

CLOSING 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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A CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, IRREGULAR RECRUITMENT AND PROCUREMENT AS WELL AS IRREGULAR INCREASE OF SALARIES BY THE SOUTH AFRICAN MARITIME SAFETY AUTHORITY.

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, IRREGULAR RECRUITMENT AND PROCUREMENT AS WELL AS IRREGULAR INCREASE OF SALARIES BY THE SOUTH AFRICAN MARITIME SAFETY AUTHORITY.

1. INTRODUCTION

- 1.1. This is a closing report 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. The Public Protector received a complaint lodged by Mr Themba Douglas Ntshangase (the Complainant) on 5 September 2017, in connection with allegations of maladministration, irregular recruitment and procurement as well as irregular increase of salaries by the South African Maritime Safety Authority (SAMSA).
- 1.3. In essence the complaint is as follows:
- 1.3.1. That Mr Sobantu, the Acting Chief Executive Officer (CEO) irregularly appointed the Senior Manager for Maritime in May 2017, Mr Chris Crispin Camp (Mr Camp) without advertising the position;
- 1.3.2. That Mr Boetse Ramatlho (Mr Ramatlho) was irregularly appointed as Head of Legal in June 2017 despite not having the requisite legal qualifications for the position;
- 1.3.3. Further that the CEO appointed Mr Daniel Vuma (Mr Vuma), Senior Manager: Strategic Sourcing irregularly as he also does not possess the necessary qualifications for the position;

- 1.3.4. That Ms Lesego Mashishi (Ms Mashishi) the Executive Manager appointed in January 2016, irregularly received 100% salary increase, within a period of 12 months, as she was only appointed in 2016/2017 financial year;
- 1.3.5. That Mr Moyahabo Lolo Raphadu (Mr Raphadu), the Company Secretary also received 100% irregular salary increase in 2016/2017 financial year;
- 1.3.6. That the Security Services tender awarded to ADT Security Company by SAMSA in 2015 was not advertised; and
- 1.3.7. That the bidding price for the Satellite dish tender issued by SAMSA in 2016 was inflated.

2. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 2.1. 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.
- 2.2. 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.”

- 2.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
- 2.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies, or any other means that may be expedient under the circumstances.
- 2.5 The South African Maritime Service (SAMSA) exercise a public power or perform a public function as contemplated by section 239 of the Constitution and therefore fall within the definition of “organ of state” and as a result this matter is within the mandate of the Public Protector to investigate.
- 2.6 The jurisdiction of the Public Protector to investigate the allegations was not disputed by the parties.

3. THE INVESTIGATION

3.1. Methodology

- 3.1.1. The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act.
- 3.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct, irregular recruitment and procurement resulting to maladministration.

3.1.3. The Public Protector conducted a preliminary investigation into the complaint lodged by the Complainant in terms of section 7(1)(a) of the Public Protector Act, to determine the merits of the complaint and how the matter should be dealt with.

3.1.4. The preliminary investigation process included an exchange of correspondence with the SAMSA commencing on 22 May 2018, analysis of the relevant documents submitted including other information obtained and interviews conducted with the Complainant.

3.2. **Approach to the investigation**

3.2.1. The investigation was approached using an enquiry process that seeks to find out:

3.2.1.1. What happened?

3.2.1.2. What should have happened?

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

3.1.1 In the event of maladministration or improper conduct, what would it take to remedy the wrong where appropriate and to place the Complainant as close as possible to where he/she would have been, but for the maladministration or improper conduct.

3.1.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence and information provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether there was maladministration and irregularities in the recruitment of employees as well as in the procurement of goods and services by SAMSA.

