

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 8(1) READ WITH
SECTION 6(4)(c)(ii) OF THE PUBLIC PROTECTOR ACT, 1994**

PUBLIC PROTECTOR SOUTH AFRICA



Accountability • Integrity • Responsiveness

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**INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, IMPROPER
CONDUCT AND PROCUREMENT IRREGULARITIES BY THE PERFORMING
ARTS CENTRE OF THE FREE STATE, REGARDING THE AWARDING AND
CANCELLATION OF A TENDER FOR THE PROVISION OF COMPANY
SECRETARIAT SERVICES**



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LIST OF ACRONYMS AND ABBREVIATIONS

Acronym /Abbreviation	Description
BAC	Bid Adjudication Committee
BEC	Bid Evaluation Committee
Constitution	Constitution of the Republic of South Africa,1996
CSS	Company Secretary Services
FCS	First Corporate Secretaries
OB	Occurrence Book
PACOFs	Performing Arts Centre of the Free-State Agency of the Department of Sports, Arts and Culture
PPR	Preferential Procurement Regulations
PP Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended
Public Protector	Public Protector of the Republic of South Africa
Public Protector Act	The Public Protector Act, 1994
RFP	Request For Proposal
RQF	Request For Quotation
SCM	Supply Chain Management
TOR	Terms of Reference
Ukhozi	Ukhozi Transcribers

1. INTRODUCTION

- 1.1 This is an Advisory Report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) read with section 6(4)(c)(ii) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report communicates the findings in respect of an investigation into allegations of maladministration, improper conduct and procurement irregularities by the Performing Arts Centre of the Free State (PACOFs), regarding the awarding and cancellation of a tender for the provision of Company Secretariat Services (CSS).

2. THE COMPLAINT

- 2.1 The investigation originates from a complaint lodged with the Free State office of Public Protector on 16 February 2022, by Mr T Sithole (the Complainant).
- 2.2 The Complainant alleged that:
- 2.2.1 His company, First Corporate Secretaries (FCS), submitted a bid for tender PAC/COSEC/2021 on 21 June 2021, before the 11:00 deadline and attended the opening of the tender box and recording of the bids submitted for the tender;
- 2.2.2 Bids submitted were from Ntanjana Attorneys (no amount was announced on this Bid), FCS (thirty one thousand four hundred and eighty one rand and twenty five cents) (R31 481.25), per month and Phatsoane Henney Attorneys (one hundred and twenty two thousand rand)(R122 000.00) per month;
- 2.2.3 On 5 July 2021, he received an email from Ms Alida Hattingh (Ms Hattingh), a Supply Chain Management official from PACOFs, informing him of a revised list of bids that had been submitted, which now included a Bid from Ukhozi

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- Transcribers (Ukhozi). The explanation provided by Ms Hattingh was that Ukhozi's Bid had been submitted on 17 June 2021;
- 2.2.4 No reasons were advanced why the Bid was not placed in the tender box as per the tender procedures;
- 2.2.5 A further explanation provided by PACOFS, was that the bid was only submitted to the Supply Chain Management (SCM) unit on 25 June 2021, when an official from SCM found the bid for Ukhozi in the safe when the official went to collect bids for another tender that closed on 25 June 2021;
- 2.2.6 In September 2021, the Complainant found out that PACOFS issued a Request for Quotation (RFQ) to appoint a service provider for the provision of secretarial services on a month-to-month basis, for a period not exceeding six (6) months to allow it to finalise the tender process for a new bid for CSS;
- 2.2.7 The FCS also submitted a quote in this regard and later learned that Ukhozi had been awarded the contract for a period of six(6) months;
- 2.2.8 Ukhozi quoted a price lower than that which was quoted by FCS as it had an advantage of knowing FCS's price quotation from its 21 June 2021 submission;
- 2.2.9 On December 2021, PACOFS issued another tender for the same services for a period of 36 months and with the same specifications, suggesting that the previous tender (PAC/COSEC/2021) was cancelled without any explanation; and
- 2.2.10 The Complainant is of the view that the cancellation of the tender was irregular and suspicious, and that Ukhozi was awarded an unfair advantage in the process.

