(1)(2) of the Constitution, as well as Batho Pele Principles. However, upon my intervention ARMSCOR issued the final amended investigation report to my office on 10 December 2018.

7.1.32. The Complainant’s response to my Discretionary Notice dated 21 May 2020 dealing with the issue above:

7.1.33. The Complainant responded to my Notice on 10 June 2020. However, she did not comment nor make any submission about my findings and conclusions relating to whether or not ARMSCOR unduly delayed to issue an investigation report to her dated February 2018 conducted by Fairbridges Attorneys.

7.2. Whether ARMSCOR failed to award a “Project Package” tender to Steradian after it was recommended as the preferred bidder resulting in the Complainant’s prejudice.
Common cause issues

7.2.1. It is common cause that ARMSCOR cancelled the request for acquisition of new mobile and tactical power generation system for the South African Defence Force with a code name “Project Package” tender number EMSS/2008/430 in a letter addressed to the Complainant dated 24 August 2010.

7.2.2. The issue before me for determination was whether ARMSCOR failed to award a “Project Package” tender to the Steradian after it was recommended as the preferred bidder.

Issues in dispute

7.2.3. The RFP dated 17 November 2008, provided that all offerors should attend a prospective pre-tender meeting on 20 January 2009 at 10h00, at ARMSCOR, Vleiloerie Conference Room. The scheduled date was fixed and could not be postponed.

7.2.4. According to the RFP, the validity of the offer(s) was for 12 months after the closing date of the tender. The tender was advertised on 12 December 2008 and the closing date was on 4 March 2009 but was extended until 15 May 2009.

7.2.5. The Acting Senior Manager, Defence Industrial Participation, ARMSCOR, Mr. PD Burger confirmed to the Senior Manager, Miscell & Landward Systems of ARMSCOR, Mr. Leon du Preez in a letter dated 8 June 2009, that ARMSCOR received offers from the two (2) bidders, Reutech Solutions and Steradian.

7.2.6. The offers received from the two (2) bidders were submitted to ARMSCOR’s Industrial Participation evaluation team to evaluate the DIP and the National Industrial Participation critical criteria of the offers. The offers were evaluated and both offers were found to have complied with the DIP critical criteria.
7.2.7. In support thereof, ARMSCOR provided me with an attendance register for the BEC dated 17 June 2009, the bids were evaluated by the BEC consisting of the following members:

7.2.7.1. Col. R A Mokonoto;
7.2.7.2. Lt.Col. A J Snyman;
7.2.7.3. Capt. JH Povey;
7.2.7.4. Capt. ST Sithole;
7.2.7.5. Mr K P J Nel;
7.2.7.6. Ms I Crossley;
7.2.7.7. Mr MC Van Tonder;
7.2.7.8. Mr C Massey;
7.2.7.9. Mr W Klomp;
7.2.7.10. Mr MN Chauke;
7.2.7.11. Mr W Clarke;
7.2.7.12. Mr PC Nell; and
7.2.7.13. Mr L Du Preez.

7.2.8. In terms of a document dated 17 June 2009 entitled “evaluation of offerors for project package” from the BEC, both Steradian and Reutech complied with the critical criteria requirement.

7.2.9. In a memorandum dated 9 July 2009, from the Quality Specialist Auditor, ARMSCOR, Ms I Crossley (Ms Crossley) to Programme Manager, ARMSCOR, Mr L du Preez (Mr du Preez) it was mentioned that the evaluation of offers against the critical and discriminating criteria was done on 17 and 18 June 2009, respectively, and that the meeting was chaired by Mr PC Nell. It was confirmed that both offers complied with the critical criteria.
7.2.10. ARMSCOR provided me with a copy of an attendance register dated 9 July 2009, of the bid evaluation meeting. The meeting was attended by the following:

7.2.10.1. Capt. JH Povey;
7.2.10.2. Ms I Crossley;
7.2.10.3. Mr MC Van Tonder;
7.2.10.4. Mr C Massey; and
7.2.10.5. TM Ndlovu.

7.2.11. Following the functional evaluation, a price evaluation was conducted and completed by the Screening Committee on 9 July 2009 which comprised of the following Members:

7.2.11.1. Capt J Povey;
7.2.11.2. Mp T M Ndlovu;
7.2.11.3. Mrs I Crossley;
7.2.11.4. Mr M C van Tonder; and
7.2.11.5. Mr CH Massey.

7.2.12. During a BoD meeting held on 5 August 2009, the Screening Committee recommended to the BoD that Steradian be appointed as the preferred bidder for the acquisition of generator systems for the SANDF and the terms and conditions of an order for the supply of generator systems for the SANDF be negotiated. The submission was approved by the BoD subject to financial authorisation.

7.2.13. On 17 September 2009, Volt Ampere addressed a letter to ARMSCOR. In terms of this letter, Volt Ampere raised issues pertaining to *inter alia* an agreement concluded with ARMSCOR in 1993, wherein it was agreed that Volt Ampere would have perpetual license to use the technology without incurring any liability in respect of royalties. In return, Volt Ampere would have the right of first refusal
to undertake the supply and or manufacture of the components in which technology is applied.

