

**REPORT OF THE PUBLIC PROTECTOR 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**



**PUBLIC PROTECTOR
SOUTH AFRICA**

PROCUREMENT QUESTIONS

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION
AND IMPROPER CONDUCT BY THE DEPARTMENT OF MINERAL RESOURCES
PERTAINING TO THE PROCUREMENT OF SERVICES**

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Executive summary

- (i) *Procurement Questions* is a Report of the Public Protector on an investigation into allegations of maladministration and improper conduct by the Department of Mineral Resources (the Department) relating to the procurement of services.
- (ii) Mr Z Ndlela, the former Director: Information Technology of the Department (the Complainant) lodged a complaint against the Department with the Public Protector in December 2010, by means of a report prepared by him, entitled “ *A REPORT ON IRREGULAR EXPENDITURE, FRAUD AND CORRUPTION AT DMR.*”, in which he, *inter alia* stated that:

“This report seeks to expose irregular expenditure, fraud and corruption involving the acting Chief Financial Officer, Mr Edson Ragimana.

The allegation arises from an incident that occurred in a BAC (Bid Adjudication Committee) meeting, chaired by the CFO (Chief Financial Officer) on Thursday 28 October 2010. The BAC meeting occurs bi-weekly and the author is a member of the committee. The incident relates to the approval of a request to extend the services of Nambiti Technologies for 2 months. The amount involved is R196 650. The Department’s procedures and the PFMA prescripts, among others, were not adhered to when the request was approved. The author is the only member in the committee that opposed the request unsuccessfully. The silence of the Internal Auditor during the meeting was noticeable.”

- (iii) According to his understanding of the “*BAC policy and processes*”, a request for consideration by the Committee has to be submitted to the Supply Chain Management Division of the Department (SCM) at least four days before the next meeting, for it to be included in the Agenda. He further explained in this regard that: “*Exceptions are only considered in a case of emergency, or in a case of a request that was previously referred back for corrections. In the case of an exception, the presenter would be given an opportunity to explain why the request was not submitted to SCM on time. The*

committee would then decide whether the request should be included in the agenda or not". (emphasis added)

(iv) As far as the request that was the subject of the complaint is concerned, the Complainant stated that he could not recall that it was introduced during the adoption of the Agenda.

(v) Nambiti Technologies (Nambiti) had, according to the Complainant, an existing contract with the Department at the time of the said meeting of the BAC, which was to expire on 30 October 2010. The Complainant stated that the request for the BAC to approve the extension of the Department's contract with Nambiti was presented by the then Acting Director: Transport and Facilities Management at the end of the meeting. He continued:

"It would seem that there were discussions between the ACFO (Acting CFO) and other members including the acting Director: TRFM before the BAC meeting.

The author (the Complainant) is known to always question both the service provider's performance and its relationship with the AFCO. A report citing a perceived corrupt relationship between the AFCO and Nambiti Technologies and requesting intervention was submitted to the Director General: Mr Sandile Nogxina, the Deputy Director General Corporate Services, Mr Bethuel Nemagovhani and the ACFO. The report was dismissed by the DG's office as an operational matter."

(vi) His objections raised at the meeting of 28 October 2010 against the approval by the BAC of the request for the extension of Nambiti's contract was based mainly on the following:

(a) He was not consulted regarding the request in his capacity as the Director: Information Technology of the Department, despite the fact that the proposed service to be rendered involved information and communication technology;

(b) The performance of Nambiti's project manager was poor and therefore there was no justification to extend its services;

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- (c) The relationship of the Acting CFO with the Nambiti was “questionable”;
- (d) The scope of the work in respect of which the request for an extension was submitted was outside the original scope of work for which Nambiti was contracted by the Department;
- (e) Some of the work referred to in the request for the extension should have been completed; and
- (f) The procedure followed by the BAC in approving the request was flawed and in violation of the provisions of the Public Finance Management Act, 1999 (PFMA).
- (vii) The Complainant further alleged that the Acting CFO and the other members of the BAC, rejected his objections and supported the request for the extension of the contract. The Acting CFO misled the other members by informing them that the services required from Nambiti did not relate to information communication technology.
- (viii) According to the Complainant’s report, he had also raised his concerns with the Director-General of the Department. He concluded as follows:
- “In the light of the above allegations in association with the complaints already lodged with the DG, DDG: Corporate Services and the ACFO, it is recommended that an in-depth investigation is conducted and the relevant disciplinary processes are invoked.”*
- (ix) The issues investigated following an analysis of the complaint are the following:
- (a) Was the request to the BAC to consider the extension of Nambiti’s contract for a period of two months in violation of the procurement policies and prescripts of the Department and therefore improper?
- (b) Was there an improper relationship between the Acting CFO and Nambiti that could have influenced the considerations of the BAC in respect of the request for an extension? and

- (c) Was the resolution of the BAC to recommend the extension of Nambiti's contract for a period of two months improper?
- (x) The Public Protector concluded from the investigation that:
- (a) The request for the extension of Nambiti's contract as presented to the BAC on 28 October 2010 was justified.
 - (b) The request to add the extension of the contract to the Agenda of the BAC meeting of 28 October 2010 was approved by the Committee.
 - (c) The adding of the extension of the contract as an additional item to the Agenda was not improper.
 - (d) The extension of the contract was debated by the Committee. Several concerns were raised and recorded.
 - (e) The approval of recommending the extension of the contract to the Director-General was subject to further information being submitted to the Committee.
 - (f) The procurement by the Department of Nambiti's services was proper and in accordance with the State Information Technology Act, 1998 and the Regulations made in terms thereof.
 - (g) No evidence was presented or could be found that there was collusion between the members of the BAC not to object to the extension of the contract.
 - (h) The allegation that there was an improper relationship between the Acting CFO and Nambiti was based on a perception of the Complainant, which could not be substantiated during the investigation. No evidence of such relationship was presented or could be found during the investigation.

