

**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, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**INVESTIGATION INTO ALLEGATIONS OF THE IRREGULAR AWARD OF A TENDER FOR
THE CONVERSION OF AN UNUSED HOSPITAL WARD INTO A 30-BED GYNAECOLOGY
WARD AT THE JOB SHIMANKANA TABANE HOSPITAL, BY THE NORTH WEST
PROVINCIAL DEPARTMENT OF HEALTH**

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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
DDG	Deputy Director-General
Department	North West Provincial Department of Health
HoD	Head of Department
MOU	Memorandum of Understanding
PFMA	Public Finance Management Act, 1999
PSA	Public Service Act, 1994
PSR	Public Service Regulations, 1996
Public Protector	Public Protector of the Republic of South Africa
Public Protector Rules	The Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as Amended
SCM	Supply Chain Management
Thavhani JV	Thavhani Trading Joint Venture
The Hospital	Job Shimankana Tabane Hospital

EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, 1994 (Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into alleged irregular awarding of a tender for the conversion of an existing ward into a 30-bed Gynaecology ward at Job Shimankana Tabane Hospital (the Hospital), by the functionaries of the North West Department of Health (the Department).
- (iii) The investigation originates from a complaint lodged with the Rustenburg Regional office of the Public Protector, in the North West Province. The complaint was lodged by an anonymous person.
- (iv) In the main, the Complainant alleged, *inter alia*, that:
 - (a) On 08 July 2019, the Department advertised a tender in the Government Bulletin, as well as on E-Tender, Tender No. DOH/PS/06/18, for the conversion of an existing unused hospital ward into a new thirty (30)-bed gynaecology ward, including all related site works, at the Hospital in Rustenburg. The closing date of the tender was 02 September 2019.
 - (b) The tender was irregularly awarded by the then Administrator of the Department, Ms Jeanette Hunter (Ms Hunter), to Thavhani Trading Joint Venture (Thavhani JV) on 07 May 2020, after the tender validity period had already expired.

- (v) The Complainant sought the following relief from the Public Protector:
 - (a) The Public Protector to investigate and determine whether the functionaries of the North West Department of Health awarded Tender No. DOH/PS/06/18 to Thavhani JV, after its validity period had expired.
- (vi) Based on the analysis of the complaint, the following issue was considered and investigated:
 - (a) Whether the functionaries of the North West Department of Health irregularly awarded Tender No. DOH/PS/06/18 to Thavhani JV, after the expiry of the tender validity period, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (vii) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all relevant documents, application of relevant laws, case law and related prescripts.
- (viii) On 15 May 2024, notices in terms of section 7(9)(a) and (b) of the Public Protector Act (Notices) were delivered to the following officials: Mr Madoda Sambatha (Mr Sambatha), Member of the Executive Council for the Department; Mr Sandile Buthelezi (Mr Buthelezi), Director General of the National Department of Health; Ms Jeanette Hunter (Ms Hunter), former Administrator of the Department; Mr Obakeng Mongale (Mr Mongale), Head of Department of Health; Ms B Maleka (Ms Maleka), former Chief Financial Officer of the Department; Mr J De Beer (Mr De Beer), Chief Director: Strategic Support in the Department; Ms M Pule (Ms Pule), Deputy Director: Financial Planning in the office of the Chief Financial Officer; Mr R Moshe (Mr Moshe), Director: Asset Management in the Department; and Mr J Maabela (Mr Maabela), Deputy Director: Legal Services.
- (ix) The above officials were all given an opportunity to respond and comment on the likely adverse findings against some officials and the proposed findings and remedial

action. Section 7(9)(a) of the Public Protector Act, 1994, provides that persons implicated in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding same.

- (x) A letter dated 22 May 2024, was received from Ms Maleka responding to the notice. The contents thereof were analysed and considered by the Public Protector.
- (xi) A letter dated 25 May 2024, was received from Ms Hunter. The contents thereof were analysed and considered by the Public Protector.
- (xii) A letter dated 27 May 2024, was received from Mr Mongale. The contents were analysed and considered by the Public Protector.
- (xiii) A letter dated 28 May 2024, was received from Mr De Beer. The contents were analysed and considered by the Public Protector.
- (xiv) A letter dated 28 May 2024, was also received from Mr Moshe. The contents thereof were analysed and considered by the Public Protector.
- (xv) No responses or comments were received from Mr Sambatha, Dr Buthelezi, Ms Pule and Mr Maabela.
- (xvi) Having regard to the evidence and regulatory framework determining the standards that the Department should have complied with, the following findings are made:
 - (a) **Whether the functionaries of the North West Department of Health irregularly awarded Tender No. DOH/PS/06/18 to Thavhani Trading JV, after the expiry of the tender validity period, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**
 - (aa) The allegation that the functionaries of the North West Department of Health irregularly awarded Tender No. DOH/PS/06/18 for the conversion of an existing

unused hospital ward into a 30-bed gynaecology ward at Job Shimankana Tabane Hospital to Thavhani JV, after the expiry of the tender's validity period, **is substantiated.**

- (bb) The tender was awarded to Thavhani JV on 07 May 2020, after its validity period had expired on 01 January 2020 and no extension of the validity period had been sought as required by relevant legislation. Ms Hunter's decision to appoint Thavhani JV after expiry of the validity period was contrary to section 45(c) and 81 of the PFMA which requires that an official must not wilfully or negligently permit or cause irregular expenditure but must also take steps to prevent it.
- (cc) The BAC unduly delayed considering the submission of the BEC, adjudicating and making a recommendation to the Administrator prior to the expiry of the tender validity period. Their conduct was consequently at variance with SCM Provincial Instruction Note 1 of 2019/2020.
- (dd) The conduct of the functionaries of the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.
- (xvii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution are the following:

The Head of the Department

- (aa) Within **ninety (90) calendar days** from the date of the final report, in terms of section 38(1)(h)(iii) of the PFMA, take appropriate corrective steps by ensuring that members of the SCM are continuously trained on tender processes to avoid a repeat of similar incidents;
- (bb) Ensure that officials who are appointed to serve on procurement committees must have been trained prior to their appointment; and

- (cc) Within **ninety (90) calendar** days of the final report, in terms of section 24(2)(a)(i) of the PSA as amended, caution the remaining members of the BAC who were involved in the adjudication and irregular awarding of the Tender No. NW DOH/PS/06/18.

The Director General of the National Department of Health

- (dd) To take cognisance of this report.

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (The Public Protector Act).
- 1.2 This report is submitted to the following persons, in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation, to affected parties, for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:
- 1.2.1 Mr Madoda Sambatha, the MEC of the North West Department of Health;
 - 1.2.2 Dr Sandile Buthelezi, the Director General in the National Department of Health;
 - 1.2.3 Ms Jeanette Hunter, the former Administrator of the North West Department of Health;
 - 1.2.4 Mr Obakeng Mongale, the HoD of the North West Department of Health;
 - 1.2.5 Ms B Maleka, the former CFO of the North West Department of Health;
 - 1.2.6 Ms J De Beer, the Chief Director of Strategic Systems in the North West Department of Health;
 - 1.2.7 Ms M Pule, the Deputy Director: Financial Planning in the North West Department of Health;
 - 1.2.8 Mr J Maabela, the Deputy Director: Legal services in the North West Department of Health; and
 - 1.2.9 Mr R Moshe, the Director: Assets Management in the North West Department of Health.
- 1.3 A copy of this report is also provided to the Complainant.
- 1.4 The report relates to an investigation into allegations of improper conduct and maladministration by the functionaries of the North West Department of Health (the Department), relating to the irregular awarding of a tender to Thavhani Trading JV.