7.2.14. Volt Ampere mentioned further that it has since come to its attention that ARMSCOR has decided to purchase variable speed generators from Kirsch, a manufacturer based in Germany. This was contradictory to the aforementioned intellectual agreement. Volt Ampere urged ARMSCOR to reconsider its decision to purchase variable speed generators from Kirsch.

7.2.15. On 2 October 2009, DoD informed ARMSCOR that it received a complaint letter from Volt Ampere. In support thereof, DoD attached a copy of the said complaint to the letter. In terms of this complaint, Volt Ampere claimed certain intellectual property rights pertaining to variable speed generator technology.

7.2.16. In a letter dated 8 October 2009, DoD addressed a letter to ARMSCOR and raised a concern about the delay to provide DoD with the recommended supplier, so that the acquisition plan can be drafted and submitted for approval.

7.2.17. The DoD also raised a concern about the time available for the acquisition plan’s approval as well as the contract approval to allow the funds approved for the project for 2009/10 financial year to be paid to ARMSCOR as planned. The DoD requested ARMSCOR to provide it with the reasons for the delay in recommending the preferred supplier and the expected contracting date.

7.2.18. In response, ARMSCOR addressed a letter dated 12 October 2009 to DoD and highlighted that ARMSCOR’s legal division was investigating a claim made by Volt Ampere and that it would not be possible to appoint the preferred bidder before February 2010. ARMSCOR recommended that the funds amounting to R30, 35 million that were available for the financial year 2009/10, if possible be carried over to 2010/11 financial year.
7.2.19. On 23 October 2009, Volt Ampere expressed its satisfaction in the fact that ARMSCOR had taken a decision to conduct an investigation into possible patent infringement by Steradian.

7.2.20. In a letter dated 28 October 2009, Senior Manager, Legal Services at ARMSCOR, Mr MP Teffo (Mr Teffo) addressed a letter to Senior Manager, Landwards Systems, ARMSCOR, K Joubert (Mr Joubert). In this letter, Mr Teffo, requested Mr Joubert to confirm in writing whether or not ARMSCOR’s RFO infringes Volt Ampere’s intellectual property, to enable the patent Attorney to provide a legal opinion.

7.2.21. On 4 November 2009, Adams & Adams provided a legal opinion to ARMSCOR that there was no infringement of intellectual property by Steradian.

7.2.22. In a letter dated 6 November 2009, Mr Joubert confirmed that the RFO and applicable documentation did not infringe the intellectual property of Volt Ampere.

7.2.23. On 23 November 2009, ARMSCOR responded to DoD’s letter dated 2 October 2009. In this letter, ARMSCOR referred to various discussions that took place between itself and Volt Ampere concerning issues of patent infringement.

7.2.24. On 2 December 2009, Acting General Manager Acquisition, ARMSCOR, Mr D Griesel (Mr Griesel) submitted to the BoD that a submission to the BoD for the Acquisition of the new Mobile and Tactical Power Generation System for the SANDF has been submitted to the BoD on 2 September 2009.

7.2.25. Further thereto, Mr Griesel recommended that ARMSCOR should proceed with Steradian as initially approved as the preferred bidder by the BoD during September 2009.

7.2.26. Mr Griesel recommended to the BoD that Steradian be requested to provide ARMSCOR with the necessary guarantee and indemnity as a pre-condition to
further engage in negotiations, and that Volt Ampere will not be afforded the right of refusal as ARMSCOR is not in breach of any of the terms or conditions provided for in the 1993 order.

7.2.27. Through a letter dated 2 January 2010 DoD, submitted to ARMSCOR that it held discussions with the representatives of ARMSCOR and the erstwhile Acting Chief Executive Officer, ARMSCOR, Mr JS Mkhwanazi (Mr Mkhwanazi) and they confirmed that the BoD recommended Steradian as a preferred bidder but that Volt Ampere has threatened to institute legal proceedings against ARMSCOR in the event a “Project Package” tender was not awarded to Volt Ampere.

7.2.28. The DoD submitted further that Volt Ampere based its allegations on a contract entered into in 1993 with ARMSCOR. The DoD recommended that the tender be awarded to Steradian as the process should be seen to be fair.

7.2.29. Furthermore, DoD emphasized the risk of legal proceedings being instituted by Steradian and that Steradian’s German partners were losing hope of being awarded the tender.

7.2.30. In a letter dated 13 January 2010, by Steradian to ARMSCOR, it raised its concern of the undue delay by ARMSCOR to award the tender based on alleged patent infringement of Volt Ampere.

7.2.31. Furthermore, the Complainant indicated that the delay caused by ARMSCOR placed Steradian at a risk of losing out on its international partnership with Kirsch GmbH.

7.2.32. On 14 January 2010, Mr Mkhwanazi, made a submission to the BoD reiterating the contents of the recommendations of Mr Griesel dated 2 December 2009.