- (xi) On 30 October 2012, the Public Protector issued a Provisional Report on the investigation, which was presented for comments to the Complainant and the Director-General of the Department. No comments were submitted.
- (xii) The Public Protector's findings are that:
- (a) **Finding 1: The request submitted to the BAC on 28 October to consider the extension of Nambiti's contract for a period of two months was justified and proper;**
 - (b) **Finding 2: No evidence or information could be found during the investigation of any improper relationship between the Acting CFO and Nambiti;**
 - (c) **Finding 3: The BAC considered the request for the extension of the contract in terms of its powers and functions as prescribed by the Treasury Regulations and the Procurement Policy of the Department; and**
 - (d) **Finding 4: The resolution of the BAC to recommend the extension of the contract subject to certain conditions was proper and in accordance with its responsibilities as prescribed by PFMA, the Treasury Regulations and the Procurement Policy of the Department.**

1. INTRODUCTION

1.1 *Procurement Perceptions* is a Report of the Public Protector in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act), regarding an investigation into allegations of maladministration and improper conduct by the Department of Mineral Resources (the Department) relating to the procurement of services.

1.1.1 The report is submitted to the Director-General of the Department of Mineral Resources, Dr Thibedi Ramontja.

1.1.2 A copy of the report is presented to Mr Z Ndlela, who lodged the complaint (the Complainant).

2. THE COMPLAINTS AND ISSUES RAISED WITH THE PUBLIC PROTECTOR

2.1 In December 2010, Mr Z Ndlela lodged a complaint with the Public Protector by means of a report prepared by him, entitled “ *A REPORT ON IRREGULAR EXPENDITURE, FRAUD AND CORRUPTION AT DMR.*”, in which he, *inter alia* stated that:

“This report seeks to expose irregular expenditure, fraud and corruption involving the acting Chief Financial Officer, Mr Edson Ragimana.

The allegation arises from an incident that occurred in a BAC (Bid Adjudication Committee) meeting, chaired by the CFO (Chief Financial Officer) on Thursday 28 October 2010. The BAC meeting occurs bi-weekly and the author is a member of the committee. The incident relates to the approval of a request to extend the services of Nambiti Technologies for 2 months. The amount involved is R196 650. The Department’s procedures and the PFMA prescripts, among others, were not adhered to when the request was approved. The author is the only member in the committee that

opposed the request unsuccessfully. The silence of the Internal Auditor during the meeting was noticeable.”

2.2 According to his understanding of the “BAC policy and processes”, a request for consideration by the Committee has to be submitted to the Supply Chain Management Division of the Department (SCM) at least four days before the next meeting, for it to be included in the Agenda.

2.3 He further explained in this regard that: *“Exceptions are only considered in a case of emergency, or in a case of a request that was previously referred back for corrections. In the case of an exception, the presenter would be given an opportunity to explain why the request was not submitted to SCM on time. The committee would then decide whether the request should be included in the agenda or not”.* (emphasis added)

2.4 As far as the request that was the subject of the complaint is concerned, the Complainant stated that he could not recall that it was introduced during the adoption of the Agenda.

2.5 Nambiti Technologies (Nambiti) had, according to the Complainant, an existing contract with the Department at the time of the said meeting of the BAC, which was to expire on 30 October 2010.

2.6 The Complainant stated that the request for the BAC to approve the extension of the Department’s contract with Nambiti was presented by the then Acting Director: Transport and Facilities Management at the end of the meeting. He continued:

“It would seem that there were discussions between the ACFO (Acting CFO) and other members including the acting Director: TRFM before the BAC meeting.

The author (the Complainant) is known to always question both the service provider’s performance and its relationship with the AFCO. A report citing a perceived corrupt relationship between the AFCO and Nambiti Technologies and requesting intervention was submitted to the Director General: Mr Sandile Nogxina, the Deputy Director General

Corporate Services, Mr Bethuel Nemagovhani and the ACFO. The report was dismissed by the DG's office as an operational matter."

- 2.7 His objections raised at the meeting of 28 October 2010 against the approval by the BAC of the request for the extension of Nambiti's contract was based mainly on the following:
- 2.7.1 He was not consulted regarding the request in his capacity as the Director: Information Technology of the Department, despite the fact that the proposed service to be rendered involved information and communication technology;
 - 2.7.2 The performance of Nambiti's project manager was poor and therefore there was no justification to extend its services;
 - 2.7.3 The relationship of the Acting CFO with the Nambiti was "questionable";
 - 2.7.4 The scope of the work in respect of which the request for an extension was submitted was outside the original scope of work for which Nambiti was contracted by the Department;
 - 2.7.5 Some of the work referred to in the request for the extension should have been completed; and
 - 2.7.6 The procedure followed by the BAC in approving the request was flawed and in violation of the provisions of the Public Finance Management Act, 1999 (PFMA).
- 2.8 The Complainant further alleged that the Acting CFO and the other members of the BAC, rejected his objections and supported the request for the extension of the contract. The Acting CFO misled the other members by informing them that the services required from Nambiti did not relate to information communication technology.
- 2.9 According to the Complainant's report, he had also raised his concerns with the Director-General of the Department. He concluded as follows:

“In the light of the above allegations in association with the complaints already lodged with the DG, DDG: Corporate Services and the ACFO, it is recommended that an in-depth investigation is conducted and the relevant disciplinary processes are invoked.”