- 3.1.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by SAMSA to prevent maladministration and prejudice where it is found to have occurred.
- 3.1.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of any maladministration or improper conduct found, where appropriate.
- 4 **Based on an analysis of the complaint and the allegations contained therein and the information obtained from various sources, the following issues are identified for investigation:**
- 4.1 **Whether the CEO irregularly appointed the Senior Manager Maritime, Captain Chris Crispen Camp, Head of Legal, Mr Boetse Ramatlho and Senior Manager: Strategic Sourcing, Mr Daniel Vuma;**
- 4.2 **Whether the Executive Manager and the Company Secretary's salary increased by 100% was irregular and improper;**
- 4.3 **Whether SAMSA irregularly extended a security services tender to ADT Security Company in 2015;**
- 4.4 **Whether there was an inflation of the bidding price for the satellite dish tender issued in 2016; and**
- 4.5 The above issues to be investigated were confirmed with the Complainant on 15 May 2018 before investigation could commence to confirm and lock the issues for investigation with the Complainant.

4.6 The Key Sources of information

4.6.1 Documents

- 4.6.1.1 A copy of Mr Ntshangase's letter of complaint, dated 5 September 2017;
- 4.6.1.2 A copy of a memorandum/submissions, dated 27 October 2016, requesting a transfer of Mr Crispen Camp from Durban office to Pretoria.
- 4.6.1.3 A copy of a letter, dated 19 December 2016, for approval of the transfer of Mr Crispen Camp from Durban office to Pretoria.
- 4.6.1.4 Minutes of the meeting of the Board of Directors dated 30 May 2017.
- 4.6.1.5 A copy of qualifications for Daniel Vuma, Mr Crispen Camp and Mr Ramathlo.
- 4.6.1.6 A copy of a memorandum/submissions, dated 4 August 2016 and 28 February 2017 for Adjustment of salaries.
- 4.6.1.7 A copy of a letter of appointment for Mr Raphadu.
- 4.6.1.8 A copy of a letter of termination of services for Fidelity ADT Company dated 4 April 2018.
- 4.6.1.9 A copy of a letter from National Treasury to SAMSA Acting CEO dated 28 February 2017.
- 4.6.1.10 Letter of invitation/invitation to bid dated 3 November 2017.
- 4.6.1.11 A copy of a letter from National Treasury to SAMSA Acting CEO dated 13 October 2017.

4.6.1.12 A copy of a letter from SAMSA Acting CEO to National Treasury dated 10 October 2017.

4.6.1.13 A copy of a letter from National Treasury to SAMSA Acting CEO dated 13 September 2017.

4.6.1.14 Copies of Bid Documents submitted by Exact Earth and Orbcomm.

4.6.1.15 Bid Evaluation Report and Evidence Documentation dated 27 November 2017.

4.6.1.16 A Copy of an appointment letter of the Supplier dated 5 December 2017.

4.6.2 **Correspondence**

4.6.2.1 A copy of a letter, dated 22 May 2018, from the Public Protector addressed to the Chairperson of the Board of SAMSA; and

4.6.2.2 A copy of a letter, dated 23 July 2018, from the Chairperson of the Board; Mr Mavuso Msimang responding to the Public Protector.

4.6.3 **Legislation and other prescripts**

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

4.6.3.2 The Public Protector Act No 23 of 1994 (PPA);

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

5.1 Whether the CEO irregularly appointed the Senior Manager of Maritime Legislation, Captain Chris Crispen Camp, Head of Legal, Mr Boetse Ramathlo and Senior Manager: Strategic Sourcing, Mr Daniel Vuma;

5.1.1 Regarding the alleged irregular appointment of Senior Manager of Maritime Legislation, Mr Chris Crispen Camp (Mr Camp).

Common cause

5.1.1.1 It is common cause that Mr Camp was appointed by SAMSA to the position of Senior Manager of Maritime Legislation.

5.1.1.2 The issue for the Public Protector's determination was whether or not the appointment of Mr Camp was irregular.

Issues in dispute

5.1.1.3 The Complainant alleged that Mr Camp was irregularly appointed in the position of Senior Manager of Maritime Legislation without his position being advertised.