7.2.33. It has come to my attention that ARMSCOR addressed a letter to Steradian wherein it requested Steradian to indemnify ARMSCOR against any possible
claim from Volt Ampere regarding potential infringement of the intellectual property. Subsequently, Steradian issued such a letter to ARMSCOR. However, ARMSCOR could not provide me with copies of such letters.

7.2.34. Through a letter dated 11 March 2010, ARMSCOR requested Steradian to extend the validity date of the request for proposal period until 30 November 2010. In a letter dated 16 March 2010, Steradian acceded to the request.

7.2.35. On 20 April 2010, Adams & Adams again offered a legal opinion that there was no infringement of intellectual property by Steradian.

7.2.36. On 28 June 2010, the PCB attended a meeting with ARMSCOR with an aim to confirm the status of “Project Package” tender and to obtain clarity on the way forward. During the PCB meeting, a decision was taken as follows:

(a) “A decision is made by Chairperson to inform Armscor of unaffordability of the RFP options present. A formal letter to be drafted to Armscor by the A/DCWA in this regards. It is recommended that the project team revise the requirement and specification and thus the RFP, to accommodate the funds available.

(b) It has also been recommended that Armscor go out on RFP to Volt Ampere for the right of first refusal as stipulated in the agreement between Armscor and Volt Ampere in the technology contract of 1993.

(c) Mr Visser expressed his discomfort and concern with agreements such as the right of first in the technology contract of 1993, written in contracts by Armscor. These agreements bind Def Mat Div to certain obligations that are not common and directly influence the DAP 1000 process. This caused severe delays on the project.”
7.2.37. ARMSCOR further provided my office with a copy of a legal opinion prepared by Adv. AIS Redding (Redding SC) dated 5 July 2010. According to the opinion, its purpose was to advice on whether ARMSCOR is obliged to halt the tender process and offer Volt Ampere the first refusal right which it contends.

7.2.38. Redding SC’s legal opinion was in particular about the nature of the right granted to Volt Ampere in terms of an agreement entered into between ARMSCOR and Volt Ampere. The relevant clause in that agreement reads as follows:

7.2.39. Adv. Redding opined that:

“12 If the technology is still used, then account must be taken of the damages brought about by the introduction of Section 217 of the Constitution and related legislation. In particular, the Constitution has introduced a requirement that a state organ such as Armscor must follow a procurement system which is equitable and competitive. A right of first is inimical to this. If Armscor offers Volt Ampere a right of first refusal it will be in breach of its statutory and constitutional obligation.

13 Where fulfilment of a contractual obligation has been made impossible by a change to legislation which would prevent the one or both parties from complying with their obligations, compliance is excused on the basis of supervening impossibility of performance. This is particularly so in the context of the introduction of new constitutional dispensation.

14 In my view, therefore, Armscor is not obliged to offer Volt Ampere a right of first refusal to supply the power system and its component.

15 Further, if my consultant is to consider abandoning the tender process it would be bound by constitutional and administrative law obligations to act
reasonably. The decision not to award a tender, like any administrative decision, must be reasonable and the tenderer is entitled to reasons for the failure to award the tender.”

7.2.40. ARMSCOR also provided me with a copy of a legal opinion which was prepared by Adv T Motau SC (Motau SC) dated 6 July 2010. The issues on which Adv Motau was requested to give a legal opinion were the following:

(a) Whether Armscor is entitled to cancel the contract (which is intended to be entered into) with SE (the SE contract) and if so, the grounds which could be advanced for the cancellation.

(b) Whether risks would be faced by Armscor if it were to cancel or withdraw the SE contract.

(c) Whether the right of first refusal claimed by Volt is enforceable in the light of the relevant provisions of the Constitution and the Public Finance Management Act.

7.2.41. Adv Motau advised that:

“…;

32 We find no reasons in law or fact, which would justify the cancellation of the SE contract. We express this view in light of the following legislative and factual considerations:

32.1 Section 217(1) of the Constitution imposes an obligation on organs of state who are involved in procurement processes for goods or services. It calls for an organ of state in any sphere of government, namely national, provincial and local government, or any other institution identified in national legislation to contract for goods or services “in accordance with a system is fair, equitable, transparent, competitive and cost effective.”

32.2 Section 217 of the Constitution find expression in section 46 of the Public Finance Management Act. In particular section 51 (1)(iii) of the PFMA imposes an obligation on the accounting authority of a public entity to ensure an appropriate procurement and provisioning system with is fair, equitable, transparent, competitive and cost-effective.”
32.3 Armscor is a public entity identified in national legislation, namely the PFMA. Chapter 1 of the PFMA, at section 3(1) (b) thereof, states that the Act applies to public entities listed in Schedule 2 or 3. Armscor is a public entity listed under schedule 2 of the PFMA and to which the PFMA applies. Armscor must, therefore, comply with the provisions of the PFMA, and in particular, section 51 thereof, when it is involved in procurement processes.