2. THE COMPLAINT

2.1 The investigation originates from a complaint lodged by an anonymous Complainant (the Complainant) with the Rustenburg Regional Office of the Public Protector on 21 April 2021.

2.2 The Complainant alleged, *inter alia*, that:

2.2.1 On 08 July 2019, the Department advertised a tender in the Government bulletin, as well as on E-Tender portal, Tender number DOH/PS/06/18, for the conversion of an existing unused hospital ward into a new thirty (30)-bed gynaecology ward, including all related site works, at the hospital in Rustenburg. The closing date of the tender was 02 September 2019; ad

2.2.2 The tender was irregularly awarded by the then Administrator of the Department, Ms Jeanette Hunter, (Ms Hunter) to Thavhani JV on 07 May 2020, after the tender validity period had already expired.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

“The Public Protector has the power as regulated by national legislation –

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*

(c) *to take appropriate remedial action”.*

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions 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 power to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.4 The Department is an organ of state in terms of section 239 of the Constitution and the conduct of its functionaries amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls within its competency to investigate as envisaged in section 182(1)(a) of the Constitution and section 6(4)(a)(i) of the Public Protector Act.

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 the functionaries of the North West Department of Health irregularly awarded Tender No. DOH/PS/06/18 to Thavhani Trading JV, after the expiry of the tender validity period, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The Investigation is conducted in terms of section 182(1) of the Constitution read with sections 6 and 7 of the Public Protector Act.

5.1.2 The Public Protector Act confers on the Public Protector, the sole discretion to determine format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.2 **Approach to the investigation**

5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration, and application of the relevant laws, regulatory framework, and prescripts.

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

(a) What happened?

(b) What should have happened?

(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?

(d) In the event of a violation, what action should be taken?

5.2.3 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. Evidence is evaluated and a determination is made on what happened based on the balance of probabilities. In this case, the factual enquiry principally focused on whether the alleged conduct of the functionaries of the Department was inconsistent with the applicable prescripts.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the functionaries of the Department in the execution of their duties in relation to the subject of the complaint.

5.3 Key sources of information

5.3.1 Documents

- 5.3.1.1 Letter of appointment of Ms Hunter as Accounting Officer of the Department of Health, dated 13 June 2018;
- 5.3.1.2 Advertisement of Tender No DOH/PS/06/18, dated 08 July 2019;
- 5.3.1.3 Memorandum extending the closing date of the tender, dated 02 August 2019;
- 5.3.1.4 Report of the BEC on the evaluation of the tender, dated 18 September 2019;
- 5.3.1.5 Minutes of the BEC meeting that was held on 18 September 2019, dated 01 October 2019;
- 5.3.1.6 BAC report on the adjudication of the BEC report, dated 17 February 2020;
- 5.3.1.7 Handwritten response by Ms Hunter dated 19 February 2020, responding to a request by the BAC for the cancellation of the tender;
- 5.3.1.8 Report of the Adhoc BEC for the evaluation of the tender, dated 25 March 2020;
- 5.3.1.9 BAC report to recommend the appointment of the service provider, dated 23 April 2020;
- 5.3.1.10 Report of the Provincial Internal Audit on the regularity of the tender, dated 04 May 2020;
- 5.3.1.11 Letter of appointment of Thavhani JV, dated 07 May 2020; and
- 5.3.1.12 Letter from Ms Hunter to the Chairperson of the BEC Mr William Kaipa, advising about the appointment of Thavhani JV, dated 07 May 2020.

5.3.2 Correspondence exchanged

- 5.3.2.1 Complaint by Anonymous, dated 25 March 2021;
- 5.3.2.2 Allegations letter from the Public Protector to Ms Hunter, dated 23 June 2021;
- 5.3.2.3 Section 7(4) Notice from the Public Protector to Ms Hunter, dated 26 August 2021;
- 5.3.2.4 Letter from the Public Protector to the HoD of Provincial Treasury, Mr N Kunene, requesting confirmation about the Department's application for condonation, dated 29 March 2022;
- 5.3.2.5 Letter from the Public Protector to Ms Hunter enquiring about the application for condonation, dated 29 March 2022; and
- 5.3.2.6 Response letter from the Mr Kunene to the Public Protector responding to the letter dated 29 March 2022, dated 02 April 2022.

5.3.2. Legal Framework

- 5.3.2.1 Constitution of the Republic of South Africa, 1996;
- 5.3.2.2 Public Protector Act, 1994;
- 5.3.2.3 Public Finance Management Act, 1999;
- 5.3.2.4 Public Service Act, 1994;
- 5.3.2.5 Public Service Regulations, 1996
- 5.3.2.6 Preferential Procurement Policy Framework Act, 2000; and

5.3.2.7 North West Provincial Treasury SCM Instruction Note 1 of 2019/20.

5.3.3. Case Law

5.3.3.1 *Telkom SA Ltd v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Ltd* [2011] ZAGPHC;

5.3.3.2 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC);

5.3.3.3 *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC*, SCA Case no 846/2021;

5.3.3.4 *Khumalo v Member of the Executive Council for Education: Kwazulu-Natal* 2014 (5) SA-579 (CC); and

5.3.3.5 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018(3) BCLR 259 (CC); 2018(2) SA 571 (CC) (29 December 2017).

5.3.4. Notice issued in terms of section 7(9)(a) of the Public Protector Act

5.3.4.1 Section 7(9)(a) of the Public Protector Act, provides that persons implicated in the investigation by the Public Protector, are to be afforded an opportunity to make representation regarding same.

5.3.4.2 On 15 May 2024, section 7(9)(a) notices were served on Mr Sambatha, Dr Buthelezi, Ms Hunter, Ms Maleka, Ms De Beer, Ms Pule, Mr Maabela and Mr Moshe on 15 May 2024. On 16 May 2024, a notice was also served on Mr Obakeng Mongale.

- 5.3.4.3 Responses to the section 7(9)(a) notices were received from the following persons:
- (a) Ms B Maleka on 22 May 2024;
 - (b) Ms Jeanette Hunter on 25 May 2024;
 - (c) Mr Obakeng Mongale on 27 May 2024;
 - (d) Mr J De Beer on 28 May 2024; and
 - (e) Mr R Moshe on 28 May 2024.
- 5.3.4.4 No responses or comments were received from Mr Madoda Sambatha, Dr Sandile Buthelezi, Ms M Pule and Mr J Maabela.
- 6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS**
- 6.1 Whether the functionaries of the North West Department of Health irregularly awarded Tender No. DOH/PS/06/18 to Thavhani Trading JV, after the expiry of the tender validity period, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**
- Common cause*
- 6.1.1 On 26 April 2018, Ms Hunter was seconded from the National Department of Health and appointed as the Administrator of the Department, by the former Minister of Health, Dr Aaron Motsoaledi and the former Member of the Executive Council (MEC) for Health, Dr Magome Masike.
- 6.1.2 On 08 July 2019, the Department advertised Tender No. DOH/PS/06/18, in the Government Bulletin, as well as on E-Tender. The initial closing date was 12 August 2019 but was extended to 02 September 2019.