2.10 The issues investigated following an analysis of the complaint are the following:

2.10.1 Was the request to the BAC to consider the extension of Nambiti’s contract for a period of two months in violation of the procurement policies and prescripts of the Department and therefore improper?

2.10.2 Was there an improper relationship between the Acting CFO and Nambiti that could have influenced the considerations of the BAC in respect of the request for an extension? And

2.10.3 Was the resolution of the BAC to recommend the extension of Nambiti’s contract for a period of two months improper?

3 THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Mandate of the Public Protector

3.1.1 The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. Section 182(1)(a) of the Constitution provides that the Public Protector has the power to:

3.1.1.1 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;

3.1.1.2 Report on that conduct; and

3.1.1.3 Take appropriate remedial action.

- 3.1.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.
- 3.1.3 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia* any alleged:
- 3.1.3.1 Maladministration in connection with the affairs of government at any level; and
- 3.1.3.2 Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.
- 3.1.4 The Public Protector may, in terms of section 8(1) of the Public Protector Act, make known to any person any finding, point of view or recommendation in respect of the matter investigated by him or her.
- 3.1.5 The issues referred to in paragraph 2.11 above were investigated in terms of the mandate and powers of the Public Protector.

3.2 Approach to the investigation

- 3.2.1 In terms of the mandate given to the Public Protector, his/her investigations and findings transcend lawfulness. The focus is on good administration and proper conduct. Such enquiry has three components:
- 3.2.1.1 What happened?
- 3.2.1.2 What should have happened; and

3.2.1.3 Is there a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, abuse of power, improper enrichment or conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act?

3.2.2 In determining whether conduct was improper or constituted maladministration or any of the violations referred to above, the Public Protector compares the conduct of government entities and officials complained of against the relevant legislation and other prescripts, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, transparency, ethical standards and local and international best practices.

3.3 The obligation of the Public Protector to follow due process

3.3.1 Due process was complied with during the course of the investigation referred to in this report. The Public Protector issued a Provisional Report on the investigation on 30 October 2012, which was presented to the Complainant and the Director-General of the Department for comments. No comments were submitted.

4 THE INVESTIGATION

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

4.1 THE SCOPE OF THE INVESTIGATION

The scope of the investigation was restricted from the date from 27 February 2009, the date on which an internal memorandum for the procurement of the services of Nambiti was submitted to the DG, to 27 October 2010, the date on which the meeting of the BAC referred to by the Complainant was held.

4.2 METHOD OF GATHERING EVIDENCE

The following methods of gathering evidence and analysing information were employed:

4.2.1 Interviews conducted

Interviews (including telephonic interviews) were conducted with the Complainant and the following officials of the Department:

- 4.2.1.1 Mr E Ragimana, the former Chief Financial Officer;
- 4.2.1.2 Mr N Myeni, the Deputy Director: Internal Audit;
- 4.2.1.3 Mr P Gamede, the Chief Director: Human Resource Management;
- 4.2.1.4 Ms L Mngengo, the former Director: Supply Chain Management;
- 4.2.1.5 Mr E Nemaghovani; the Chief Director: Internal Audit; and
- 4.2.1.6 Mr C Benside, the Deputy Director: Transport Facilities and Record Management.

4.2.2 Correspondence

Correspondence between the Public Protector and:

- 4.2.2.1 The former Director-General of the Department, Adv S Nogxina; and
- 4.2.2.2 The former Chief Financial Officer, Mr E Ragimana

4.2.3 Analyses of documentation and /or information

The following documents were analysed and perused:

- 4.2.4.1 The Agenda of the meeting of the BAC held on 28 October 2010;
- 4.2.4.2 The Minutes of the meeting of the BAC held on 28 October 2010;
- 4.2.4.3 The report of the Internal Audit Services of the Department entitled: *“Investigation into allegations of misconduct by the Bid Adjudication Committee (BAC), relating to the extension of the contract of Nambiti Technology by two(2) months”* dated 28 January; and
- 4.2.4.4 Transversal Term Agreements numbers RFB 569 and 570 of the State Information Technology Agency.

4.2.4 Legislation and other prescripts

The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

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

4.2.4.2 The Public Protector Act, 1994

4.2.4.3 The Public Finance Management Act, 1999;

4.2.4.4 The State Information Technology Act, 1998

4.2.4.5 The Treasury Regulations;

4.2.4.6 General Regulations made in terms of the State Information Technology Agency Act, 1998;

4.2.4.7 The Procurement Policy of the Department, dated 1 February 2008; and

4.2.5 The Charter of the Bid Adjudication Committee of the Department, dated 5 March 2010.

5 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION RELATING TO THE ALLEGATIONS INVESTIGATED

5.1 The procurement by the Department of Nambiti's services prior to 27 October 2010

5.1.1 From the contents of an internal memorandum submitted by the then Acting Chief Information Officer (the proposals of which were recommended by Acting CFO) to the former Director-General (the DG) on 27 February 2009, it was established that the former Department of Minerals and Energy (DME) was at the time going through a process of improving its Information and Communication Technology (ICT) system. The

memorandum indicated that Nambiti had conducted a due diligence assessment of the ICT environment, which determined that a number of projects had to be undertaken to improve its performance, the lack of which had a negative impact of the operations of the DME.