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, or in the public administration in any sphere of government.
- 3.2 Section 182(2) directs that the Public Protector has additional powers and functions as prescribed by national legislation. The Public Protector's powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs as well as any act or omission by a person in the employ of government at any level, which results in unlawful or improper prejudice to any person.
- 3.3 In terms of section 6(4)(c)(ii) of the Public Protector Act, the Public Protector may, if he or she deems it advisable, refer any matter which has a bearing on the investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- 3.4 Section 8 of the Public Protector Act deals with the publication of findings by the Public Protector after an investigation has been conducted. Accordingly, it reads: *The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.*

3.5 *Phorego (2017)* notes that there are different interpretations of the word “*recommendations*”.¹ In any discourse about what the legislature could have intended, it is possible that those involved might engage in a literal interpretation of the particular wording as used in a particular legal provision.² The Supreme Court of Appeal distinguished between “*mere recommendations, which an organ of State may accept or reject*”, and binding remedial action as envisaged in section 182(1)(c) of the Constitution.³

3.6 *In the EFF matter*⁴ (Nkandla judgement) the Constitutional Court stated that the remedial action taken in a particular case, will be informed by the subject-matter of the investigation and the type of findings made.

3.7 Of cardinal significance about the nature, exercise and legal effect of the remedial power is the following:

“... (f) **Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken;**

(g) *Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken; and*

¹ For example, in www.oxforddictionaries.com, the word is defined as “a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body”. Of course there are other meanings which are not important for our purposes. Furthermore, at www.merriam-webster.com, recommendations are defined as a “suggestion as to what should be done”.

² Powers of the Public Protector: are its findings and recommendations legally binding? *Phorego, Molefhi Solomon*. URI: <http://hdl.handle.net/2263/65709>.

³ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* (393/2015) [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (8 October 2015).

⁴ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

(h) *Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is **binding or not** or what its legal effect is, **would be a matter of interpretation** aided by context, nature and language.” (Emphasis added)*

3.8 The Constitutional Court further noted that all the powers set out in section 6(4)(c)(ii) of the Public Protector Act accord and are harmoniously coexistent with section 182 –

*“..... referring a matter to an appropriate body or authority **or making suitable recommendations** to remedy the complaint; and resolving any complaint by ‘any other means that may be expedient in the circumstances’, are all regulatory and additional powers. And they are consistent with and flow from the constitutional power ‘to take appropriate remedial action’ and provision for ‘additional powers and functions’.” (Emphasis added)*

3.9 The Constitutional Court concluded that –

*“... what legal effect the appropriate remedial action has in a particular case, depends on the nature of the issues under investigation and the findings made. As common sense and section 6 of the Public Protector Act suggest, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. **And so might recommending** litigation or a referral of the matter to the relevant public authority **or any other suitable recommendation**, as the case might be. **The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow.** (Emphasis added)*

3.10 However, the fact that the Public Protector may in appropriate circumstances propose a non-binding “*recommendation*” or remedy, does not mean that

organs of state may accept or reject them at whim. The test is that if an organ of state were to consider the findings and proposed “*recommendations*” by the Public Protector, that decision itself must not be irrational.

3.11 The PACOFS is a schedule 3A entity, in terms of that Public Finance Management Act, 1999 (PFMA) that was established by the Ministry of Sport, Arts and Culture in terms of the Cultural Institutions Act³. It is therefore an organ of state and the conduct of the institution amounts to conduct in state affairs, and as a result, the matter falls within the ambit of the Public Protector’s mandate.

3.12 The Public Protector’s powers and jurisdiction to investigate, report and take appropriate remedial action was not disputed by any of the parties.

4 ISSUE IDENTIFIED FOR INVESTIGATION

4.1 Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

4.1.1 Whether PACOFS failed to follow correct procurement procedures in the awarding and cancellation of a tender for the provision of Company Secretariat Services, and if so, whether such conduct constitutes improper conduct in terms of Section 182(1) of the Constitution and maladministration as envisaged in Section 6(5) of the Public Protector Act.

5 THE INVESTIGATION

5.1 The investigation process

5.1.1 The investigation was conducted in terms of section 182(1)(a), (b) and (c) of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report

³ Act 119 of 1998.

on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

5.1.2 The investigation process included exchange of documents with the then Acting Chief Executive Officer of PACOFS, Ms Sharon Snell, investigative interviews with officials of PACOFS and the Complainant, an analysis of the relevant documentation; legal research conducted; and the consideration and application of the relevant laws, regulatory framework and jurisprudence.

5.2 Approach to the investigation

5.2.1 The investigation was approached using an enquiry process that seeks to determine:

5.2.1.1 What happened?

5.2.1.2 What should have happened?

5.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to a maladministration and improper conduct?

