A report on an investigation into allegations of improper prejudice suffered by Nduza Cleaning and Security Services as a result of maladministration by the Kagisano-Molopo Local Municipality in awarding a security tender number: KMLM 2012-030 to FBL Enterprise

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Executive Summary

“Our task now is not to fix the blame for the past, but to fix the course for the future” - John F Kennedy

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

(ii) The report communicates my findings and appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged improper prejudice suffered by Nduza Cleaning and Security Services as a result of maladministration by the Kagisano-Molopo Local Municipality (the Municipality).

(iii) The Complainant is Mr Lucky Makwati an Entrepreneur in his own right and Spouse to the owner of Nduza Cleaning and Security Services (the Company). The Complainant lodged a complaint on 26 September 2012 on behalf of the Company alleging that the Municipality allocated Sambo Security and Protection, FBL Trading Enterprise (FBL) a security tender despite the fact that it did not comply with the requirements of the tender (functionality document), and should have been disqualified.

(iv) In the main the Complainant alleged that:

a) On 06 June 2012 the Municipality advertised the Provision of Security Services Tender number KLML 2012-030 and the closing date was 20 June 2012. The Company was amongst the companies that submitted tender applications.
b) The Municipality’s Bid Evaluation Committee (BEC) shortlisted FBL, the Company and Tshireletso Security at a meeting held on 25 June 2012.

c) On 26 July 2012, the functionality criterion was forwarded to the bidders by the Municipality with a request that it be completed and returned immediately. This request was made after the closing date of 20 June 2012.

d) The BEC reconvened and met on 30 July 2012 and recommended four (4) bidders.

1) FBL was irregularly awarded ten (10) points despite the fact that it did not submit the required documents under the category management operations i.e. detailed pictures / explanation of the control room and copies of license discs for patrol vehicles registered in the name of the company. As a result of the irregular allocation of ten (10) points to FBL under this category, FBL scored a total of seventy points (70) for functionality instead of sixty (60) points.

2) The Complainant further asserts that as a result of this failure to submit the required documents under the category management operations, FBL should have instead been disqualified.

3) The Bid Adjudication Committee (BAC) at a meeting held on 31 July 2012 recommended that FBL be appointed as the successful bidder for a period of twenty four (24) months with effect from 01 August 2012, for a total amount of Five Million Six Hundred and Seventy Eight Thousand, Eight Hundred and Forty Four Rand and Forty Eight Cents (R 5,678,844.48).

4) According to the appointment letter dated 01 August 2012, the contract between the Municipality and FBL was to end on 01 October 2014.
During the course of this investigation, it transpired that FBL was still contracted with the Municipality on a month to month basis.

5) After the awarding of the tender the Complainant requested access to the records of the decision to award the contract to FBL in terms of section 18(1) of the Promotion of Access to Information Act, 2000 (PAIA) and the Municipality failed to respond to such request.

(v) The investigation was conducted in terms of section 182 of 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 in terms of section 6(4) of the Public Protector Act, 1994, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level. The Municipality did not contest or dispute the jurisdiction of the Public Protector.

(vi) On analysis of the complaint, the following issues were considered and investigated:

a) Whether the Municipality improperly failed to follow proper procurement processes when appointing FBL and if so, does such failure constitute maladministration;

b) Whether the Complainant suffered prejudice as a result of the Municipality’s failure to follow proper procurement processes when appointing FBL;

c) Whether the Municipality failed to provide the Complainant with information/documentation relating to the appointment of FBL upon request, and if so whether such failure resulted in prejudice being suffered by the Complainant.
(vii) Upon completion of the investigation, a notice was issued in terms of section 7(9) of the Public Protector Act, addressed to the Municipal Manager of the Municipality.

(viii) Key laws and related prescripts taken into account to help determine if there had been maladministration by the Municipality were principally those imposing administrative standards that should have been upheld by the Municipality or its officials when awarding the tender to FBL. These include the Constitution, Municipal Finance Management Act 56 of 2003 (MFMA), Section 3(1) of Promotion of Administrative Justice Act (PAJA), 2000; Section 2 of the Supply Chain Management Policy of the Kagisano-Molopo Local Municipality, 2011 and PAIA.

(ix) The regulatory framework was also used to determine why the Municipality awarded a security tender to FBL despite the fact that it did not submit all the required documents for functionality under management operations.

(x) After careful examination of the evidence and information obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the Municipality, I make the following findings:

(a) Whether the Municipality improperly failed to follow proper procurement processes in appointing FBL and whether if so, such failure constitutes maladministration, I find that:

(aa) The allegation that the Municipality improperly failed to follow proper procurement processes in appointing FBL is substantiated:

(bb) The Municipality appointed FBL despite the fact that it did not submit all the required documents in the form of pictures of its actual control room
and copies of discs for two (2) patrol vehicles that are registered in its name in terms of the functionality document;

(cc) The Municipality's appointment of FBL despite its failure to submit the required documents in terms of the functionality document and despite it scoring less points than the Company was in violation of sections 2 and 38 of its Supply Chain Management Policy dated 15 June 2011, section 112(1) of the Municipal Finance Management Act No. 56 of 2003 (MFMA), Section 2(1) of the Preferential Procurement Policy Framework Act No. 5 of 2000 (PPPFA) and Section 217 of the Constitution. Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Whether the Company suffered prejudice as a result of the Municipality's improper failure to follow proper procurement processes when appointing FBL I find that:

(aa) The Complainant's suffered prejudice as a result of the Municipality officials conduct, had it not been due to the Municipality's conduct, his Company would have been awarded the tender and in terms of the Supreme Court of Appeal Judgment of Transnet Limited and Sechaba Photoscan (Pty) Ltd 98/03 the Municipality must pay him the total amount of R 649 909. 40 plus 15.5.%pa interest being 14.8% of the Complainant's tendered amount as stipulated in the Minutes of the Bid Re-Evaluation Committee Minutes dated 31 July 2012 would have been realised as profit by the Complainant if the tender was awarded to them. The Complainant is entitled to be placed in the position he would have been in but had the maladministration occurred as a result of the actions of the Municipality by failing to follow proper procurement processes.
(c) Whether the Municipality failed to provide the Company with information/documentation relating to the appointment of FBL upon request, and if so whether such failure results in prejudice being suffered by the Company, I find that:

(aa) The Complainant further suffered prejudice by virtue of the fact that contrary to sections 32 and 33(1)(2) of the Constitution—and section 3(1), (2) of the PAJA and Section 2(1)(g) of PPPFA the Complainant was not provided with reasons upon request as to why the Company was not awarded the tender despite it having scored higher points than FBL, which information would have assisted the Complainant in his challenging of the Municipality’s decision.

(bb) The Complainant’s prejudice was exacerbated by the fact that it has taken five (5) years for the Municipality to accept its wrongdoing and agree to remedy the injustice suffered by the Company.