5.1.2 The memorandum motivated a two phased approach, the first of which would run over a period of two months, focusing on the implementation of the identified projects to improve and stabilize service levels in the DME. The next step was to enhance and optimize the ICT environment.

5.1.3 It further stated that:

“The BAC requires that there should be at least three quotes from service providers. There is only one quote from the Nambiti Consortium(which incorporated EDS and Nambiti Technologies, where Nambiti Technologies is the Prime Contractor) that has been attached to the submission. The reason is that the required service can be procured directly from Nambiti Technologies via SITA Tender 569 and 570, which is cost effective. The process listed in RFB 569 and 570 contracts are the best prices available in the market. SITA qualified suppliers such as Nambiti Technologies, are contractually bound to ensure that this is the case.”

5.1.4 The DG approved the memorandum on 3 March 2009.

5.1.5 On 14 August, the Acting Chief Information Officer submitted a memorandum requesting that Nambiti be appointed to review and develop ICT and System Development and Management Policies. The memorandum referred to the involvement of Nambiti in the ICT due diligence exercise and the implementation of the ICT stabilization project. It further stated, *inter alia*, that:

“The ICT environment is being stabilized, but this is not the end goal. There is an urgent need to move to a more formalized Managed Service state. To do that requires that accompanying policies and SLA are in place”

- 5.1.6 Reference was also made to the fact that the required service could be procured directly from Nambiti in terms of the Transversal Term Agreement it had with SITA (RFB 569). It was proposed that Nambiti's services be procured for a period of three months.
- 5.1.7 The proposal was recommended by the Acting CFO on 8 September 2009 and approved by the DG on 28 September 2009.
- 5.1.8 According to the records of the Department, former DME was split into two departments by virtue of a government decision in July 2009, i.e. the Department of Mineral Resources (the Department) and the Department of Energy.
- 5.1.9 The Department procured accommodation for its new Head Office in the Trevenna Building in Pretoria, which required its information technology infrastructure and systems to be relocated.
- 5.1.10 An internal memorandum addressed to the Chairperson of the BAC, signed by the Acting CFO, the Director: System Development and Management and the Acting Director: Information Technology on 13 April 2010, requested an extension of Nambiti's services, to include the provision of skilled resources for a period of six months. It was motivated as follows:

"This (the split of the DME into two separate departments) resulted in the split of the DME IT resources between Department of Minerals and Energy (DME) and Department of Energy, (sic) consequently the DMR (Department of Mineral Resources) requires additional resources to supplement the current skeleton IT team in order to deliver the expected support services. Currently there is a temporary arrangement with the DMR and Energy to continue with the support of both departments as they were supporting DME until both departments have managed to secure an independent support structure which these terms of reference should address.

In order for the DMR Information Systems environment to operate optimally, the departments need to put in place resources that would address the support and maintenance of the systems application and databases, server systems and technology

applications and also the desktop environment. The DME has been using the services of Nambiti Technologies to facilitate the support and maintenance of the Microsoft environment and would like to extend these services to the DMR.”

5.1.11 This proposal for the procurement of Nambiti’s services was also based on the Transversal Term Agreement it had with SITA.

5.1.12 It was recommended by the BAC on 15 April 2010, and subsequently approved by the DG.

5.2 The memorandum of 27 October 2010

5.2.1 The Acting CFO and the Office Administrator submitted a memorandum to the Chairperson of the BAC on 27 October 2010. The purpose thereof was to obtain approval for the procurement of project management services from Nambiti for a period of two months. Referring to the previous engagement by the Department of Nambiti’s services, the memorandum motivated the request to the BAC as follows:

5.2.2 *“Nambiti Technologies has completed the relocation from the old Visagie building to the new Trevenna building and also assisted the department with the successful split of the DMR ICT environment from the Department of Minerals and Energy within a short space of time. The department requires the project management services (sic) to facilitate the institutionalization of the Audio Visual and Video Conferencing infrastructure, the optimization of the telecommunications and the enhancement of office space to accommodate the DMR business needs. The engagements that the project manager was involved in are still running and should be completed by end of September 2010. In order to deliver these projects the department required additional (sic) two months.*

5.2.3 The financial implications were stated as R196 650.

5.3 The Agenda and Minutes of the meeting of the BAC held on 28 October 2010

5.3.1 According to the original Agenda of the meeting, the request relating to extension of Nambiti's contract was not included in list of items to be discussed.

5.3.2 However, the Minutes of the meeting indicate that three additional items were added when the meeting commenced, before the Agenda was adopted. These included "Request the BAC to approve the extension for the project management services from Nambiti for a period of two months", which was the second last item discussed. The deliberations of the BAC in this regard were recorded as follows:

"The committee needed more information on the initial project scope, a detailed report for (sic) what has been delivered and the work to be delivered for the required two months extension. The timing of the project also needed to be looked at considering that the two months will fall in November and December when companies will be closed."

5.3.3 No objections in respect of the items added to the Agenda or the issue of the extension of Nambiti's contract appear in the Minutes.

5.3.4 It states that the BAC resolved that:

"Approved, subject to the following amendments:

1. *To attach initial project scope*
2. *Report on project delivered.*
3. *Scope of work to be delivered for the required two months extension.*

To be signed on round robin."

5.4 Interviews conducted during the investigation

5.4.1 The Complainant, **Mr Z Ndlela**, was the Director: Information Technology at the Department at the time when the meeting of the BAC in question was held on 28 October 2010. He was a member of the BAC.

