
REPORT NO: 13 OF 2017/18

"Allegations of abuse of power and maladministration regarding the alleged irregular termination of a contract of services awarded to Castle Terminal by Eskom"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF ABUSE OF POWER AND MALADMINISTRATION BY ESKOM REGARDING THE ALLEGED IRREGULAR TERMINATION OF A CONTRACT OF SERVICES AWARDED TO CASTLE TERMINAL CO (PTY) LTD AND THE IRREGULAR INCLUSION OF VOLTEx (PTY) LTD AND AURECON (PTY) LTD ON A TENDER: GEN 3135 FOR THE INSTALLATION OF LIGHT FIXTURES AT ESKOM FOSSIL FIRED POWER STATIONS
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"It is because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost effective manner."

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

Executive Summary

(i) This is a report of 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 relates to an investigation into the alleged abuse of power and maladministration by Eskom regarding the termination of a contract of services, number 4600025920 awarded to Castle Terminal Co (Pty) Ltd (Castle Terminal) and the alleged irregular involvement of Aurecon (Pty) Ltd (Aurecon) and Voltex (Pty) Ltd (Voltex) on Eskom Tender: GEN 3135 for the installation of lighting fixtures at Eskom fossil fired Power Stations. The complaint was lodged by Mr Oupa Teke: Managing Director of Castle Terminal (Complainant) on 11 February 2011.

(iii) The Complainant is a middle aged business owner and Managing Director of Castle Terminal, a wholly black owned company with registration number 2008/027442/07, whose main business object covers the sourcing and installation of lighting fixtures. He alleged that his company was invited during November 2010 by Eskom to tender for the installation of lighting fixtures at Eskom’s six fossil fired power stations on Tender: GEN 3135. He further alleged that when his company was provided with the Pre-tender Audit Report containing specified material applicable to the relevant tender during January 2011, the date when Castle Terminal had to start rendering
the service in view of completing the project on 15 February 2011 as required by
Eskom, it became apparent that Aurecon was appointed on the same tender for the
remaining four power stations and had sub-contracted Voltex on the contract
concerned. It further emerged to him during the course of the tender process that the
specified material applicable to the relevant tender was only available from Voltex in
South Africa and overseas, particularly Asia, and the specified material was
determined by Voltex during their Pre-tender Audit conducted on behalf of Eskom
during October 2010.

(iv) Having realised that the deadline for the completion of the service was impossible to
achieve due to the limited time period and the scarce availability of the specified
material, he requested an extension of time to deliver the service but Eskom refused
to accede to the request and later terminated his contract for non-performance
regarding the terms of the contract, which the Complainant had disputed and raised
the time constraint factor. He asserted that Mr. Liwalam Jafta, Senior Legal Advisor
of Eskom: Regulation and Governance, arbitrarily cancelled his contract without
considering the condition of the contract in clause 8 of Eskom’s Notice of Acceptance
dated 21 December 2010, which provides that in case of a dispute, the Adjudicator
would be appointed in terms of the NEC Adjudicator’s Contract. He averred that
Eskom should have appointed the Adjudicator and referred the dispute for arbitration.
However, Eskom disputed the averment.

(v) In essence the complaint was that: 1) Eskom terminated the contract of Castle
Terminal without taking into account the provision of paragraph 8 of Eskom’s Notice
of Acceptance forming part of the contract which provided that when a dispute arises
emanating from the contract, Adjudicators will be appointed in terms of the NEC
Adjudicator’s Contract; 2) Voltex was improperly included as a service provider in the
contracts which were awarded to Aurecon on Tender: GEN 3135, as it participated
in determining the specifications and the scope of the tender in issue during its
conducting of the Pre-tender Audit earlier prior to the issuing of the tender concerned,
and further as Aurecon was awarded the bulk of the tender while the actual services
were rendered by Voltex; 3), the inclusion of Aurecon in the tender was also improper as Aurecon formed part of the team that participated in the Pre-tender Audit referred to herein; and 4) Eskom’s management of Tender: GEN 3135 was irregular.

(vi) Eskom did not dispute that the contract of Castle Terminal ended and also did not dispute that Voltex participated in the Tender: GEN 3135. It also did not dispute that the inclusion of Voltex in the tender concerned was improper. However, while Eskom did not dispute the termination of Castle Terminal’s contract, it disputed that it terminated the contract improperly and to this end asserted that it was the Complainant who terminated the contract by failing to perform in terms of the signed agreement.

(vii) Eskom further argued that the contract was also terminated by the expiry of the completion date of the contract period. Complainant maintained that Eskom improperly failed to refer the dispute regarding the time period of the contract to the Adjudicators in terms of paragraph 8 of the contract but improperly terminated Castle Terminal’s agreement. Eskom however disputed the assertion that it was obliged to refer the dispute raised by the Complainant to the Adjudicators regarding the dispute raised by the Complainant relating to the contract period allegedly resulting in the impossibility of performance and asserted in the alternative that the Complainant was the one who was supposed to refer the dispute to the Adjudicators. However, paragraph 8 of the Notice of Acceptance by Eskom provides that “We confirm that the Adjudicator for this contract will be appointed when a dispute arises”.

(viii) Eskom admitted that the participation of Voltex in the Tender: GEN 3135 was improper and had during the Public Protector’s investigation subjected the Project Manager: Mr Shanil Singh and Mr Mdakane: Procurement Manager within Eskom’s Group Commercial to disciplinary actions. Eskom disputed further Complainant’s assertion that the participation of Aurecon in the Tender: GEN 3135 was improper. The evidence received by the Public Protector indicated that Aurecon was contracted by Eskom to do a Pre-tender Audit on its power stations during October 2010 and Aurecon had sub-contracted Voltex in the project to do audit on the lighting fixtures.
Eskom used Voltex specified material codes in the main Tender: GEN 3135 in which Voltex also participated as an independent contractor. Voltex was not sub-contracted by Aurecon in the tender concerned.

(ix) It was observed during the investigation that the negotiated and agreed total amount of the contract, which is R 8 058.000.00, was not included in the NEC 3 contract of the parties despite the contract making provision for such at paragraph C1.1, option B.

(x) On analysis of the complaints the following four (4) issues were considered and investigated:

(a) Whether Eskom's alleged termination of Castle Terminal’s contract was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act;

(b) Whether Eskom’s alleged inclusion of Voltex in the Tender: GEN 3135 was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act;

(c) Whether Eskom’s alleged inclusion of Aurecon in the Tender: GEN 3135 was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act; and

(d) Whether Eskom’s alleged management of the Tender: GEN 3135 was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act.

(xi) The investigation process was conducted through meetings and interviews with the Complainant and relevant officials of Eskom, as well as the inspection of all relevant documents and analysis and application of the relevant laws, policies and related prescripts. The investigation process commenced with the preliminary inquiry about the allegations with the former Chief Executive of Eskom, Mr Brian Dames with a view to assess and to determine the merits of the complaint, allegations and information
received. Having assessed Eskom's response as well as Complainant's reply thereto, a formal investigation ensued. A Notice in terms of Section 7(9) of the Public Protector Act relating to the preliminary findings made on the allegations investigated was issued and served on Eskom to respond, and further copied to Aurecon and Voltex as affected parties to make submissions.

