Dr Poncho Mokaila  
Head of Department  
Department of Rural, Environment and Agricultural Development  
Private Bag X 94  
MMABATHO  
2735

Dear Dr Mokaila

INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENT AND AGRICULTURAL DEVELOPMENT TO EFFECT PAYMENT FOR WORK DONE BY MLB CONSTRUCTION ON CONTRACT NUMBER NW/68500 FOR THE REFURBISHMENT OF TAUNG COLLEGE OF AGRICULTURE

Attached hereto is my report on an investigation into the above matter for your information.

Your attention is specifically directed to the remedial action taken in terms of section 182(1) (c) of the Constitution and dealt with in paragraph 8 of the report for your implementation.

Best wishes

[Signature]

ADV BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA  
DATE: 08/03/2017
The Honourable, Manketsi Emily Tlhape, MPL
MEC for Rural, Environment and Agricultural Development
Private Bag X 94
MMABATHO
2735

Dear Honourable Manketsi Emily Tlhape

INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENT AND AGRICULTURAL DEVELOPMENT TO EFFECT PAYMENT FOR WORK DONE BY MLB CONSTRUCTION ON CONTRACT NUMBER NW88500 FOR THE REFURBISHMENT OF TAUNG COLLEGE OF AGRICULTURE

Attached hereto is my report on an investigation into the above matter for your information.

Your attention is specifically directed to the remedial action taken in terms of section 182(1) (c) of the Constitution and dealt with in paragraph 8 of the report for your implementation.

Best wishes

[Signature]

ADV BUSI SIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 08/03/2017
Mr. L B Molełowatladi and Ms. Lumka ka M'Belle
6908 Magogoe Village
MAFIKENG
2745

Dear Messrs

INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENT AND AGRICULTURAL DEVELOPMENT TO EFFECT PAYMENT FOR WORK DONE BY MLB CONSTRUCTION ON CONTRACT NUMBER NW88500 FOR THE REFRUBISHMENT OF TAUNG COLLEGE OF AGRICULTURE

Attached hereto is my report on an investigation into the above matter for your information.

Best wishes

ADV BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 08/02/2017

PUBLIC PROTECTOR SOUTH AFRICA

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FAILURE BY NORTH WEST PROVINCIAL DEPARTMENT TO PAY FOR SERVICES RENDERED BY MLB CONSTRUCTION ON CONTRACT NUMBER NW 88500

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENTAL AND AGRICULTURAL DEVELOPMENT TO EFFECT PAYMENT FOR WORK DONE BY MLB CONSTRUCTION ON CONTRACT NUMBER NW 88500 FOR THE REFURBISHMENT OF TAUNG COLLEGE OF AGRICULTURE.
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Executive Summary

(i) This is the Public Protector's report 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 No. 23 of 1994.

(ii) The report communicates the Public Protector's findings and the appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged maladministration and undue delay by the North West Province Department of Rural, Environment and Agricultural Development (the Department) in effecting payment for work done by Mr Lesley Molelowatiadi and Ms Lumka ka M'Belle.

(iii) Mr Molelowatiadi lodged the complaint together with his business partner Ms Lumka ka M'Belle on 28 March 2012, on behalf of the company MLB Construction CC Building and Renovations (hereinafter referred to as Complainant). The Complainant alleged wrongful refusal to pay by the Department on various payments for work done on contract number NW 88500 for the refurbishment and renovation of Taung College of Agriculture.

(iv) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action, and section 8(4) of the Public Protector Act regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(v) The Department was cooperative in the investigation but noticeably failed to produce material evidence in support of their submissions in many of the Public Protector's engagements with its officials.
(vi) On analysis of the complaint, the following issues were considered and investigated:

(a) Whether the Department improperly failed to pay the Complainant a 10% retention fee on the total contract price originally agreed to at the commencement of the project;

(b) Whether the Department improperly failed to pay the Complainant an amount of R797 055.55 for building materials purchased at the commencement of the project;

(c) Whether the Department improperly deducted an amount of R43 460.00 from the Complainant's final account paid by the Principal Agent to the Complainant's labourers without the Complainant's consent;

(d) Whether the Department improperly deducted an amount of R274 000.00 from the Complainant's final account and paid it to the Complainant's domestic sub-contractors resulting in double payment;

(e) Whether the Department improperly overpaid Naledi Builders as the initial cession entered into was for R2 954 512.67, the total amount paid to Naledi was R7 735 448.72 resulting in excess payment of R3 503 951.80;

(f) Whether the Department improperly overpaid Jankowitz Electrical an excess payment of R1 819 375.98;

(g) Whether the Principal Agent improperly failed to follow proper procurement procedures when appointing Mpepele Trading 98CC; and

(h) Whether the Department improperly failed to pay the claimed amount of R244 995.55 to the Complainant's which was on payment certificate number 1.
(vii) The investigation process included an analysis of applicable laws, correspondence, meetings with officials from the Department, perusal of documents and consideration of applicable legislation and prescripts.

(viii) In an attempt to resolve the matter, two (2) Alternative Dispute Resolution (ADR) sessions were held with the parties in accordance with section 6(4)(b) of the Public Protector Act. The first meeting took place on 13 March 2013. The second meeting took place on 14 November 2013.

While the meeting held on 13 March 2013, failed to resolve the dispute, an oral agreement was reached on the following issues:

(a) Payment to the Complainant for material on site in the amount of R797 055.55

It was agreed that the Department would produce evidence that the Complainant was paid for the said material. It was also agreed that in the absence of such evidence, the amount would be deemed to be owed to the Complainant as they had provided sufficient evidence that they bought the material in question.

(b) Double Payment of wages to the Complainant's labourers in the amount of R43 460.00

It was agreed that the Department should pay the Complainant an amount of R43 460.00 as the Complainant had the responsibility to pay the labourers' wages and that it did so. There was no responsibility on the part of the Department to pay the Complainant's labourers without getting any consent from it. The Department agreed with the Public Protector that the Department will pay the above mentioned amount to the Complainant on or before 14 April 2013.
(c) Improper deduction of R274 000.00 from the Complainant's final account which was paid to the Complainant's subcontractors resulting in double payment

The Department agreed that they will pay the Complainant an amount of R274 000.00 with interest.

(ix) After the Department failed to comply with the agreement and findings following the ADR sessions, it was decided that further investigations would be conducted by the Public Protector.

(x) Upon completion of the investigation a notice issued in terms of section 7(9) of the Public Protector Act was addressed to the Head of Department (HOD) Dr. Poncho Mokaila.

(xi) In arriving at the findings, the Public Protector was guided by the standard approach adopted by the office, which simply asks: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

(xii) As is customary, the "what happened" enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. The question regarding what should have happened on the other hand relates to the standard that the conduct in question should have complied with.

(xiii) In determining the standard that the Department and its functionaries should have complied with to avoid improper conduct or maladministration, the Public Protector was guided, as is customary, by the Constitution, national legislation, contract, applicable policies and guidelines. Key among these policies was the Principal Building Agreement between the Complainant and the Department.
(xiv) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding whether the Department improperly failed to pay the Complainant a 10% retention fee on the total contract price originally agreed at the commencement of the project:

(aa) The allegation that the Department is indebted to the Complainant to the amount of R1 030 172.20 as a 10% retention fee deducted from approved invoices is not substantiated;

(bb) In terms of the Principal Building Agreement the retention fee is deducted from regular progress payment as a percentage of the contract and is held by the Department as a safeguard against defects which may subsequently develop in future and which the contractor may fail to remedy;

(cc) The Complainant signed deeds of cession agreements with a number of subcontractors, which were voluntarily entered into by the Complainant; and

(dd) By virtue of the signed cession agreements, the subcontractors became the Department’s direct contractors in terms of clause 22 of the conditions of the contract and were thus entitled to payment of the retention fee, not the Complainant.