5.4.1.1 He confirmed the contents of his complaint referred to in paragraph 2 above. In addition, he stated that the reason why he suspected Nambiti of being involved in corruption is because it was also involved in the relocation and purchasing of office furniture for the Minister of Minerals and Energy and the DG. He could not provide any further information in this regard.

5.4.1.2 As far as the meeting of the BAC is concerned, he explained that it was chaired by the Acting CFO. The original Agenda was approved at the start of the meeting without any additions. The extension of Nambiti's contract was introduced by Mr Bense during the course of the meeting. He objected but was overruled by the other members of the Committee.

5.4.1.3 According to Mr Ndlela, the matter was discussed and approved by the Committee. He was unhappy because he was not consulted as the Director responsible for Information Technology and as he was not satisfied with the performance of Nambiti. However, he did not inform Supply Chain Management division of the Department of his dissatisfaction, but only spoke to the Acting CFO about it.

5.4.1.4 He could not indicate which provisions of the PFMA were, in his view, violated by the procurement of Nambiti's services.

5.4.1.5 As far as his allegation that the extension of the contract was discussed prior to the meeting by the Acting CFO, Mr Bense and other members of the BAC, is concerned, Mr Ndlela stated that he came to this conclusion based on the fact that no concerns were raised by the other members of the BAC when the request for the extension was introduced.

5.4.1.6 He was also informed during the meeting that the extension of the contract did not relate to information technology matters, which was not the case. The Chairperson failed to provide a clear scope of the work completed by Nambiti.

5.4.1.7 Mr Ndlela could not provide any information or evidence in respect of his allegation that there was a corrupt relationship between the Acting CFO and Nambiti.

5.4.2 **Mr C Benside** was the Acting Director: Transport, Facilities and Records Management at the time of the meeting.

5.4.2.1 He indicated during his interview that he was requested by the Acting CFO to present the memorandum referred to in paragraph 5.2 to the BAC. The contents of the memorandum related directly to facilities, although it also included an ICT component.

5.4.2.2 At the time when the adoption of the Agenda was discussed, he requested that two items be added, including the request for the extension of Nambiti's contract. Approval was granted and copies of the relevant documents circulated to all members.

5.4.2.3 The matter was discussed as per the approved Agenda. Questions in respect of the request were asked by members of the Committee and detailed answers provided. It was agreed to recommend the extension.

5.4.2.4 According to Mr Benside, no prescribed procedure was violated during the meeting and in respect of the procurement of Nambiti's services. He was not part of any discussions prior to the meeting with a view of suppressing any objections.

5.4.3 **Mr E Ragimana**, who was the Acting CFO and the Chairperson of the BAC at the time, and **Ms L Mgengo**, the Director: Supply Chain Management and a member of the BAC, in essence confirmed the evidence of Mr Benside, as referred to in paragraph 5.4.2 above.

5.5 Responses provided by witnesses during an internal investigation by the Department

From the records of the Department, it was established during the investigation that an internal investigation into the allegations made by Complainant was conducted, which is referred to in more detail in paragraph 5.9 below. The following recorded evidence is of significance to the investigation referred to in this report:

5.5.1 **Mr B Qina** was a member of the BAC at the time. He explained that it is the normal practice of the BAC to add matters to the Agenda at the request of a member and that the request by Mr Benseke was therefore not unusual or irregular. He recalled specifically that the matter was put on the Agenda and that the relevant documents were circulated at the start of the meeting.

5.5.1.1 He confirmed that the request to extend the contract was debated and questions asked.

5.5.1.2 Mr Qina further stated that:

“The issue of whether this had anything to do with the ICT was, indeed raised. But it is not true that the chairperson misled the meeting in any way. The question that had arisen was what exactly the contract with Nambiti involved and what was their scope of work (terms of reference) and it came out that some of it touched on IT. Mt Clifford Mboyana (the Acting Chief Information Officer) attended the meeting and would have raised any concerns if the chairperson had misled the committee on this matter. The issue of ICT was not even dominant in the discussion, it was just a point of clarity. The chairperson did not provide any information on this matter except to comment on the terms of reference of Nambiti and to answer some questions regarding the contract. So it is plainly untrue that he informed the meeting that the services did not relate to ICT.”

5.5.1.3 As far as the allegation by the Complainant that there was collusion between members of the Committee prior to the meeting, which explained the lack of objections, is concerned, Mr Qina stated:

“This is a downright fabrication and a very serious allegation of impropriety on the part of the members. There has never been and can never be any meeting of BAC members prior to a meeting. The matter was fully discussed and lots of pertinent questions were asked by members regarding the contract. I can recall that the questions were on the terms of reference, the outstanding deliverables by Nambiti and their (sic) thereof, whether Nambiti would be in a position to deliver on those outstanding deliverables as the members emphasized that they do not want the company to have an open-ended contract with the department. The matter was engaged to a point that, in fact, it was not concluded on the day of the meeting as the member who presented it had to do extra work in order to satisfy the members, e.g. he had to provide information on the terms of reference, provide the BAC with the reasons why the company could not complete its work within the contracted time and the assurance that it would complete it on the time the contract was extended.”