5.2.1.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong occasioned by the said improper conduct or maladministration.

5.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

5.2.3 In this particular case, the factual enquiry principally focused on whether or not the alleged conduct by PACOFS relating to the awarding and cancellation

of a tender for the provision of CSS, constituted maladministration and improper conduct.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by PACOFS to prevent maladministration.

5.3 Key sources of information

5.3.1 Documents

- 5.3.1.1 Copy of the Terms of Reference: Provision of Company Secretariat Services for a period of 36 months: Bid No PAC/COSEC/2021 published on 02 June 2021;
- 5.3.1.2 Response letter from Ms Sharon Snell dated 30 April 2022;
- 5.3.1.3 Copy of Email dated 03 September 2021 from Nomza Topo to First Corporate Secretaries regarding the cancellation of the Bid dated 15 September 2021;
- 5.3.1.4 Copy of a Notice dated 31 August 2021 regarding the cancellation of a Bid for the Provision of Company Secretariat Services;
- 5.3.1.5 Attendance Register regarding the Opening of Bids dated 21 June 2021.
- 5.3.1.6 Copy of the page of the OB 284/06/2021 dated 21 June 2021;
- 5.3.1.7 Copy of an advertisement for the Request for Proposal (RFP) with a closing date of 10 September 2021;
- 5.3.1.8 Minutes of the Bid Evaluation Committee meeting dated 22 February 2022;
- 5.3.1.9 Attendance Register for members of the BEC dated 22 February 2022;
- 5.3.1.10 Minutes of the BAC meeting dated 16 March 2022;
- 5.3.1.11 BAC Report dated 25 March 2022;
- 5.3.1.12 Minutes of the Specification Committee meeting dated 08 October 2021;
- 5.3.1.13 Attendance Register for Bid Specification Committee dated 08 October 2021; and
- 5.3.1.14 Appointment letter to Mr Mbengo of Ukhozi dated 05 April 2022.

5.3.2 Correspondence sent and received

- 5.3.2.1 Complaint letter dated 18 January 2022;
- 5.3.2.2 Copy of letter dated 21 June 2021, regarding the List of Service Providers;
- 5.3.2.3 Copy of an email dated 05 July 2021 regarding the revised list of tenders for the appointment of Company Secretariat to First Corporate Services;
- 5.3.2.4 Copy of a photo of a page dated 17 June 2021 of the Occurrence Book (OB) regarding the submission of Ukhozi Transcribers bid documents;
- 5.3.2.5 Allegations letter to the Acting Chief Executive Officer, Ms Sharon Snell dated 13 April 2022; and
- 5.3.2.6 Follow-up letter to the Acting Chief Executive Officer, Ms Sharon Snell dated 12 August 2022.

5.3.3 Applicable law

- 5.3.3.1 The Constitution;
- 5.3.3.2 The Public Protector Act, 1994;
- 5.3.3.3 Public Finance Management Act, 1 of 1999;
- 5.3.3.4 Preferential Procurement Policy Framework Act 2000: Preferential Procurement Policy Regulations, 2017;
- 5.3.3.5 Supply Chain Management Guide for Accounting Officers/Authority, February 2004; and
- 5.3.3.6 PACOFS Supply Chain Management Policy, dated 02 March 2019.

6 THE DETERMINATION OF THE ISSUE IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

- 6.1 **Whether PACOFS failed to follow correct procurement procedures in the awarding and cancellation of a tender for the provision of Company Secretariat Services, and if so, whether such conduct constitutes improper conduct in terms of Section 182(1) of the Constitution and**

maladministration as envisaged in Section 6(5) of the Public Protector Act

Common cause

- 6.1.1 A tender for the provision of CSS for a period of 36 months was advertised by PACOFS (Tender No: PAC/COSEC/2021) on 31 May 2021. The closing date of the bid advertisement was Monday, 21 June 2021 at 11:00.
- 6.1.2 The tender advertisement emphasised that no late applications would be accepted.

Issue in dispute

- 6.1.3 The issue for the Public Protector's determination is whether PACOFS failed to follow proper procurement procedures in the awarding and cancellation of tender no: PAC/COSEC/2021 for the provision of CSS.