(b) Regarding the Department’s alleged failure to effect payment in the amount of R797 055.55 to the Complainant for building materials purchased at the commencement of the project:

(aa) The allegation that the Department is indebted to the Complainant to the amount of R797 055.55 for building material on site is partially substantiated;
(bb) The Complainant was paid an amount of R184 700.00 from its claim, the balance of the payment in the amount of R612 355.55 owed to them is outstanding;

(cc) The Department failed to prove that payment was made to the Complainant for the materials purchased; and

(dd) The Department’s failure to pay an amount of R612 355.55 owed to the Complainant for materials purchased constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act and is improper as envisaged in section 182(1) of the Constitution.

(c) Regarding the Department’s improper deduction of an amount of R43 460.00 from the Complainant’s final account paid by the Principal Agent to the Complainant’s labourers without the Complainant’s consent:

(aa) The Complainant’s allegation that the Department improperly deducted an amount of R43 460.00 from its account to pay its labourers without its consent is substantiated;

(bb) The Department due to the failure by the Complainant to pay its labourers, paid the Complainant’s labourers. The Complainant failed to provide evidence that it paid salaries to the labourers at the end of November 2007;

(cc) The Department did not have the Complainant’s authority to make the payment of R43 460.00 towards their labourer’s wages for the month of November 2007; and
(dd) The Department's conduct in deducting an amount of R43 460.00 from the Complainant's final account without any form of consent or authority from the Complainant to pay its labourers constitutes maladministration as envisaged in section 6(4)(l) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

(d) Regarding the Department's alleged improper deduction of the amount R274 000.00 from the Complainant's final account and payment thereof to the Complainant's domestic sub-contractors resulting in double payment:

(aa) The allegation that the Department improperly deducted an amount of R274 000.00 from the Complainant's final account, which was supposedly for payment made to the contractor's domestic sub-contractors is substantiated;

(bb) The Department did not have the Complainant's authority to make payment of R274 000.00 towards its appointed sub-contractors and further the Department could not explain the deduction since the Complainant had effected payment to the subcontractors; and

(cc) The Department's conduct in deducting an amount of R274 000.00 from the Complainant's final account constitutes maladministration as envisaged in section 6 (4) (l) of the Public Protector Act and improper conduct as envisaged in section 182 (1) of the Constitution.
(e) Regarding whether the Department overpaid Naledi Builders as the initial cession entered into was for R3 750 000.00, the total amount paid to Naledi Builders was R7 253 951.80 resulting in excess payment of R3 503 951.80:

(aa) The allegation that the Department improperly made an excess payment of R3 503 951.80 to Naledi Builders is substantiated. The allegation of excess payment was also confirmed by the Departmental internal investigative report dated 31 January 2013; and

(bb) The excess payment in this regard constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act and improper conduct as envisaged in Section 182(1) of the Constitution.

(f) Regarding whether the Department overpaid Jankowitz Electrical as the initial cession entered into was for R2 884 480.67, the total amount paid to Jankowitz Electrical was R4 703 856.65 resulting in excess payment of R1 819 375.98:

(aa) The allegation that the Principal Agent improperly made an excess payment of R1 819 375.93 is not substantiated. This allegation was also confirmed by the Departmental investigative report dated 31 January 2013; and

(bb) Jankowitz Electrical was paid an amount of R2 760 571.64 resulting in a saving of R123 909.03.
(g) Regarding whether the Principal Agent improperly failed to follow proper procurement procedures when appointing Mpepule Trading 98CC:

(aa) The allegation that the Principal Agent improperly appointed Mpepule Trading without following proper procurement procedures is substantiated;

(bb) The Principal Agent, who was delegated by the Department's accounting officer, appointed Mpepule Trading 98CC for rendering services of training to the Complainant's employees and certified payment in the amount of R800 000.00 to Mpepule Trading 98CC;

(cc) The Principal Agent failed to call for quotations in respect of the actual requirements and instead requested proposals from service providers;

(dd) The Principal Agent failed to carry out due diligence in ensuring that Mpepule Trading 98CC was an accredited service provider; was registered in terms of section 24 of the Skills Development Act No. 97 of 1998; ascertain the company registration number and whether Mpepule Trading was a registered tax payer and VAT vendor; and

(ee) The Principal Agent's failure to follow proper procurement procedures and failure to carry out due diligence constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4) (l) of the Public Protector Act.
(h) Regarding whether the Department improperly failed to pay the claimed amount of R244 995.55 to the Complainant which was on payment certificate number 1:

(aa) The allegation that the Department improperly failed to pay the claimed amount of R244 995.55 but instead paid R82 688.52 is not substantiated; and

(bb) There was no evidence found to support the allegation and that the Complainant has submitted invoices in the amount of R244 995.55.

(xv) The appropriate remedial action that the Public Protector is taking in terms of section 182 (1) (c) of the Constitution is the following:

(a) The MEC for Rural, Environment & Agricultural Development:

The MEC must take appropriate steps to ensure that all members of the Department are made aware of the report and are sensitised about compliance with public procurement laws, policies and prescripts.

(b) The Head of Department:

(aa) The Head of Department must as a matter of urgency effect payment of R612 355.55 to the Complainant, the amount of which is for the Complainant’s material on site. This amount is to be paid with interest from the date it became due to the date of payment at the rate of 15.5% per annum in terms of section 1(1) and (2) of the Prescribed Rate of Interest Act No. 55 of 1975.

(bb) The Head of Department must take appropriate steps against the Principal agent for their role in paying the Complainant’s labourers without its consent.
(cc) The Head of Department must as a matter of urgency effect payment of R274 000-00 to the Complainant, the amount of which was irregularly deducted from the Complainant's account. This amount is to be paid with interest from the date it became due to the date of payment at the rate of 15.5% per annum in terms of section 1(1) and (2) of the Prescribed Rate of Interest Act No. 55 of 1975.

(dd) The Head of the Department must take appropriate action against the Principal Agent for its role in the excess payment of R3 503 951.80 made to Naledi Builders and ensure that such amount is recovered from the Principal Agent.

(ee) Where evidence of criminality is found, the South African Police Service and the HAWKS should be alerted and requested to take appropriate action with a view of prosecution and civil recovery of monies found to have been improperly paid or misappropriated.

(ff) Where evidence of non-compliance with the Income Tax Act No. 58 of 1962 is found, it should be reported to the South African Revenue Services with a view of prosecution and civil recovery of monies which has been misappropriated.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE NORTHERN WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENTAL AND AGRICULTURAL DEVELOPMENT TO EFFECT PAYMENT FOR WORK DONE BY MLB CONSTRUCTION ON CONTRACT NUMBER NW 88500 FOR THE REFURBISHMENT OF TAUNG COLLEGE OF AGRICULTURE

1. INTRODUCTION

1.1 This is the Public Protector's report 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 No. 23 of 1994 (the Public Protector Act).