- 5.5.2 In an e-mail message in response to questions asked during the internal investigation, **Mr T Mboyana** stated the following:

*“I was the acting Chief Information Officer and also representing the Systems Development and Maintenance Directorate. The Acting Chief Information Officer is a Chief Directorate responsible for both SDM and IT Directorates. Mr Ndlela represented IT in the meeting. The matter was introduced during the adoption of the Agenda as normal. I can’t remember exactly who introduced the matter into the Agenda. The extension was for Nambiti Consultant (Aubrey Mochela) to finish the work he was doing for the minister on behalf of the CFO office. During the deliberations there was a contention by the IT Director on the renewal of the contract because he was dissatisfied with its performance in the IT Directorate, but I (**on behalf of both IT and SDM**) asked that the contract be renewed with a clause that exclude IT services. The IT Director was not happy with my proposal and went on to ask that he be excused from signing the approval of this extension.”* (emphasis added)

5.5.3 **Ms E Breytenbach** was a member of the BAC at the time and recalled Mr Benside requesting an addition to the Agenda of the matter relating to the extension of Nambiti's contract. She further explained that:

"IT did want to know who is tabling this item, since he knew nothing about it. It was explained that it was from the CFO's office. He (Mr Benside) explained that the contract of the service provider would expire and if only tabled during the next BAC, it would be too late. The BAC considered the motivation and adopted the submission as an Agenda item under new matters. The document was circulated during the meeting."

5.5.3.1 She further indicated that the discussion relating to the matter concerned took place towards the end of the meeting. "IT" raised certain concerns and as she did not have the background to the request, she also raised some, including that:

"I wanted to know whether the extension would not be a double payment i.e. paying them for delivering what was already part of the initial contract. Mr Benside explained that it was not. As the (sic) BAC member, I still wanted a copy of the first contract as well as the terms of reference of the extension to cross reference and make sure that we are not going to pay them for work they should have delivered and were already paid for."

5.5.3.2 She concluded by stating that: *"Director IT raised the concern that as the custodian, many of the outputs form part of his performance agreement. I do recall the chairperson commenting that there were some other issues that would be delivered and are (sic) not part of Director: IT's Performance Agreement."*

5.6 The Complainant's report to the DG dated 31 August 2010

5.6.1 The Complainant alleged that he informed the DG and the Deputy Director-General of the "perceived" corrupt relationship between the Acting CFO and Nambiti, but that nothing was done in response thereto.

5.6.2 The copy of the report that the Complainant submitted during the investigation in this regard, is an unsigned document titled: *“Objections to the appointment of a consultant as Acting Chief Information Officer (ACIO) at the Department of Mineral Resources (DMR).”* It is dated 31 August 2010 and was ostensibly addressed to the DG by the Complainant and Mr T C Mboyana, the Director: SDM.

5.6.3 The gist of the report relates to objections against the decision of the Acting CFO to appoint Mr A Mochela of Nambiti as the Acting Chief Information Officer of the Department. The basis for the objection was that Nambiti failed to comply with its contractual obligations by not delivering:

- Data Recovery within four months after the relocation of offices;
- Backups prior to the relocation;
- The securing of user e-mail during the relocation process;
- A reliable and protected Information Technology environment;
- A Disaster Recovery Plan; and
- Updating anti vires software and patches management.

5.6.4 Notably, the report also stated that:

*“The contract term of the consultant expires at the end of Oct 2010 and his appointment as acting CIO **plus previous requests from the ACFO for the Dir: IT to recommend the extension of his company’s contract terms beyond October 2010**, suggests that there is an intention to keep him at DMR for a longer term. This is a direct violation of the PFMA prescripts that require competitive procurement practices. The Dir: IT indicated in one of his emails the need to obtain 3 quotations from various companies when procuring resources after the expiry terms of the current contract.”*(emphasis added)

5.6.5 The only reference in the report to the relationship between the Acting CFO and Nambiti, is the following:

“Various interactions among the 2 directors, the consultant (Mr A Mochela), Nambiti Tecnologies, and the ACFO have enforced the directors’ perception of a corrupt relationship between the ACFO and/or the consultant and Nambiti Technologies.”

5.6.6 In conclusion, the report recommended that the Complainant and Mr Mbonzana should be appointed to alternate as the Acting Chief Information Officer for a period of six months each.

5.6.7 As indicated above, Mr Mbonzana was appointed to act as the Chief Information Officer, the position that he occupied at the time of the meeting of the BAC held on 28 October 2010.

5.7 The records of the Department in respect of the management of the services provided by Nambiti

5.7.1 As indicated in paragraph 7.3.2 below, the management of the performance of suppliers is regulated by paragraph 27 of the Supply Chain Management Policy of the Department. SCM is responsible to ensure that service providers perform in accordance with the terms and conditions of the contract and to continuously communicate unsatisfactory performance to it. Failure to rectify a lack of performance may result in the termination of the contract.

5.7.2 No indication could be found in the evidence and information presented and obtained during the investigation that the Complainant ever raised his dissatisfaction with the performance of Nambiti with SCM, for it to take the necessary action.

5.7.3 The records of the Department indicate that the Complainant approved the timesheets submitted by Nambiti, confirming the hours spent on the project concerned without recording any objection. It was also noted that he authorized and approved the payment of R1 050 994 to Nambiti during the period May 2010 to September 2010.

5.8 Transversal Term Agreements of the State Information Technology Agency

5.8.1 At the time of the procurement of the services by the Department relevant to the matters referred to in this report, Nambiti was a registered vendor for the provision Information Technology Skills and Information Technology Services, in terms of Transversal Term

Agreements RFB 569 and 570 entered into with the State Information Technology Agency (SITA), respectively.

5.8.2 As indicated paragraph 7.1 below, the Department was therefore obliged and entitled to procure such services directly from Nambiti.