32.4 The formulation of the RFO and the award thereof by Armscor to SE constitutes administrative action which is the subject of judicial review in terms of the Promotion of Administrative Justice Act No.3 of 2004. It is axiomatic that the cancellation and/or the withdrawal of the award of the SE contract also constitute administrative action.

33 On the facts before us, there is no indication that the procurement of services or goods pursuant to the RFO fell short of section 51(1)(iii) of the PFMA. It is noteworthy to have regard in this context, to the conduct of Volt up to the award of the RFO to SE.

33.1 … SE was awarded the RFO on the basis that it offered the lowest and thus most competitive and acceptable price. This is reflected in the letter prepared by Senior Manager: Armscor, Legal Services, dated 11 June 2010.

33.6 In light of these facts and the applicable legislative provisions; and in the absence of any facts to the contrary, the only reasonable conclusion that we can reach is that the RFO process and the consequent award to SE was, as a matter of fact fair, equitable, transparent, competitive and cost effective. The RFO does not infringe the provision of section 217 of the Constitution read with section 46 and 51 of the PFMA. In fact it complies therewith.

33.7 We are of the opinion, therefore, that the RFO and the process pursuant thereto which led to the award of the RFO to SE, were lawful. We find no reason, either on the facts or in law that justifies a cancellation or withdrawal of the SE contract. This leads us to the next issue of concern to Consultant, namely the risk which would be faced by Armscor if it were to cancel or withdraw the SE contract.

34 As we have already indicated, SE, we are informed, is aware of the fact that it was the successful of the two bidders to the RFO. It considers itself as such, as the preferent bidder. It further contends to have a legitimate expectation of a preferent bid in respect of the RFO. It has further sought from Armscor, clarity and confirmation of this status, which status has not been refuted by Armscor.

35 We are of the opinion that the cancellation or withdrawal of the contract will all likelihood open Armscor up to a legal challenge, such as an interdict and later a review of the decision to cancel or withdraw the contract for the reasons given above.
7.2.42. With regard to a claim by Volt that it has a right of first refusal in respect of the RFO, Adv Motau mentioned that this contention finds no support in law for the following reasons:

38.1 First, on a proper construction of clause 23, given its ordinary literal and grammatical meaning, there arises no infringement of the intellectual property of Volt as a result of the RFO.

38.1.1 Clause 23, properly construed, makes it plain that while intellectual property rights vest in Volt to use, exploit and develop same, as well as rights which may arise in future in respect of all improvements to the relevant technology developed by Volt for Armscor/SANDF in terms of the 1993 contract, this right is limited to the right of the contractor, Volt, to:

(a) recover royalties; and/or

(b) apply for the registration of patents, trademarks and/ or designs relating to any new technology apparatus process machinery equipment etc which may be developed as a result of the activities of the parties of the order called for by Armscor.

38.1.2 The effect of the above clause is important for the following reasons. In the event that there is in fact some validity to the intellectual properties claims made by Volt in respect of the service/ goods offered by SE/Kirsch to Armscor, pursuant to the RFO, Volt would be entitled, in terms of clause 23 of the 1993 contract, to claim royalties from SE and/ or Kirsch for the use of its technology. There are no ramifications, in the circumstances, for Armscor if SE and/ or Kirsch are later found to have infringed the intellectual property right vesting on Volt.

39.2 In the circumstances, the claim to a violation of its intellectual property rights appears to us, not only to be contrary to the ordinary literal and grammatical meaning of clause 23, but also seems to contradict the intentions of the parties at the time when the 1993 contract was concluded. The meaning attached to clause 23 will in our view, lead to an absurdity.

7.2.43. With regard to whether the right of first refusal claimed by Volt is enforceable in light of the relevant provisions of the Constitution and the PFMA, Adv Motau
mentioned that neither the provisions of the Constitution, nor those of the PFMA are implicated in the right of first refusal claimed by Volt.

4.1 Clause 23 of the 1993 contract vests on Volt the right of first refusal in the following limited circumstances:

41.1 In particular, clause 23.6 reads:

"Notwithstanding the aforesaid, Armscor shall have a perpetual licence to use the technology without incurring any liability to the contractor in respect of royalties provided that the contractor shall have the right of first refusal to undertake the supply and/or manufacture of the components in which the technology is applied." (our emphasis)

41.2 We are of the opinion that properly construed clause 23.6 confers the right of first refusal on Volt subject to two conditions. The first instance is where Armscor makes use of Volt’s technology pursuant to a licence permitting same. The second is that such right of first refusal shall be limited to the supply and/or manufacture by Volt of ‘components’ in which Volt’s technology is used by Armscor.

41.3 Given above, it is clear to us that the right of first refusal conferred on Volt by 23 is not an unlimited right. It is qualified by the use of Armscor of Volt’s technology pursuant to a licence for such use; and relates only to the supply and/or manufacture of components that will be used in the technology.

The demand made on behalf of Volt requiring that Armscor cancel the SE contract and provide it with an offer to supply and/or manufacture the product specified in the RFO is made without having regard to these considerations. The right of first refusal does not extend to new RFO’s and any technology used by Armscor not belonging to Volt.