The Complainant's version

- 6.1.4 The Complainant submitted that his company, FCS, submitted a bid for tender no. PAC/COSEC/2021 on 21 June 2021 before the 11:00 deadline.
- 6.1.5 He stated that at the opening of the tender box and recording of the bids submitted for the tender on 21 June 2021, the only bids submitted were from Ntanjana Attorneys, FCS and Phatsoane Henney Attorneys.
- 6.1.6 The Complainant further submitted that he was later made aware by PACOFS of a revised list of bids that was submitted which now included a bid from Ukhozi Transcribers (Ukhozi). The explanation provided, in the email dated 05 July 2021, from Ms Hattingh to the Complainant, was that Ukhozi's bid was submitted on 17 June 2021 and had been found in the safe at security when

an official from SCM went to collect bids for another tender which closed on 25 June 2021.

6.1.7 The Complainant submitted that subsequently, tender no. PAC/COSEC/2021 was improperly cancelled and PACOFS followed a quotation process for the provision of CSS on a month to month basis, until the tender was re-advertised in December 2021.

6.1.8 The Complainant further submitted that as a result of the irregular and suspicious processes, Ukhozi received an unfair advantage.

PACOFS's version

6.1.9 On 13 April 2022, the Public Protector issued a letter to Ms Sharon Snell, the then Acting Chief Executive Officer (Ms Snell) of PACOFS in respect of the allegations made and requested PACOFS to respond to the allegations and to provide information.

6.1.10 On 04 May 2022, a response as well as supporting documentation was received from Ms Snell, indicating, *inter alia*, the following:

6.1.10.1 PACOFS invited service providers for the provision of CSS on 31 May 2021 as per Bid No. PAC/COSEC/2021 and the closing date was 21 June 2021;

6.1.10.2 The Terms of Reference (TOR) for the tender indicated that the tender documents were to be hand delivered to PACOFS;

6.1.10.3 The Complainant's company, FCS, submitted a bid for the above tender on 21 June 2021 before the 11:00 deadline and he attended the opening of the tender box on the same day;

6.1.10.4 The bid opening register dated 21 June 2021, indicated the names and the amounts of the three (3) companies that submitted their bids on the closing date and time. This is detailed below as follows:

SERVICE PROVIDER	B-BBEE LEVEL	BID PRICE
1. Ntanjana Attorneys	1	No amount specified
2. First Corporate Secretaries	1	R377 775.00 for 36 months or R31 481.25 per month
3. Phatsoane Henney Attorneys	1	R122 000.00

- 6.1.10.5 On 28 June 2021, the list of bids received was published on the PACOFS website;
- 6.1.10.6 During the month of June 2021, PACOFS had published two other tenders, namely for the provision of legal services and debt collection services, with a closing date was 25 June 2021;
- 6.1.10.7 During the opening of these tenders on 25 June 2021, the submission of Ukhozi was found among the bids for legal services and debt collection services and this was considered to have been submitted after the closing date for the CSS tender;
- 6.1.10.8 On 29 June 2021, Mr Steve Mbengo from Ukhozi sent an email to Ms Hattingh stating that Ukhozi had submitted its bid for the provision of CSS at PACOFS on 17 June 2021, before the closing date of 21 June 2021, however, from the list of bidders published on the website, Ukhozi's bid was not included on the PACOFS website;
- 6.1.10.9 Ms Snell submitted that an internal investigation was immediately conducted and it was discovered through the security register that the bid document for Ukhozi was received on 17 June 2021 at 12:42 and it was placed in the safe at security;

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- 6.1.10.10 On 01 July 2021, Ms Hattingh immediately notified Ukhozi, through an email, that PACOFS acknowledged receipt of their bid document and that it had been placed in the safe at security with other bid documents. Ms Hattingh further stated that an email will be sent to all bidders with a revised list of bids received and be rectified on PACOFS website;
- 6.1.10.11 On 05 July 2021, an email was sent to all service providers that had submitted their bids indicating the reasons for the adjusted bidders list and proof of submission from Ukhozi was attached to the email, and it further stated that Ukhozi submitted its bid on 17 June 2021;
- 6.1.10.12 Ms Snell further stated that when PACOFS communicated the updated bidders list and reasons thereof to bidders, the Complainant informed PACOFS that Ukhozi is known to him and FCS. The two employees of Ukhozi are former employees of FSC and it would appear that his complaint comes from a personal matter and does not necessarily stem from PACOFS processes;
- 6.1.10.13 Ms Snell indicated that service providers are required to drop their quotations or bids in the bid box, if hand delivered, and that most tender documents would normally not fit in the opening at the top of the bid box. Such tender documents would be handed to the security official and recorded. During the opening of the bid box at closing time, security will drop the tenders they received in the opened bid box for collection;
- 6.1.10.14 The Bid Evaluation Committee (BEC) held a meeting on 20 July 2021 to evaluate the bids for CSS based on the advertised terms of reference;
- 6.1.10.15 During the meeting of the BEC, both FCS and Ukhozi were disqualified for failure to submit all the required documentation;
- 6.1.10.16 Phatsoane Henney Attorneys was the only bidder that met all the pre-qualification requirements as per the terms of reference, and the BEC

recommended the appointment of Phatsoane Henney Attorneys to the Bid Adjudication Committee (BAC), for an amount of four million three hundred and ninety two thousand rand (R 4 392 000.00);