- 6.1.3 The tender was issued for the conversion of an unused, existing hospital ward into a 30-bed gynaecology ward, including all related site works, at the hospital at Job Shimankana Tabane Hospital in Rustenburg.
- 6.1.4 The tender document stated that the tender validity period was ninety (90) days.
- 6.1.5 On 07 May 2020, Ms Hunter awarded the tender to Thavhani JV. The tender was awarded in the amount of nineteen million three hundred and forty-seven thousand, twenty-four rand and fifty-four cents (R19 347 024,54).

Issue in dispute

- 6.1.6 The issue for the Public Protector's determination is whether the functionaries of the Department awarded Tender No. DOH/PS/06/18 following the lapse of its validity period, contrary to Regulation 4.1.2 of the SCM Instruction Note 1 of 2019/2020.

The Complainant's version

- 6.1.7 The Complainant contends that at the time when the Department awarded the tender to Thavhani JV, the tender validity period had already expired, as such, the tender was irregularly awarded.
- 6.1.8 The Complainant provided the Public Protector with copies of the following documents:

Provincial Internal Audit letter dated 04 May 2020 addressed to Ms Hunter titled: "Interim Feedback on the review of NWDOH/PS/06/18: conversion of an existing unused ward into a new 30-bed gynaecology ward including all related site works at the Job Shimankana Tabane Hospital".

6.1.8.1 The Internal Audit letter stated that:

- (a) On 30 April 2020, the Chief Financial Officer, Ms Maleka (Ms Maleka) approached the Provincial Internal Auditors and requested them to review the tender before Ms Hunter could proceed to award the said tender;
- (b) The tender validity period had expired on 01 January 2020. *“Its terms, conditions and prices do not maintain beyond this date and the validity period cannot be resuscitated”*; and
- (c) The Department should engage the Provincial Treasury in writing on the way forward and options available to the Department.

Letter from Ms Hunter dated 07 May 2020, addressed to the Chairperson of the Ad-hoc Bid Evaluation Committee (BEC), Mr William Kaipa (Mr Kaipa), titled “Conversion of an existing unused ward into a new 30-bed gynaecology ward including all related site works at the Job Shimankana Tabane Hospital”.

6.1.8.2 In the letter addressed to Mr Kaipa, which was also copied to the Assistant Director: Supply Chain Management, Ms R Mogolegang, Ms Hunter stated the following:

“This communique serves to inform your committee that approval is hereby granted for appointment of Thavhani Trading JV, for a total bid price of R19 347 024, 54 for conversion of an existing unused ward into a new 30-bed gynaecology ward including all related site works at the Job Shimankana Tabane Hospital.

NOTE: Administrator to note that this appointment will result in irregular expenditure due to the fact that the validity period expired on 2 January 2020. The Chief Directorate should apply for condonement to regularise this appointment”.

The Department's response

- 6.1.9 The Public Protector sent an allegations letter dated 23 June 2021, to Ms Hunter. No response was received on the due date of 23 July 2021. Despite a reminder sent to the Department on 28 July 2021, with a return date of 06 August 2021, the Department still did not respond.
- 6.1.10 On 26 August 2021, the Public Protector issued a notice in terms of section 7(4) of the Public Protector Act to Ms Hunter. Ms Hunter did not appear personally at the *subpoena* hearing held on 03 September 2021, but was represented by Adv. Pogiso Monchusi (Adv Monchusi), the Deputy Director, Legal Services. Adv Monchusi stated at the hearing that the Department had followed due process to award the tender to Thavhani JV. He denied that it was awarded irregularly.
- 6.1.11 In support of his statement, Adv Monchusi provided the Investigation Team with the following documents, namely:
- 6.1.11.1 Invitation to Bid dated 08 July 2019: NWDoh/PS/06/18: "*Conversion of an existing unused ward into a new 30-bed gynaecology ward including all related site works, at the Job Shimankana Tabane Hospital*" (Invitation to Bid NWDoh/PS/06/18);
- 6.1.11.2 The Bid Adjudication Committee Report, dated 05 May 2020;
- 6.1.11.3 Letter of Appointment of Thavhani JV, dated 07 May 2020; and
- 6.1.11.4 Provincial Internal Audit Report, dated 04 May 2020.

Invitation to Bid NWDoh/PS/06/18 dated 08 July 2019

- 6.1.12 The Bid was for the conversion of an existing unused hospital ward into a new 30-bed gynaecology ward, including all related site works at the Job Shimankana Tabane Hospital. The closing date was indicated as 12 August 2019 at 11H00. Paragraph 12(b) of Bid document states the Bid validity period as ninety (90) days.

Memorandum to prospective bidders

- 6.1.13 The memorandum dated 02 August 2019, addressed to all prospective bidders informed them of the extension of the closing date for submission of bids from 12 August 2019 to 02 September 2019.

The Bid Adjudication Committee (BAC) Report, dated 05 May 2020

- 6.1.14 According to the BAC Report, the BAC consisted of the following members:

- 6.1.14.1 Ms B Maleka (Chairperson);
- 6.1.14.2 Ms M Pule;
- 6.1.14.3 Mr J De Beer;
- 6.1.14.4 Mr R Moshe;
- 6.1.14.5 Mr J Maabela; and
- 6.1.14.6 Mr L Nzimande (apology).

- 6.1.15 The BAC members met on 23 April 2020 and recommended to Ms Hunter that the tender be awarded to Thavhani JV for nineteen million three hundred and forty-seven thousand and twenty-four rands and fifty-four cents (R19 347 024, 54) for the conversion of an existing unused hospital ward into a 30-bed gynaecology ward, including all related site works at the Hospital.

- 6.1.16 The Chairperson of the BAC, Ms Maleka, made a note to Ms Hunter, indicating that *“the appointment would result in irregular expenditure because the tender validity period expired on 02 January 2020”*. The BAC members further advised Ms Hunter that, *“to regularise the appointment, the Chief Directorate should apply for condonement”*.

Letter of appointment of Thavhani Trading JV dated 07 May 2020

- 6.1.17 The appointment letter was signed by Ms Hunter and addressed to the Director of Thavhani JV, Mr Floyd Ngwana, informing him that the company was appointed as the preferred bidder to implement the project, at an amount of R19 347 024, 54, for the conversion of an existing unused hospital ward into a 30-bed gynaecology ward, including all related site works, at the Hospital.

Provincial Internal Audit report titled “Feedback on the review of NWDOH/PS/06/18: Conversion of an existing unused ward into a 30-bed Gynaecology ward including all related site works at Job Shimakana Tabane hospital”, dated 04 May 2020.

- 6.1.18 The report was signed by the Chief Audit Executive, Adv T R Sekoboane and it was addressed to Ms Hunter. The report stated the following:

- 6.1.18.1 The validity period of the tender had expired;
- 6.1.18.2 The awarding of the tender should not be proceeded with;
- 6.1.18.3 Disciplinary action should be taken against the Departmental officials for allowing the tender validity period to expire; and
- 6.1.18.4 The Department must urgently approach the Provincial Treasury in writing on options available, if any.

Additional information provided by Adv Monchusi

- 6.1.19 At the *subpoena* hearing, Adv Monchusi also provided the Investigation Team with the following additional information:

Government Gazette placing the North West Province under Administration

- 6.1.19.1 On 09 May 2018, through a Government Gazette, the national government placed the North West province under administration in terms of section 100(1)(a) and (b) of the Constitution. Following the said announcement, the then Minister of Public Service and Administration, Ms Ayanda Dlodlo, as well as the then Premier of the

North West Province, Prof Job Mokgoro (Prof Mokgoro), signed an Implementation Protocol on 11 June 2018.