(xi) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view to placing the Complainant as close as possible to where it would have been had the improper conduct or maladministration not occurred, while addressing systemic Supply Chain Management deficiencies in the Municipality, is to ensure the Municipality:

(aa) Issues a written apology to the Complainant for the Municipality’s failure to follow proper procurement processes and provide the necessary information/documentation after being requested to do so;

(bb) To within 90 days from the receipt of my report pay the Complainant an amount of R 649 909. 40 plus interest at 15.5% pa being 14.8 % profit as per the minutes of the Bid Re-Evaluation Committee would have been realised by the Complainant if the tender was awarded to them but for the maladministration on the part of the Municipality
(cc) Ensures that all its officials involved in Supply Chain Management are properly familiarized with the MFMA, with particular reference to following proper procurement processes in the applicable Policies and Legislative Prescripts in terms of the MFMA;

(dd) Terminates the month to month contract with FBL;

(ee) Takes appropriate steps to ensure that disciplinary action is taken against all the officials within the BEC and BAC, responsible for exposing the Municipality to such acts of maladministration and improper conduct in violation of the MFMA and Supply Chain and Procurement Processes and Procedures; and

(ff) within 90 days from the receipt of my report, appoints a service provider for the provision of security services in accordance with the MFMA and the Municipality’s supply chain management policy.
REPORT ON INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED BY NDUZA CLEANING AND SECURITY SERVICES AS A RESULT OF MALADMINISTRATION BY THE KAGISANO-MOLOPO LOCAL MUNICIPALITY IN AWARDING A SECURITY TENDER NUMBER: KMLM 2012-030 TO FBL TRADING ENTERPRISE.

1. INTRODUCTION

1.1.1. This is my report as the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23, 1994 (the Public Protector Act) following an investigation into alleged improper prejudice suffered by Nduza Cleaning and Security Services as a result of maladministration by Kagisano-Molopo Local Municipality in awarding a security tender number: KMLM 2012-030 to FBL Trading Enterprise(FBL).

1.2. The report is submitted in terms of section 8(1) of the Public Protector Act, to the Municipal Manager of Kagisano-Molopo Local Municipality, Mr A Khuduge;

1.2.1 Copies of the report are also provided to the following:

1.2.1.1. The Member of the Executive Council for Local Government and Human Settlements in the North West Provincial Government, Hon GF Gaolaolwe;

1.2.1.2. The Head of North West Provincial Department of Local Government and Human Settlements, Mr PE Motoko;

1.2.1.3. The Complainant, Mr Makwati.
1.3. The report relates to an investigation into the alleged improper prejudice suffered by Nduza Cleaning and Security Services (the Complainant) as a result of maladministration by the Kagisano-Molopo Local Municipality (the Municipality) lodged by the Complainant.

2. THE COMPLAINT

2.1. Mr Lucky Makwati an Entrepreneur in his own right and Spouse to the owner of Nduza Cleaning and Security Services lodged a complaint on 26 September 2012 on behalf of the Company. The Complainant alleged that the Municipality allocated FBL a security tender despite the fact that it did not comply with the requirements of the functionality document and should have been disqualified.

2.2. The specific allegations made by the Complainant are the following:

2.2.1 On 06 June 2012 the Municipality advertised the Provision of Security Services Tender number KLML 2012-030 and the closing date was 20 June 2012. The Company was amongst the companies that submitted tender applications.

2.2.2 The following bidders were shortlisted by the Bid Evaluation Committee (BEC) at the meeting held on 25 June 2012:

2.2.2.1. Sambo Security and Protection;

2.2.2.2. FBL Trading Enterprise (FBL);

2.2.2.3. Nduza Cleaning and Security Services (Nduza); and

2.2.2.4. Tshireletso Security.
2.2.3. On 26 July 2012, the functionality criterion was forwarded to the bidders by the Municipality with a request that it be completed and returned immediately. This request was made after the closing date of 20 June 2012.

2.2.4. The BEC reconvened on 30 July 2012 and recommended four (4) bidders.

2.2.5. FBL was irregularly awarded ten (10) points despite the fact that it did not submit the required documents under the category management operations, i.e. detailed pictures / explanation of the control room and copies of license discs for patrol vehicles registered in the name of the company. As a result of the irregular allocation of ten (10) points to FBL under this category of management operations, FBL scored a total of seventy points (70) for functionality instead of sixty (60) points.

2.2.6. The Complainant further asserts that as a result of this failure to submit the required documents under management operations, FBL should have instead been disqualified.

2.2.7. The Bid Adjudication Committee (BAC) at the meeting held on 31 July 2012 recommended that FBL be appointed as a successful bidder for a period of twenty four (24) months with effect from 01 August 2012, for a total amount of Five Million Six Hundred and Seventy Eight Thousand, Eight Hundred and Forty Four Rand and Forty Eight Cents (R 5,678,844.48).

2.2.8. According to the appointment letter dated 01 August 2012, the contract between the Municipality and FBL was to end on 01 October 2014. During the course of this investigation, it transpired that FBL was still contracted with the Municipality on a month to month basis.
2.2.9. After the awarding of the tender the Complainant requested access to the records of the decision to award the contract to FBL in terms of section 18(1) of the Promotion of Access to Information Act, 2000 (PAIA) and the Municipality failed to respond to such a request.

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 is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
3.5 The Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector's mandate.

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 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 investigation process included correspondence, interviews, inspection in loco 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 deviation does that deviation 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 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 investigation relying on the evidence provided by the parties and independently sourced during the investigation and making a determination based on a balance of probabilities. In this particular case, the factual enquiry principally focused on whether or not the Municipality awarded the tender to FBL in the manner alleged and whether the Complainant suffered prejudice as a result thereof.

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 Municipality or organ of state to prevent maladministration and prejudice. The specific question in this regard focussed on whether the award of the security contract to FBL complied with the substantive and procedural requirements of the law and related prescripts. Key in this regard was whether the Municipality failed to follow proper procurement processes in awarding a security tender to FBL. In this regard the law was consulted to determine whether the awarding of the tender to FBL by the Municipality was fair, equitable, transparent, competitive and cost effective.

4.2.4 The question regarding the remedy or remedial action seeks to redress the consequences of maladministration. Where a Complainant has suffered prejudice the intention is to restore the
Complainant as close as possible to where he or she would have been had the Municipality complied with the regulatory framework setting the applicable rules and standards for good administration

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

4.3.1 Whether the Municipality improperly failed to follow proper procurement processes when appointing FBL and if so, whether such failure constitutes maladministration

4.3.2. Whether the Complainant suffered prejudice as a result of the Municipality’s failure to follow proper procurement processes when appointing FBL

4.3.3. Whether the Municipality failed to provide the Complainant with information/documentation relating to the appointment of FBL upon request, and if so whether such failure resulted in prejudice being suffered by the Complainant

4.4. Key Sources of information

4.4.1. Documents

4.4.1.1. Photographs of the security Officers and control room, date unknown,- received from the Municipality on 28 October 2014 and 02 February 2016 respectively;

4.4.1.2. Copy of a Motor Vehicle License disc NN 67632 dated 31 March 2013 registered in the name of FBL Trading Enterprise-Newcastle. Received from the Municipality on 28 October 2014;
4.4.1.3. FBL Trading Enterprise Bid documents received from the Municipality dated 20 June 2012;