(xii) Key laws and policies taken into account to determine if there was improper conduct or abuse of power and maladministration by Eskom and prejudice suffered by the Complainant were principally those imposing administrative standards that should have been held by Eskom or its officials in managing the Tender: GEN 3135 and exercising due diligence in the appointment of contractors as well as the management contracts entered into between Eskom and the parties in the tender concerned. Those laws and regulations are the following:

(a) Eskom's Procurement and Supply Chain Management Procedure: 32-188 implemented on 1 December 2006 [reviewed version 32-1034 signed 2010/2011] (Eskom's Procurement and SCM Procedure) relating to the exclusion of the suppliers, which provides at clause 3.7(c) that suppliers' specifications are not to be used as a standard except where a true sole source situation exists. It further provides that where Eskom personnel are not qualified to develop the specification, a supplier may be paid to do so, but this would exclude the supplier concerned from participating in at least the first tender for the items concerned.

(b) Eskom's Code of Ethics (Standard 32-527) which provides at item 3.3.14 that (Eskom) "to constantly act in a respectful, professional manner that promotes trust, loyalty, transparency, and discipline, and a commitment to honesty and fairness at all times."

(c) Section 195(1) of the Constitution requires public administration to be governed by the democratic values and principles enshrined in the
Constitution which provide among others that a high standard of professional ethics must be maintained and the public administration must be accountable.

(d) Section 217(1) of the Constitution provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent and competitive.

(e) These principles apply also to Eskom.

(xiii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding whether Eskom’s alleged termination of Castle Terminal’s contract was improper:

(aa) The allegation that Eskom’s cancellation of Castle Terminal’s contract was improper, is not supported by the evidence and information obtained during the investigation.

(bb) The contract between the parties came to an end on 15 February 2011, the date provided in the contract as the date for completion of the project.

(cc) Eskom only confirmed the expiry of time in its letter dated 24 February 2011 when it declined to grant a request for the extension of the period of the contract.

(b) Regarding whether Eskom’s alleged inclusion of Voltex in the Tender: GEN 3135 was improper:

(aa) The allegation that the inclusion of Voltex to participate in Tender: GEN 3135 was improper, is substantiated.

(bb) The inclusion of Voltex in the Tender: GEN 3135 by Eskom was in violation of the provisions of clause 3.7(c) of Eskom’s Procurement and
SCM Procedure and was not in line with the provisions of sections 195(1) requiring high level of professional ethics and 217(1) of the Constitution requiring contracting for services to be done in accordance with a system which is equitable, fair and competitive, as Eskom was aware that Voltex was initially sub-contracted by Aurecon in conducting a Pre-tender Audit on an Electricity Efficiency Review on the lighting fraction of the contract number 4600024744 with Eskom prior to the issuing of Tender: GEN 3135.

(cc) Accordingly, Voltex had an unfair advantage over other bidders, due to their prior knowledge of the specifications.

(dd) Eskom's conduct in that regard amounts to failure to exercise due diligence and therefore constitutes maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

(c) Regarding whether Eskom's alleged inclusion of Aurecon in Tender: GEN 3135 was improper:

(aa) The allegation that Eskom improperly included Aurecon to participate in Tender: GEN 3135 is unsubstantiated.

(bb) The alleged inclusion of Aurecon in the Tender: GEN 3135 was not supported by the evidence received by the Public Protector during the investigation and no act of improper conduct or maladministration could be found against Eskom in this regard.

(d) Regarding whether Eskom's alleged management of Tender: GEN 3135 was improper:

(aa) The allegation that Eskom's management of Tender: GEN 3135 was improper, is substantiated.
(bb) Eskom’s conduct was in contravention of clause 3.7(c) of Eskom’s Procurement and SCM Procedure and not in line with the provisions of sections 195(1) requiring a high level of professional ethics and 217(1) of the Constitution which required Eskom in contracting with Castle Terminal and Voltex, to do so in accordance with a system that is fair, equitable, transparent and competitive as Voltex had participated in the Pre-tender Audit and was improperly included by Eskom in Tender: GEN 3135 in which Voltex’s specified material code was used, contrary to the provision of clause 3.7(c) of Eskom’s Procurement and SCM Procedure.

(cc) Eskom’s conduct in the above regard constitutes maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

(xiv) In the light of the above findings, the Public Protector is taking the following remedial action as contemplated in section 182(1)(c) of the Constitution.

(a) **The Minister of Public Enterprises to:**

(aa) Take cognisance of the findings regarding the improper conduct and maladministration mentioned in the report.

(b) **The Chairman of Eskom Board to ensure that:**

(aa) The Board takes cognisance of the findings regarding the improper conduct and maladministration against Eskom mentioned in the report and consequently the Board issues a written apology to the Complainant.

(bb) The Board, as the Accounting Authority, must ensure that in future the Group Chief Executive properly conduct due diligence, vets and
authorises contracts of service providers to ensure that a supplier whose specification is used as a standard is excluded from the first tender with a view to ensure compliance with clause 3.7(c) of Eskom's Procurement and SCM Procedure and the principles envisaged in section 195(1) and 217(1) of the Constitution to prevent a recurrence of the improper conduct and maladministration outlined in the report.

(cc) The Group Chief Executive considers amending Eskom's Procurement and SCM Procedure to prescribe the compulsory inclusion of the agreed full amount of the contract in the main contract to foster transparency as envisaged in item 3.3.14 of Eskom's Code of Ethics and section 217(1) of the Constitution.

(c) The Group Chief Executive of Eskom to ensure that:

(aa) Eskom conducts due diligence, properly vets and authorises contracts of service providers to ensure that a supplier whose specification is used as a standard is excluded from the first tender with a view to ensure compliance with clause 3.7(c) of Eskom's Procurement and SCM Procedure and the principles envisaged in section 195(1) and 217(1) of the Constitution to prevent a recurrence of the improper conduct and maladministration outlined in the report.

(bb) Eskom’s Procurement and SCM Procedure be amended to prescribe the compulsory inclusion of the agreed full amount of the contract in the main contract to foster transparency as envisaged in item 3.3.14 of Eskom’s Code of Ethics and section 217(1) of the Constitution.

(cc) Eskom issues a written apology to the Complainant within 30 days regarding Eskom’s improper conduct and maladministration referred to in this report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF ABUSE OF POWER AND MALADMINISTRATION BY ESKOM REGARDING THE ALLEGED IRREGULAR TERMINATION OF A CONTRACT OF SERVICES AWARDED TO CASTLE TERMINAL CO (PTY) LTD AND THE IRREGULAR INVOLVEMENT OF VOLTEX (PTY) LTD AND AURECON (PTY) LTD IN A TENDER: GEN 3135 FOR THE INSTALLATION OF LIGHT FIXTURES AT ESKOM FOSSIL FIRED POWER STATIONS

1. INTRODUCTION

1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 It is submitted to:

1.2.1 The Minister of Public Enterprises, Ms Lynne Brown, MP

1.2.2 The Interim Chairman of Eskom Board, Mr Zethembe Khoza; and

1.2.3 The Interim Group Chief Executive of Eskom, Mr Johnny Dladla.

1.3 A copy is provided to Mr. Oupa Teke, the Complainant in terms of section 8(3) of the Public Protector Act.

1.4 The report relates to an investigation into the alleged abuse of power and maladministration by Eskom in the termination of a contract of services, number 4600025920 awarded to Castle Terminal Co (Pty) Ltd (Castle Terminal) and the involvement of Aurecon (Pty) Ltd (Aurecon) and/or Voltex (Pty) Ltd (Voltex) in Eskom Tender: GEN 3135 for the installation of light fixtures at Eskom’s fossil fired power stations.
2. THE COMPLAINT

2.1 The complaint was lodged by Mr Oupa Teke: Managing Director of Castle Terminal (Complainant) on 11 February 2011.

2.2 The Complainant alleged that:

2.2.1 Eskom’s Mr. Liwalam Jafta, Senior Legal Advisor of Eskom: Regulation and Governance, arbitrarily cancelled the contract with Castle Terminal, without considering the condition of the contract in clause 8 of Eskom’s Notice of Acceptance of Castle Terminal’s proposal dated 21 December 2010, in which Eskom stated that in case of a dispute, an Adjudicator would be appointed in terms of the NEC Adjudicator’s Contract. He alleged that Eskom should have appointed an Adjudicator and referred the dispute for arbitration;

2.2.2 During the cause of the tender briefing session by Eskom on 20 December 2010, it transpired that Voltex was responsible for the conducting of the Pre-tender Audit and the preparation of the scope and specifications of Eskom’s tender: GEN 3135, including the Bill of Quantities. The specified materials to be used in the tender were determined by and solely available from Voltex in South Africa and abroad;

2.2.3 In terms of the agreement with Eskom, Castle Terminal was to commence rendering the agreed services with effect from 3 January 2011 and the project was expected to end on 15 February 2011. The time period within which to prepare for a contract of that magnitude was unreasonably short, taking into account the date of signing of the main contract by Eskom;

2.2.4 Voltex was the main competitor in the tender and the probability of obtaining the requisite items from it was minimal, as Voltex had already advised the Complainant that it did not have available stock at the time when he approached it for assistance;
2.2.5 Sourcing of material from overseas countries would have taken time for the items to be delivered, tested and approved in South Africa as required in terms of the contract and Castle Terminal would have been penalised for the delay in completing the contract and would have rendered the services at a loss;

2.2.6 Castle Terminal requested an extension of the deadline on 17 January 2011, from 15 February 2011 to 17 April 2011 after disputing the reasonableness of the timeframe within which to render the required service. Castle Terminal clarified the request for extension in a meeting chaired by Mr T Sibanyoni, held between Eskom and Castle Terminal at Megawatt Park on 20 January 2011, who advised that the request for extension of the contract raised in the previous meeting by Castle Terminal would not be entertained and that Castle Terminal was in breach of the contract by requesting such an extension as the agreement did not provide for it;

2.2.7 Castle Terminal's contention was that the request was done in terms of the condition of the agreement which states that “any extension, concession, waiver or relaxation of any action stated in this contract by the parties ... does not constitute a waiver of rights”. Nevertheless, the point raised was not considered favourably by Eskom;

2.2.8 During a meeting held on 17 January 2011 at Eskom College LDC in Midrand between Eskom representatives: Messrs L Reddy, Shanil Singh and the Complainant, Mr Reddy stated that the former Minister of Public Enterprises: Mr Malusi Gigaba, MP insisted that the project had to be completed by 15 February 2011 and consequently the request for the extension, regardless of the reasons could not be granted;

2.2.9 The argument raised by Eskom that the Minister insisted that the project be completed by 15 February 2011 was used as a scapegoat against the Complainant's request as it was never confirmed and Voltex was allowed to continue with services after the date concerned;
2.2.10 Voltex was improperly included as a service provider in the contracts which were awarded to Aurecon on Tender: GEN 3135, because it participated in determining the specifications and the scope of the tender concerned during the Pre-tender Audit conducted prior to the issuing of Tender: GEN 3135, and further that Aurecon was awarded the bulk of the tender while the actual services were rendered by Voltex;

2.2.11 The inclusion of Aurecon in the tender was also unjustified as Aurecon formed part of the team that participated in Eskom’s Pre-tender Audit Project;

2.2.12 The recommendations of the Pre-tender Audit prescribed in relation to Eskom’s Tender: GEN 3135, the specified Voltex coded electrical products and Voltex was responsible for conducting of the Pre-tender Audit and the preparation of the scope and specifications of Eskom’s tender: GN 3135, including the Bill of Quantities; and

2.2.13 Voltex fronted Aurecon in the tender: GN 3135 and hence the involvement of Voltex in the tender concerned was inappropriate.

2.3 The Complainant further alleged that Eskom’s general management of Tender: GEN 3135 was irregular in that:

2.3.1 Eskom did not treat Castle Terminal as fairly as Voltex/Aurecon as the latter participated in the Pre-tender Audit and had enough time to prepare for the service required as they had insight of what was expected in relation to the tender and also had the relevant compulsory specified material for the tender concerned readily available at their disposal;

2.3.2 Castle Terminal was expected to commence rendering the agreed services with effect from 3 January 2011 and the project was expected to end on 15 February 2011 when its contract with Eskom was only signed on 12 and 14 January 2011 by the parties respectively;
2.3.3 Castle Terminal used the price list of the electrical material from AC/DC Company as the proposed material in its tender documents delivered to Eskom on 3 December 2010, as it was not yet informed of the compulsory specified materials and Eskom accepted it without queries;

2.3.4 During the bidding process, Castle Terminal was not provided with the Pre-tender Audit Report which contained Voltex specified material codes and the scope of the specification in the Bill of Quantities;

2.3.5 During a weekly safety meeting held on 14 January 2011 at Witbank, Castle Terminal requested clarity from Eskom as to whether the specifications that were contained in the Pre-tender Audit Report and the Bill of Quantities were peremptory conditions applicable to the concerned tender and the Project Supervisor; Mr Shanil Singh insisted that they were indeed peremptory conditions of the tender;

2.3.6 Castle Terminal was required to comply with the compulsory specified material described in the Pre-tender Audit Report, despite Eskom having signed the agreement based on the items initially proposed by Castle Terminal;

2.3.7 The bid by Castle Terminal was successful in respect of two power stations, namely Grootvei and Arnot on condition that Castle Terminal granted a discount of R1, 3 million to Eskom and pursuant to the acceptance of the offer by Eskom, a construction agreement (NEC 3) was signed, but the discount amount of R1, 3 million was not reflected in the main agreement or addendum;

2.3.8 Eskom was aware that Castle Terminal was in a position to render the required services and had incurred substantial expenses in preparation of labour for the rendering of the said contract, as some of its employees were taken to Eskom for medical check-up during January 2011. Castle Terminal had also sourced capital from Standard Bank for the said service; and
2.3.9 Taking into account the circumstances relating to the tender, if Castle Terminal's contract was cancelled, Voltex would have been the only service provider that would render the concerned service, as the sole supplier of the specified material in South Africa.

2.3.10 The Complainant further alleged that Voltex was fronted by Aurecon during the bidding process for Tender: GEN 3135, despite both companies having earlier participated in the Pre-tender Audit process relating to the tender in question.