- 6.1.19.2 The objective of the protocol was to provide a framework for bilateral cooperation between the Office of the Premier and the Department of Public Service and Administration regarding the execution of the Intervention Plan in the North West Province in terms of section 100(1)(b) of the Constitution, as per the decision of the National Government of the Republic of South Africa.
- 6.1.19.3 The Implementation Protocol was followed by the signing of a Memorandum of Understanding (MOU) on 28 June 2018. The MOU was signed by Dr Nkosazana Dlamini-Zuma, on behalf of the National Government of the Republic of South Africa and Prof Mokgoro on behalf of the North West Provincial Government.
- 6.1.19.4 On 11 July 2018, the former Minister of Health, Dr Aaron Motsoaledi, and the former Member of the Executive Council (MEC) for Health, Dr Magome Masike, signed a Protocol Agreement. In terms of the said agreement, Ms Hunter was seconded from the National Department of Health and appointed as the Administrator of the Department. The main objectives of this agreement, were *inter alia*, the following:
- (i) *“To strengthen supply chain management of the NW Department of Health, focusing on identifying potential risks associated with corruption and initiation of disciplinary and criminal proceedings where applicable, financial management, focusing on budget, expenditure, and cash management as well as data integrity, with a focus on effective record keeping, tracking procurements and inform future decisions, and*
 - (ii) *to conduct diagnostic assessment by investigating the root causes and focus on internal governance, including leadership, management, and organisational arrangements”, within the Department”.*
- 6.1.19.5 An *“Intervention Work Plan”* formed part of the Protocol Agreement. The Work Plan identified certain specific areas within the Department and set out key activities and

milestones that needed to be focused on for the purpose of achieving the objectives of the intervention. Some of the identified areas that required special attention included Human Resources Management, Finance and Supply Chain Management, Leadership, and Governance. A specific official was assigned for each identified area.

- 6.1.19.6 On 13 June 2018, the MEC for Finance, Economy and Enterprise Development of the North West Province, Ms Wendy J Nelson, appointed Ms Hunter as the Accounting Officer for the Department in terms of section 36(3) of the PFMA.
- 6.1.19.7 According to the Work Plan, Ms Hunter, besides being the Accounting Officer, was also given the responsibility of dealing with the area of Leadership and Governance.
- 6.1.19.8 Some of the key tasks that she had to perform in that area included the following:
- (i) *“Conclude disciplinary processes pertaining to relevant staff members.*
 - (ii) *Reinstate the required NWDoH communication internal and external processes; and*
 - (iii) *Improve functionality of the hospital boards.”*

Additional information obtained from the Department

- 6.1.20 On 29 March 2022, the Investigation Team directed a follow up letter to Ms Hunter, enquiring whether an application for condonation in respect of the irregular expenditure relating to Thavhani JV, to the Provincial Treasury was made, and if so, what the outcome of the said application was. Despite a reminder sent on 11 April 2022, no response was received from Ms Hunter.
- 6.1.21 On 09 September 2022, the Investigation Team sent an e-mail to the Department’s Chief Director for Infrastructure Development, Mr Kitso Molawa, enquiring whether the said gynaecology ward had been constructed and completed. Mr Molawa

responded on the same day by e-mail and confirmed that the project was completed on 14 October 2021.

Evidence received from the North West Provincial Treasury

- 6.1.22 On 29 March 2022, the Investigation Team addressed a letter to the Head of Department (HoD) of the Provincial Treasury, Mr N Kunene (Mr Kunene), enquiring whether the Department had applied for condonation to regularise the appointment of Thavhani JV.
- 6.1.23 On 06 April 2022, Mr Kunene responded stating that Provincial Treasury does not have any record indicating that the Department ever applied for condonation to regularise the appointment of Thavhani JV.
- 6.1.24 On 12 July 2022, Mr Geo Paul, the Accountant General from the Provincial Treasury confirmed in writing to the Investigation Team that the section 100¹ intervention by the National Department was concluded on 11 July 2022, and that Ms Hunter would return to the National Department.

Evidence obtained from the North West Provincial Internal Audit

- 6.1.25 On 24 August 2023, the Investigation Team addressed an email to the Chief Audit Executive, Adv Sekoboane, of the North West Provincial Internal Audit, to enquire whether Ms Hunter ever engaged with Internal Audit regarding their report dated 04 May 2020.
- 6.1.26 On 28 August 2023, Adv Sekoboane informed the Investigation Team that they did not receive any communication from Ms Hunter regarding the Internal Audit report which was issued to the Department.

¹ Section 100(1)(a) & (b), Constitution, 1996

Inspection in loco

- 6.1.27 On 23 February 2024, the Investigation Team conducted an inspection *in loco* at the hospital to ascertain if the ward was completed. The Investigation Team met with Dr M Maisela who took the team on a tour of the ward. The Investigation Team observed that the ward had been completed and was fully functional. Dr Maisela advised the team that although the ward was meant to accommodate thirty (30) patients, it is currently accommodating around forty-five (45) patients.

Responses to the Notice in terms of section 7(9)

Response from Ms B Maleka

- 6.1.28 The Investigation Team issued a Notice in terms of section 7(9) of the Public Protector Act to Ms B Maleka on 15 May 2024, who responded on 22 May 2024 stating *inter alia* that:
- 6.1.28.1 During October 2019, she was the chairperson of the BAC. On 01 October 2019, she received a report from the BEC recommending the cancellation of the tender “*due to expired validity period*”;
- 6.1.28.2 She then sent a request to Ms Hunter recommending that she should approve the recommendation of the BEC to cancel the tender;
- 6.1.28.3 Ms Hunter declined the request and instructed in writing that they should go ahead to evaluate and adjudicate the tender;
- 6.1.28.4 Ms Maleka sent a letter to the chairperson of the BEC informing him about Ms Hunter’s instructions that the tender should be evaluated and adjudicated upon;
- 6.1.28.5 The tender was evaluated upon as per Ms Hunter’s instructions. When the BEC report was tabled before the BAC, Ms Maleka requested Internal Audit to evaluate the tender;

- 6.1.28.6 After evaluating the BAC report, Internal Audit gave her a report which she then gave to Ms Hunter;
- 6.1.28.7 She then indicated to Ms Hunter that if she approved the tender, it would result in irregular expenditure, which would require condonement;
- 6.1.28.8 To substantiate her submission, Ms Maleka provided the Public Protector with a copy of her letter dated 25 February 2020, which she had addressed to the chairperson of the BEC, Mr William Kaipa;
- 6.1.28.9 The said letter stated the following, “*The Administrator has not approved the cancellation with the comments: ‘this evaluation MUST continue. The specification committee says they provided SCM with correct specifications. The Bid Evaluation Committee must use that correct specification to evaluate.’ The Administrator further stated that: ‘This is happening too frequently, that I suspect that these errors are deliberate.’*”

Response by Ms Hunter

- 6.1.29 The Investigation Team issued a Notice in terms of section 7(9) of the Public Protector Act to Ms Hunter on 15 May 2024, who responded on 25 May 2024 stating *inter alia* that:
- 6.1.29.1 She was appointed as the Administrator of the NWDoH on 26 April 2018, following the placement of the Department under administration by Cabinet;
- 6.1.29.2 At the time of her appointment, the Department had a series of challenges regarding the provision of health care services in the province, including strikes by health care workers regarding the working conditions under which they had to perform their duties;