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

1.2.1 The Member of the Executive Council responsible for the Department of Rural, Environment and Agricultural Development in the North West Province, Ms. Manketse Thape;

1.2.2 The Head of Department for the North West Provincial Department of Rural, Environment and Agricultural Development, Dr. Poncho Mokaila;

1.2.3 A copy of the report is also provided to the Complainant, Mr. Lesley Botoko Molelomela and Ms. Lumka ka M'Belle on behalf of their business, MLB Construction CC.

1.3 The report relates to an investigation on the alleged failure by the North West Provincial Department of Rural, Environmental and Agricultural Development (the Department) to effect payment for the work done by MLB Construction under contract number NW 88500 for the refurbishment of Taung College of Agriculture (the College).
2. **THE COMPLAINT**

2.1 On 28 March 2012, Mr. Lesley Molelowatladi and Ms. Lumka ka M’Belle lodged a complaint at the Public Protector’s North-West Provincial office, wherein they alleged that on 30 August 2007, the Department awarded them a tender as per Tender Number NW 88500 for the amount of R10 301 722.00 (including VAT) for the refurbishment and renovation of Taung College of Agriculture.

2.2 Mr. Molelowatladi and Ms. Ka M’Belle are owners of MLB Construction CC Building and Renovations (CK no. 2002/011038/23) (the Complainant).

2.3 The Complainant alleged the following:

2.3.1 That during the awarding of the above-mentioned tender, the Department also appointed a Principal Agent, Bigen Africa Services (Pty) Ltd (the Principal Agent), as project managers.

2.3.2 Further, that the Department owes MLB Construction the following amounts for work done in terms of the contract:

2.3.2.1 **Payment in the amount of R1 030 172.20 which represents 10% retention fees deducted on the total contract price:**

   a) The Complainant alleged that on completion of the project on 25 August 2009, the Department failed to pay it the retention fee of 10% of the contract price amounting to R1 030 172.20. It indicated that it was entitled to the said payment as per the contract between the parties.

   b) The Complainant alleged that the Department deducted the retention fees.
c) The Complainant further alleged that the purpose of the 10% deduction of retention fee, was to cover the cost of repairs to latent defects that may arise after the completion date, should the Complainant not be in a position to repair such defects.

d) The Complainant also alleged that the Department was under a legal obligation, during the five (5) years from the date of completion, to present to it a list detailing all latent defects (if any) that arose from the refurbishment of the College.

e) Should the Department fail to submit the list detailing any latent defects, or should the list be submitted and the cost of repairs is less than the amounts deducted from the payment certificates as retention fees, the Department is obliged, five (5) years after the completion date, to pay the Complainant the amounts so deducted or the balance thereof.

f) The Complainant alleged that during the five (5) years after the completion date, the Department never submitted any list detailing defects, and that as a result thereof, it was entitled to all the monies deducted from the approved invoices as retention fees.

g) The Complainant alleged that the Department failed to pay them the retention fees.

2.3.2.2 Payment in the amount of R797 055.55 in respect of building materials purchased at the commencement of the project:

a) The Complainant alleged that during the existence of the contract they purchased material to the value of R797 055.55. The material was certified by the Quantity Surveyor, but the cost of the material was never paid for by the Department.
b) The Complainant further indicated that they addressed numerous correspondence to the Principal Agent requesting payment of R797 055.55 for the material purchased at the commencement of the project.

c) It alleged that it submitted invoices to the Department dating from September 2007 to November 2007 to substantiate its claim but that the Department still refused to effect payment.

2.3.2.3 Improper deduction of an amount of R43 460.00 by the Principal Agent:

(a) The Complainant alleged that the Department deducted an amount of R43 460.00 from their final account. Furthermore that on enquiry about the deduction, the Principal Agent informed them that due to their failure to pay their labourers' salaries for the month of November 2007, the Principal Agent assumed responsibility for same on their behalf and thereafter made a deduction of the said payment from MLB Construction's final account.

(b) The Complainant alleged that the Department had earlier refused to pay its labourers, but then paid their salaries for the month of November 2007. The Department therefore had no right to pay them without MLB Construction's consent. They further contended that this was a domestic matter between the labourers and MLB Construction and that neither the Department nor the Principal Agent should have involved themselves in the matter.

2.1.2.4 Failure by the Department to pay the Complainant an amount of R274 000.00 improperly deducted from the Complaint's account:

(a) The Complainant alleged that the Department deducted an amount of R274 000.00 from their final account and that when they enquired about
the reasons for the deduction, the Principal Agent advised them that the
deduction was due to MLB Construction failure to pay its nominated sub-
contractors. The Complainant further alleged that the Department was
not entitled to deduct the said amount from its final account as it had
already paid its subcontractors.

(b) The Complainant further alleged that the Department refused to refund
the said deducted money.

2.1.2.5 Payment of an excessive amount by the Department to Naledi Builders:

(a) The Complainant alleged that they signed a Deed of Cession with Naledi
Builders (registration number CK2004/020131/23) for an amount of
R3 750 000.00. The Complainant further indicated that the Principal
Agent deviated from the signed cession regarding the agreed amount
payable to Naledi Builders by paying the latter an amount of
R7 253 951.81, which amounted to an excess of R3 503 951.80.

2.1.2.6 Payment of an excessive amount by the Department to Jankowitz
Electrical:

(a) The Complainant further alleged that they signed a Deed of Cession with
Jankowitz Electrical (registration number 42401115420) for an amount of
R2 884 480.67. The Complainant further indicated that the Principal
Agent deviated from their signed cession regarding the agreed amount
payable to Jankowitz Electrical by paying the latter an amount of
R4 703 856.60 which amount is in excess by R1 819 735.93.
2.1.2.7 Failure to follow proper tender processes in the appointment of Mepule Trading 98CC:

(a) The Complainant alleged that when the Department awarded them the tender for the refurbishment and renovation of the College, there was a budget allocated for Professional Fees and Disbursement. The implication thereof was that the Department had to appoint a service provider who would offer skills and development training to their employees and to pay the appointed service provider from the budget which was classified under Professional Fees and Disbursements.

(b) The main contractor had to be involved in the final selection of this subcontractor, yet the Principal Agent chose to contravene Section 21.1.2 of the contract by not involving the main contractor.

(c) The Principal Agent appointed Mepule Trading 98CC to conduct training but the service provider is not accredited and thus did not qualify to conduct training for the Complainant's labourers.

2.1.2.8 Failure by the Department to pay the claimed amount of R244 995.55 to the Complainant in respect of payment certificate 1:

(a) The Complainant alleged that the Department improperly failed to pay them the claimed amount of R244 995.55 for work done which was on payment certificate number 1.

(b) The invoice from which payment certificate 1 was generated related to preliminaries for site establishment, construction of a notice board, insurance, HIV awareness and management of works.

(c) MLB Construction further alleged that the Department only paid them an amount of R82 668.52 instead of the claimed amount.
(d) The Complainant indicated that despite repeated requests for explanations for failure to pay the full invoice, the Department failed to do so.

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

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

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power 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.

3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also gives the Public Protector the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
3.5 The North West Provincial Department of Rural, Environmental and Agricultural Development is an organ of state and its conduct amounts to conduct in state affairs. As a result the matter falls within the jurisdiction of the Public Protector.

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

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The complaint was initially classified as a matter capable of resolution by way of a conciliation process in line with section 6(4)(b) of the Public Protector Act. However, after several failed attempts to conciliate the matter, a formal investigation was undertaken. The investigation process included correspondence, interviews, sourcing of documents and the sourcing and application of relevant laws and related prescripts.
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 if there is a discrepancy, does that discrepancy amount to improper conduct or maladministration?