2.3.11 The Complainant also alleged that Eskom's management of Tender: GEN 3135 was improper.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides:

"The Public Protector has the power as regulated by national legislation-

(a) to investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

3.3 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) BCLR 618, the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect [at
para 76]. The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”.

3.4 In the above-mentioned matter of Economic Freedom Fighters v Speaker of the National Assembly and Others, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

3.4.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.4.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (para 67);

3.4.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.4.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);

3.4.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings
made and the particular kind of remedial action taken, based on the demands of the
time, that would determine the legal effect it has on the person, body or institution it
is addressed to. (para 70);

3.4.6 The Public Protector’s power to take appropriate remedial action is wide but certainly
not unfettered. What remedial action to take in a particular case, will be informed by
the subject-matter of investigation and the type of findings made. (para 71);

3.4.7 Implicit in the words “take action” is that the Public Protector is herself empowered to
decide on and determine the appropriate remedial measure. And “action”
presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in
these words suggests that she necessarily has to leave the exercise of the power
to take remedial action to other institutions or that it is power that is by its
nature of no consequence; (para 71(a));

3.4.8 She has the power to determine the appropriate remedy and prescribe the
manner of its implementation (para 71(d));

3.4.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress
or undo the prejudice, impropriety, unlawful enrichment or corruption, in a
particular case (para 71(e));

3.4.10 Section 182(2) of the Constitution directs that the Public Protector has the additional
powers and functions prescribed by national legislation.

3.4.11 The Public Protector is further mandated by the Public Protector Act to investigate
and redress maladministration and abuse or unjustifiable exercise of power in the
conduct of state affairs. Section 6(5)(a) and (b) of the Public Protector Act specifically
empowers the Public Protector to investigate any maladministration in connection with
the affairs of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (PFMA).

3.4.12 Eskom is a state-owned entity and its conduct falls within the ambit of the Public Protector.

3.5 The Public Protector’s powers and jurisdiction to investigate and take appropriate remedial action was not disputed by Eskom.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where he/she would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not Eskom acted improperly in relation to the termination of Castle Terminal’s contract and in allegedly allowing the participation of Aurecon and Voltex in the Tender: GEN 3135, as well as in its general management of the tender concerned.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been complied with by Eskom to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration. Where the Complainant has suffered any prejudice, the idea is to place him as close as possible to where he would have been had Eskom complied with the regulatory framework setting the applicable standards for good administration.

4.2.5 Jurisprudence and touchstones from previous Public Protector Reports were also considered and applied.

4.3 On analysis of the complaint, the following were issues considered and investigated:
4.3.1 Whether Eskom's termination of Castle Terminal's contract was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act;

4.3.2 Whether Eskom's inclusion of Voltex in the Tender: GEN 3135 was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act;

4.3.3 Whether Eskom's inclusion of Aurecon in the Tender: GEN 3135 was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act; and

4.3.4 Whether Eskom's management of the Tender: GEN 3135 was improper, and if so, constituted improper conduct and/or maladministration as contemplated by section 6(5) of the Public Protector Act.

4.4 The key sources of information:

4.4.1 Documents received and considered:

4.4.1.1 Eskom tender: GEN 3060 documents for conducting of Electricity Efficiency Review on Eskom fleet comprising 15 Power Stations during the period 5 February 2010 to 31 March 2010;

4.4.1.2 Final Report on Conducting an Electricity Efficiency Review on Eskom Generation Fleet comprising 15 Power Stations, dated 22 October 2010;

4.4.1.3 Eskom's Notice of Acceptance, dated 21 December 2010;

4.4.1.4 Eskom Tender: GEN 3135 documents for the supply and installation of lighting fixtures for six (6) fossil fired power stations to realise energy efficiency during the period 03 January 2011 to 15 February 2011;
4.4.1.5 NEC 3 Engineering and Construction Contract No 4600025920 dated 14 January 2011;

4.4.1.6 Minutes of a site Meeting for the Tender: GEN 3135, held on 26 November 2010;

4.4.1.7 Minutes of negotiations meeting between Eskom and Castle Terminal dated 20 December 2010; and

4.4.1.8 Letter dated 27 January 2011 from Eskom to the Complainant.

4.4.2 Meetings and Interviews conducted:

4.4.2.1 A Meeting held with Messrs Bogale Molefe: Prevention and Detection Manager: Eskom Forensic and Anti-Corruption and Tim Makeba: Senior Advisor: Forensic and Anti-Corruption on 29 September 2011; and

4.4.2.2 A meeting held on 12 December 2016 with Mr Stanley Green, the Managing Director of Voltex (Pty) Ltd.

4.4.2.3 Interviews held with the Complainant on 25 May 2011; 06 March 2013; 03 October 2013; 06 November 2013; 06 June 2017; 06 July 2017 and 11 August 2017.

4.4.3 Correspondence sent and received:

4.4.3.1 Letter dated 11 February 2011 from Complainant’s Attorneys, Rammutla-at-Law Inc to the Public Protector;

4.4.3.2 Facsimile dated 24 February 2011 from Eskom’s Liwalam Jafta to Complainant’s Attorneys: Rammutla-at-Law Inc;

4.4.3.3 Letter dated 30 August 2011 from the Public Protector to Mr. Brian Dames, the former Chief Executive of Eskom;
4.4.3.4 Letter dated 7 October 2011 from Mr. Bob Sookrajh, the Acting General Manager Assurance and Forensic of Eskom to the Public Protector;

4.4.3.5 Letter dated 24 January 2012 from the Public Protector to Ms Thembeka Ndaba, Senior Manager Forensic and Anti-Corruption of Eskom;

4.4.3.6 E-mail dated 1 March 2012 from the Public Protector to Mr. Bob Sookrajh, the Acting General Manager Assurance and Forensic of Eskom;

4.4.3.7 Letter dated 13 February 2012 from Ms Thembeka Ndaba, Senior Manager Forensic and Anti-Corruption of Eskom to the Public Protector;

4.4.3.8 Letter dated 13 July 2012 from Mr. Bogale Molefe, Response Manager Forensic and Anti-Corruption of Eskom to the Public Protector;

4.4.3.9 Letter dated 8 May 2013 from the Public Protector to Mr. Brian Dames, the former Chief Executive of Eskom;

4.4.3.10 E-mail dated 9 May 2013 from the Public Protector to Mr. Tim Makeba, Senior Forensic and Anti-Corruption Analyst of Eskom;

4.4.3.11 Memorandum dated 25 May 2013 from Mr. Bogale Molefe: Prevention and Detection Manager: Eskom Forensic and Anti-Corruption Unit to the Public Protector;

4.4.3.12 Letter dated 27 June 2013 from Mr. Molofi Nkhabu, Senior General Manager Assurance and Forensic of Eskom to the Public Protector;

4.4.3.13 Notice issued in terms of section 7(9) (a) of the Public Protector Act to Eskom on 24 November 2016;
4.4.3.14 Letter from the Public Protector to Aurecon dated 24 November 2016;

4.4.3.15 Letter from the Public Protector to Voltex dated 24 November 2016;

4.4.3.16 Response to section 7(9) (a) Notice from Eskom dated 12 December 2016;

4.4.3.17 Response to section 7(9)(a) Notice from Voltex dated 16 January 2017;

4.4.3.18 Response to section 7(9)(a) Notice from Aurecon dated 15 December 2016;

4.4.3.19 Windeed Report dated 01 December 2016;

4.4.3.20 Tax Clearance Certificate of Castle Terminal valid for the period between 05 October 2010 to 05 October 2011;

4.4.3.21 Letter of Good Standing of Castle Terminal from the Compensation Commissioner’s Office valid issued on 28 December 2010 with a validity period up to 28 February 2011; and

4.4.3.22 Letter from CIPC to Public Protector dated 22 August 2017.

4.4.4 Legislation and other prescripts:

4.4.4.1 The Constitution of the Republic of South Africa;
4.4.4.2 The Public Protector Act No 23 of 1994;
4.4.4.3 The Public Finance Management Act No 1 of 1999;
4.4.4.4 Eskom Procurement and Supply Chain Management Procedure (32-188); and
4.4.4.5 Eskom Code of Ethics (Standard 32-527).
4.4.5 Case law

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

4.4.5.2 Khumalo and Another v Member of the Executive Council for Education Kwa-Zulu Natal (CCT 10/13) [2013] ZACC 49.

4.4.5.3 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) BCLR 618.