- 6.1.29.3 The placement of the Department under administration found several allegations of deliberate acts of fraud and corruption. Irregularities in tender awards were also caused by a lack of skilled capacity in the Supply Chain Management (SCM) of the Department;
- 6.1.29.4 During May 2018, she visited the Hospital, where she found several challenges, both in terms of building structure and essential medical equipment. She found that the worst affected patients were pregnant women, who were without proper accommodation, where women in labour had to sit on benches;
- 6.1.29.5 Following these discoveries, a decision was then taken that in order to address the problem of congestion regarding pregnant women, the Department would go out on tender to convert an unused ward into a 30-bed Gynaecology ward;
- 6.1.29.6 While she was attending to the running of the Department, she had assumed that the SCM team was running with the tender process. However, it was only in February 2020 that she received a request to cancel the tender, which was four months later, after the Technical Evaluation Committee had held its first meeting on 18 September 2019;
- 6.1.29.7 After receiving the request to cancel the tender, she engaged the Director of SCM, Mr Daniel Makhubu, who assured her that the tender was issued with the correct specifications which were received from the Bid Specification Committee. Following her engagement with Mr Makhubu, she then declined the request to cancel the tender;
- 6.1.29.8 The SCM team failed to advise her in time about the expiry of the validity period, otherwise she would have approached the Provincial Treasury to extend the validity period. She was only approached after the validity period had already expired, hence she declined the request. She further submitted that the urgent situation that was prevailing at the Hospital, which was worsened by COVID 19, made it imperative that the tender be proceeded with. Further, cancelling the tender and having it re-advertised, would have also constituted fruitless and wasteful expenditure;

- 6.1.29.9 She did not take disciplinary action against the SCM Managers as she thought that the situation could be managed and corrected in a collegial manner. She had a conversation with both the CFO and the Acting Chief Director of Infrastructure, asking for improvements in the handling of tender processes. She further submitted that both units of the CFO and Infrastructure had a high vacancy rate;
- 6.1.29.10 The two sections would have collapsed if additional staff members were charged and placed on precautionary transfers or suspensions. She submitted further that charging staff members without removing them from the area where transgressions occurred was a fruitless exercise for a number of labour related reasons. She stated that the Department still needed the managers from SCM and Infrastructure to complete a number of urgent tenders;
- 6.1.29.11 The chairperson of the BEC, Mr William Kaipa, resigned and left the employ of the Department. During May 2020, Ms Hunter instituted disciplinary action against the CFO and the Director of SCM for offences unrelated to this tender and they have since been dismissed. Although the awarding of the tender constituted irregular expenditure, its implementation made a huge effect and positive improvements for maternity patients at the hospital. The award and implementation of the tender was audited by Auditor-General of South Africa (AGSA) and was not found to be a material irregularity. Furthermore, the amount was recorded in the Irregular Expenditure Register by the Department, for purposes of condonement;
- 6.1.29.12 In support of her submission, Ms Hunter furnished the Investigation Team with two reports. The first report dated 27 April 2020, titled *“Response to the Report sent by Dr NM Kotsedi (Clinical Manager) JSTH to Deputy Minister: Presidency”*, was from Mr P E Mokatsane, the Deputy-Director-General Hospital and Clinical Support in the Department. Under paragraph 6 of the report, the following is stated: *“The 24- bed maternity ward is inadequate to cater for the 1.7 million Bojanala population. The Adult ICU has 5 beds which is inadequate to cater for this population”*;

6.1.29.13 The second report was dated 11 April 2021 and titled “*Preliminary findings regarding incident of patients sleeping on the floor at Job Shimankana Tabane (JST) Hospital*”. The unsigned report was prepared by Polaki Mokatsane and was addressed to the Premier of the North West Province; and

6.1.29.14 In short, the report highlighted the challenges faced by patients at the hospital. It was prepared in response to a picture that was posted on the Executive group (a WhatsApp chat group for members of the executive in the province) showing two patients sleeping on the floor in a ward at the hospital. The report indicated that the obstetrics ward was full beyond capacity and to alleviate the situation more wards needed to be constructed at the hospital.

Response by Mr Mongale

6.1.30 The Investigation Team issued a Notice in terms of section 7(9) of the Public Protector Act to Mr Mongale on 15 May 2024, who responded on 27 May 2024 stating *inter alia* that:

6.1.30.1 On 27 May 2024, the Investigation Team received a response from Mr Obakeng Mongale who is the HoD. He submitted that the decision taken by Ms Hunter was a necessary decision given the challenges that were faced by the Department during that time and in particular the dire situation that was prevailing at the hospital;

6.1.30.2 He further submitted that the Department had been placed under administration and the country was engulfed by the Covid 19 pandemic. He had known Ms Hunter for over twenty-three (23) years and regarded her as an ethical professional, with exacting standards of performance and a leader who is committed to the service of humanity;

6.1.30.3 Regarding the Public Protector’s remedial action calling upon him, as the HoD to take disciplinary action against certain staff members, Mr Mongale stated that such a move would be a travesty of justice, given the fact that the BEC had recommended

cancellation of the bid and two of those managers, namely Ms Maleka and Mr Makhubu, were since dismissed for unrelated offences;

- 6.1.30.4 Regarding the remedial action by the Public Protector directing the Director-General of the national Department of Health to take corrective action against Ms Hunter, Mr Mongale submitted that his department had previously appointed an investigator to investigate the circumstances surrounding the award of the same bid. The Investigator, Mr J Mphamo, found that, under the circumstances at the time, the Administrator's decision should not be punishable; and
- 6.1.30.5 In conclusion, Mr Mongale requests the Public Protector to reconsider her proposed remedial actions in so far as they relate to taking action against the Administrator and other managers.

Response by Mr De Beer

- 6.1.31 The Investigation Team issued a Notice in terms of section 7(9) of the Public Protector Act to Mr J De Beer on 15 May 2024, who responded on 28 May 2024 stating *inter alia* that:
- 6.1.31.1 He stated that he was appointed as a member of the BAC from 01 April 2019 to 31 March 2021. He mentioned that during his term as a BAC member, he did not receive training regarding adjudication of tenders. As a result, he had to rely on the knowledge of the chairperson of the BAC, Ms Maleka, to provide guidance and advice on all relevant policy prescripts;
- 6.1.31.2 When the bid was presented to the BAC for consideration, the BAC agreed with the recommendations of the BEC that the tender should be cancelled due to incorrect specifications. The Administrator declined to cancel the bid and instead she instructed that the evaluation of the bid continues. He further stated that he did not know the reasons for the delay in submitting the bid to the BAC since such processes were handled by the secretariat. He further stated that the bid was only resubmitted

to the BAC in April 2020. He did not intentionally cause the irregular expenditure as he lacked the capacity and guidance during the process;

6.1.31.3 In support of his submission, Mr De Beer furnished the Investigation Team with a copy of the BAC report dated 17 February 2020. The report was addressed to the Administrator, Ms Hunter and it was titled "*Provision of an existing unused ward into a new 30-bed Gynaecology ward including all related site works at the Job Shimankane Tabane Hospital.*" Paragraph 1.1 of the said report stated the following:

"The purpose of the submission was to request the Accounting Officer to approve cancellation of the above-mentioned bid".