6.1.10.17 The Bid Adjudication Committee (BAC) had its meeting on 24 August 2021, to consider the recommendation made by the BEC. The BAC noted that the price quoted by Phatsoane Henney Attorneys was excessive compared to the budgeted amount which was only one million five hundred thousand rand (R1 500 000.00), in terms of the 2021-2022 Procurement Plan;

6.1.10.18 The BAC concluded that the bid price was too expensive and that the tender would be re-issued, however, in the interim a Request for Quotation (RFQ) would be issued on a month-to-month basis, to allow for the finalisation of the tender with the specification “*reduced*” to allow for a more competitive process;

6.1.10.19 Ms Snell stated that according to Regulation 13 of the Preferential Procurement Regulations (PPR), a tender can be cancelled if there are no funds available to appoint a bidder;

6.1.10.20 On 31 August 2021, Ms Snell signed a Notice of Cancellation for bid PAC/COSEC/2021. On 03 September 2021, Ms Hattingh submitted an email to all service providers who had submitted bids informing them of the cancellation of the tender and the reasons thereof. She also informed the service providers that the cancellation of the tender would be published on the tender portal on the same date;

6.1.10.21 Subsequent to the cancellation of the tender, the RFQ for the provision of CSS was issued on 03 September 2021 on a month-to-month basis, and the specifications were reviewed with some of the duties initially required removed so as to allow for a more competitive process; and

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- 6.1.10.22 Ms Snell indicated that as per the cost effective requirement stated in Treasury Regulations 16A3.2 (a), the expected supplier to be awarded a tender is the one that has the lowest price, and that Ukhozi had quoted the lowest price of twenty seven thousand eight hundred and fifty four rand and fifty four cent (R27 854.54).
- 6.1.11 According to the submission titled *“Requesting approval to appoint Company Secretariat Services on a month to month basis for PACOFS for a maximum of six (6) months”* dated 22 September 2021, from Mr Sello Sanyane, the Chief Financial Officer to Ms Snell, thirteen (13) quotations were received and FCS submitted a quotation of twenty nine thousand rand (R29 000.00).
- 6.1.12 On 25 November 2021, PACOFS issued another tender for the provision of CSS for a period of 36 months, with a closing date of 17 January 2022, where the specifications were the same as the RFQ;
- 6.1.13 The TOR issued for the re-advertised tender included on paragraph 6(b) compliant tax status certificate on the Central Data Base (CSD) and paragraph 6(i) submission of a Municipal utilities bill. A further note at the end of paragraph 6 of the TOR stated that failure to submit the requested documents *“will lead to disqualification unless stated otherwise”*.
- 6.1.14 According to the minutes of the BEC meeting held on 22 February 2022, the following was indicated:
- 6.1.14.1 Five (5) bids were received, including bids from both FSC and Ukhozi;
- 6.1.14.2 FSC’s bid amount was eight hundred and twenty eight thousand rand (R828 000.00) and that of Ukhozi was one million and fifty three thousand seven hundred and thirty seven rand and twenty eight cents (R1 053 737.28), for the 36 months period;

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- 6.1.14.3 Three (3) bids, including that of FSC were disqualified as they did not meet the prequalification criteria. Paragraph 3.2 stated that FSC was “*non tax complaint and no utilities bill utilities bill/lease agreement not submitted*”;
- 6.1.14.4 The CSD dated 15 February 2022, confirmed that FSC had a non-compliant tax status;
- 6.1.14.5 Two (2) service providers including Ukhozi, were assessed on the evaluation criteria and both companies scored more than 60 points and were evaluated for price and B-BBEE; and
- 6.1.14.6 Ukhozi scored the highest points and was recommended for appointment to the BAC.
- 6.1.15 On 24 March 2022, the BAC submitted its report to Ms Snell and the PACOFS Council (the Council) for consideration. On 25 March 2022, Ms Snell supported the recommendation of the BEC to appoint Ukhozi.
- 6.1.16 According to an email dated 31 March 2022 from Adv Thato Moeeng, the Chairperson of the Council, to Ms Snell, the Council approved the recommendation to appoint Ukhozi.