4.4.5.4 Sokhela & others v MEC, Agriculture & Environmental Affairs (Kwa-Zulu - Natal) & others ([2009] JOL 23782 (KZP) at para [52]).

4.4.6 Public Protector's Touchstone

4.4.6.1 Report No: 3 of 2015/16: Report of the Public Protector on investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against PRASA.

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

5.1 Regarding whether Eskom's termination of the contract of Castle Terminal was improper:

Common cause issues
5.1.1 It is common cause that the contract between the parties was signed by the Complainant on 12 January 2011 and Eskom on 14 January 2011 respectively.

5.1.2 Mr Liwalam Jafta, Eskom’s former Senior Legal Advisor: Regulation and Governance issued Castle Terminal with a notification of intention to cancel the contract on 02 February 2011, after Castle Terminal’s submission of the request for extension of the end date of the contract period from 15 February 2011 to 17 April 2011, submitted on 17 January 2011.

5.1.3 It is also common cause that on 27 January 2011, Mr L Reddy, Eskom’s Project Manager issued a letter to Complainant rejecting Castle Terminal’s request for the extension of time.

5.1.4 Further, that on 24 February 2011, Mr Jafta advised the Complainant that Eskom’s CEO referred Castle Terminal’s letter of request for extension to them and that same was being considered.

5.1.5 It is also common cause that on the same date, 24 February 2011, Mr Jafta notified the Complainant by letter that Eskom had the opportunity to review and consider the discussions and documentation involved in the matter and had concluded that the agreement between the parties had come to an end through the effluxion of time.

5.1.6 The notification letter also stated that since no work had been started at Grootvlei and Arnot power stations, Eskom had decided to restart the tender process soon and consequently, Castle Terminal’s request for extension could not be entertained any further.

5.1.7 It is also common cause that a clause for penalties (delay damages) of R5000 per day formed part of the agreement between the Parties and that a discount of R1, 3
million was granted by the Complainant to Eskom, but was not recorded in the NEC 3 agreement or the Deviation of Schedules or the initial Notification of Acceptance of Castle Terminal's proposal by Eskom.

5.1.8 The issue for determination by the Public Protector was whether or not Eskom's termination of the contract was improper.

Issues in dispute

5.1.9 Eskom conceded that the contract number 4600025920 with Castle Terminal in Tender: GEN 3135 had come to an end but denied that it was improperly terminated by Eskom, as alleged by the Complainant.

5.1.10 Eskom denied the Complainant's assertion that Eskom should have referred a dispute for arbitration when Castle Terminal raised the time constraint regarding the contract period, from 03 January 2011 to 15 February 2011, due to the delay in the signing of the contract by the parties on 12 and 14 January 2011 respectively.

5.1.11 Eskom submitted in a response through its Group Company Secretary and Acting Head: Legal and Compliance, Ms Suzanne Daniels dated 12 December 2016 to the Public Protector's notice issued in terms of section 7(9)(a) of the Public Protector Act, dated 24 November 2016 (section 7(9) Notice), that it was in disagreement with the provisional findings and conclusion reached by the Public Protector. It made the following submissions:

5.1.11.1 Eskom issued a notice of intention to terminate the contract with Castle Terminal in accordance with the provisions of the NEC 3 Engineering and Construction Contract (NEC 3) in terms of which the parties were to be guided by the procedure in clause W1 for dispute resolutions, which states that any party may refer a dispute that arises out of or in connection with the contract to the Adjudicator.
5.1.11.2 Despite Castle Terminal’s submission of the request on 17 January 2011, Eskom notified Castle Terminal of its final refusal to grant the request on 24 February 2011, long after the contract term came to an end on 15 February 2011 through expiry of the contract period.

5.1.12 Voltex submitted on 16 January 2017 to the Public Protector’s Section 7(9) Notice issued to Eskom, that Castle Terminal was deregistered as a company from the CIPC records when it was awarded a contract by Eskom and therefore its contract was invalid.

5.1.13 However, the Tax Clearance Certificate from SARS issued on 05 October 2010 valid until 05 October 2011 and the Letter of good standing from the Compensation Commissioner issued on 28 December 2010 valid until 28 February 2011 confirmed that Castle Terminal was in good standing during the period when the tender was awarded.

5.1.14 On 22 August 2017, the CIPC advised the Public Protector that Castle Terminal was in a process of deregistration on 12 January 2011 and that its *legal persona* could only be withdrawn upon final deregistration of the entity concerned. According to the CIPC records, Castle Terminal was only referred for final deregistration on 26 August 2016.

5.1.15 It then follows from the above that Castle Terminal was not deregistered during the time when it contracted with Eskom.

*Application of the relevant law*

5.1.16 The legal framework applicable to this issue is Eskom’s Code of Ethics (32-527) relating to transparency and fairness regarding the management of Complainant’s contract.
5.1.17 Eskom’s Code of Ethics provides at item 3.3.14 that (Eskom) “to constantly act in a respectful, professional manner that promotes trust, loyalty, transparency, and discipline and a commitment to honesty and fairness at all times”. Eskom must therefore act in a transparent and fair manner at all times.

5.1.18 It follows from the evidence considered, that Eskom did not grant Castle Terminal’s request for extension due to the expiry of the contract period despite the challenges raised in the request concerned.

5.1.19 However, Eskom’s conduct relating to the refusal to grant the extension of time to Castle Terminal, but deciding to restart the tender process again, which could have also contributed to the delay which Eskom was arguing against, compromised the requirement of fairness and transparency in the process.

Conclusion

5.1.20 The contract between the parties came to an end through the lapse of time. However, either party to the contract had a right to refer the dispute raised by Castle Terminal regarding the time period for arbitration, in terms of paragraph 8 of the initial Notification of Acceptance dated 21 December 2010, in which Eskom stated that “We confirm that the Adjudicator for this contract will be appointed when a dispute arises”.

5.2 Regarding whether Eskom improperly included Voltex to participate in Tender: GEN 3135:

Common cause issues

5.2.1 It is common cause that Eskom included Voltex in the Tender: GEN 3135. The issue to be determined was whether or not such inclusion was improper.
5.2.2 Eskom conceded during the investigation that the inclusion of Voltex in the tender concerned was improper. It further advised that it subjected the Project Manager: Mr Shanil Singh and Mr Mdakane: Procurement Manager within Eskom's Group Commercial to an internal disciplinary action for allowing Voltex to participate in the Tender: GEN 3135.