6.1.31.4 According to the said report, the BAC met on 15 January 2020 to consider the report from the BEC. In that meeting of 15 January 2020, the BAC resolved to recommend to the Administrator to cancel the bid;

6.1.31.5 The said report was signed by the Chairperson of the BAC, Ms Maleka, on 17 February 2020. Ms Hunter did not approve the request for the cancellation of the bid. On 19 February 2020, she made the following written comments on the report: "*This evaluation MUST continue. The specification committee says they provided SCM with the correct specification. The Bid Evaluation Committee must use that correct specification to evaluate*";

6.1.31.6 Mr De Beer further furnished the Public Protector with a copy of the minutes of the meeting of the BEC that was held on 18 September 2019. The minutes, signed on 01 October 2019 by the chairperson of the BEC, Mr William Kaipa, stated the following: "*The committee resolved to recommend the bid for cancellation and re-advertisement based on the wrong functionality on the specification*".

Response by Mr Moshe

- 6.1.32 The Investigation Team issued a Notice in terms of section 7(9) of the Public Protector Act to Mr Moshe on 15 May 2024, who responded on 28 May 2024 stating *inter alia* that:
- 6.1.32.1 The BAC met on 15 January 2020, to consider the submission from the BEC. The BAC consisted of the following members: Ms B Maleka (Chairperson), Ms Pule, Mr J De Beer, Mr K Molawa, Mr T Mmako and Mr Moshe. The secretariat consisted of the following members: Ms Seeco, Ms G Setshedi and Ms B Molamu. In the said meeting of 15 January 2020, the BAC unanimously resolved to recommend to the Administrator, Ms Hunter, that the tender should not be approved, but it should be cancelled;
- 6.1.32.2 On 17 February 2020, the chairperson of the BAC signed a recommendation to the Administrator recommending that the tender should be cancelled;
- 6.1.32.3 On 19 February 2020, Ms Hunter responded to the chairperson's request, declining the request to cancel the tender and ordered that the evaluation of the tender continues;
- 6.1.32.4 The Chairperson of the BAC then informed the BAC members that the Administrator had issued a valid, lawful instruction that the evaluation of the tender must continue. There was an understanding by members of the BAC that failure to execute the Administrator's instructions might result in them being charged for gross insubordination;
- 6.1.33 In support of his submission, Mr Moshe furnished the Public Protector with copies of the same BAC report dated 17/02/2020 which was also furnished by Mr De Beer as already discussed under paragraph 6.1.31.3 above.

Applicable law

The Constitution of the Republic of South Africa, 1996

6.1.34 Section 100(1) of the Constitution provides as follows:

“When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the National Executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –

(a) ...

(b) assuming responsibility for the relevant obligation in that province to the extent necessary to-

(i) maintain essential national standards or meet established minimum standards for the rendering of a service...”,

6.1.35 Section 195(1) provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

“(a) A high standard of professional ethics must be promoted and maintained;

(b)...

(f) Public administration must be accountable...”

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

Public Finance Management Act, 1999 (PFMA)

6.1.37 Section 1(c) of the PFMA defines irregular expenditure as *“expenditure, other than authorised expenditure incurred in contravention of or that is not in accordance with*

the requirement of any applicable legislation, including any provincial legislation providing for procurement procedures.”

6.1.38 Section 18(2)(a) of the PFMA provides that:

“A Provincial Treasury must issue provincial treasury instructions not inconsistent with this Act”.

6.1.39 Section 36 of the PFMA states that:

“(1) Every department and constitutional institution must have an accounting officer;

(2) Subject to subsection (3) –

(a) the head of the department must be the accounting officer for the department;

(b)...

(3) The relevant Treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection (2) be the accounting officer”...

6.1.40 Section 38(1)(h) provides that:

“The Accounting Officer must take effective and appropriate disciplinary steps against any official in the service of the Department, Trading Entity or Constitutional Institution who -

(i)...

(ii)...

(iii) makes or permits an unauthorised expenditure, irregular expenditure, or fruitless and wasteful expenditure”.

6.1.41 Section 45 of the PFMA provides that:

“45. An official in a department, trading entity or constitutional institution—

- (a) *must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;*
- (b) *is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;*
- (c) *must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*
- (d) *must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 44; and*
- (e) *is responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility."*

6.1.42 Section 81(1)(b) provides that:

"An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer wilfully or negligently makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure".

Preferential Procurement Policy Framework Act, 2000

6.1.43 In terms of section 1(i) *"acceptable tenders"* means...any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

North West Provincial Treasury SCM Instruction Note 1 of 2019/2020: Application of Bid Validity Period, effective from 1 April 2020 (Instruction Note)

6.1.44 Paragraph 2 of the Instruction Note states that, *"The purpose of this SCM Instruction Note is to provide guidance with regard to the proper application of the bid validity period, in order to ensure uniformity, fairness and transparency, as prescribed by the*

Constitution, the Public Finance Management Act and the Preferential Procurement Framework Act".

6.1.45 Paragraph 4 of the Instruction Note provides that:

“4.1.1 The bid validity period is the period within which:

- The bidder maintains the terms and conditions, and price offered.*
- The Department must complete the evaluation and adjudication of the bid by awarding the bid, cancelling the bid or re-advertising the bid.*

4.1.2. Once the validity period has expired, the bids are no longer legally valid.

4.2. Bid validity period standard requirement:

4.2.1. The bid validity period must be stipulated in the bid documents.

4.2.2. The bid validity period must be 90 days.

- In the event of the validity period not being complied with for award purpose, an extension should be requested or applied for through the bidders who responded to the bid on closing date and time.*
- Where the organs of state foresee the possibility of not concluding the process within 90 days it should request extension of tender validity prior to expiry of 90 days.*
- The extension should not be more than 30 days (the total number of days for bid validity should not exceed 120 days).*
- Where the organ of state foresees the possibility of not concluding the process within 120 days, institutions must seek prior approval from Provincial Treasury with valid reasons for extension.*
- If the approval is granted by the Provincial Treasury, the same process of the extension must be followed.*

- *If disapproved, the institution must cancel and re-advertise the bid upon expiry”. (sic)*

6.1.46 Paragraph 5 of the Instruction Note provides that:

“... ”

- 5.1. *A request to extend the validity period must be made and responses must be received before expiry of the bid validity period.*
- 5.8. *Should the bid exceed the extension of 90 days to 120 days the approval should be sought internally through the Accounting Officers/Authorities.*
- 5.9 *Should the bid exceed the extension of 120 days the approval must be sought from the Provincial Treasury”.*

Public Service Act, 1994 (PSA)

6.1.47 Section 21 of the PSA, provides for the “*investigations of the charges of misconduct*” in the Public Administration as follows:

“21(1) ”

- (2) **[After the conclusion of the investigation the]** *The investigating officer shall inform the head of department within 30 days after his or her appointment, or within such further period as the head of department may on good cause shown allow, whether in his or her opinion the officer concerned should be charged or not, and if so, what in his or her opinion the contents of the charge in question should be.*

6.1.48 Section 22 of the PSA, provides for the “*steps to be taken after the investigations of by investigation officer*” as follows:

“22(1) [A] *The head of department may in writing under his or her hand charge an officer referred to in section 21 with misconduct, if he or she is of the opinion*

that sufficient grounds for a charge of misconduct against him or her have been found during the investigation.