4.4.1.4. Nduza Security Services Bid documents received from the Municipality dated 20 June 2012;

4.4.1.5. Functionality/Quality document received from the Municipality;

4.4.1.6. Copies of BEC minutes of the first evaluation meeting held on 25 June 2012; BEC minutes of the re-evaluation held on 30 July 2012 and; BAC minutes of the adjudication held on 31 July 2012;

4.4.1.7. Correspondence from Venter Booysen & Ferreira Attorneys dated 28 August 2012;

4.4.1.8. Copy of Annexure B, Form A in terms of Section 18(1) of the Promotion of Access to Information Act 2000;

4.4.1.9. Correspondence from Du Plessis-Viviers Ing/Inc. Attorneys dated 01 November 2012

4.4.2. Interviews conducted

4.4.2.1. Interview with Complainant on 12 November 2012 to request clarity on his complaint;

4.4.2.2. Interview with Adv Selebogo, Director: Corporate Services at the Municipality requesting clarity on tender documents received;

4.4.2.3. Meeting between the Investigating Team and Messer’s Selebogo and Ntsimane, the Acting CFO, from the Municipality on 05 December 2015;
4.4.2.4. Meeting between the Investigation Team with Messrs Selebogo and Mokgara, Manager in the Office of the Municipal Manager from the Municipality on 04 March 2016;

4.4.2.5. Meeting between the Investigation Team and the Complainant on 04 March 2016;

4.4.2.6. Meeting between the Investigation Team and the gentleman named "Sandle" of FBL on 04 March 2016;

4.4.2.7. Meeting between the Investigation Team and officials from the Municipality, Adv Selebogo and Mr Khuduge, Municipal Manager on 7 May and 17 September 2013;

4.4.3 Correspondence sent and received

4.4.3.1 E-mail dated 02 October 2012 from the Complainant containing the detailed complaint;

4.4.3.2 E-mail dated 03 October 2012 from the Complainant containing additional information relating to the complaint as well as the Municipality Functionality document;

4.4.3.3 E-mail dated 25 March 2013 from the Complainant sent with the following attachments: BEC minutes of the first evaluation held on 25 June 2012; BEC minutes of the re-evaluation held on the 30 July 2012 and; BAC minutes of the adjudication held on 30 July 2012;

4.4.3.4 Letter dated 22 October 2012 from the Investigator of my office in the North West Province NW sent to the Municipality;

4.4.3.5 Letter dated 26 September 2013 from the Municipality responding to the issues raised with the Municipality;
4.4.3.6 E-mail dated 13 June 2013 from the Complainant in response thereto;

4.4.3.7 Faxed documents from the Complainant dated 27 February 2014 containing FBL registration, Minutes and Functionality documents;

4.4.3.8 Faxed documents from Adv Selebogo dated 21 October 2015 containing a copy of the Advertisement, Supply Chain Management Policy and FBL’s appointment letter;

4.4.3.9 A copy of a Section 7(9) letter issued by the Public Protector to Mr Khuduge, Municipal Manager at the Municipality dated 23 January 2016;

4.4.3.10 A copy of an undated response from Mr Khuduge to the Section 7(9) letter issued by the Public Protector;

4.4.3.11 A copy of additional information and Annexures dated 03 February 2016 received from the Complainant; and

4.4.3.12 A copy of a letter dated 01 April 2016 to Adv Selebogo, the Acting Municipal Manager at the Municipality requesting a council resolution and Auditor General’s comments in relation to the tender decision, A copy of FBL’s extended contract and a copy of an advertisement for the new tender by the Municipality.

4.5. Legislation and other prescripts:


4.5.2 Municipal Finance Management Act, 2003 (MFMA);
4.5.3 Public Protector Act, 1994;

4.5.4 Preferential Procurement Policy Framework Act, 2000 (PPPFA);

4.5.5 Preferential Procurement Regulations, 2001;

4.5.6 Promotion of Administrative Justice Act, 2000 (PAJA);

4.5.7 Promotion of Access to Information Act 2000 (PAIA);

4.5.8 The Municipality’s Supply Chain Management Policy, dated 15 June 2011

5. THE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1. General Principles

5.1.1. The conduct and procurement of goods and services in the Municipality is principally regulated by its own Supply Chain Management (SCM) Policy.

5.1.2. Key provisions regulating the impugned conduct of the Municipality relates to contracts for goods and services with a system that is fair, equitable, transparent, competitive and cost effective. Any procurement transaction executed by the Municipality in order to avoid maladministration or improper conduct should have conformed to such standards and processes.

5.1.3. I have considered it proper to also present a comprehensive overview of all the key constitutional provisions, policies and related regulatory instruments that collectively shape the standard of compliance that the Municipality should have been complied with to
escape being classified as irregular, thus constituting maladministration or improper conduct.

5.1.4. It must be understood upfront that for conduct to escape a finding of irregularity and ultimately, maladministration or improper conduct, the decision-maker must have had authority to act, acted within the confines of that authority and followed the procedure prescribed by the authorizing instrument should such procedure be prescribed.

5.2. Regarding whether the Municipality failed to follow proper procurement processes in appointing FBL and if so, whether such failure constitutes maladministration:

The first and second issues as investigated are regulated by the legal principles outlined hereunder:

5.2.1 The Constitution

5.2.1.1 The Constitution enjoins the Municipality and all other organs of state to ensure that contracts for goods and services are entered into in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Section 217 of the Constitution provides that:

1) "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" .......

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2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

a) Categories of preference in the allocation of contracts, and

b) The protection or advancement of persons, or categories or persons, disadvantaged by unfair discrimination...."

5.2.1.2. Section 217(1) of the Constitution states that all spheres of government and state institutions must contract for goods and services with a system that is fair, equitable, transparent, competitive and cost effective. In terms of this section, the Municipality i.e. the BAC and BEC had a duty to comply with a system that was fair, equitable, transparent, competitive and cost effective when adjudicating the bids received.

5.2.2 Applicable Legislation

5.2.2.1 Overview

5.2.2.2. Building on section 217 of the Constitution, national legislation seeks to provide public functionaries, principally accounting officers and authorities, with guidance regarding the key elements of a procurement system that is fair, equitable, transparent, competitive and cost effective. Practical measures need to be implemented to ensure that procurement by the organs of state is undertaken in accordance with such a system.

5.2.2.3. Section 217(1) of the Constitution is supported by section 112(1) of the MFMA. In terms of these sections, the Municipality's supply chain and management policy must be fair, equitable, transparent, competitive and cost effective, and similarly comply
with prescribed regulatory framework applicable to the Municipality's supply chain management.

5.2.2.4. The issue of awarding of tenders is regulated in the main by the provisions of section 112 of the MFMA which prescribes;

"The SCM policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management."

5.2.2.5. Implementation of, and separation of duties in supply chain management is regulated by section 115 of MFMA, which provides;

(1) The accounting officer office of a municipality or municipal entity must-

(a) Implement the supply chain management policy of the municipality or municipal entity; and

(b) Take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimize the likelihood of fraud corruption, favoritism and unfair and irregular practices."

5.2.2.6. Section 112(1) of the MFMA provides that the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective" and comply with a prescribed regulatory framework for municipal supply chain management.