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

4.2.2 The question regarding what happened is answered through a factual investigation 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 the Department improperly failed and/or delayed in making payments to the Complainant and whether the Department made any improper payments to cessionaries in the matter alleged.

4.2.3 The enquiry regarding what should have happened focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state in an effort to guard against maladministration and prejudice. The specific questions in this regard focused on whether or not the alleged improper failure by the Department to effect payments to the Complainant was in line with the Principal Building Agreement and whether or not the
Department deviated from the Deeds of Cession read with the Principal Building Agreement when making payments to the nominated sub-contractors.

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

4.2.5 The investigation revealed that it involved much more than a mere case of undue delay or failure by the Department to pay the Complainant. A number of issues relating to maladministration and good governance were uncovered during the investigation.

4.3 On analysis of the complaint, the following were the issues considered and investigated:

4.3.1 Whether the Department improperly failed to pay the Complainant a 10% retention fee on the total contract price originally agreed at the commencement of the project;

4.3.2 Whether the Department failed to effect payment in the amount of R797 055.55 to the Complainant for building materials purchased at the commencement of the project;

4.3.3 Whether the Department improperly deducted an amount of R43 460.00 from the Complainant’s final account which was paid by the Principal Agent to the Complainant’s labourers without the Complainant’s consent;
4.3.4 Whether the Department improperly deducted an amount of R274 000.00 from the Complainant’s final account and paid it to the Complainant’s subcontractors resulting in double payment;

4.3.5 Whether the Department overpaid Naledi Builders an excess payment of R3 503 951.80;

4.3.6 Whether the Department improperly overpaid Jankowitz Electrical an excess payment of R1 819 375.98;

4.3.7 Whether the Department failed to follow proper procurement procedures when appointing Mpepule Trading 98CC; and

4.3.8 Whether the Department improperly failed to pay the claimed amount of R244 651.56 to the Complainant.

4.4 Key Sources of information:

4.4.1 Correspondence sent and received

(a) Letter issued by Public Protector to the Department dated 12 April 2012;

(b) Supporting documents received on 09 July 2013 from the Head of Department;

(c) A Notice in terms of Section 7(4) of the Public Protector Act issued to the Department on 31 October 2013;

(d) Letter dated 22 November 2013 received from the Head of Department;
(e) Notice in terms of Section 7(4) and (5) of the Public Protector Act issued on 01 November 2013 to the Office of the MEC and the Head of Department;

(f) Letter dated 17 May 2013 received from the Complainant;

(g) A second Notice in Terms of Section 7 (4) of the Public Protector Act issued on 15 January 2014;

(h) Copy of a letter dated 24 July 2008 from Quantity Surveyors, B & L Bloemfontein;

(i) Copy of a letter dated 31 August 2007 from Quantity Surveyors, B & L Bloemfontein;

(j) Copy of a letter dated 05 September 2009 from Complainant to Bigen Africa;

(k) A copy of the Discretionary letter dated 19 December 2014;

(l) A copy of a Section 7(9) Notice delivered to the Department on 22 December 2014;

(m) Undated letter to Public Protector received on 01 August 2016 from Naledi Builders;

(n) Letters from the Complainant to the Principal Agent; and

4.4.2 Meetings Held

(a) A meeting between the Principal Agent and the Public Protector's North West Provincial Office held on 3 March 2012;

(b) ADR sessions held on the 14 November 2013 between the Public Protector, the Complainant, the Head of Department (Dr Poncho Mokaila), Chief Financial Officer (Mr. Pakiso Mothupi), and the Investigating Officer of the Department (Mr. Ananda Amarisinhghe);

(c) Meeting between the Department and the Public Protector, held in Pretoria on 27 April 2013;

(d) A follow up meeting between the Head of Department and the Public Protector held on 27 June 2013; and

(e) A follow up ADR session chaired by the Deputy Public Protector, Advocate Kevin Malunga at the North-West Provincial Office (Mahikeng) on 06 February 2014.

4.4.3 Documents

(a) Copy of the Tender Documentation Provisional Bills of Quantities Project number 02420607 dated May 2007;

(b) Copy of the Principal Building Agreement of the Joint Building Contracts Committee (Principal Building Agreement) dated 30 August 2007;

(c) Copy of the Deed of Cession between Afrisearch Resources/MLB Construction Joint Venture and Naledi Builders dated 31 March 2006;
(d) Copy of the Deed of Cession between Afrisearch Resources/MLB Construction Joint Venture and Jankowitz Electrical dated 15 January 2008;

(e) Copies of payment certificates no 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18;

(f) A report on an internal investigation conducted by the Department regarding the allegations raised by the Complainant received on 15 February 2013 from the former Head of Department/DED (Dr. N.E. Mogajane);

(g) A report entitled "Analytical Findings on Payment Certificates issued to Afrisearch/MLB Construction JV (AMJV) commissioned by the Public Protector and prepared by Delta Built Environment Consultants (Pty) Ltd; and

(h) Addendum to a report entitled "Analytical Findings on Payment Certificates issued to Afrisearch/MLB Construction JV (AMJV) commissioned by the Public Protector and prepared by Delta Built Environmental Consultants (Pty) Ltd.

4.4.4 Legislation and other prescripts

(a) The Constitution of the Republic of South Africa, 1996;

(b) Public Protector Act No. 23 of 1994;

(c) Public Finance Management Act No 29 of 1999;

(d) Skills Development Act No. 97 of 1998; and

(e) National Treasury Practice Note No. 8 of 2007/2008.
5. EVIDENCE AND INFORMATION OBTAINED DURING INVESTIGATION

5.1 Whether the Department improperly failed to pay the Complainant 10% retention fee on the total contract price originally agreed at the commencement of the project:

5.1.1 It is common cause that in terms of the Principal Building Agreement, entered into between the Department and the Complainant on 30 August 2007, the former was entitled to retain 10% from all approved invoices as retention fee on work undertaken by the Complainant.

5.1.2 It is common cause that in terms of the Principal Building Agreement, entered into between the Department and the Complainant on 30 August 2007, the former is entitled to retain, from the balance after the deduction of a retention fee, a further 10% as a construction guarantee where the contractor has failed to provide a construction guarantee to the Department.

5.1.3 It is not disputed that during the period between 04 September 2007 and 23 December 2007, the Complainant was paid an amount of R1 668 509.10 in terms of payment certificates 1; 2; 3; 5 and 7.

5.1.4 It is not disputed that after the above payments, the Complainant ceded all the work to other nominated sub-contractors by way of Deeds of Cession.

5.1.5 It is not disputed that after the signing of these cessions, and during the period 01 February and 31 July 2008 the Complainant was paid an amount of R1 229 980.44 in terms of payment certificates numbers 10; 11; 12; 13; 14 and 15.

5.1.6 It is not disputed that at the expiry of the defects liability period the Principal Agent must either issue a defect list or a certificate of final completion in case
where there are no defects. Should the Principal Agent fail to do so, it shall then be deemed that there were no defects.

5.1.7 It is not disputed that the retained construction guarantees are payable as part of the final account in terms of clause 34.8 of the Principal Building Agreement.

5.1.8 It is disputed by the Complainant that payment was made for the 10% retention fee from payment certificates numbers 1; 2; 3; 5; 7; 10; 11; 12; 13; 14 and 15 by the Department.