43 Even if we were to proceed on the assumption that the RFO does in fact involve the use of Volt’s technology, Volt would only be entitled to a right of first refusal to supply any components necessary for the use of that technology belonging to it. If, on the other hand, the technology used belongs to SE/ Kirsch and was offered to Armscor pursuant to the RFO, Volt would be entitled to either bring legal action against SE and/or Kirsch for patent infringement or claim royalties from them. Volt would still not be entitled to first refusal of the RFO or services or goods requested thereunder.

7.2.44. Adv. Motau concluded his opinion by stating inter alia that:
46.1 there is no basis in law or fact on which Armscor would be entitled to cancel or withdraw the SE contract;

46.2 there is no credible basis to support the legitimacy of Volt’s claim to a right of first refusal, and

46.3 there is a risk that SE will institute appropriate legal proceedings should Consultant cancel the SE contract.

47 …it is, however pressing at this point, that the RFO be finalised in order to avoid legal action against Armscor from SE and/ or Kirsch for reneging on the contract.
7.2.45. In a letter dated 23 July 2010, the DoD submitted to ARMSCOR as follows:

The Project Control Board (PCB), held on 22 Jul 10 refers.

It is hereby confirmed that the requirement for a Transportable and Mobile Power Provisioning system remains valid.

The financial implications of the options presented at the referred PCB have been studied and compared to the allocated budget for Project PACKAGE as per SCAMP of 21 July 2010.

The following analysis resulted:

a. Funds Required. The funds required for the 25% option as quoted by the lowest tenderer is RM 329,9.

b. Funds Allocated for Project PACKAGE. RM 128,7 has been allocated to the project on the current SCAMP as on 21 July 2010.

As can be seen from these facts, there is not sufficient funds on budget and the Defence Material Division has no other recourse but to request Armscor to seek other more affordable options as possible solutions for the Mobile and Transportable Power Provision System being pursued by Project PACKAGE.
7.2.46. ARMSCOR provided me with a copy of the minutes of the BoD dated 7 August 2010. Herein below is an extract from the minutes of the said meeting:

**New Mobile Tactical Power Generation System**

The Board noted that this matter was referred to the Audit and Risk Committee to consider legal opinions received on the matter and evaluate risk for Armscor.

The Chairman of the Audit and Risk Committee gave the following report.

The User (DOD) had in the interim requested Armscor in writing to withdraw the tender process due to lack of funds and consider more affordable options as possible solutions for the mobile and transportable power provision system requirement.

The Committee considered the matter and obtained legal advice from the Head of Armscor Legal Division.

**RECOMMENDATION**

The Audit and Risk Committee was satisfied that Armscor was under the circumstances entitled to cancel the tender; one of the reasons recognised by law for cancellation being lack of funds; the Audit and Risk

**ACTION**

Committee therefore recommended to the Board of Directors that the New Mobile Tactical Power Generation System tender be cancelled due to lack of funds.

**DECISION**

Approved as per recommendation.

7.2.47. Through a letter dated 23 August 2010, the Divisional Manager, Landward System Division Acquisition Department, ARMSCOR, Mr MA Magagula issued a letter to the Manager, Procurement Secretariat wherein he informed her that she should send a communication to the offerors who submitted offers for the New Mobile Tactical Power Generation System that the tender has been withdrawn due to DoD’s lack of funds.
7.2.48. In a letter to the Complainant dated 24 August 2010, ARMSCOR informed the Complainant that “the Request for Offer has been cancelled”.

7.2.49. On 29 April 2019, I held an ADR session with ARMSCOR, DoD and the Complainant. During the said session, DoD conceded that it could not proceed with the “Project Package” tender due to lack of funds.

7.2.50. Through an email dated 28 October 2019, ARMSCOR submitted to me that it did not award a tender to Steradian as it was cancelled due to lack of funds.

7.2.51. As part of further investigation into this complaint, I approached the DoD. In a letter dated 14 February 2020, the DoD submitted that it had convened a meeting with the PCB on 22 July 2010 with an aim to get clarity on the status and progress of the “Project Package” tender.
7.2.52. In support thereof, the DoD provided me with minutes of the meeting held with the PCB on 22 July 2010. Herein below is an extract of the minutes of the said meeting:

   a. The presentation was done by Mr D. Griesel.
   b. Mr D. Griesel once again mentioned that the leaking of information to industry has put Armscor in a very uncomfortable position.
   c. Brief background is given regarding the tender process and results. The right of first refusal and intellectual property issues are presented and discussed.
   d. Mr J.M. Joubert requests to present his technical report findings to the board.
   e. Chairperson is happy with the presentation given and compliments Armscor on a good factual and objective presentation.
   f. 3 Options are presented to board as possible solutions to problems being experienced within the project namely:
      i. Continue with the placement of the order on Stertadian with the proposed guarantees and indemnities.
      ii. Cancel the tender and award Volt Ampere right of first refusal.
      iii. Confirm with the user the existence of the requirement, as well as the availability of funding. If not positively confirmed cancel the tender.
7.2.53. During the said meeting a decision was made as follows:

Application of the relevant law

7.2.54. Administrative action is defined by Promotion of Administrative Justice Act 3 of 2000 PAJA any decision taken, or any failure to take a decision, by an organ of the state when exercising power in terms of the Constitution or in terms of any legislation which adversely affects the rights of any person and which has a direct external legal effect.