5.2.2.7. The MFMA essentially sets standards for financial management, including financial controls. The MFMA's
provisions have enormous compliance implications for and, to some extent, spill over into the regulation of aspects of state procurement. Key provisions in this regard are principally those relating to fiscal discipline or prudence and the duties imposed on accounting officers.

5.2.2.8. It is the MFMA read with Treasury Regulations and guidelines issued under it that outlines the responsibilities that the accounting officer was required to comply with to escape a finding of maladministration or improper conduct owing to procurement irregularities as alleged in the complaints investigated.

5.2.2.9 The MFMA imposes certain responsibilities on accounting officers regarding financial and procurement management. The questions that had to be answered with regard to the impugned conduct of the Municipality are principally regulated by section 80 and 61 which provides, among others, that its

".... accounting officer, must-

(a) Exercise the functions and powers assigned to an accounting officer in terms of this Act, and

(b) Provide guidance and advice on compliance with this Act to-

(i) the political structures, political office- bearers and official of the municipality, and

(j) The accounting officer of a municipality must-

(a) act with fidelity, honestly, integrity and the best interests of the municipality in managing its financial affairs;
5.2.2.10. The above-mentioned section imposes a duty on the Municipal Manager to take appropriate steps to prevent abuse of municipal policies and to investigate any official or role player who failed to comply with relevant policies during the procurement process which was followed to award the tender to FBL.

5.2.2.11. The PPPFA, Act 5 of 2000, is key legislation, directly giving effect to section 217 of the Constitution and principally provides guidance on striking a balance between the weighting of the functionality of goods and services providers, incorporating pricing and ability to deliver, and considerations of equitable access to state contracts for historically disadvantaged business owners or suppliers.

5.2.2.12. The Preamble to the PPPFA gives effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and provide for matters connected therewith.

5.2.2.13. The PPPFA provides the framework for implementation of preferential procurement policy. Section (2) states that:

(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference point system must be followed;

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

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

(d) ..... 

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

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

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have”.

5.2.2.14. Section 2(1) of the PPPFA provides, amongst other things, that contracts must be awarded to the tenderer who scores the highest points unless objective criterion justify the award to another tenderer. Such objective criterion might encompass specific goals which amongst others include contracting with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability,
for which points may be awarded. Such criterion should clearly be specified in the invitation to submit a tender.

5.2.2.15. The legislative framework, which includes the PPPFA, the MFMA and Treasury Regulations, also incorporates elements of financial management, more specifically relating to avoiding financial mismanagement in the procurement of goods and services.

5.2.2.16 This legislative framework gives effect to Constitutional principles of fairness, equity, transparency and competitiveness while outlining processes to be followed for a proper procurement process.

5.2.2.17. Moreover, Paragraph 1(b) of the Municipality’s SCM Policy, dated 15 June 2011 provides that the Municipality must implement the policy in a way that is fair, equitable, transparent, competitive and cost-effective. This provision is in line with Section 217 of the Constitution and Paragraph 38 of the SCM Policy.

5.2.2.18. Paragraph 2 of the SCM Policy further provides that all officials and other role players (the BAC and BEC) in the supply chain management system of the Municipality must implement the SCM Policy in such a way that it gives effect to section 217(1) of the Constitution in a manner which is fair, equitable, transparent, competitive and cost effective.

5.2.2.19. Paragraph 38 of the SCM Policy provides that the Accounting Officer, in this case the Municipal Manager, must take all reasonable steps to prevent abuse of the SCM Policy and investigate any allegations against an official or any other role player of fraud, corruption, favoritism, unfair or irregular practices.
or failure to comply with the SCM Policy and when justified take appropriate steps.

5.2.2.20. It is my considered view that compliance with the Municipality policy is automatic compliance with the Constitutional and legal policy framework. In the same token, a violation of the SCM Policy translates into contravention of the national legal framework and Constitutional provisions on procurement.

5.2.2.21. Therefore it was incumbent upon the Municipality to have adjudicated this tender utilizing a system that is fair, equitable, transparent, competitive and cost-effective ensuring that the winning bid is one that complies with the law and tender specifications.

5.3 Whether the Municipality failed to provide the Company with information/documentation relating to the appointment of FBL upon request, and if so, whether such failure resulted in prejudice being suffered by the Company:

The third issue as investigated is regulated by the legal principles outlined hereunder

5.3.1. Section 33 of the Constitution provides that:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and

c. promote an efficient administration.

5.3.2. Section 33(1) of the Constitution provides for the right to administrative action that is lawful, reasonable and procedurally fair. Subsection (2) further provides that persons adversely affected by administrative action are entitled to written reasons for the decision.

5.3.3. In terms of section 33(1) of the Constitution, It follows therefore that the decision to award FBL the tender should have been taken in a lawful manner that is, in compliance with legal prescripts regulating procurement processes by the Municipality, and also be reasonable and procedurally fair.

5.3.4. The National Legislation referred to above is the PAJA and section 3 thereof provides as follows:

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(a) adequate notice of the nature and purpose of the proposed administrative action;

(b) a reasonable opportunity to make representations;

(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and

(e) adequate notice of the right to request reasons in terms of Section 5.

5.3.5 Section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

5.3.6 Furthermore, in terms of section 33(2) of the Constitution and section 3(1) of PAJA, it was expected of the Municipality upon request to provide written reasons to the unsuccessful bidders in the event of a prejudicial decision or action. The reasons were supposed to contain sufficient information to enable the recipient to understand the reasoning and processes behind that decision or action.

5.3.7 Section 32 of the Constitution provides that:

1. Everyone has the right of access to
a. any information held by the state; and
b. any information that is held by another person and that is required for the exercise or protection of any rights.

2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

5.3.8 The National Legislation referred to above is the PAIA. Section 11 thereof provides that:

(1) A requester must be given access to a record of a public body if
(a) That requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) Access so that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) A request contemplated in subsection (1) includes a request for access to record containing personal information about the requester.

(3) A requester’s right of access contemplated in subsection (1) is, subject to this Act, not affected by-

(a) Any reasons the requester gives for requesting access; or

(b) the information officer’s belief as to what the requester’s reasons are for requesting access.

5.2.6. The aggrieved persons such as unsuccessful bidders are entitled to access information necessary to determine whether the administrative action or decision was justifiable in relation to the reasons given therefor; as well as whether his or her rights were negatively affected or threatened by such an action or decision namely, not being awarded the tender.

5.2.7. The Complainant’s prejudice was exacerbated by the fact that it has taken five (5) years for the Municipality to accept its wrongdoing and agree to remedy the injustice suffered by the Complainant.
6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION.

6.1. The following issues are not in dispute

Regarding the alleged undue failure by the Municipality to follow proper procurement processes when appointing FBL and whether such failure constitutes maladministration:

The evidence and information obtained relates to the two issues investigated.

6.1.1 The investigation process commenced with a preliminary investigation which included interviews and meetings with the Complainant, the Municipal Manager and other Municipal officials; correspondence with the Municipality; analysis of the relevant documentation; inspection in loco; research undertaken; and the consideration and application of the relevant laws, regulatory framework and jurisprudence.