5.2.3 Eskom admitted that it was undesirable to include Voltex in the tender as Voltex was involved in the Pre-tender Audit, but nevertheless argued that its inclusion did not prejudice Castle Terminal in delivering service on its contract.

5.2.4 In its response dated 21 June 2013 to the Public Protector, Eskom refuted the allegation that there was any fronting between Voltex and Aurecon. However, it conceded that it was aware of the fact that Aurecon had earlier sub-contracted Voltex on the Pre-tender Audit for the lighting fraction on which it earlier appointed Aurecon to conduct. This assertion was supported by Aurecon and Voltex in their respective responses which refuted the allegation of fronting between Aurecon and Voltex.

5.2.5 Eskom further conceded that the sub-contracting relationship between Voltex and Aurecon in the Pre-tender Audit was discussed and agreed to with Eskom. It however, refuted the allegations that Voltex had prepared tender documents for Eskom on Tender: Gen 3135.

5.2.6 Eskom's Response Manager: Forensic and Anti-Corruption, Mr. Bogale Molefe acknowledged in a letter dated 13 July 2012 to the Public Protector that Mr. Mdakane, the Procurement Manager within Eskom's Group Commercial was subjected to a disciplinary hearing on 15 June 2012 for the invitation of Voltex to participate in the Tender: GEN 3135 and was found guilty and given a written warning which was valid for a period of six months.

5.2.7 The letter from Mr Molefi Nkhabu dated 27 June 2013 confirms that Mr Mdakane, and Mr Shanil Singh were subjected to disciplinary process for their involvement of Voltex in Tender: GEN 3135. However, Mr Singh's penalty was not indicated.
5.2.8 The issue for determination by the Public Protector was whether or not Eskom’s inclusion of Voltex in the Tender: GEN 3135 was improper.

*Issues in dispute*

5.2.9 Eskom submitted in its response to the section 7(9)(a) Notice on 12 December 2016 that the provisional finding of the Public Protector that the involvement of Voltex is in violation of section 195(1) of the Constitution is incorrect. This submission cannot be sustained as Eskom had already conceded the impropriety in the inclusion of Voltex in the tender contrary to the requirement to maintain a high standard of professional ethics.

5.2.10 Whereas Voltex submitted in its response to the section 7(9) Notice dated 16 January 2017 that any negative findings against or concerning Voltex would be fundamentally tainted by procedural irregularity, the submission is incorrect as the Public Protector followed the correct procedures and made the findings against Eskom based on its conduct and not that of Voltex.

5.2.11 The submission fails to address the fact that Voltex was a participant in the Pretender Audit and that its suggested specifications were used by Eskom in Tender: GEN 3135 and was therefore improperly included by Eskom in the tender contrary to the provision of clause 3.7 (c) of Eskom’s Procurement and Supply Chain Management Procedure.

5.2.12 Voltex argued that its inclusion in Tender: GEN 3135 was not irregular and, in support of its argument, made reference to the Judgment of the Supreme Court of Appeal in Aurecon South Africa (Pty) Limited v City of Cape Town dated 9 December 2015, in which the Appeal Court held that *Aurecon was not precluded in terms of clause 95 of the City of Cape Town’s Supply Chain Management Policy, the Supply Chain Management Regulations made in terms of section 168 of the Local Government: Municipal Finance Management Act 56 of 2003 or for any reason from bidding for the City of Cape Town’s tender 459C/2010/2011 or for any tender pertaining to the decommissioning of the Athlone Power Station which is*
based on the draft scope of work prepared by the joint venture between Aurecon Engineering International (Pty) Ltd and ODA (Pty) Ltd.

5.2.13 Voltex's submission fail to distinguish the facts that in the present matter, the finding of impropriety against Eskom for its inclusion in the Tender: GEN 3135 is based on Eskom’s Procurement and Supply Chain Management Procedure: 32-188 implemented on 1 December 2006, [reviewed version 32-1034 signed 2010/2011] (Eskom’s Procurement and SCM Procedure) relating to the prohibition of the supplier from participating in the first tender, whose specifications it developed, or whose specification is used as a standard in the main tender.

5.2.14 The submissions by Voltex that there is no basis for the Public Protector's provisional remedial action outlined in the section 7(9)(a) Notice, relating to its inclusion in the tender cannot be sustained.

Application of the relevant law

5.2.15 The issue relating to procurement is regulated by section 217(1) of the Constitution which provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Eskom must therefore apply a system that is in compliance with these five essential procurement principles when it contracts for goods and services.

5.2.16 The relevant provision of the Constitution that relates to accountability in the public administration is section 195(1) which provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. These principles provide, among others that a high standard of professional ethics must be maintained and that public administration must be accountable.

5.2.17 Eskom must in terms of section 195(1) of the Constitution, therefore maintain a high standard of professional ethics and be accountable and when it contracts for
services, apply a system that is transparent, fair, equitable, competitive and cost effective as envisaged in section 217(1) of the Constitution.

5.2.18 Eskom’s supply chain management is regulated by Eskom’s Procurement and SCM Procedure: 32-188, among others, the prohibition of the supplier from participating in the first tender whose specifications it developed or whose specification is used as a standard in the main tender, as well as the Constitution relating to transparency and fairness in contracting for services or goods.

5.2.19 Eskom’s Procurement and SCM Procedure provides at clause 3.7(c) that suppliers’ specification are not to be used as a standard except where a true sole supply situation exists. It further provides that where Eskom personnel are not qualified to develop the specification, a supplier may be paid to do so, but this would exclude that supplier from participating in at least the first tender for the item/s concerned.

5.2.20 Eskom conceded that it was aware that Voltex was sub-contracted by Aurecon in the Pre-tender Audit to conduct audit on the lighting fixtures, and therefore, Voltex should not have been allowed to participate in Tender: GEN 3135.

**Conclusion**

5.2.21 Eskom was therefore required in terms of clause 3.7(c) of Eskom’s Procurement and SCM Procedure not to allow Voltex to participate in the Tender: GEN 3135.

5.3 Regarding whether Eskom’s inclusion of Aurecon in the Tender: GEN 3135 was improper:

**Common cause issues**

5.3.1 According to part 4 on contract number 4600024744 of the Final Report on Conducting an Electricity Efficiency Review on Eskom Generation Fleet comprising 15 power stations dated 22 October 2010, Aurecon was responsible for the Audit on HVAC and Water and Voltex was responsible for Audit on lighting.
5.3.2 The issue for determination was whether or not Aurecon was improperly included in the Tender: Gen 3135 by Eskom.

*Issues in dispute*

5.3.3 Aurecon and Eskom disputed that Aurecon was included in Tender: GEN 3135 as alleged by the Complainant.

5.3.4 Eskom submitted in its response to the Public Protector during December 2016 that Aurecon was not involved in the tender in issue.

5.3.5 Aurecon confirmed in its response to the Public Protector dated 15 December 2016 that it did not participate in the Tender: GEN 3135 and further denied that it fronted Voltex in the tender concerned.