Interviews and Inspection in loco conducted

- 6.1.17 The Public Protector sent a further letter to Ms Snell on 12 August 2022 requesting an interview with certain officials of PACOFS, including the Security Officer, who allegedly received the bid documents for Ukhozi on 17 June 2021; the official who opened the tender box on 21 June 2021; and the SCM official who allegedly received the bid documents for Ukhozi on 25 June 2021.
- 6.1.18 On 12 September 2022, the Public Protector held an interview with Mr Matladi, the Security Officer who was on duty on 17 June 2021. He provided a copy of

the respective OB entries and indicated that on 17 June 2021, he received two tender documents, one from Ntanjana Attorneys as per OB entry 283/06/21 and another from Ukhozi as per OB entry 284/06/21. This OB entry indicated that Ukhozi's bid documents were received at 12:42 and placed in the safe.

- 6.1.19 Mr Matladi further stated that if the tender documents are large and not fit in the tender box, an entry will be made on the OB, and the person who hand-delivered the bid document will also sign the OB. He indicated that the key for the tender box is held with the SCM unit and the key for the safe is held by the security official.
- 6.1.20 He stated that he could not remember if he was present when the tender box was opened on 21 June 2021.
- 6.1.21 During the inspection *in loco* conducted by the Public Protector on 12 September 2022, it was found that there are two boxes at the entrance of PACOFS, the first box is for Human Resources, which was mainly for application forms for employment, and the other box is for tender documents.
- 6.1.22 An interview was also held on 13 September 2021 with Ms Hattingh who stated that there was a human error on the part of the security official. She stated that she believed that the security official who received the bid documents locked the documents in the safe. When they opened the tender box for the provision of legal services and debt collection services, the bid documents for Ukhozi were found amongst the documents from the safe.
- 6.1.23 She further stated that as a result of the mishap that had occurred, she immediately implemented a register so that all bids are registered before they are put into the tender box and those that cannot fit into the tender box are kept in the safe and recorded in the register so that they have information regarding all tenders received.

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- 6.1.24 Ms Hattingh further stated that all service providers were informed that there was another bid which had been received from Ukhozi, which was not placed in the tender box but in the safe, and that it was received before the closing date of the tender as per the OB entry made.
- 6.1.25 On 19 June 2023, the Public Protector sent an email enquiry to the Free State Provincial Treasury in respect of a Treasury Practice Note, guideline or other legal framework relating to the placement of bid documents in tender boxes.
- 6.1.26 On 22 June 2023, a response was received from the Ms Sesing, Head of Department (HOD) of the Free State Provincial Treasury, indicating the following:
- 6.1.26.1 That there is no legal prescripts with regards to the placement of bid documents, however, this does not mean that Accounting Officers/Authorities should not put in place, good practices to minimise the risk associated with the submission of bid documents during the opening of bids/quotations; and
- 6.1.26.2 That this can achieved by either outlining the process in the Departments SCM Policy or in the Standard Operating procedures.

Applicable law

The Constitution

- 6.1.27 Section 217(1) of the Constitution provides that “*When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective*”.

The Public Finance Management Act

6.1.28 Section 49 of the PFMA dealing with Accounting Authorities provides that-

(1) Every public entity must have an authority which must be accountable for the purpose of the Act.

(2) If the public entity-

(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or

(b) does not have the controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designate another person as the accounting authority”.

6.1.29 Section 51 regarding general responsibilities of accounting authorities provides that - (1) An accounting authority of a public entity-

(a) Must ensure that public entity has an maintains-

(i)

(ii)

(iii) An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”.

The National Treasury Regulations, 2005

6.1.30 Regulation 16A3 of the National Treasury Regulations provides that: -

“16A3.1 The accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for

–

(a) the acquisition of goods and services;

16A3.2 A supply chain management system referred to in paragraph 16A3.1

must –

(b) be fair, equitable, transparent, competitive, and cost effective”.