6.1.2 The Municipality advertised a tender for the provision of security services in the Stellalander newspaper dated 06 June 2012 and 12 bids were received by the closing date. FBL and the Complainant’s Company were amongst the shortlisted bidders as per a copy of the advertisement received from the Municipality.

6.1.3 After the closing date of the tender on 20 June 2012, the BEC at its meeting held on 25 June 2012 considered all the bids that were received by the Municipality. It was noted during the meeting that although the advert clearly stipulates that the tender will be evaluated according to “functionality” e.g. quality, reliability, and
durability, the tender document appeared to be silent with regard to the allocation of functionality points as per the Functionality document received from the Municipality.

6.1.4 Bidders were forwarded the functionality criterion document which was considered at the Bid Re-evaluation Committee meeting held on 30 July 2012 as per the minutes availed by the Municipality.

6.1.5 The functionality document provided that points would be allocated as follows: Capacity 50 points; Operation 15 points; and Compliance 35 points. In terms of the functionality document, prospective bidders were expected under management operations to provide detailed pictures or explanations for certain conditions. In this regard they would further be awarded five (5) points for pictures of their control room and ten (10) points for evidence of two patrol vehicles registered in the name of the company, including copies of licence discs.

6.1.6 The BAC at its meeting held on 31 July 2012, after having considered the report and recommendations of the BEC, made a recommendation for the award of the tender to FBL as per the minutes dated 31 July 2012.

6.1.7 In terms of FBL tender documents received from the Municipality on 15 March 2013, there were no copies of vehicle licence discs registered in the name of FBL or pictures of the control room as per the functionality document that was issued to the prospective bidders.

6.1.8 On 28 October 2014 my Office received a copy of a vehicle licence disc from Advocate Selebogo, Director: Corporate Services at the Municipality, with registration number DXS475L registered in the name of FBL Trading Enterprise-Newcastle, and 5 pictures of security officers in uniform and what was termed a “control room”.
On 05 December 2014 the Investigation team conducted an inspection *in loco* at the Municipal Offices at Ganyesa in the presence of Adv. Selebogo, Director Corporate Services and Mr Ntsimane, Acting CFO at the Municipality. Surprisingly upon perusal of FBL’s tender documents dated 20 June 2012, the Investigation team discovered that there were no copies of vehicle licence discs registered in the name of FBL or pictures of the control room as per the functionality document for reasons set out below:

Whilst on the inspection *in loco* and making a comparison of the pictures of the alleged control room, the Investigation team observed the following:

One of the pictures that were submitted to my Office by the Municipality as evidence on 28 October 2014 was actually a picture of a security officer posing in front of the entrance/parking area at the Municipal Offices building at Ganyesa.

The building in Vryburg which my Investigators visited, that was alleged to have been a control room belonging to FBL, was found locked and was not the same as the pictures obtained as evidence from the Municipality.

According to the Bid Re-Evaluation report dated 30/07/2012 the score sheets indicate that FBL scored 70 points for functionality and the Complainant scored 85 points. During the financial evaluation stage, FBL scored 98 points and the Complainant, on the other hand, scored 85 points. Thus the total points scored by FBL were 168 and the Complainant scored a total of 170 points. The Complainant obtained the highest score.
6.1.12 After perusal of the evidence provided by the Municipality in the form of a set of bid documents as per the shortlisted list of Bidders, there is only one patrol vehicle registered in the name of FBL-Newcastle and the control room could not be verified during the inspection in loco conducted on 05 December 2014 as the premises housing the alleged control room were locked.

6.1.13 The Municipality further could not provide my Office with copies of the vehicle licence discs and pictures of the control room received from FBL on documents forwarded to my office on 13 March 2013 and at the meeting between the investigation team, Advocate Selebogo and Mr Ntsimane on 05 December 2014. Although the municipality alleged that these documents were available, Adv Selebogo could not explain the Municipality’s failure to provide same to my team. Furthermore, Adv. Selebogo could not explain the reasons why the Municipality forwarded pictures purporting to be that of a “control room” for FBL when it was not.

6.1.14 On 13 January 2016 I issued a Section 7(9) Notice in terms of the Public Protector Act to afford the Municipality an opportunity to respond to the Notice to enable me to conclude my investigation and to issue a report on the outcome of my investigation.

6.1.15 The Municipal Manager responded per undated letter received on 28 January 2016 that reason why the documents in question did not form part of the bid documentation is that the bid documents were delivered to the Municipality on or before 20 June 2012 while the functionality criterion document was delivered to the four bidders on 26 July 2012. Documents that were received in response thereto were not added to or bound into their initial bid were not added to or bound into their initial bid documentation.

6.1.16 The Municipal Manager however went further to state that he noticed that in the Complainant’s case the functionality criterion
document and three photos had in fact been bound into the bid document. The Complainant’s license discs did not however form part thereof having not been bound to the original bid documentation. He indicated further that at that stage he was however not aware who might have attached these documents to the Complainant’s initial bid documentation.

6.1.17 The Municipal Manager indicated further that the fact that the photographs and disc were not bound into FBL’s bid documentation, did not warrant the conclusion that they had not been provided to the Municipality by FBL. The Municipal Manager again admitted that the photographs and disc were not, on receipt thereof, bound into FBL’s initial bid documentation but confirmed that they had been received by the Municipality.

6.1.18 It should be noted that my Office received five photographs of security officers posing outside what was termed a control room on 28 October 2014. At the time when the Municipal Manager responded to the section 7(9) Notice the Municipality only provided the Office with three photographs excluding the one that depicted a security Officer posing in front of their premises. If the Municipality still maintains that the five photographs formed part of the tender documents that were submitted to them in 2012 during the adjudication of the tender, I hold that this version of events cannot be true.

6.1.19 If the photographs in question had formed part of the initial tender documents they should have been availed to the investigation team in the first place or they should have been provided to the investigation team during the inspection in loco. The question is as to why they had not been submitted together with other documents remains of issue. It was incumbent upon the Municipality to have
undertaken due diligence to make sure that all terms and conditions of the tender were complied with.

6.1.20 The Municipal Manager requested my Office to present him with the pictures of “security officers posing in front of the entrance to the Municipal Offices’ building” as alleged and promised to have this matter further investigated and undertook to respond to my Office within 10 days.

6.1.21 After perusing a response from the Municipal Manager, Mr Khuduge (who was indisposed), the Investigation team visited the Municipality’s Offices at Ganyesa on Friday, 04 March 2016 and met with Adv Selebogo, Acting Municipal Manager and Mr Mokgara, Manager in the Office of the Municipal Manager. The investigation team showed the picture of a security Officer posing at the entrance/parking lot on the Municipal premises and the said picture was recognised by Adv Selebogo who confirmed that the said picture is that of an FBL Officer in uniform and posing at their premises. The other official Mr Mokgara was non-committal.

6.1.13. The Municipal Manager in his undated letter indicated further that when the contract with FBL came to an end, it was extended in terms of the then existing contract, from 1 October 2014 to 31 March 2016, with an option to extend it further by agreement on a month to month basis. This he further confirmed at a meeting between the Public Protector North West on 04 March 2014. He advised that the office of the Auditor-General is aware of this situation and has only advised the Municipality to bring this to the attention of the Council. It had meanwhile been decided by the Municipality to advertise the tender before the end of March 2016. However Mr Selebogo undertook to provide the copy of the
contract, signed council resolution, confirmation from the Auditor General and a copy of the Security Services tender advertisement.