*Conclusion*

5.3.6 According to evidence received, Aurecon did not participate in Tender: GEN 3135.

5.4 *Regarding whether Eskom’s management of the Tender: GEN 3135 was improper:*

*Common cause issues*

5.4.1 It is common cause that:

5.4.1.1 Voltex conducted audit on the lighting fixtures in Eskom’s Pre-tender Audit during October 2010 and that its suggested specification of material was used by Eskom in the Tender: GEN 3135.

5.4.1.2 Eskom improperly included Voltex to participate in Tender: GEN 3135, as conceded by Eskom in its response to the Public Protector dated 21 June 2013.

5.4.1.3 The formal contract between Castle Terminal and Eskom was signed by the parties on 12 and 14 January 2011 respectively, about 10 days after the set date of commencement of the contract, being 03 January 2011, in terms of the Notification
of Acceptance of Castle Terminal’s proposal regarding the tender, signed by Mr P Du Toit, Senior Manager: Commercial Generation Department of Eskom on 21 December 2010.

5.4.1.4 The nature of the project was complex, required significant resources and logistics in terms of delivery, distance, occupational health and safety, access to sites and all related requirements and that the timelines given to Castle Terminal were tight.

5.4.1.5 Eskom refused to grant Castle Terminal an extension of time period when the contract was only signed 10 days later, but had decided to re-start the tender process despite the alleged tight timelines.

5.4.1.6 The minutes of the meeting to discuss Castle Terminal’s request for extension held on 20 January 2011 provides that Eskom would revert to Castle Terminal regarding way forward by 28 January 2011. On 02 February 2011, Eskom served Castle Terminal with a notice of termination of the contract for breach of contract.

5.4.1.7 According to paragraph C1.1 of the NEC 3 contract, Castle Terminal became the “Contractor” after the signing of the acceptance part of Offer and Acceptance by Eskom.

5.4.1.8 In terms of paragraph 11.2(9), the key contract period was set as being from 03 January 2011 to 15 February 2011.

5.4.1.9 Eskom confirmed in its letter dated 7 October 2011 that Aurecon sub-contracted Voltex to conduct reviews on the lighting portion of the Pre-tender contract.

Issues in dispute

5.4.2 The Complainant alleged that Eskom did not treat him fairly as it gave him limited time to comply with the contract conditions while it gave Voltex, by virtue of it having taken part in the Pre-tender Audit, sufficient time to prepare for the tender in issue. Eskom and Voltex denied the allegation.
5.4.3 The issue for determination by the Public Protector was whether Eskom’s management of the Tender: GEN 3135 was improper.

5.4.4 Eskom argued that both tenderers were treated fairly and nothing material was hidden from Castle Terminal that was revealed after the conclusion of the contract, which could have made it impossible for Castle Terminal to perform duties in accordance with the contract.

5.4.5 The above assertion cannot be sustained as Castle Terminal was given a limited time to familiarise itself with, prepare for and execute the service required while Voltex had insight of what was required as it participated in the Pre-tender Audit.

5.4.6 The Complainant asserted that Voltex had the required material readily available as the supplier and that the use of its specification codes worked in its favour while it impeded the efficiency of Castle Terminal in sourcing the relevant specified material.

5.4.7 Eskom argued that during a site meeting held on 26 November 2010, it informed the tenderers that though the specification of the product in Tender: GEN 3135 used Voltex codes, the tenderers were allowed to quote on alternative products as long as the use of those products would yield the desired energy saving results.

5.4.8 The NEC 3 contract provides that no amendments to or deviations from the Deviation of Schedules from the documents listed in the Tender Data and any addenda thereto shall not be valid unless contained in the Schedule of Deviations.

5.4.9 The assertion that tenderers were allowed to quote on alternative products should have been confirmed in the Schedule of Deviations prior to the awarding of the contract.

5.4.10 Eskom submitted in its letter to the Public Protector dated 21 June 2013 that the initial amount tendered for and the discount of R1.3 million were recorded on the minutes of its negotiation meeting with Castle Terminal, which was signed by the
parties and reported to the tender committee which approved and recorded it on the SAP system.

5.4.11 The Complainant’s argument was that the discount amount of R1, 3 million was not recorded in the main contract.

5.4.12 The Notification of Acceptance of Castle Terminal’s proposal referred to above as well as the minutes of negotiation meeting dated 21 December 2010, only provided that the contract value agreed upon was the amount to R 8 058 000.00 excluding VAT, but did not make reference to any discount.

5.4.13 The Notification of Acceptance concerned required in paragraph 4 that a formal contract be entered into by the parties.

5.4.14 It was observed during the investigation that the NEC 3 contract signed by the parties on 12 and 14 January 2011 respectively, did not mention the agreed contract amount of R 8 058 000.00 or the discount negotiated by Eskom and granted by Castle Terminal. Part C1.1, option B, of the NEC 3 contract makes provision for the inclusion of the total agreed amount of the contract by specifying that "The offered total of the Price excluding VAT is." However, the amount was not recorded therein.

Application of the relevant law

5.4.15 The legal prescripts applicable to this issue, which are outlined in detail hereinabove in paragraph 5.2, are: - The Constitution relating to the values and professional ethics that Eskom should have upheld during the management of the tender envisaged in sections 195 and 217 of the Constitution and Eskom’s Procurement and SCM Procedure as well as Eskom’s Code of Ethics relating to the ethical standard which Eskom should have applied in managing Tender: GEN 3135.

5.4.16 Eskom’s Procurement and SCM Procedure provides at clause 3.7(c) regarding the specification of requirements that suppliers’ specification are not to be used as a standard except where a sole supplier situation exists.
5.4.17 The supplier’s specification on Tender: GEN 3135 specified Voltex’s code as a standard requirement as acceded to by Eskom.

5.4.18 The time period within which Castle Terminal was supposed to prepare and deliver the service in terms of the Tender: GEN 3135 was minimal, taking into account the signing of the contract 10 days after the determined commencement date and the limited time for sourcing of the specified materials.

5.4.19 Voltex, which participated in the Pre-tender Audit, had more time to prepare for the delivery of the service in the Tender: GEN 3135 whereas Castle Terminal was given far less time to prepare.

5.4.20 The touchstone considered and applied from the previous Public Protector Report on an investigation into allegations relating to maladministration, financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA), Report No: 3 of 2015/6 relates to the principles espoused in section 217 of the Constitution.

5.4.21 On the duty of state functionaries to comply with and uphold the rule of law, the judgment of the Constitutional Court in Allpay Consolidated Investment Holdings (PTY) Ltd v Chief Executive Officer of the South African Social Security Agency (No 1) (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC) was considered and applied, in which Justice Froneman held that:

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

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

5.4.22 In Sokhela & others v MEC, Agriculture & Environmental Affairs (Kwa-Zulu - Natal) & others ([2009] JOL 23782 (KZP) at para [52]), the court held per Wallis J that:

“...the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. That is hardly surprising bearing in mind that one of the grounds upon which the decision of an administrator may be set aside is because irrelevant considerations were taken into account or relevant considerations were not considered.”

Conclusion

5.4.23 Eskom was required in terms of clause 3.7(c) of its Procurement and SCM Procedure to exclude Voltex from Tender: 3135.