7.2.55. Regulation 10(4)(b) of the PPPFA provides that “an organ of state may, prior to the award of a tender, cancel a tender if funds are no longer available to cover the total envisaged expenditure.”

7.2.56. The facts and evidence discussed above indicates that the BoD approved Steradian as the preferred bidder for the acquisition of a new mobile tactical
power generation system during a BoD meeting held on 5 August 2009. The approval by the BoD was made after Steradian was recommended by the evaluation committee as the preferred bidder.

7.2.57. The DoD informed ARMSCOR in a letter dated 23 July 2010 that there were no sufficient funds in the budget and that it had no option but to request ARMSCOR to seek more affordable options as possible solutions for the mobile and transportable power provision system being pursued by “Project Package” tender.

7.2.58. ARMSCOR did not award the “Project Package” tender to the Complainant. Instead, it cancelled the tender in a letter addressed to her dated 24 August 2010 after it had received the above-mentioned letter from the DoD, wherein the latter raised issues pertaining to the lack of sufficient funds to cover the cost of the “Project Package” tender, and this was consistent with Regulation 10(4)(b) of the PPPFA.

**Conclusion:**

7.2.59. ARMSCOR’s decision to cancel the “Project Package” tender was not an administrative decision as defined in the definitions of PAJA and highlighted above. The fact that ARMSCOR cancelled the tender did not adversely affect the Complainant and the cancellation did not have any direct legal effect on the Complainant, as her rights were not infringed in that regard.

7.2.60. The Complainant would only have rights to the contract/ tender if ARMSCOR had awarded the “Project Package” tender to her, thereby bestowing such rights upon her. In this regard, the Complainant did not suffer any prejudice by ARMSCOR’s decision to cancel the tender, since at the time of the cancellation, rights had not vested in her.
7.2.61. **The Complainant’s response to my Notice dated 21 May 2020 dealing with the issue above:**

*At paragraphs 1-8 of the response*

7.2.62. The Complainant responded to my Notice on 10 June 2020 and submitted that when she approached my office in August 2017, she lodged a complaint relating to maladministration, fraud and corruption in the awarding of “Project Package” tender by ARMSCOR and the undue delay by it to issue a report relating to such allegations. The Complainant submitted further that the “Project Package” tender was awarded to Steradian but later awarded to “another company”.

7.2.63. The Complainant proceeded and referred me to an ADR session that I held between the DoD, ARMSCOR and herself on 29 April 2019 and highlighted that during the said ADR I found that Steradian suffered prejudice due to the irregularities in the cancellation of “Project Package” tender by ARMSCOR.

7.2.64. During the ADR session, I resolved as follows:

7.2.64.1. *That Steradian was indeed prejudiced and ARMSCOR was directed to advance an offer to Steradian;*

7.2.64.2. *Steradian was directed to furnish ARMSCOR with a settlement claim figure proposed directly to the acting Chief Executive Officer, Mr, Solomon Mbada;*

7.2.64.3. *ARMSCOR was directed to engage directly with Steradian within 10 (ten) days of the date of the ADR; and*

7.2.64.4. *That the Public Protector undertook to revert to the parties by 16 May 2019 on ADR conclusions and way forward.*
7.2.65. She mentioned that I failed, neglected and/or refused to honour my undertakings and to enforce the directives by myself, and issued a Notice that contravened the directions issued during the proceedings of the ADR session. It was unlawful to disregard the directives. As such, I failed to control and manage the process of resolving her complaint during the ADR session.

7.2.66. The fact that on my Notice dated 21 May 2020, I intend to find that Steradian was not prejudiced by the cancellation of the “Project Package” tender came as a surprise to her and views such as unprofessional.

7.2.67. In view of the above context, I would like to put it on record that ARMSCOR did not award Steradian a “Project Package” tender. The BoD merely approved Steradian as the preferred bidder for the acquisition of a new mobile tactical power generation system during a BoD meeting held on 5 August 2009.

7.2.68. Subsequently, ARMSCOR cancelled the tender in a letter addressed to the Complainant dated 24 August 2010 after it had received a letter dated 23 July 2010 from the DoD wherein it raised issues pertaining to the lack of sufficient funds to cover the cost of the “Project Package” tender.

7.2.69. During the ADR held on 29 April 2019, I was exercising my powers in terms of section 6(4)(b) of the Act, wherein I endeavored to resolve the dispute between the parties. I mentioned during the ADR session that should the parties fail to reach a settlement agreement within 10 (ten) days of the ADR, I will conduct a full investigation into this complaint and depending on the outcome, I will issue an investigation report pertaining to my findings.