6.1.14. Adv Selebogo agreed to avail same to the Provincial Office by 10 March 2015. On 01 April 2016 my Office directed correspondence to the Acting Municipal Manager to provide the requested documents by 08 April 2016 and to date no response has been received. Unless convinced otherwise I am inclined to believe that the Municipal Council did not approve the extension of the Contract and there is no confirmation from the Auditor General.

6.1.15. After meeting with Adv Selebogo and Mr Mokgara on 04 March 2016 the Investigation team had a meeting with the Complainant on the premises to verify and understand the correctness of the one photograph in dispute. The Complainant took the members of the Investigation team around the premises and pointed out features and positions as captured in the photograph. After the inspection my Investigation team was satisfied that what they witnessed in this inspection matched what appears in the picture. After the inspection the Investigation team returned to Advocate Selebogo to confirm their observations. He did not deny that the disputed photograph was in fact that of an FBL security Guard posing in front/parking of the Municipal premises.

6.1.16. Subsequently the Investigation team proceeded to No. 28C Van Niekerk Street, the alleged FBL control room, in Vryburg to do an inspection in loco. It should be mentioned that this location is completely different from that captured in photographs availed to my Office. The team met with an Official by the name of Sandile who was very helpful. The members of the Investigation team showed him the pictures and he could recognise some of the Officers in uniform and indicated that some of those pictures were taken at Taung Mall, Social Development Offices and New Castle
Town. He could not identify others as he was still fairly new in the Office.

6.1.17. The Complainant indicated further in his complaint that the Functionality document provided for 10 points for two patrol cars registered in the name of the company. Regardless of the number of cars owned by the company only two cars license discs were required by the municipality for 10 points to be awarded. Points were not allocated from this total according to the numbers of cars owned by the company. The fact that FBL had one car not two as required, means it should not have been allocated the 10 points it was accordingly irregularly awarded.

6.1.18. The Complainant is of the view that FBL should never had been awarded five points for photographs, as these had not been submitted at the time when the bid was awarded. FBL should have been disqualified for not meeting this functionality requirement. Some photographs clearly show that they were taken at the municipality main gate. FBL was not working at the municipality prior to the closure of the bid and the photographs were clearly taken after. This issue was confirmed by the investigating team during inspection in loco.

6.1.19. The Complainant indicated that an evaluation is done firstly on functionality. Once all the functionality requirements are met, bidders proceed to the next stage of evaluation for price and B-BBEE scoring. The bidder who scores highest points on price and B-BBEE is appointed. The issue here is that FBL should not have proceeded to the second evaluation stage of price and B-BBEE scoring since they did not meet the functionality requirements. As they did not meet all the requirements they should have accordingly been disqualified as was the case with Sambo security.
6.1.20. The Complainant indicated that if the functionality was not critical, the municipality could have just evaluated on price and B-BBEE at the first evaluation meeting. The fact that the Municipality sent functionality documents to bidders on the 26\textsuperscript{th} July 2012 requesting that same be complied with indicates the critical role this fulfils in the appointment of service providers. The nature of the work is highly technical, hence the requirement for patrol vehicles and control room facilities. According to the complainant in terms of scoring FBL performed badly overall and should not have been appointed over the Complainant.

6.1.21. In terms of the minutes of the BEC, the Committee met on 25 June 2012 and bidders who did not provide amongst other requirements functionality requirements, VAT registration, a Psira certificate, or BBBEE verification certificate in terms of the Bid document were disqualified. Be that as it may it would appear that FBL received special treatment in that, from the evidence obtained, FBL failed to submit the required copies as per the functionality document.

6.1.22. From the evidence obtained during investigation, it is clear that the Municipality did not disqualify FBL despite the fact that FBL had failed to submit copies of the vehicle licence discs and pictures of the control room as per the tender documents forwarded to my office on 13 March 2013 and as per the inspection \textit{in loco} conducted by my investigators on 05 December 2014.

6.1.23. The Municipal Manager, Mr Ashmar Khuduge responded per undated letter received by my Office on 28 January 2016 that it is correct that FBL had provided only one copy of one patrol car disc and not two copies for two patrol cars and this is why only 5 points were allocated and not 10.
6.1.24. The Complainants’ version seems to be in my view the one more probable in the circumstances.

Regarding the alleged prejudice suffered by the Complainant as a result of the Municipality’s failure to follow proper procurement processes when appointing FBL.

6.2.2.1. The issue as to whether the Complainant suffered prejudice as a result of the alleged failure by the Municipality to follow proper procurement processes when appointing FBL will be determined once the alleged maladministration has been established.

6.2 Regarding whether the Municipality failed to provide the Complainant with information/documentation relating to the appointment of FBL upon request, and if so whether such failure resulted in prejudice being suffered by the Company.

6.2.1 The evidence and information obtained relates to the third issue investigated.

6.2.3.1 The Complainant completed an undated Annexure B, Form A in terms of section 18(1) of the PAIA, which form was received by the Municipality on 31 August 2012 as per its date stamp. This application requested access to the record of the decision for the award of the contract for the rendering of security at the Municipality in terms of tender number KMLM 2012-2013.

6.2.3.2 In his application the Complainant requested information amongst others on the name and the date of the newspaper in which the tender was advertised, the results of the tender, the contact details of the successful tenderer, copies of tender documents,
tender evaluation and adjudication reports and minutes including calculations, allocation of points, score cards and criterion used to calculate the points allocated to bidders and contact details of members of BEC and BAC.

6.2.3.3. On 28 August Venter Booysen and Ferreira Attorneys acting on behalf of the Municipality informed Complainant’s Attorneys, Du Plessis-Viviers Ing/Inc that their client had decided to obtain advice from counsel regarding the request and consultation was scheduled for 13 September 2012. A decision would be scheduled after the lapsing of 21 days as provided for in terms of section 48(1) of the Act. Their client decided to extend the period until 7 October 2012.

6.2.3.4. On 01 November 2012, in the absence of receipt of any response from the Municipality or its attorneys, Du Plessis-Viviers Ing/Inc. on behalf of the Complainant, requested further information from Venter Booysen and Ferreira Attorneys. The Complainant confirmed that no such response for the requested information was ever received.

6.2.3.5. In response to my section 7(9) Notices dated 23 January 2016 the Municipal Manager, Mr Khudge responded that the request in terms of the Act was not made to the information officer of the Municipality as is required by Section 18. The request was received by the typist/ receptionist on 31 August 2012.

6.2.3.6. Mr Khuduge then requested copies of the contents of the files of the attorneys acting for the Municipality. It is evident from the file that Mr D Moate the former Municipal Manager did not provide the necessary assistance to the attorneys notwithstanding requests therefor.
6.2.3.7. Mr Khuduge indicated further that when he took over as Municipal Manager he was under the impression that documents were supplied as requested.