5.1.9 The Department indicated that during the period of 30 August 2007 to 25 January 2008, the Complainant undertook building works and submitted invoices which were paid in terms of payments certificates no 1; 2; 3; 5 and 7.

5.1.10 The Department further alleges that the retention fees in terms of the payment certificates no 1; 2; 3; 5 and 7 amounted to R180 691.70, an amount which was deducted from the Complainant’s approved invoices;

5.1.11 According to the Department the said amount of R180 691.70 was paid to the Complainant in terms of payment certificate number 10.

5.1.12 The Department alleges that except for the R180 691.70 paid to the Complainant, the latter was not entitled to any other payment as retention fee as no other monies were deducted from their approved invoices.

5.1.13 The Department further alleges that an amount of R162 552.72 was deducted as construction guarantees were paid to the Complainant as part of payments made in terms of payment certificates numbers 10; 11; 12; 13; 14 and 15.
5.1.14 On the Department's submission the retention fees deducted from payment certificates numbers 11; 12; 13; and 15 were for the work undertaken by the cessionary and not the Complainant.

5.1.15 The Department further alleges that all other retention fees deducted from certificates numbers 11; 12; 13; and 15 were paid to the sub-contractors as per payment certificates numbers 16; 17 and 18.

5.1.16 The Department submitted that as a result of the above no further retention fees are owed to the Complainant.

5.1.17 In terms of a letter forwarded to the Public Protector on 01 August 2016, from Naledi Builders, the Complainant played no role in the project after the contract was ceded to them. There were no interactions between Naledi Builders and the Complainant.

5.1.18 In terms of the Report by Delta Built Environment Consultants (Pty) Ltd (hereinafter referred to as DELTA), a company commissioned by the Public Protector to advise on the investigation, and on the documents available, it is not clear which option the parties agreed to in relation to retention and or security (guarantees)

5.1.19 DELTA further advised that even in respect of Contracts of Cession, both retention and guarantees were not dealt with.

5.1.20 The Department and the Complainant signed a contract on 30 August 2007.

5.1.21 The Complainant ceded the completion of the contract to both Jankowitz Electrical and Naledi Builders on 15 January 2008 and 31 March 2008 respectively.
5.1.22 During the period between 30 August 2007 and 25 January 2008, the Complainant submitted invoices which were paid as per payment certificates no 1; 2; 3; 5 and 7.

5.1.23 The Department deducted amounts totalling R180 169.70 from payment certificates numbers 1; 2; 3; 5 and 7 which amount represented 10% retention fees.

5.1.24 The Department further deducted amounts totalling R162 552.72 from payment certificates numbers 1; 2; 3; 5 and 7 which amount to the represented construction guarantees.

5.1.25 The Complainant never undertook subsequent work and all payments made to the Complainant in terms of payment certificates numbers 10; 11; 12; 13; 14 and 15 were not for work done but were refunds of retention fees, construction guarantees, and profit and attendance.

5.1.26 The Department paid the Complainant an amount of R180 169.70 and R162 552.72 as retention fees and construction guarantees respectively.

5.1.27 Therefore on the evidence submitted the Department is not indebted to the Complainant in the amount of R1 030 172.20. The total amount received by the Complainant was R2 908 036.95 of which 10% of it is R290 803.69.

5.2 Whether the Department improperly failed to effect payment of the amount of R797 055.55 to the Complainant for the material purchased during the building project:

5.2.1 The Complainant and the Department signed a contract on 30 August 2007.
5.2.2 The Complainant purchased material between the period 4 September 2007 and 15 January 2008.

5.2.3 The Complainant ceded the contract to various sub-contractors and stopped with building works on 15 January 2008.

5.2.4 The Complaint had been, at the time they stopped with building works, paid an amount of R1 668 509.09 in terms of payment certificates numbers 1; 2; 3; 5 and 7 for work done in terms of the contract until 15 January 2008.

5.2.5 It is not in dispute that in terms of the Department's Investigative Report dated 31 January 2013 the Complainant submitted invoices to the Department valued at R796 645.79 in order to substantiate its claim. These invoices are dated from 4 September 2007 to 15 January 2008.

5.2.6 It is in dispute that the Department owes the Complainant any outstanding monies for the material purchased.

5.2.7 The Department admitted that Naledi Builders took over material that was left on site.

5.2.8 It is disputed that the Department paid the Complainant an amount of R39 731.39 for material on site when the Complainant appointed Naledi Builders as a nominated sub-contractor.

5.2.9 It is disputed that an amount of R1 668 509.09 paid to the Complainant as per payment certificates numbers 1; 2; 3; 5 and 7 would not have included payment for material on site and/or payment for material which was part of the completed works.
5.2.10 In terms of the findings of DELTA, the Complainant was, in terms of payment certificates numbers 5, 6, 7, 8, 9, 10, 11, 12 and 13 paid an amount of R184 700.00 for materials on site.

5.2.11 The Department and the Principal Agent failed to produce evidence negating the Complainant’s claim that their company was never paid.

5.2.12 In terms of the Conditions of Contract, the Department is only required to remunerate the Contractor for materials on site which are not included in the completed works and whose existence is physically verified on the site at the time of certification of payment.

5.2.13 Payment certificates only indicate that an amount of R184 700.00 was paid to the Complainant in regard to the materials on site. The Department owes the Complainant an amount of R 612 355.55.

5.3 Whether the Department improperly paid the Complainant’s labourers an amount of R43 460-00 and deducted same from the Complainant’s final account without Complainant’s consent:

5.3.1 The Complainant requested that the Department pay its labourers’ salaries for the month of November 2007, however the Department refused to do.

5.3.2 Without obtaining prior approval from the Complainant and subsequent to the refusal to assist Complainant in discharging their financial obligation towards their labourers, the Department on 28 January 2008, paid the Complainant’s labourers an amount totalling R43 460.00 representing their wages for November 2007.
5.3.3 The Department submitted they deducted an amount of R 43 460.00 from the Complainant's account representing an amount the Department paid to the Complainant's labourers for November 2007 wages.

5.3.4. The Complainant could not provide proof that they paid their labourers for November 2007.

5.3.5. It is in dispute as to whether the Department had the authority to pay the Complainant's labourers for the month of November 2007 wages without obtaining their written authorisation after the Department had initially declined to accede to the Complainant's request for assistance in this regard.

5.3.6. The Department was under an obligation to seek the Complainant's authority to pay the labourers their wages for November 2007.

5.4 Whether the Department improperly deducted an amount of R274 000.00 from the Complainant's final account:

5.4.1 It is common cause that Complainant requested that the Department assist it to pay its domestic sub-contractors, however the Department refused to do.

5.4.2 Without obtaining prior approval from the Complainant and subsequent to the refusal to assist, the Department paid the Complainant's domestic sub-contractors an amount totalling R274 000.00.

5.4.3 It is in dispute whether the Department had the authority to make the deduction of the amount of R 274 000.00 and whether any requisite approval was necessary.

5.4.4 A copy of payment certificate number 10 indicates a deduction of R274 000.00 in item 3.7 of the certificate as direct payment to cessionaries.
5.4.5 The Complainant provided copies of cheques as proof that they did pay the domestic sub-contractors an amount of R274 000.00.

5.4.6 The Department was under an obligation to seek the Complainant’s authority to pay the latter’s domestic sub-contractors.

5.4.7 This amount should not have been deducted from the final account of the Complainant.

5.5 Whether the Department improperly overpaid Naledi Builders:

5.5.1 The cession entered into between the Complainant and Naledi Builders was for R3 750 000.00. The total amount paid to Naledi Builders was R 7 253 951.80.