(2) ...

(4) *A charge contemplated in subsection (1) or (2) shall contain or shall be accompanied by a direction calling upon the officer charged to send or deliver [within a reasonable period specified in the direction to a person likewise specified] a written admission or denial of the charge and*

(a) if he or she so desires, [a written] u explanation in writing regarding the misconduct with which he or she is charged;

(b) if he or she admits the charge and so desires, representations in writing regarding the steps which may be taken under section 24(2),”

6.1.49 Section 24 of the PSA, provides for the “steps after hearing” as follows:

(1)

(2)(a) *If the presiding officer has found that the officer charged is [found] guilty of the misconduct [as charged by the presiding officer] with which he or she has been charged, or if [he or she] the officer charged admits [that he or she is guilty of] the charge, the head of department [shall, with due observance of the finding and recommendation of the presiding officer in terms of section 23(5)] may, after having considered, in the case of a hearing, the documents relating to the hearing or, in any other case, any explanation or representations submitted to him or her—*

(i) Caution or reprimand the officer charged;

(ii) impose upon him or her a fine not exceeding R6 000;”

6.1.50 Section 27 of the PSA, provides for the “misconduct by head of department” as follows:

“27(1)(a) When a head of department is accused of misconduct, the relevant executing authority may appoint a person to investigate the matter and report to him or her thereon, [and such authority may thereupon report the matter to the President or, in the case of a provincial administration, to the

Premier of the province, who may direct the said] whereupon the said authority [to] charge [the] that head of department [concerned] with [that] misconduct.

(b)

(2) *The provisions of sections 21(2), 22(1) and (4) to (8) and 23 to 26 shall apply mutatis mutandis to any proceedings or steps following upon an investigation...*

Public Service Regulations, 2016 (PSR)

6.1.51 Paragraph 11 of Chapter 2 of the PSR, provides for “*Adherence to Constitution and other laws*”, as follows

“An employee shall:

(d) *an employee shall be faithful to the republic and abide by the Constitution and other laws in the execution of his duties.*

(e) *put the public interest first in the execution of his or her official duties;...*”

Case law

6.1.52 In ***Telkom SA Ltd v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Ltd [2011] ZAGPHC 1*** the court considered what the legal consequences would be if an organ of state attempted to award a bid after the validity period for the tenders had lapsed. In this matter the contracting authority engaged in discussions with the preferred bidders after the validity period of the bids had lapsed, but before any award had been made. The court held that such a step would be contrary to section 217 of the Constitution. In the court's view, the entire tender process came to an end when the validity period for the tenders expired without any tender being awarded or an extension of the validity period was obtained from all tenderers.

6.1.53 The Court added that the tender validity period is calculated as stated in terms of the tender document, which in this instance, was the date of closing of the tender. The

court further added that if the contracting authority continued to engage with the bidders after that date, it would not be acting within a valid tender process and its actions would accordingly not be transparent, equitable or competitive, in other words, it would violate section 217 of the Constitution.

- 6.1.54 In the matter of ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC)***, when applying constitutionally valid procurement principles, Froneman J held that compliance was required for a valid procurement process and its components were not mere 'internal prescripts' that could be disregarded at whim.
- 6.1.55 In ***City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC, SCA Case no 846/2021***, the matter revolved around a request for extension of the validity period. In this case, the Municipality sought to send a request for extension of the validity period around noon on the day on which the validity period was to expire. While some bidders responded, most of the bidders, including the Respondent, did not, due to the lateness of the request. The court stated the following: “*there is no proof that request for extension was communicated to the bidders prior to the expiry of the validity period and that the bidders consented to the extension prior to the expiry thereof*”. The court held that once the validity period expires, validity cannot be condoned, and the tender process is regarded as having been concluded.
- 6.1.56 In ***Khumalo v Member of the Executive Council for Education: Kwazulu-Natal 2014 (5) SA-579 (CC)***, the Constitutional Court held that the rule of law is a founding value of our constitutional democracy and that it is the duty of the courts to insist that the State, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The court held that “[*t*]he supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights”.

6.1.57 It was further held that “[35] Section 195 provides for a number of “important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues”.

Analysis

6.1.58 The evidence in the Public Protector’s possession indicates that the Department advertised a tender with a closing date of 12 August 2019, which was extended to 02 September 2019. The BEC met for the first time on 18 September 2019 and resolved that the bid should be cancelled due to wrong specifications. The BEC submitted its report to the BAC, dated 1 October 2019.

6.1.59 However, the evidence indicates that the BAC only met on 15 January 2020 to consider the report of the BEC. By then, the 90-day validity period had already expired i.e. four months had elapsed since the resolution of the BEC.

6.1.60 Notwithstanding the provisions of paragraphs 4.2.1 and 4.2.2 of the NW Provincial Treasury SCM Instruction Note 1 of 2019/20, which provides that the bid validity period must be stipulated in the bid document, and that it must be ninety (90) days, the functionaries who formed part of the BAC only considered the submission of the BEC after the validity period of the tender had lapsed.

6.1.61 In *Telkom SA Ltd v Merid Training (Pty) Ltd; Bihati Solutions (Pty) Ltd v Telkom SA Ltd [2011] ZAGPHC 1*, the Court held that the validity period is calculated from the date of closing of the bid.

6.1.62 In light of the above jurisprudence, the Department advertised a tender on 08 July 2019, with a closing date of 02 September 2019, and as such, the validity period of

90 days would be calculated from 02 September 2019. Therefore, the validity period would have expired on 01 January 2020.

- 6.1.63 Evidence in the Public Protector's possession indicates that the BAC met on 15 January 2020 to consider the report of the BEC. By this time, validity period of the tender had already expired during the first week of January 2020.
- 6.1.64 Subsequent to this meeting, on 17 February 2020, the BAC, through Ms Maleka sent a memo for cancellation of the tender to Ms Hunter. The reasons advanced in the memo were that the specifications of the tender were incorrect. This memo made no mention of the expiry of the tender's validity period. In the interest of transparency, the BAC ought to have informed Ms Hunter of the expiry of the validity period of the tender.
- 6.1.65 Ms Hunter declined the request two days later, on 19 February 2020, after consultation with the Director of SCM Mr Daniel Makhubu who denied that the specifications were incorrect. In this regard Ms Hunter was justified in declining the cancellation as her decision to decline was based on confirmation from Mr Makhubu that the specification was correct and not on the expiry of the validity period.
- 6.1.66 On 25 February 2020, Ms Maleka sent a letter to the BEC informing them that the Administrator had declined the request to cancel the tender and had ordered the evaluation to continue.
- 6.1.67 On 26 March 2020, the BEC met again to consider the Bid and recommended that the tender be awarded to Thavhani JV. The BEC further indicated to the BAC that the validity period had expired, and that the administrator must apply for condonation and consequence management should apply.
- 6.1.68 The evidence further indicates that the BAC met again on 23 April 2020 to consider the report of the BEC. In this meeting the BAC recommended to Ms Hunter that the bid be awarded to Thavhani JV, despite the report by the BEC. They further advised that the validity period had expired, and that the appointment will result in irregular

expenditure, and that the Chief Directorate should apply for condonation to regularise the appointment.