5.9 The report on the internal investigation conducted by the Department

5.9.1 In his response, dated 16 February 2011, to the initial enquires made by the Public Protector relating to the complaint, the DG stated that he had received the same complaint and that the internal Audit Services of the Department was tasked with investigating the following:

5.9.1.1 The alleged misconduct by the BAC in relation to the extension Nambiti's contract for the provision of information technology services; and

5.9.1.2 The alleged corrupt relationship between the Acting CFO and Nambiti.

5.9.2 A copy of the report on the internal investigation was attached to the DG's letter.

5.9.3 According to the report, the complaint was lodged with the Presidential Hotline. The allegations made were similar to those contained in the complaint lodged with the Public Protector, referred to in paragraph 2 above.

5.9.4 The methodology of the investigation included:

5.9.4.1 Perusal and analysis of the relevant departmental documents;

5.9.4.2 Interviews conducted with officials of the Department involved in the matters complained of; and

5.9.4.3 Evaluation and application of the relevant legislative and other prescripts relevant to the procurement of the services concerned.

5.10 The conclusions made in the report include the following:

5.10.1 The allegation pertaining to the violation of the prescripts of the PFMA was ambiguous and failed to provide details;

5.10.2 The allegation of non-compliance with the formal meeting procedures of the BAC was false and unsubstantiated;

5.10.3 The allegation relating to a lack of justification for the extension of the Nambiti contract was incorrect;

5.10.4 The allegation of collusion by the Acting CFO and other members of the BAC was false and misleading; and

5.10.5 The allegation of a corrupt relationship between the Acting CFO and Nambiti was not substantiated by reliable, factual and sufficient evidence.

6 LEGAL FRAMEWORK AND ANALYSIS

6.1 The State Information Technology Agency Act, 1998

6.1.1 Section 7(1)(a) of this Act provides that the SITA must, on behalf of a department:

6.1.1.1 Provide or maintain its private communication network;

6.1.1.2 Provide or maintain transversal information systems; and

6.1.1.3 Provide data-processing or associated services for transversal information systems.

6.1.2 Section 7(1)(b) provides that SITA may on behalf of a department, which so requests, provide, *inter alia*:

6.1.2.1 Application software development;

6.1.2.2 Maintenance services for information technology software or infrastructure;

6.1.2.3 Data-processing or associated services for departmentally specific information technology applications or systems;

6.1.2.4 Technical, functional or business advice or support; and

6.1.2.5 Management services for information technology or information systems.

6.2 General Regulations made in terms of the State Information Technology Agency Act, 1998

6.2.1 Regulation 10 provides for transversal term contracts for goods and services. A transversal term contract is defined by Regulation 1 as meaning:

“A contract with one or more suppliers for the supply of information technology goods or services over a period, required by more than one department or public body according to approved user requirement specifications, with overall pricing of goods being firm, unless otherwise provided for in the contract;”

6.2.2 In terms of Regulation 10.6, a transversal term contract may be in the form of, *inter alia*:

6.2.2.1 A transversal services’ term contract which provides for the supply of information technology services at the contracted prices; or

6.2.2.2 A transversal goods’ term contract which provides for the supply of information technology goods at the contracted prices.

6.2.2.3 Regulation 10.8 provides that during the validity of a transversal term contract, a department may not request a bid for goods or services that are the subject matter of

that contract and may procure such goods or services only from the relevant supplier or suppliers under that contract.

6.2.2.4 The following applies, *inter alia*, in terms of Regulation 10.11 to procurement from a transversal goods' or transversal services' term contract:

“(a)...

- (b) a department or public body must place an order directly with the supplier and furnish a copy of the order to the relevant contract manager of the Agency; and*
- (c) the department or public body must make payment in respect of the order directly to the supplier.”*

6.3 The Procurement Policy of the Department

6.3.1 Paragraph 8.2.3 of the Procurement Policy of the Department (dated 1 February 2008) provides that:

“The BAC considers and adjudicates in line with the procurement delegations all submissions made by the sub-committees and the secretariat. The chairperson of the Bid Adjudication Committee must be the Chief Financial Officer. The responsibilities and authority of the BAC will be detailed in the Charter and approved by the Director-General.

6.3.2 The management of supplier performance is provided for in paragraph 27. It provides that SCM is responsible for ensuring that a supplier perform in terms of the conditions of the contract between it and the Department and to continuously communicate unsatisfactory performance to suppliers in writing.

6.4 The Charter of the BAC

6.4.1 The Charter of the BAC was approved by the DG on 5 March 2010.

6.4.2 Paragraph 3 provides that the purpose of the Charter is to assist the Department to follow the procedures prescribed by the relevant procurement legislation and guidelines.

6.4.3 The relevant provision of the Charter for the purposes of this report is paragraph 10.2, which provides that:

“Submissions, Request for Goods and Services or User Request Forms (IT Related matters) for approval must be handed to the Secretariat before the closing date and time communicated through before the next BAC meeting to ensure timely preparation, investigations and distribution to Members.”

7 EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING AND CONCLUSIONS MADE FROM THE INVESTIGATION

7.1 Was the request to the BAC to consider the extension of Nambiti Technologies’ contract for a period of two months in violation of the procurement policies and prescripts of the Department and therefore improper?

7.1.1 As indicated in paragraph 6.4.3 above, assistance in the following of procedures is provided to the BAC by the Charter. However, it is not part of the Procurement Policy of the Department and is not made and issued in terms of the PFMA and the Treasury Regulations. The Charter is therefore merely a guideline for proper procedure and due to the functions and structure of the BAC, it cannot be regarded as rules that are casted in stone and which do not allow for any deviation.