5.5.2 The Departmental investigative report dated 31 January 2013 revealed that an excess payment of R3 503 951.80 was made to Naledi Builders.

5.5.3 In terms of the findings of DELTA, there is no proof of any approved site instructions, variation orders or contract indicating extra monies.

5.5.4 The Department made an excess payment for the amount of R 3 503 951.80.

5.6 Whether the Department improperly overpaid Jankowitz Electrical:

5.6.1 The Cession entered between the Complainant and Jankowitz Electrical was for R2 884 480.67. The total amount allegedly paid to Jankowitz by the Department is R4 703 856.60.
5.6.2 The Departmental investigative report dated 31 January 2013 did not indicate that a payment of R 4 703 856.60 was made to Jankowitz Electrical by the Department.

5.6.3 In terms of the findings of DELTA, the final account from the Principal Agent indicates that an amount of R2 760 571.64 was paid Jankowitz Electrical.

5.6.4 The Department did not make an excess payment for the amount of R 1 819 735.93 to Jankowitz but instead there was a saving of R123 909.00.

5.7 Whether the Principal Agent failed to follow proper procurement Procedures when appointing Mpepule Trading 98CC:

5.7.1 At the request of the Department and the accounting officer, the Principal Agent was requested to call quotations for training from prospective service providers;

5.7.2 It is common cause that the Principal Agent did not follow proper procurement procedure by failing first to call for quotations and instead called for proposals from three service providers.

5.7.3 The Principal Agent failed to determine whether Mpepule Trading 98CC was an accredited service provider before its appointment, this was confirmed by the Departmental investigative report.

5.7.4 The Department confirmed that invoices submitted by Mpepule Trading 98CC clearly showed that Mpepule Trading 98CC was not an accredited service provider.
5.7.5 It is also common cause that the Principal Agent violated clause 20.1.3 of the JBCC contract in the appointment of this service provider without the involvement of the main contractor.

5.7.6 Mpepule Trading 98CC trained forty (40) persons, four (4) courses, for ten (10) days at a fee of R20 000.00 per person.

5.7.7 Mpepule Trading 98CC was paid for an HIV Awareness program which was not part of the service scope.

5.7.8 On investigation Mpepule Trading 98CC’s details could not be established, these include the company’s registration number; contact details; directors and VAT registration number.

5.8 Whether the Department improperly failed to pay the claimed amount of R244 955.55 to the Complainant in respect of payment certificate number 1:

5.8.1 The Department paid the Complainant an amount of R82 688.52 as per payment certificate number 01 for site establishment.

5.8.2 It is disputed that the Complainant made a claim for the amount of R 244 955.55 but the Department only paid MLB Construction an amount of R82 688.52 through payment certificate number 01.

5.8.3 Copy of a letter dated 31 August 2007 from B & L Bloemfontein (Pty) Ltd recommended payment of R82 688.52 which the Principal Agent approved and the Department paid.
5.8.4 Copy of a letter dated 05 September 2009 from the Complainant to the Principal Agent indicates a request for payment of an invoice in the amount of R82 668.52, which the Principal Agent approved and the Department paid.

5.8.5 On the evidence available the Complainant submitted a claim for a payment of R82 668.52 which was processed and paid to the Complainant as per payment certificate number 01, the Complainant could not provide sufficient evidence that a balance of R162 287.03 was due to them.

5.8.6 In the premise, the allegation could not be supported by any evidence that shows that the Complainant is still owed as alleged.

6. **THE ADMINISTRATIVE STANDARDS THAT SHOULD HAVE BEEN COMPLIED WITH**

6.1 Whether the Department improperly failed to pay the Complainant a 10% retention fee on the total contract price originally agreed at the commencement of the project:

6.1.1 The manner in which the retention fee is dealt with is governed by the Principal Building Agreement;

6.1.2 The retention fee is deducted from regular progress payments as a percentage of the contract amount and is held by the employer as a safeguard against defects which may subsequently develop and which the contractor may fail to remedy;

6.1.3 In terms of clause 27.1 of the Principal Building Agreement, the latent defects liability period for the works shall commence at the start of the construction period and end five (5) years from the date of achievement of final completion. It then follows that if after five (5) years from the date of final completion, no
defects are identified, that the retention amount is paid to the main contractor (the Complainant);

6.1.4 Further in terms of clause 5.1 of the respective Deeds of Cession entered into between the main contractor and two nominated subcontractors (Jankowitz Electrical and Naledi Builders) the cedent (Complainant) cedes his right to receive payment of the ceded portion of the contract sum, to the cessionaries (nominated subcontractors); and

6.1.5 By virtue of the signed cession agreements, the subcontractors became the Department's direct contractors in terms of clause 22 of the contract and were thus entitled to payment of the retention fee.

6.1.6 Therefore MLB Construction is not entitled to be paid retention fees for the portions of the contract ceded.

6.2 Whether the Department improperly failed to effect payment of the amount of R797 055.55 to the Complainant for the material purchased at the onset of the project:

6.2.1 The manner, in which payment for material purchased is made, is governed by the Principal Building Agreement.

6.2.2 In terms of clause 3.1.6 the value of materials shall be included in the value certified.

6.2.3 In terms of clause 39.3.6 of the Principal Building Agreement, the employer shall be liable to the contractor for the cost of materials and goods including those ordered before cancellation where the contractor is bound to accept and make payment.
Clause 39.3.7 of the Principal Building Agreement also provides that the Principal Agent shall continue to certify the value of the material and goods for payment by the employer. The Department only paid a portion of the value for the materials on site, in the amount of R184 700.00, and could not provide evidence on numerous occasion that they paid the remainder of the value in the amount of R612 355.55. The Department owes the Complainant an amount of R612 355.55. The Department did not uphold the terms and conditions in the Principal Building Agreement. Whether the Department improperly paid the Complainant’s labourers an amount of R43 460.00 and deducted same from the Complainant’s final account without the Complainant’s consent: The manner in which direct payment is made to other parties, other than the main contractor, by the Principal Agent or employer (the Department) is governed by the Principal Building Agreement; In terms of clause 35, the principal agent must issue a special payment certificate to other parties being paid and provide copies thereof to the Contractor where the employer: a) Engages other parties to execute work in terms of clause 17.4 or 36.5.5 and; b) Elects to pay a nominated or selected subcontractor directly in terms of clause 20.6 or 21.6. Payment in terms of clause 17.4 provides for direct payment by the Principal Agent to another party for contract work done, where the main contractor has failed to perform such work, despite notice by the Principal Agent. In addition payment in terms of clause 36.5.5 provides for payment by the Principal Agent.
to another party for either the safeguarding, completion or rectification of defects of the contract work undertaken by the main contractor;

6.3.4 Further payment in terms of clause 20.6 provides for direct payment to a nominated subcontractor by the Principal Agent, where the contractor has failed to furnish proof of discharge of the latter's financial obligations to the nominated subcontractor. Whereas payment in terms of clause 21.6 provides for direct payment to a selected subcontractor by the Principal agent, where the contractor has failed to furnish proof of discharge of the latter's financial obligations to the selected subcontractor;

6.3.5 The Complainant's responsibility to pay its labourers arose in terms of a contract of employment between the contractor and his labourers, the matter is governed by common law;

6.3.6 It then follows from the above, that payment to other parties by the Department is limited to either parties directly engaged with the Department, or selected or nominated subcontractors. This further requires that the Department, in either of the aforementioned scenarios, give notice of the direct payment in question, to the main contractor;

6.3.7 It then follows that where the Complainant is unable to perform in terms of any agreement with parties outside those mentioned at paragraph 6.3.2 (b) above, such as the employment contract with the labourers, that the Department would require written consent from the Complainant to effect any such payment on their behalf to the labourers. In the absence of such a written consent, the Department has no legal authority to make such payment;

6.3.8 The Department was under an obligation to obtain written consent from the Complainant, authorising the Department to pay wages of the Complainant's labourers; and
6.3.9 The Department failed to abide by the terms of the contract, more specifically, the clauses mentioned above.