- 6.1.69 While the Public Protector acknowledges that the BAC duly recommended to the Administrator, that the Chief Director apply for condonement due to the expiry of the validity period, this was *ex post facto* the expiry of the validity period.
- 6.1.70 On 30 April 2020, in compliance with National Treasury Instruction, which prescribes that all tenders that are in excess of ten million rands (R10 000 000) be referred to Internal Audit prior to approval, Ms Maleka referred the BAC report to Internal Audit for auditing of the tender before it could be awarded.
- 6.1.71 Through a report dated 04 May 2020, Internal Audit cautioned both the Administrator and Ms Maleka not to award the tender as “*In terms of the formulation and text of the provincial treasury SCM Note 1 of 2017/2018, expiry of validity makes the process, not only non-compliant, but legally invalid and not resuscitatable, let alone condonable (sic)*”. They further advised that Ms Hunter should approach the Provincial Treasury for a way forward.
- 6.1.72 On 05 May 2020, Ms Maleka sent the report of the BAC recommending the appointment of Thavhani JV to Ms Hunter.
- 6.1.73 On 07 May 2020, Ms Hunter appointed Thavhani JV, fully cognisant of the expiry of the validity of the tender. This was evidenced by Ms Hunter’s note in her letter to Mr Kaipa, wherein she noted inter alia that this appointment will result in irregular expenditure due to the fact that the validity period expired and instructed the Chief Directorate to apply for condonement to regularise this appointment.
- 6.1.74 The Public Protector has given due consideration to the reasons advanced by Ms Hunter, in her response to the Notice in terms of section 7(9). Under the prevailing circumstances of the time, which included COVID-19, a hospital which was already severely constrained to provide health care, a lack of capacity and the conditions and inadequate facilities that were available to cater for pregnant women.

- 6.1.75 In the *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC*, the court held that a request for an extension of the validity period must be sought from the bidders prior to the expiry of the validity period and approval for extension must be obtained from the bidders prior to the expiry of the validity period. Once the validity period expires, the validity cannot be condoned.
- 6.1.76 Section 217(1) of the Constitution provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. The court in *Bihati Solutions (Pty) Ltd v Telkom SA Ltd*, considered what the legal consequences would be if an organ of state attempted to award a tender after the validity period for the tenders had lapsed. The court held that such a step would be contrary to the provision of section 217 of the Constitution.
- 6.1.77 The evidence before the Public Protector, regarding the timelines pertaining to each step in the procurement process clearly indicates that there was an undue delay. These delays resulted in non-compliance with the timeframes as stipulated in the procurement prescripts. The Public Protector noted with concern the lack of transparency demonstrated by the contradictory information provided by the different functionaries to the Administrator in the first instance.
- 6.1.78 Section 195(1) provides that Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the maintenance of a high standard of professional ethics and accountability in the public administration.

Conclusion

- 6.1.79 Having considered all evidence, the Public Protector makes the following conclusions:

- 6.1.79.1 The BAC unduly delayed its consideration of the BEC report and its adjudication of the tender. At no stage during the course of this investigation has any feasible explanation been provided by the members of the BAC for why their first sitting was held after the expiry of the validity period of the tender;
- 6.1.79.2 The omission by the BAC in the detection that the validity period had expired and further the omission of not cautioning the relevant role players timeously, had the consequence of exposing Ms Hunter to a legal quagmire and had the potential of perpetuating the undesirable circumstances that were prevailing at the hospital;
- 6.1.79.3 While Ms Hunter's decision to proceed with the appointment resulted in non-compliance, the reasons advanced by her during the course of this investigation demonstrate that her decision to proceed with the appointment was taken in the best interests of the community that the hospital serves; and
- 6.1.79.4 Despite the non-compliant process leading to the appointment of Thavhani JV, the ward was duly renovated and is fully functional.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standards that the functionaries of the Department should have complied with, and the impact thereof on good administration, the Public Protector makes the following findings:

7.1 Whether the functionaries of the North West Department of Health irregularly awarded Tender No. DOH/PS/06/18 to Thavhani Trading JV, after the expiry of the tender validity period, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act

- 7.1.1 The allegation that the functionaries of the North West Department of Health irregularly awarded Tender No. DOH/PS/06/18 for the conversion of an existing unused hospital ward into a 30-bed gynaecology ward at Job Shimankana Tabane

Hospital to Thavhani JV, after the expiry of the tender's validity period, **is substantiated.**

- 7.1.2 The tender was awarded to Thavhani JV on 07 May 2020, after its validity period had expired on 01 January 2020, and no extension of the validity period had been sought as required by relevant legislation. Ms Hunter's decision to appoint Thavhani JV after expiry of the validity period was contrary to section 45(c) and 81 of the PFMA which requires that an official must not wilfully or negligently permit or cause irregular expenditure but must also take steps to prevent it.
- 7.1.3 The BAC unduly delayed considering the submission of the BEC, adjudicating and making a recommendation to the Administrator prior to the expiry of the tender validity period. Their conduct was consequently at variance with SCM Provincial Instruction Note 1 of 2019/2020.
- 7.1.4 The conduct of the functionaries of the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

8. REMEDIAL ACTION

- 8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report upon the conclusion of an investigation where adverse findings are made.
- 8.2 In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.
- 8.3 The Public Protector notes that Ms Hunter is currently serving as the Deputy Director General: Primary Health Care at the National Department of Health. No remedial

action is taken against Ms Hunter due to the reasons canvassed in paragraph 6.1.68.11(c) above.

8.4 The Public Protector further notes that both chairpersons of the BAC, Ms Maleka and Director of SCM, Mr Makhubu, as well as chairperson of the BEC Mr William Kaipa have since been dismissed by the Department and have left the employ of the government.

8.5 The Public Protector further notes the submissions made by Mr J De Beer that some members of the BAC were not trained on SCM processes and had to rely on the knowledge and guidance of Ms Maleka as the chairperson of the BAC.

8.6 Having regard to the evidence, the regulatory framework determining the standard the functionaries of the Department should have complied with, the Public Protector takes the following remedial action, in terms of section 182(1)(c) of the Constitution.

The Head of the Department

8.6.1 Within **ninety (90) calendar days** from the date of the final report, in terms of section 38(1)(h)(iii) of the PFMA, take appropriate corrective steps by ensuring that members of the SCM are continuously trained on tender processes to avoid a repeat of similar incidents.

8.6.2 Ensure that officials who are appointed to serve on procurement committees must have been trained prior to their appointment.

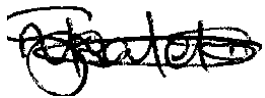
8.6.3 Within **ninety (90) calendar days** of the final report, in terms of section 24(2)(a)(i) of the PSA as amended, caution the remaining members of the BAC who were involved in the adjudication and irregular awarding of the tender No. NW DOH/PS/06/18.

The Director General of the National Department of Health

8.6.4 To take cognisance of this report.

9. MONITORING

- 9.1. The Head of the Department to submit a confirmation of the implementation of the remedial action to the Public Protector within **ninety (90) calendar days** from date of this report on the implementation of the above remedial action referred to in paragraph 8 above.
- 9.2. The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within a period prescribed in this report to avoid being in contempt of the Public Protector.
- 9.3. In line with the Constitutional Court judgement in the matter of the *Economic Freedom Fighters*, and in order to ensure the effectiveness of the Public Protector, the remedial action prescribed in this report is legally binding on the department unless there is an interim interdict or Court Order directing otherwise.



ADV. KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE:30 JUNE 2024

Assisted by Ms. Nthoriseng Motsitsi
Executive Manager PII: Inland