6.2.3.8. Mr Khuduge apologised that the requested documentation had not been provided to the Complainant and that these were only made available to our offices on 15 March 2013.

6.2.3.9. The Complainant’s version seems to be the one more probable in the circumstances and is substantiated.

7. MEASURING CONDUCT AGAINST APPLICABLE PRESCRIPTS

7.1 Whether the Municipality failed to follow proper procurement processes when appointing FBL and if so, whether such failure constitutes maladministration

7.1.1 Having considered that the Municipality awarded a security tender to FBL which did not meet the functionality requirements in contravention of its SCM Policy and applicable national prescripts, I now turn to examine whether such action constitutes maladministration.

7.1.2. To arrive at a fair answer, I had to test the manner in which the tender processes were implemented by the Municipality against the requirement of a fair, equitable, transparent, competitive and cost-effective process.

7.1.3. The appointment was made following an open and competitive bidding process, therefore, section 217 of the Constitution, section 1 of the SCM Policy Section 112 of the MFMA applied.
7.1.4. Moreover, Section 1(b) of the SCM Policy provides that the Municipality must implement the policy in a way that is fair, equitable, transparent, competitive and cost-effective. This provision is in line with Section 217 of the Constitution and Section 38(a)(iii) of the PFMA. It is my considered view that a fair, competitive and cost-effective process includes ensuring that the winning bid is one that complies with the law and tender specifications.

7.1.5. In terms of Section 217 of the Constitution read with section 2 of the SCM Policy and section 112(1) of the MFMA requires that the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective, and also comply with a prescribed.

7.1.6. In terms Section 217(1) of the Constitution the Municipality is required to ensure that it contracts for goods and services using a system that is fair, equitable, transparent, competitive and cost effective. In terms of this section, the Municipality in the form of the BAC and BEC had a duty to comply with a system that was fair, equitable, transparent, competitive and cost effective when adjudicating the bids received.

7.1.7. The Municipality’s responsibility to procure goods and services using a system that is fair, equitable, transparent, competitive and cost effective is re-enforced by Section 112(1) of the MFMA.

7.1.8. Section 217(1) of the Constitution is supported by Section 112(1) of the MFMA. In terms of these sections it further affirms that, the Municipality’s supply chain and management policy must be fair, equitable, transparent, competitive and cost effective, and similarly comply with prescribed regulatory framework applicable to the Municipality’s supply chain management.
The SCM Policy also provides in paragraph 2 that all officials and other role players (the BAC and BEC) in the supply chain management system of the Municipality must implement the Policy in such a way that it gives effect to section 217(1) of the Constitution in a manner which is fair, equitable, transparent, competitive and cost effective. It is my considered view that a fair, competitive and cost effective process includes ensuring that the winning bid is one that complies with the law and tender specifications.

Paragraph 38 of the SCM Policy provides that the Accounting Officer, in this case the Municipal Manager, must take all reasonable steps to prevent abuse of the SCM Policy and investigate any allegations against an official or any other role player of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with the SCM Policy and when justified take appropriate steps.

The above-mentioned section imposes a duty on the Municipal Manager to take appropriate steps to prevent abuse of the SCM Policy and to investigate any official or role player who fails to comply with the SCM Policy during the procurement process which was followed to award the tender to FBL.

Section 2(1) of the PPPFA provides, amongst other things, that contracts must be awarded to the tenderer who scores the highest points unless objective criterion justify the award to another tenderer. Such objective criterion might encompass specific goals which amongst others include contracting with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability, for which
points may be awarded. Such criterion should clearly be specified in
the invitation to submit a tender.

7.1.13 It is the responsibility of the municipality to verify all information
provided by the bidder in terms of the functionality requirements
and if the bidder misleads the municipality in respect of functionality
the bidder will be regarded as submitting a non-responsive bid and
should be disqualified. The 10 points allocated to FBL for having
two patrol cars is reflected in the bid evaluation committee minutes
and the vehicle disc supplied is one as confirmed by the
Municipality. As noted earlier photographs of the control room were
not provided by FBL. The inspection in loco confirmed this.

7.1.14. The Complainant’s version seems to be the one more probable in
the circumstances since the Municipality failed to undertake due
diligence to ensure FBL provided proof of possession of two motor
vehicle license discs and to provide proof of the existence of the
control room by FBL as per the Functionality document.

7.1.15. I am accordingly unable to accept the Municipality’s submission that
its policy allowed it to act unlawfully and accordingly find that the
award of the contract to FBL was unlawful and accordingly irregular.

7.1.16. Failure by the Municipality to follow the above legislative prescripts
amounts to maladministration.

7.2. Whether the Complainant suffered prejudice as a result of the
Municipality’s failure to follow proper procurement processes
when appointing FBL

7.2.1 The Municipality and the Complainant entered into a two year
contract with effect from 01 February 2010 to 31 January 2012. It
was later extended to 31 July 2012.
7.2.2. Be that as it may be, the Complainant scored higher points than FBL and as a result should have been appointed. Be it so, section 217 of the Constitution creates an obligation to take into cognisance fairness, equity and competitiveness and cost effectiveness in the award of tenders.

7.2.3. The PPPFA also affords the Municipality powers to appoint or not to appoint those who had highest scores. In cases where the Municipality decides not to appoint a highest scored candidates, it must give reasons for their decisions not to appoint the affected persons.

7.2.4. Failure by the Municipality to apply the principles of fairness, equity and competitiveness and cost effectiveness in the award of tender to FBL amounts to maladministration which led the Complainant to suffer prejudice.

7.2.5. In terms of the Minutes of the Bid Re-evaluation Committee dated 30 July 2017 they provided an Illustrative Contract Pricing Structure PSIRA R 5580.12pm x Number of Security (37) x 24 +14% VAT = R 5 658 99.28. In terms of such contract pricing structure they provided the following table indicating an amount of profit each tenderer could have made if the contract was awarded to it.

<table>
<thead>
<tr>
<th>NO</th>
<th>BIDDER</th>
<th>BID AMT</th>
<th>PROFIT %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Padisho Multipurpose Centre</td>
<td>R 4 528 800.00</td>
<td>-19.97</td>
</tr>
<tr>
<td>2.</td>
<td>Sambo Security and VIP Protection</td>
<td>R 5 658 993.12</td>
<td>0.0001</td>
</tr>
<tr>
<td>3.</td>
<td>FBL Trading Enterprises</td>
<td>R 5 678 844.48</td>
<td>0.4</td>
</tr>
<tr>
<td>4.</td>
<td>Nduza Security</td>
<td>R 6 499 094.40</td>
<td>14.8</td>
</tr>
<tr>
<td>5.</td>
<td>Tshireletso Security</td>
<td>R 7 127 160.20</td>
<td>25.9</td>
</tr>
<tr>
<td>6.</td>
<td>Sizani Private Investigation &amp; Tracing</td>
<td>R8 038 763.52</td>
<td>42.0</td>
</tr>
</tbody>
</table>
According to the above table the Complainant tendered an amount of R 6 499 094.40 and the profit was estimated at 14.8% of the tendered amount. The total amount of R 649 909.40 would have been realised by the Complainant if the tender was awarded to them.