6.4 Whether the Department improperly deducted an amount of R274 000.00 from the Complainant's final account and paid it to the Complainant's domestic sub-contractors:

6.4.1 The manner in which direct payment is made to other parties, other than the main contractor, by the principal agent or employer is governed by the Principal Building Agreement, whereas the amount payable under the cession to the cessionary is provided for in the first deed of cession;

6.4.2 In this regard, reference is made to clause 35 as referred to in paragraph 6.3 above;

6.4.3 Further of particular importance is clause 20.6, which provides for direct payment to a nominated subcontractor by the Principal Agent, where the contractor has failed to furnish proof of discharge of the latter's financial obligations to the nominated subcontractor;

6.4.4 It therefore follows that direct payment to the nominated subcontractor may only be made where the main contractor (the Complainant) has failed to discharge their responsibility in this regard. Even to this end, a copy of the certificate payment herein should be provided to the main contractor;

6.4.5 It therefore follows that unless otherwise provided in the deed of cession and the main contract, which the amount provided for herein may not be deviated from;

6.4.6 The Complainant, being the main contractor, had a direct responsibility to pay its direct sub-contractors and they did so; and
6.4.7 It then follows that the Department was under an obligation to obtain written consent from the Complainant, authorising the Department to pay the Complainant's sub-contractors, the Department failed to obtain such consent from the Complainant. The Department thus failed to honour the terms stipulated in the contract.

6.5 Whether the Department improperly overpaid Naledi Builders:

6.5.1 The amount of payment (including conditions thereof) payable to Naledi Builders (the cessionary) by the Complainant (cedant and main contractor herein) is governed by the Deed of Cession (the Deed of Cession) entered into by the aforementioned parties on 31 March 2008 and which was effective from 25 January 2008;

6.5.2 In terms of the Deed of Cession, an amount of R3 750 000.00 was ceded to Naledi Builders by the Complainant. The amount represents a portion of the total contract amount of R10 301 722.00;

6.5.3 The cession was consented to by the Principal Agent in terms of clause 19.2 of the Principal Building Agreement;

6.5.4 The manner in which direct payment is made to the cessionary by the Principal Agent or employer is governed by the Principal Building Agreement, reference is made to clause 35 as referred to above;

6.5.5 Clause 32.0, more specifically 32.1, provides for adjustment to the contract value. It provides that the Principal Agent shall determine the value of adjustments to the contract value according to the bills of quantities;

6.5.6 No proof was provided by the Principal Agent nor the Department relating to approved site instructions, variation orders or contract instructions indicating payment of extra monies; and
6.5.7 Thus the excessive payment made to Naledi Builders in the amount of R3 503 951.80 was irregularly made by the Principal Agent and the Department and further not in accordance to the Principal Building Agreement.

6.6 Whether the Department improperly overpaid Jankowitz Electrical:

6.6.1 The amount of payment (including conditions thereof) payable to Jankowitz Electrical (the cessionary) by the Complainant (cedant and main contractor herein) is governed by the Deed of Cession (the Deed of Cession) entered into by the aforementioned parties on 05 November 2007 and which was effective from 07 November 2007;

6.6.2 In terms of the Deed of Cession, an amount of R2 884 480.67 was ceded to Jankowitz Electrical by the Complainant. The amount represents a portion of the total contract amount of R10 301 722.00;

6.6.3 The cession was consented to by the Principal Agent in terms of clause 19.2 of the Principal Building Agreement;

6.6.4 The manner in which direct payment is made to the cessionary by the Principal Agent or employer is governed by the Principal Building Agreement, reference is made to clause 35 as referred above;

6.6.5 Jankowitz Electrical was paid an amount of R2 760 571.64, thus the Principal Agent and the Department did not pay an excess amount of R1 819 375.98.

6.7 Whether the Principal Agent failed to follow proper procurement procedures when appointing Mpepule Trading 9BCC:

6.7.1 Section 217 of the Constitution provides that when an organ of state contracts for goods or services, it must do so in accordance to a system which is fair, equitable, transparent, competitive and cost effective;
6.7.2 Section 38 (1) (a) (iii) of the Public Finance Management Act No 29 of 1999 (PFMA) provides that the accounting officer of a department must ensure that the Department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective;

6.7.3 Similarly Regulation 16A3.2 (a) of the National Treasury Regulations issued in terms of the PFMA provides that a supply chain management system must be fair, equitable, transparent, competitive and cost effective;

6.7.4 National Treasury Practice Note No. 8 of 2007/2008 provides in paragraph 3.4 that competitive bids should be invited for transactions above R500 000.00 and should be advertised in appropriate media to ensure a greater exposure to potential bidders.

6.7.5 The Principal Agent who was delegated responsibilities by the Department’s accounting officer violated section 217 of the Constitution, section 38 of the PFMA and paragraph 3.4 of the National Treasury Practice Note No. 8 by requesting proposals from service providers.

6.7.6 In addition the Principal Agent failed to ensure that Mpepule Trading 98CC was in compliance with section 24 of the Skill development Act No. 97 of 1998 which provides that any person who wishes to provide employment services for gain must apply for registration to the Department of Labour in the prescribed manner.

6.7.7 Section 33 of the Skills Development Act No. 97 of 1998 states that it is a criminal offence to provide employment services for gain without being registered in terms of section 24.
6.8 Whether the Department improperly failed to pay the claimed amount of R244 955.55 to the Complainant which was claimed in respect of payment certificate number 1:

6.8.1 The manner in which claimed payments by the Complainant are paid by the Principal Agent is governed by the Principal Building Agreement;

6.8.2 In terms of clause 31 the payments are effected upon submission of the claim by the main contractor and after certification by the Principal Agent;

6.8.3 In terms of clause 40, should any disagreement arise between the parties arising out of the agreement, either party may give notice to the other to resolve such disagreement;

6.8.4 Where such disagreement is not resolved within 10 working days, such dispute shall be referred for adjudication in terms of JBCC Rules for Adjudication; and

6.8.5 The Complainant never embarked on a process mentioned under clause 40 and in addition they could not provide sufficient evidence proving that they were owed an amount of R244 995.55.

7. FINDINGS

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

7.1 Regarding whether the Department improperly failed to pay the Complainant a 10% retention fee on the total contract price originally agreed at the commencement of the project:

7.1.1 The allegation that the Department is indebted to the Complainant to the amount of R1 030 172.20 as a 10% retention fee deducted from approved invoices is not substantiated;
7.1.2 The retention fee is deducted from regular progress payment as a percentage of the contract and is held by the Department as a safeguard against defects which may subsequently develop in future and which the contractor may fail to remedy;

7.1.3 The Complainant signed deeds of cession agreements with a number of subcontractors, which were voluntarily entered into by the Complainant; and

7.1.4 By virtue of the signed cession agreements, the subcontractors became the Department’s direct contractors in terms of clause 22 of the conditions of the contract and were thus entitled to payment of the retention fee, not the Complainant.