5.4.24 Eskom was also required to observe the provisions of section 195(1) of the Constitution which requires state organs to be governed by the democratic values and principles of maintaining high standard of professional ethics.

5.4.25 Eskom was further required to manage Tender: GEN 3135 in line with the requirements of section 217(1) of the Constitution which provides that an organ of state must, when it contracts for goods or services, do so in accordance with a system which is fair, equitable, transparent and competitive.

5.4.26 Regarding deviation from the specified material mentioned in the Tender Documents, Eskom was required to include the deviation clause in the Schedule of Deviations to form an addendum to the NEC 3 contract.

5.4.27 It has been confirmed that the NEC 3 agreement makes provision at paragraph C1.1, option B, for the inclusion of the total price of the contract. However, despite the contract value having been agreed to during the negotiations on 20 December
2010, Eskom did not include it in the relevant paragraph of the NEC 3 contract signed on 12 and 14 January 2011.

5.4.28 It has further been confirmed that in order to foster transparency as envisaged in item 3.3.14 of Eskom’s Code of Ethics and section 217(1) of the Constitution, it was necessary for Eskom to record the agreed amount of R8 058 000.00 in the NEC 3 contract.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1 Regarding whether Eskom’s alleged termination of Castle Terminal’s contract was improper:

6.1.1 The allegation that Eskom’s cancellation of Castle Terminal’s contract was improper, is not supported by the evidence and information obtained during the investigation.

6.1.2 The contract between the parties came to an end on 15 February 2011, the date provided in the contract as the date for completion of the project.

6.1.3 Eskom only confirmed the expiry of time in its letter dated 24 February 2011 when it declined to grant a request for the extension of the period of the contract.

6.2 Regarding whether Eskom’s alleged inclusion of Voltex to participate in Tender: GEN 3135 was improper:

6.2.1 The allegation that the inclusion of Voltex to participate in Tender: GEN 3135 was improper, is substantiated.
6.2.2 The inclusion of Voltex in the Tender: GEN 3135 by Eskom was in violation of the provisions of clause 3.7(c) of Eskom’s Procurement and SCM Procedure and was not in line with the provisions of sections 195(1) requiring high level of professional ethics and 217(1) of the Constitution requiring contracting for services to be done in accordance with a system which is equitable, fair and competitive, as Eskom was aware that Voltex was initially sub-contracted by Aurecon in conducting a Pretender Audit on an Electricity Efficiency Review on the lighting fraction of the contract number 4600024744 with Eskom prior to the issuing of Tender: GEN 3135.

6.2.3 Accordingly, Voltex had an unfair advantage over other bidders, due to their prior knowledge of the specifications.

6.2.4 Eskom’s conduct in that regard amounts to failure to exercise due diligence and therefore constitutes maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

6.3 Regarding whether Eskom’s alleged inclusion of Aurecon in the Tender: GEN 3135 was improper:

6.3.1 The allegation that Eskom improperly included Aurecon to participate in Tender: GEN 3135 is unsubstantiated.

6.3.2 The alleged inclusion of Aurecon in the Tender: GEN 3135 was not supported by the evidence received by the Public Protector during the investigation and no act of improper conduct or maladministration could be found against Eskom in this regard.
6.4 Regarding whether Eskom’s management of the Tender: GEN 3135 was improper:

6.4.1 The allegation that Eskom’s management of Tender: GEN 3135 was improper, is substantiated.

6.4.2 Eskom’s conduct was in contravention of clause 3.7(c) of Eskom’s Procurement and SCM Procedure and not in line with the provisions of sections 195(1) requiring a high level of professional ethics and 217(1) of the Constitution which required Eskom in contracting with Castle Terminal and Voltex, to do so in accordance with a system that is fair, equitable, transparent and competitive as Voltex had participated in the Pre-tender Audit and was improperly included by Eskom in Tender: GEN 3135 in which Voltex’s specified material code was used, contrary to the provision of clause 3.7(c) of Eskom’s Procurement and SCM Procedure.

6.4.3 Eskom’s conduct in the above regard constitutes maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1)(a) of the Constitution.

7. REMEDIAL ACTION

Appropriate remedial action to be taken as envisaged in section 182(1) (c) of the Constitution is the following:

7.1 The Minister of Public Enterprises to:

7.1.1 Take cognisance of the findings regarding the improper conduct and maladministration mentioned in the report.
7.2 The Chairman of Eskom Board to ensure that:

7.2.1 The Board takes cognisance of the findings regarding the improper conduct and maladministration against Eskom mentioned in the report and consequently the Board issues a written apology to the Complainant.

7.2.2 The Board, as the Accounting Authority, must ensure that in future the Group Chief Executive properly conduct due diligence, vets and authorises contracts of service providers to ensure that a supplier whose specification is used as a standard is excluded from the first tender with a view to ensure compliance with clause 3.7(c) of Eskom’s Procurement and SCM Procedure and the principles envisaged in section 195(1) and 217(1) of the Constitution to prevent a recurrence of the improper conduct and maladministration outlined in the report.

7.2.3 The Group Chief Executive considers the amendment of Eskom’s Procurement and SCM Procedure to prescribe the compulsory inclusion of the agreed full amount of the contract in the main contract to foster transparency as envisaged in item 3.3.14 of Eskom’s Code of Ethics and section 217(1) of the Constitution.

7.3 The Group Chief Executive of Eskom ensures that:

7.3.1 Eskom conducts due diligence, properly vets and authorises contracts of service providers to ensure that a supplier whose specification is used as a standard is excluded from the first tender with a view to ensure compliance with clause 3.7(c) of Eskom’s Procurement and SCM Procedure and the principles envisaged in section 195(1) and 217(1) of the Constitution to prevent a recurrence of the improper conduct and maladministration outlined in the report.

7.3.2 Eskom’s Procurement and SCM Procedure be amended to prescribe the compulsory inclusion of the agreed full amount of the contract in the main contract to foster
transparency as envisaged in item 3.3.14 of Eskom's Code of Ethics and section 217(1) of the Constitution.

7.3.3 Eskom issues a written apology to the Complainant within 30 days regarding Eskom's improper conduct and maladministration referred to in this report.

8. MONITORING

8.1 The Chairman of Eskom to submit an implementation plan indicating how the remedial action referred to in paragraph 7.2 above will be implemented, within 30 working days from the date of this report.

8.2 The Chief Executive of Eskom to submit an implementation plan indicating how the remedial action referred to in paragraph 7.3 above will be implemented, within 30 working days from the date of this report.

8.3 All actions requested in this report as part of the remedial action taken in terms of the Public Protector's powers under section 182(1) (c) of the Constitution to be finalised within six months and a final report be presented to the Public Protector.

8.4 Each remedial action listed in paragraph 7 above is legally binding on the person directed to implement, unless it has been reviewed and set aside by the Court or an appropriate interim Court Order to stay the implementation of the remedial action is obtained within the period stated therein.
"The principle of legality is applicable in all exercise of public power and not only in administrative action as defined in PAJA. It requires that all exercise of public power are, at minimum, lawful and rational."

Justice Skweyiya in Khumalo and Others v Member of the Executive Council for Education: Kwa-Zulu Natal (CCT 10/13) [2013] ZACC 49

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA.
DATE: 02 / 10 / 2017

Assisted by the Good Governance and Integrity