7.2.6. In Transnet Limited and Sechaba Photoscan (Pty) Ltd Case Number 98/03 heard in the Supreme Court of Appeal the primary question was whether on the facts of the case the loss of prospective profits is compensable in law as delictual damages. It was held that the award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict.

7.2.7. As a result therefore the Complainant is entitled to be placed in the position he would have been in but had the maladministration occurred as a result of the actions of the Municipality by failing to follow proper procurement processes.

7.3 Whether the Municipality failed to provide the Complainant with information/documentation relating to the appointment of FBL upon request, if so whether such failure resulted in prejudice being suffered by Complainant

7.3.1 The Municipality has not denied that it failed to provide the Complainant with the requested documents and the Municipal Manager has tendered an apology for failing to avail such documents.

7.3.2 In terms of Section 33 of the Constitution the right to administrative action has to be lawful, reasonable and fair. Persons adversely
affected by administrative action are entitled to written reasons for the decision.

7.3.3 Section 3(1) of the PAJA, 2000 provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

7.3.4 Section 33(1) of the Constitution and Section 3(1) of the PAJA imposes a duty on the Municipality to have provided reasons and documents to the Complainant who was adversely affected by an act that awarded a tender to a bidder who did not comply with the terms and conditions of the tender.

7.3.5 Furthermore, in terms of section 33(2) of the Constitution and section 3(1) of PAJA, it was expected of the Municipality to provide written reasons to the unsuccessful bidders in the event of a prejudicial decision or action. The reasons were supposed to contain sufficient information that would enable the recipient to understand the reasons and process for the decision.

7.3.6 In terms of section 32(1) of the Constitution and section 11 of PAJA the aggrieved persons such as unsuccessful bidders were supposed to have been provided with the requested information/documentation be able to consider whether an administrative action or decision was justifiable in relation to the reasons thereof and also, whether their rights were affected or threatened by such an action or decision namely, not being awarded the tender.

7.3.7 In this case the Municipality did not provide reasons when they deviated from section 33 of the Constitution, when they awarded the tender to FBL despite the fact that they did not score the highest
points and did not provide proof of the control room and vehicle licences as required by the Functionality document.

7.3.8. The Complainant’s prejudice was exacerbated by the fact that it has taken five (5) years for the Municipality to accept its wrongdoing and agree to remedy the injustice suffered by the Complainant by tendering an apology for not providing the Complainant with the requested documents which were only provided to my Office on 15 March 2013.

7.3.9. The Complainant’s version seems to be the one more probable in the circumstances since the Municipality failed to provide the required documents and reasons for the appointment of FBL who did not comply with the terms and conditions of the tender.

7.3.10. I am accordingly unable to accept the Municipality’s submission that the Constitution and PAJA allowed the Municipality to act unlawfully by refusing to provide reasons and documentation requested by the complainant and am likely to find that such refusal was unlawful and accordingly irregular.

8. Findings

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the Municipality, and the impact on the Complainant, my findings are as follows:

8.1 Regarding whether the Municipality improperly failed to follow proper procurement processes in appointing FBL and whether if so, does such failure constitute maladministration, I find that:
8.1.1. The allegation that the Municipality improperly failed to follow proper procurement processes in appointing FBL is substantiated.

8.1.2. The Municipality appointed FBL despite the fact that it did not submit all the required documents in the form of photographs of its actual control room and copies of discs for two (2) patrol vehicles that are registered in its name in accordance with the requirement of the functionality document;

8.1.3. The Municipality’s appointment of FBL despite its failure to submit the required documents in terms of the functionality document and despite it scoring less points than the Company was in violation of section 2 and section 38 of its SCM Policy dated 15 June 2011, section 112(1) of the MFMA, Section 2(1) of the PPPFA and Section 217 of the Constitution. Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

8.2 Regarding whether the Complainant suffered prejudice as a result of the Municipality’s improper failure to follow proper procurement processes when appointing FBL I find that:

8.2.1. The Complainant’s suffered prejudice as a result of the Municipality officials conduct, had it not been due to the Municipality’s conduct, his Company would have been awarded the tender and in terms of the Supreme Court of Appeal Judgment of Transnet Limited and Sechaba Photoscan (Pty) Ltd 98/03(98/03) [2004] ZA SCA 24 the Municipality must pay him the total amount of R 649 909.40 plus 15.5% interest being 14.8% of the Complainant’s tendered amount as stipulated in the Minutes of the Bid Re-Evaluation Committee Minutes dated 31 July 2012 would have been realised as profit by the Complainant if the tender was awarded to them. The
Complainant is entitled to be placed in the position he would have been in but had the maladministration occurred as a result of the actions of the Municipality by failing to follow proper procurement processes.

8.3 **Regarding whether the Municipality failed to provide the Complainant with information/documentation relating to the appointment of FBL upon request, and if so whether such failure result in prejudice being suffered by the Complainant?**

8.3.1 The Complainant further suffered prejudice by virtue of the fact that contrary to sections 32 and 33(1)(2) of the Constitution and section 3(1), (2) of the PAJA and Section 2(1)(g) of PPPFA he was not provided with reasons upon request as to why his company was not awarded the tender despite it having scored higher points than FBL.

8.3.2 In the absence of receipt of the information requested, the Complainant was not able to determine the rationale for the decision to award the tender to FBL and ascertain if his rights have been violated.

8.3.3 The prejudice or injustice suffered by the Complainant was compounded by the failure to resolve the dispute expeditiously. It has taken about five years for the Municipality to admit that it wronged the Complainant and is prepared to remedy the injustice suffered.

9. **REMEDIAL ACTION**

9.1 The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where it would have been had the improper conduct or maladministration not occurred, while
addressing systemic Supply Chain Management deficiencies in the Municipality, is to require the Municipality/ Municipal Manager:

9.1.1 To issue a written apology to the Complainant for failing to follow proper procurement processes and provide the necessary information/documentation after requested to do so;

9.1.2 To within 90 days from the receipt of my report pay the Complainant an amount of R 649 909.40 plus 15.5% interest being 14.8% profit as per the minutes of the Bid Re-Evaluation Committee would have been realised by the Complainant if the tender was awarded to them but for the maladministration on the part of the Municipality;

9.1.2 To ensure that all its officials involved in Supply Chain Management are properly familiarized with the MFMA, with particular reference to following proper procurement processes in the of applicable Policies and Legislative Prescripts in terms of the MFMA;

9.1.3 To take appropriate steps to ensure that disciplinary action is taken against all the officials who are responsible for exposing the Municipality to acts of maladministration /improper conduct in violation of the MFMA and Supply Chain and Procurement Processes and Procedures; and

9.1.4 To within 90 days from the receipt of my report appoint a service provider for the provision of security services in accordance with the MFMA and the Municipality’s supply chain policy.

10. MONITORING

10.1 The Municipal Manager is to submit an Action Plan to the Public Protector indicating the Municipality’s intentions regarding the
implementation of the remedial action referred to in paragraphs 9.1 to 9.4 above within 30 days of the issue of this report.

10.2 A report on the system remedial steps taken to improve SCM in the Municipality is to be submitted within 60 days of the issue of this report.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 29/11/2016