7.2 Regarding the Department’s alleged failure to effect payment in the amount of R797 055.55 to the Complainant for building materials purchased at the commencement of the project:

7.2.1 The allegation that the Department is indebted to the Complainant to the amount of R797 055.55 for building material on site is partially substantiated;

7.2.2 The Complainant was paid an amount of R184 700.00 from their claim, the balance of the payment in the amount of R616 355.55 allegedly owed to them is still outstanding;

7.2.3 The Department failed to prove that payment was made to the Complainant for the materials purchased which was in violation of clause 39.3.6 of the Principal Building Agreement; and

7.2.4 The Department’s failure to pay an amount of R612 355.55 owed to the Complainant for materials purchased constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
7.3 Regarding the Department’s improper deduction of an amount of R43 460.00 from the Complainant’s final account paid by the Principal Agent to the Complainant’s labourers without the Complainant’s consent:

7.3.1 The Complainant’s allegation that the Department improperly deducted an amount of R43 460.00 from their account is substantiated;

7.3.2 The Complainant failed to provide evidence that they paid salaries to the labourers at the end of November 2007;

7.3.3 On the contrary the Department did not have the Complainant’s authority to make the payment of R43 460.00 towards their labourer’s wages for the month of November 2007; and

7.3.4 The Department’s conduct in deducting an amount of R43 460.00 from the Complainant’s final account without any form of consent or authority from the Complainant constitutes maladministration as envisaged in section 6(4)(l) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

7.4 Regarding the Department’s alleged improper deduction of the amount R274 000.00 from the Complainant’s final account and paid it to the Complainant’s domestic sub-contractors resulting in double payment:

7.4.1 The allegation that the Department improperly deducted an amount of R274 000.00 from the Complainant’s final account, which was supposedly for payment made to the contractor’s domestic sub-contractors is substantiated;

7.4.2 The Department did not have the Complainant’s authority to make payment of R274 000.00 towards his appointed sub-contractors and further the Department could not explain the deduction since the Complainant had effected payment to the subcontractors; and
7.4.3 The Department’s conduct in deducting an amount of R274 000.00 from the Complainant’s final account constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

7.5 Regarding whether the Department overpaid Naledi Builders as the initial cession entered into was for R3 750 000.00, the total amount paid to Naledi Builders was R7 253 951.80 resulting in excess payment of R3 503 951.80:

7.5.1 The allegation that the Department improperly made an excess payment of R3 503 951.80 to Naledi Builders is substantiated. The allegation of excess payment was also confirmed by the Departmental internal investigative report dated 31 January 2013; and

7.5.2 The excess payment in this regard constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act and improper conduct as envisaged in Section 182(1) of the Constitution.

7.6 Regarding whether the Department overpaid Jankowitz Electrical as the initial cession entered into was for R2 884 480.67, the total amount paid to Jankowitz Electrical was R4 703 856.65 resulting in excess payment of R1 819 375.98:

7.6.1 The allegation that the Principal Agent improperly made an excess payment of R1 819 375.93 is not substantiated. The finding was also confirmed by the Departmental investigative report dated 31 January 2013;

7.6.2 Jankowitz Electrical was paid an amount of R2 760 571.64 resulting in a saving of R123 909.03; and

7.6.3 Therefore the conduct of the Department in this regard did not constitute maladministration or improper conduct.
7.7 Regarding whether the Principal Agent improperly failed to follow proper procurement procedures when appointing Mpepule Trading 98CC:

7.7.1 The allegation that the Principal Agent improperly appointed Mpepule Trading 98CC without following proper procurement procedures is substantiated;

7.7.2 The Principal Agent appointed Mpepule Trading 98CC for rendering services of training to the Complainant’s employees and certified payment in the amount of R800 000.00 to Mpepule Trading 98CC;

7.7.3 The Principal Agent failed to call for quotations in respect of the actual requirements and instead requested for proposals from service providers;

7.7.4 The Principal Agent failed to carry out due diligence in ensuring that Mpepule Trading 98CC was an accredited service provider; was registered in terms of section 24 of the Skills Development Act No 97 of 1998; ascertain the company registration number and whether Mpepule Trading was a registered tax payer and VAT vendor;

7.7.5 The Principal Agent failed to follow a procurement process which was fair, equitable, transparent, competitive and cost effective which resulted in violation of section 217 of the Constitution, section 38 of the PFMA, regulation 16A3.2(a) of the National Treasury Regulation issued in terms of the PFMA and paragraph 3.4 of the National Treasury Practice Note No. 8 of 2007/2008; and

7.7.6 The Principal Agent’s failure to follow proper procurement procedures and failure to carry out due diligence constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.
7.8 Regarding whether the Department improperly failed to pay the claimed amount of R244 651.56 to the Complainant which was on payment certificate number 1:

7.8.1 The allegation whether the Department improperly failed to pay the claimed amount of R244 995.55 but instead paid R82 668.52 is not substantiated; and

7.8.2 No evidence was found to support the allegation and there was no proof that the Complainant submitted invoices in the amount of R244 995.55

8. REMEDIAL ACTION

The appropriate remedial action that the Public Protector is taking in pursuit of section 182 (1) (c) of the Constitution, with a view of addressing the maladministration, has been identified as follows:

8.1 The MEC for Rural, Environment & Agriculture Development

The MEC must take appropriate steps to ensure that all members of the Department are made aware of the report and are sensitised about the compliance with public procurement laws, policies and prescripts.

8.2 The Head of Department:

8.2.1 The Head of Department must as a matter of urgency effect payment of R612 355.55 to the Complainant, the amount of which was for the Complainant's material on site. This amount is to be paid with interest from the date it became due to the date of payment at the rate of 15.5% per annum in terms of section 1(1) and (2) of the Prescribed Rate of Interest Act No. 55 of 1975.

8.2.2 The Head of Department must take appropriate steps against the Principal Agent for their role in paying the Complainant's labourers without their express consent.
8.2.3 The Head of Department must as a matter of urgency effect payment of R274 000-00 to the Complainant, the amount of which was irregularly deducted from the Complainant’s account. This amount is to be paid with interest from the date it became due to the date of payment at the rate of 15.5% per annum in terms of section 1(1) and (2) of the Prescribed Rate of Interest Act No. 55 of 1975.

8.2.4 The Head of the Department must take appropriate action against the Principal Agent, for their role in the excess payment of R3 503 951.80 made to Naledi Builders and ensure that such amount is recovered from the Principal Agent.

8.2.5 Where evidence of criminality is found, the South African Police Service and the HAWKS should be alerted and requested to take appropriate action with a view of prosecution and civil recovery of monies found to have been improperly paid or misappropriated.

8.2.6 Where evidence of non-compliance with the Income Tax Act No. 58 of 1962 is found, it should be reported to the South African Revenue Services with a view of prosecution and civil recovery of monies which has been misappropriated.

9. MONITORING

9.1 The Public Protector will require -

9.1.1 An implementation plan from the Head of the Department indicating how the remedial action referred to in this report will be implemented within thirty (30) days from the date of this report;

9.1.2 A progress report from the Head of Department is required within thirty (30) days of submission of the implementation plan referred to above;
9.2.3 The Public Protector will monitor the implementation of the remedial action taken in this report.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 08/03/2017

Assisted by: Mr TK Kekana
Senior Investigator: Private Office