The Preferential Procurement Policy Framework Act 2000: Preferential Procurement Policy Regulations, 2017

6.1.31 Regulation 3(1) of the Preferential Procurement Policy Regulations, 2017 provides the following:

“An organ of state may, before the award of a tender, cancel a tender invitation if-

- (a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;*
- (b) funds are no longer available to cover the total envisaged expenditure;*
- (c) no acceptable tender is received; or*
- (d) there is material irregularity in the tender process.*

(2) The decision to cancel a tender invitation in terms of sub regulation (1) must be published in the same manner in which the original tender invitation was advertised”.

Supply Chain Management a Guide for Accounting Officers/ Authorities, February 2004 (the SCM Guide)

6.1.32 Paragraph 2.8 of the SCM Guide defines “*fraudulent practice*” as a “*misrepresentation of facts in order to influence a selection process or the execution of a contract to the detriment of the accounting officer/authority, and includes collusive practices among bidders/contractors (prior to or after submission of proposals) designed to establish prices at artificial, non-competitive levels and to deprive the accounting officer/authority of the benefits of free and open competition.*”

- 6.1.33 Paragraph 4.8 of the SCM Guide dealing with bid submission states that *“bidders should be permitted to submit bids by mail or by hand. The deadline and place for receipt of bids should be specified in the invitation to bid. To standardise on the closing time of bids, it is recommended that bids should close at 11:00”*.
- 6.1.34 Paragraph 4.10 of the SCM Guide dealing with opening of bids and late bids states that *“The time for the bid opening should be the same as for the deadline for receipt of bids or promptly thereafter and should be announced, together with the place for bid opening, in the invitation to bid. The institution should open all bids at the stipulated time and place. Bids should be opened in public, that is, bidders or their representatives should be allowed to be present. If requested by any bidder, the name of the bidders and if practical the total amount of each bid and of any alternative bids, should be read aloud. The names of the bidders and their individual total prices should be recorded when bids are opened. Bids received after the time stipulated should not be considered.”*

PACOF'S Supply Chain Management Policy, dated 02 March 2019

- 6.1.35 According to paragraph 4(iv) of PACOF'S Supply Chain Management Policy all quotations and proposals must be either emailed to the dedicated email address **or deposited into the quotations box situated in the main entrance (own emphasis added)**.

Analysis

- 6.1.36 As PACOF'S is an organ of state their procurement processes must be in line with section 217 of the Constitution and section 51(1)(a)(iii) of the PFMA in that any tender processes undertaken by PACOF'S must be, fair, equitable, transparent, competitive and cost effective.

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- 6.1.37 The evidence submitted indicates that PACOFS did follow a competitive bidding process for bid PAC/COSEC/2021, which was advertised on 31 May 2021. On 21 June 2021, the closing date for bid PAC/COSEC/2021, three (3) bids were received including, those from FCS, Ntanjana Attorneys and Phatsoane Henney Attorneys and the bid information was subsequently published on the PACOFS website.
- 6.1.38 In terms of Paragraph 2.8 and 4.8 of the SCM Guide, the Accounting Officer is required to guard against non-compliance with stated bid requirements that will pose a significant risk to the legitimacy of the bidding process. Bidders, in terms of the SCM Guide can mail or hand deliver bids before the prescribed time suggested by National Treasury.
- 6.1.39 The Accounting Officer is required in terms of paragraph 4.10 of the SCM Guide to ensure that all bids are opened on the date of the closure of the bid and that Bids received **after the time** (own emphasis added) stipulated should not be considered.
- 6.1.40 According to PACOFS Supply Chain Management Policy, proposals are to be deposited into the quotations box situated in the main entrance.
- 6.1.41 On 29 June 2021, PACOFS was alerted by Ukhozi, that their bid did not form part of the published information.
- 6.1.42 The OB entry made by Mr Matlali on 17 June 2021 indicates that Ukhozi's bid documents were submitted before the deadline and was placed in the safe by him. Ms Hattingh informed all bidders of the inclusion of Ukhozi as a bidder on 05 July 2021.
- 6.1.43 The evidence indicates that Ukhozi hand delivered their bid before the date of closure of the bid on 17 June 2021. Their bid was placed in the safe as their documents did not fit into the tender box. Ukhozi therefore qualified to be considered for the tender. It is noted by the Public Protector that the PACOFS

Supply Chain Management Policy does not specify how the hand delivery of bid documents should be managed.