7.1.2 There is no indication in the PFMA, the Treasury Regulations, Procurement Policy of the Department or the Charter of the BAC that items can only be added to an Agenda, as alleged by the Complainant, in exceptional cases. As is the case of any other departmental committee, the BAC has the powers, when it is in the interest of the performance of its functions, to do so. The evidence of the other members of the BAC obtained during the investigation also indicates that the adding of items to the Agenda at the start of the meeting was not regarded as irregular.

- 7.1.3 The Minutes of the meeting further confirm that the BAC approved that the request could be added to the Agenda when the meeting started. It was also noted that request was one of three items that were added.
- 7.1.4 The Minutes further indicate that the request was not the last item that was discussed by the BAC, as was alleged by the Complainant. The information obtained from other members of the BAC confirmed this and that the documents relating to the request were circulated at the start of the meeting.
- 7.1.5 The evidence and information obtained during the investigation indicate that although the Secretariat of the BAC requires that submissions and request to be considered by the Committee should be made available in advance, nothing prevents to BAC from adding items to its Agenda when requested to do so. The adding to the Agenda of the meeting of 28 October 2010 of the item relating to the extension of Nambiti's contract therefore did not constitute a violation of the procurement policies and prescripts of the Department and was not improper.
- 7.2 Was there an improper relationship between the Acting CFO and Nambiti that could have influenced the considerations of the BAC in respect of the extension of its contract?**
- 7.2.1 In his report to the DG relating to his objection to the appointment of a consultant of Nambiti as the Acting Chief Information Officer, the Complainant stated that his "*perception*" in this regard was based on interactions between him, Mr Mboyana of the Department, Mr Mochela of Nambiti and the Acting CFO. However, he could not explain the basis for his perception of impropriety and also could not do so during the investigation.

7.3 Was the resolution of the BAC to recommend the extension of Nambiti's contract for a period of two months improper?

- 7.3.1 At the time when the request for the extension of Nambiti's contract was presented to the BAC, the Department had been engaging its services for some time for different projects relating to the improvement and upgrading of its ITC systems.
- 7.3.2 The procurement of Nambiti's services was done in terms of the State Information Technology Act, 1998 and the Regulations issued in terms thereof, by virtue of which the Department could and was obliged to obtain the required services from service providers that were parties to Transversal Terms Agreements with SITA.
- 7.3.3 No formal procurement process in terms of the PFMA, the Treasury Regulations and the Procurement Policy of the Department, as contended by the Complainant, was therefore required.
- 7.3.4 The extension of the contract was necessary to complete the engagements that Nambiti were involved in as project manager facilitating the institutionalization of the audio visual and video conferencing infrastructure of the Department, the optimization of its telecommunications and the enhancement of its office space to accommodate its business needs.
- 7.3.5 The said project did not relate directly to Information Technology, as alleged by the Complainant, although it included certain components thereof. It focused more on the improvement and upgrading of the audio visual and telecommunication facilities of the Department.
- 7.3.6 The Complainant's allegation that there must have been collusion between the Acting CFO and the other members of the BAC before the meeting not to oppose the request for the extension of the contract, hence their failure to raise any concerns, is not supported by the Minutes of the meeting and the information and evidence obtained from other members of the Committee.

- 7.3.7 From the Minutes and the evidence of other members, it is evident that a number of concerns were raised and that the presenter of the request, Mr Bense, had to submit additional information before the approval thereof could be considered. The extension was therefore approved on condition that the additional information was submitted to the satisfaction of the Committee.
- 7.3.8 The objection of the Complainant to the request for the extension of the contract that he, as the Director: Information, was not consulted, is inconsistent with the contents of the report that he submitted to the DG on 31 August 2010, in which he stated that the Acting CFO had approach him, requesting that he recommend the extension of the contract.
- 7.3.9 At the time of the 28 October 2010 meeting, Mr Mboya was the Acting Chief Information Officer. According to the records of the Department, he was aware of the objections raised by the Complainant, but as the head of Information Technology, he supported the request for the extension, albeit with conditions.
- 7.3.10 The allegation that the Acting CFO as the Chairperson of the BAC misled the Committee by stating that the contract had nothing to do with Information Technology, is not supported by the evidence of the other members.
- 7.3.11 The Complainant's allegation that he was dissatisfied with the Nambiti's performance and therefore against the extension of the contract is also inconsistent with his approval of payments made to the company and the fact that no record could be found that he ever brought his concerns to the attention of SCM, as is required by the Procurement Policy.
- 7.3.12 From the records of the Department and the evidence and information provided by other members of the BAC, it is evident that the BAC as a Committee was in favour of the extension of the contract, subject to the submission and consideration of additional evidence relating to certain aspects of the work performed by Nambiti for the Department up to that date.

7.3.13 No reliable and substantiated evidence or information could be found during the investigation indicating that the request to extend the contract for a period as short as two months was unjustified, that the process relating to the extension was improper or that it violated the relevant prescripts relating to the procuring of services in terms of SITA's Transversal Term Agreements.

8 FINDINGS


The Public Protector's findings are that:

Finding 1: The request submitted to the BAC on 28 October to consider the extension of Nambiti's contract for a period of two months was justified and proper;

Finding 2: No evidence or information could be found during the investigation of any improper relationship between the Acting CFO and Nambiti;

Finding 3: The BAC considered the request for the extension of the contract in terms of its powers and functions as prescribed by the Treasury Regulations and the Procurement Policy of the Department; and

Finding 4: The resolution of the BAC to recommend the extension of the contract subject to certain conditions was proper and in accordance with its responsibilities as prescribed by PFMA, the Treasury Regulations and the Procurement Policy of the Department.



ADV. N. MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 26 November 2012