7.2.70. The proposal that I issued during the ADR session depended on whether ARMSCOR would be amenable to settle within 10 (ten) days with the Complainant. Since ARMSCOR did not accede to the settlement proposal in a
letter addressed to me dated 13 May 2019, therefore my team had to proceed and investigate the matter further.

7.2.71. Indeed, after the unsuccessful ADR process, my Investigation team conducted a full investigation into the complaint which culminated in the Notice I issued dated 21 May 2020 to the Complainant.

*At paragraphs 8.1-8.4 of the response*

7.2.72. In her response, the Complainant mentioned that I selectively and conveniently disregarded the proceedings of the ADR session held on 29 April 2019 and only selected a submission that ARMSCOR could not proceed with the “Project Package” tender due to lack of funds.

7.2.73. The Complainant argued that the BoD approved Steradian as the preferred bidder on 2 September 2009. However, Volt Ampere lodged a complaint to the DoD pertaining to infringement of intellectual property rights after it had obtained classified information to appeal to ARMSCOR to halt the awarding of “Project Package” tender to Steradian, and that the complaint was irrelevant, unjustified and non-existent as it was confirmed by the legal opinion of several Senior Counsels.

7.2.74. Volt Ampere connived with Mr. Mkhwanazi and Ms Griesel and disrupted the completion of the awarding of the tender to Steradian. The Complainant argued further that I did not consider the investigation report relating to an outcome of an investigation conducted by Fairbridges Attorneys.

7.2.75. The legal framework that I applied, which included PAJA and PPPFA are nothing, as it is principles that are carelessly misdirected to justify an act of wrong-doing by ARMSCOR relating to irregularities mentioned in my Notice and contradicts the findings of the investigation report of Fairbridges Attorneys.
7.2.76. The Complainant argued further that I am wrong to arrive at a conclusion that Steradian was not prejudiced by the cancellation of the tender as Motau SC, Redding SC and Fairbridges investigation report concurred with the fact that Steradian was indeed prejudiced by such cancellation.

7.2.77. There was no plausible evidence for arriving at a conclusion to disregard the findings of the Fairbridges Attorneys investigation report, and my contention that Steradian has no rights in law was a miscarriage of justice. The Complainant highlighted that I indicated that I relied on Fairbridges Attorney’s investigation report as additional evidence, yet in my Notice, I opted to misrepresent the facts.

7.2.78. According to the evidence at my disposal, ARMSCOR cancelled the “Project Package” tender after it had received a letter dated 23 July 2010 from the DoD wherein it raised issues pertaining to the lack of sufficient funds and this was consistent with Regulation 10(4)(b) of the PPPFA, which provides that an organ of state may, prior to the award of a tender, cancel a tender if funds are no longer available to cover the total envisaged expenditure.

7.2.79. The fact that several legal counsels like Motau SC and Redding SC arrived at the conclusion that Volt Ampere’s complaint to the DoD relating to infringement of intellectual property rights was irrelevant, unjustified and non-existent, does not compel me to concur with their findings. Therefore, as the Public Protector, I am required to investigate and probe further to establish what actually transpired. I cannot solely rely on the findings of the legal counsels without probing further in order to arrive at the truth.

7.2.80. The court in the Public Protector v Mail & Guardian Ltd emphasised that the function of the Public Protector is to weigh the importance of information and if appropriate to take steps that are necessary to determine its truth. The court mentioned that the Public Protector is an investigator and not a mere adjudicator of verified information that must be sought out and placed before her by others.
7.2.81. As the Public Protector, I have to conform to the legal framework surrounding the issue under investigation. The Complainant’s matter relates to whether or not ARMSCOR failed to award a “Project Package” tender to Steradian after it was recommended as the preferred bidder resulting in the Complainant’s prejudice.

7.2.82. The relevant applicable legislation in this regard is the definition of an administration action as provided for by PAJA and Regulation 10(4)(b) of the PPPFA. I also considered and aligned the evidence obtained during the investigation of the complaint with the legal prescripts. As such, I cannot disregard the rule of law in order to arrive at a favorable outcome for the Complainant.

7.2.83. The Complainant’s argument that Steradian was prejudiced by ARMSCOR’s cancellation of the “Project Package” tender is misconstrued. ARMSCOR did not award the “Project Package” tender to the Complainant, instead it was cancelled before such award could come into effect. The right to the contract would have vested in the Complainant had ARMSCOR awarded the tender to Steradian. Since the “Project Package” tender was cancelled, the Complainant cannot have a legal right to the contract.

At paragraphs 9-10 of the response

7.2.84. The Complainant proceeded and mentioned that from the onset, I did not have any interest to conduct this investigation in a fair, independent, honest and impartial manner as my Investigation team were against her and thereby undermining the constitutional mandate of the Public Protector. Also that I subjected her to further prejudice as I connived with a former employee of the Public Protector, who is now employed by ARMSCOR, since he unjustly influenced the investigation to the advantage of ARMSCOR and to her detriment.
7.2.85. The Complainant argued that I lacked independence, impartiality and proper conduct expected of the Public Protector, and that I condoned and perpetuated maladministration, corruption and fraud levelled against ARMS COR. Thus I undermined the Public Protector Act.