5.1.1.4 The evidence submitted to the Public Protector in a letter dated 23 July 2018 confirms that Mr Camp was transferred from the position of a Surveyor in the Durban office of SAMSA to the position of Senior Manager of Maritime Legislation with effect from 9 January 2017 and not May 2017.

5.1.1.5 SAMSA conceded to the Public Protector in the above-mentioned correspondence that there was no advertisement as this was an internal

movement triggered by the untimely departure of two (2) legal experts who held positions in the Centre for Policy and Regulation.

5.1.1.6 It further highlighted that the level of the position to which Mr Camp was transferred to was not a promotion, but a lateral transfer as provided for by their policy.

5.1.1.7 SAMSA further stated that Mr Camp was therefore considered after he was identified as the only qualified employee within SAMSA who possesses a National Maritime diploma, an LLB Degree, an admitted attorney of the High Court of Kwa-Zulu Natal and Masters in Maritime Law from the Durban University of Technology.

5.1.2 Regarding the alleged irregular appointment of the Head of Legal, Mr Boetse Ramahlo (Mr Ramahlo).

Common cause

5.1.2.1 It is not in dispute that Mr Ramahlo was appointed to the position of Head of Legal by SAMSA.

5.1.2.2 The issue for the Public Protector's determination was whether or not the appointment of Mr Ramathlo was irregular.

Issues in dispute

5.1.2.3 The Complainant has alleged that Mr Ramathlo was irregularly appointed in the position of Head of Legal. He also stated that the incumbent does not have the necessary requisites of legal qualifications for the position.

5.1.2.4 In a correspondence dated 23 July 2018, Mr Ramahlo was initially appointed as Executive Head in the office of the Chief Executive Officer (CEO) in 2009,

part of his portfolio included also being responsible for Corporate Security Legal and Policy.

5.1.2.5 The Executive position for Policy and Regulations was vacant from November 2016 and Mr Ramahlo was requested to oversee the operations of Centre for Policy and Regulations.

5.1.2.6 SAMSA indicated that during a restructuring process in 2017 two portfolios were merged which is the Corporate and Maritime Legal to form a new portfolio called Legal, Policy and Regulatory.

5.1.2.7 The Board of Directors in a meeting held on 30 May 2017, supported that Mr Ramahlo be reassigned to the position Executive Manager: Policy and Regulations from the office of the CEO as he possess the experience required at that level. Mr Ramahlo possess a Bachelor of Arts degree, International Relations and Diplomacy Diploma and completed some modules for the Master of Security Studies Programme.

5.1.2.8 However, in light of foregoing, the allegation by the Complainant could not be substantiated.

5.1.3 Regarding the alleged irregular appointment of the Senior Manager: Strategic Sourcing, Mr Daniel Vuma (Mr Vuma).

Common cause

5.1.3.1 It is common cause that Mr Vuma was appointed as the acting incumbent to the position for Senior Manager: Strategic Sourcing by SAMSA.

5.1.3.2 The issue for the Public Protector's determination was whether or not the appointment of Mr Vuma was irregular.

Issues in dispute

- 5.1.3.3 In a correspondence dated 23 July 2018, SAMSA indicated that Mr Vuma occupies the position of Senior Manager Strategic Sourcing and holds a Bachelor of Administration degree. However, he was initially appointed as the Acting Senior Sourcing Specialist reporting to the Senior Manager Supply Chain.
- 5.1.3.4 The position of Senior Sourcing Specialist was vacant after the incumbent resigned from SAMSA in September 2011. The position has since been filled by another suitable incumbent.
- 5.1.3.5 Therefore, in light of foregoing, the allegation by the Complainant could not be substantiated.