- 6.1.44 The BEC evaluated the bids received from Ntanjana Attorneys, Phatsoane Henney Attorneys, FCS and Ukhozi on 22 July 2021. FCS and Ukhozi were disqualified for its failure to submit all the required documentation and Ntanjana Attorneys failed to submit a bid amount.
- 6.1.45 Phatsoane Henney Attorneys was the only bidder that met all the pre-qualification requirements as per the TOR and it was recommended for appointment by the BEC to the BAC, at an amount of R 4 392 000.00.
- 6.1.46 On 24 August 2021, the BAC noted that the price quoted by Phatsoane Henney Attorneys was excessive compared to the budgeted amount of R1 500 000.00 in terms of the 2021-2022 Procurement Plan, and it took a decision to cancel the bid.
- 6.1.47 According to Section 3(1) of the Preferential Procurement Policy Regulations 2017, the Accounting Officer can make the decision to cancel a tender, if *“funds are no longer available to cover the total envisaged expenditure”* and such cancellation should be published.
- 6.1.48 On 31 August 2021, Ms Snell signed a Notice of Cancellation for bid PAC/COSEC/2021 and on 03 September 2021, Ms Hattingh submitted an email to all service providers who had submitted bids informing them of the cancellation of the tender and the reasons thereof. She also informed the service providers that the cancellation of the tender would be published on the e-tender portal on the same date. The cancellation was accordingly published on the e-tender portal on 03 September 2021.
- 6.1.49 Subsequently, PACOFS issued a RQF on 03 September 2021 for the provision of CSS on a month-to-month basis, pending the advertisement of the tender for 36 months. Ukhozi was appointed on 23 September 2021, to

render services on a month-to-month basis as it had submitted the lowest quotation.

Conclusion

6.1.50 The Public Protector could not find any evidence to indicate that Ukhozi was unfairly preferred as opposed to other service providers. Ukhozi as well as FCS were disqualified during the evaluation process for bid PAC/COSEC/2021. Bid PAC/COSEC/2021 was subsequently cancelled.

6.1.51 Both FCS and Ukhozi had revised their quotations during the RFQ process, with Ukhozi ultimately submitting the lowest quotation and was appointed on a month-to-month basis.

6.1.52 FCS was disqualified on the re-advertised tender as it did not meet the prequalification criteria.

7 OBSERVATIONS

7.1 Even though the evidence provided by PACOFS indicates that Ukhozi had hand delivered its bid on time as stipulated in the TOR, the lack of oversight by SCM to adequately manage the receipt of bid documents, led to uncertainties by prospective bidders regarding whether the bid from Ukhozi was submitted on time, and the perception of possible fraudulent practices.

7.2 The Public Protector has noted that the SCM official has subsequently implemented a register so that all bids are registered before they are put into the tender box and those that cannot fit in the tender box are placed in the safe, and recorded in the register by the Security official.

7.3 However, this response by PACOFS to mitigate the issue of bid documents not being able to fit into the tender box can also create problems in the bid process. The reason for placing bid documents in a tender box is to ensure

that prior to the closing date of the tender, anonymity of bidders is maintained and possible fraudulent practices are prevented.

- 7.4 The TOR states that bids are to be hand delivered to PACOFS, however, there is no directive to prospective bidders regarding who should receive the hand delivered bid documents. Furthermore, the TOR does not direct the prospective bidders to place the tender documents in the tender box, as required by PACOFS Supply Chain Management Policy.

8 RECOMMENDATIONS

The Chairperson of the Council

- 8.1 Take cognisance of this report and ensure that PACOFS complies with the PACOFS Supply Chain Management Policy, in terms of section 51(b)(ii) of the PFMA.

The Chief Executive Officer

- 8.2 Review the TOR and/or RFQ documents in order to eliminate the risk of perceptions by prospective bidders of possible fraudulent practices and irregularities in the tender process by:
- 8.2.1 Excluding receipt of hand delivered documents from the TOR;
 - 8.2.2 Include under the paragraph titled "*Submission*" in the TOR that all prospective bidders are to place bid documents in the tender box; and
 - 8.2.3 Include in the TOR, the size (centimetres) of the tender box as well as the size of the opening through which bids will be placed.
- 8.3 Ensure that Security personnel of PACOFS do not play any role in the SCM process, including the receipt, recording and safekeeping of bid documents; and

8.4 Ensure that SCM officials comply with policies and prescripts in managing the procurement process.

9 MONITORING

9.1 The Chairperson of Council and CEO of PACOFS must, within three (3) months from the date of this Advisory Report, provide my office with progress report on the implementation of the recommendations referred to in paragraph 8 above.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 30 JUNE 2023

Assisted by: Adv Elsabe de Waal
Senior Manager: PII Inland