7.2.86. I did not consent to her request for access to information lodged in terms of PAIA with an aim to undermine the mandate of the Public Protector to resolve access to information disputes.

7.2.87. The Complainant called upon the withdrawal of my Notice and to enforce the directions issued during the ADR session held on 29 April 2019 within 14 (fourteen) days of receipt of her submissions, failing which she would instruct her legal representatives to approach the court to declare the Notice unconstitutional and set aside, with further instructions to request punitive cost order against me.

7.2.88. I have considered the Complainant’s submission in this regard, but I maintain that my Investigation team did not collude with any official of ARMS COR in the investigation of this complaint. In terms of the Public Protector’s internal processes, before and during the investigation of a complaint, until it is finalised, several officials are involved as part of appropriate measures put in place to make sure that the investigation is not compromised. As such, my team had no ulterior motives against the Complainant and would not have any reason to prejudice her.

7.2.89. I have also taken note of the preposterous argument advanced in this regard, and I do not agree therewith because the Complainant seems to have arrived at these absurd conclusions despite what the Discretionary Notice has convincingly demonstrated to her. I therefore find the Complainant’s rationale and attitude towards my investigation disturbing at the very least, and bordering on contempt of the Public Protector at the worst.
7.2.90. Furthermore, I had also received the Complainant’s application for access to information on 20 March 2019. Subsequently, through a letter dated 24 April 2019, I issued a response relating to the outcome thereof to her. Therefore, the Complainant had remedies in terms of the PAIA that she could resort to if she was not satisfied with the said outcome.

7.2.91. Therefore, I will not withdraw my Notice issued to the Complainant on 21 May 2020 as demanded by her in the submissions she made to me on 10 June 2020, as I believe that the investigation into this complaint was not compromised at all.

8. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I hereby make the following findings:

8.1. **Regarding whether ARMSCOR unduly delayed to issue an investigation report to the Complainant dated 28 February 2018 conducted by Fairbridges Attorneys relating to the irregularities in the cancellation of a “Project Package” tender.**

8.1.1. The allegation that ARMSCOR unduly delayed to issue an investigation report to the Complainant dated 28 February 2018 conducted by Fairbridges Attorneys has merit.

8.1.2. Fairbridges Attorneys issued a preliminary report which was presented to the BoD on 31 August 2017. However, due to the fact that there were findings against the officials of ARMSCOR, the BoD could not issue a report to the Complainant since this might have prejudiced the implicated officials because preliminary enquiries had to be conducted under the ARMSCOR’s disciplinary code.
8.1.3. ARMSCOR unduly delayed to issue a *final amended investigation report* to the Complainant for a period of nine (9) months after Fairbridges Attorneys had issued the aforesaid report to it.

8.1.4. Although ARMSCOR unduly delayed to issue the *final amended investigation report* to the Complainant as required by section 195(1)(d), section 237 and 33(1)(2) of the Constitution, as well as Batho Pele Principles, upon my intervention, ARMSCOR albeit belated, eventually released the report to my office on 10 December 2018. The delay to issue the report was attributable to their own internal HR process, and was therefore justified.

8.1.5. In light of the foregoing I could not find that the conduct of ARMSCOR constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

8.2. **Regarding whether ARMSCOR failed to award a “Project Package” tender to Steradian after it was recommended as the preferred bidder resulting in your prejudice.**

8.2.1. The allegation that ARMSCOR failed to award a “Project Package” tender to Steradian after it was recommended as the preferred bidder, resulting in the Complainant’s prejudice is unsubstantiated.

8.2.2. Although after Steradian was recommended by the screening committee as the preferred bidder, the BoD approved Steradian as the preferred bidder during a meeting held on 5 August 2009, this was subject to financial authorisation, ARMSCOR did not proceed to award the tender to the Complainant.

8.2.3. Instead, ARMSCOR cancelled the tender and informed the Complainant of such cancellation in a letter addressed to her dated 24 August 2010 after it received a letter dated 23 July 2010 from the DoD wherein the latter raised issues pertaining
to lack of sufficient funds to cover the cost of the “Project Package” tender, and this was consistent with Regulation 10(4)(b) of the PPPFA.

8.2.4. ARMSCOR’s decision to cancel the “Project Package” tender did not constitute an administrative action as defined in the definitions of PAJA. Such decision did not adversely affect the Complainant because the cancellation did not have any legal effect on her, since at the time of cancellation of the tender, rights to the contract/ tender had not vested in her.

8.2.5. Therefore, I could not find that the conduct of ARMSCOR constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration or abuse of power as envisaged in section 6(4)(a)(i)& (ii) of the Public Protector Act.

9. **REMEDIAL ACTION**

9.1. Based on the above conclusion, I am unable to take any remedial action as contemplated in section 182(1) (c) of the Constitution.

Kind regards

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ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 25/11/2020