The Application of the relevant legal prescripts

- 5.1.3.6 In terms of section 158 (1)(h) of the **Labour Relation Act No 66 of 1995 as amended** (LRA) provides that the Labour Court may –*“review any decision taken or any act performed by the state in its capacity as employer, on such ground as permissible in law”*. The applicant must be able to show which grounds thereof exist.
- 5.1.3.7 Paragraph 2 subparagraph 2.2 and 2.5 of the SAMSA transfer policy states that
- 2.2 – *“transfers initiated by the employer may be necessary due to – ... corporate restructuring”*.
- 2.5– *“transfer implies a horizontal movement from one position to another. No increase or decrease in salary is normally considered but the duties and working circumstances may alter”*.

- 5.1.3.8 Paragraph 7 subparagraph 7.1 of the SAMSA transfer policy under the heading *Employer initiated transfer and Strategic deployment* provides the following:
- *“SAMSA may transfer any employee to perform specified tasks or functions on a temporary or permanent basis anywhere in SAMSA Offices. The employee concerned should give his/her consent to such horizontal transfer or deployment”...*
- 5.1.3.9 Paragraph 6.4 subparagraph 6.4.1 of the Remuneration policy provide that *“SAMSA may request an employee who is suitably qualified to act on a higher position for a period of appointment that is longer than the minimum of 21 days but not exceeding a period of six(6) months”.*
- 5.1.3.10 The evidence provided to my office and discussed above indicates that Mr Camp was transferred from the position of a Surveyor in the Durban office to the position of Senior Manager of Maritime Legislation with effect from 9 January 2017 and not May 2017. The transfer was effected in terms of paragraph 7 subparagraph 7.1 of the Policy which provides that SAMSA may transfer any employee subject to that employees consent.
- 5.1.3.11 Triggered by the restructuring process due to two portfolios which were merged being the Corporate and Maritime Legal to form a new portfolio called Legal, Policy and Regulatory, the Board of Directors in a meeting held on 30 May 2017, supported that Mr Ramahlo be reassigned to the position of Executive Manager: Policy and Regulations from the office of the CEO as he possess the experience required at that level.
- 5.1.3.12 The placement of Mr Ramahlo through restructuring was supported by Paragraph 2 subparagraph 2.2 of the SAMSA transfer policy which provides

that “*transfers initiated by the employer may be necessary due to corporate restructuring*”.

5.1.3.13 Evidence proves that Mr Vuma holds the position of Senior Manager Supply Chain, however he was requested to be the Acting Senior Sourcing Specialist as provided for under paragraph 6.4 subparagraph 6.4.1 of the Remuneration policy which allows an employee who is suitably qualified to act on a higher position for a stipulated period not longer than six (6) months.

5.1.3.14 It is therefore important to note that the decision taken in this case to transfer the above referred employees was in accordance with the transfer policy by SAMSA in its capacity as the employer.

Conclusion

5.1.3.15 The Public Protector has considered the evidence submitted by SAMSA in respect of the allegations of irregular recruitment and the applicable law and found the allegations to be unsubstantiated.

5.1.4 **Submissions made by the Complainant in response to the discretionary notice dated 26 November 2019 on 20 December 2019.**

5.1.4.1 The Complainant was informed on 26 November 2019 of the intended closure of the investigation of the complaint that he had raised, based on the evidence obtained and the application of the relevant laws and prescripts referred to above, and provided with an opportunity to respond thereto or to submit further or additional information.

5.1.4.2 In his response to the Discretionary notice dated 20 December 2019 the Complainant made the following submissions:

At paragraph 5.1.1.1 – 5.1.3.4 of the response

- 5.1.4.3 In respect of the alleged irregular appointment of Senior Manager of Maritime Legislation, Mr Camp, the Complainant did not dispute the appointment of Mr Camp and the evidence submitted by SAMSA in relation to the transfer.
- 5.1.4.4 The Complainant further confirmed that he knew of the two (2) erstwhile officials' appointments namely, Mr Nkosi in the position of Centre for Policy and Regulation and Mr Mbatha to the position of Senior Manager for Maritime Legislation, respectively. The Complainant conceded to having been confused by the claim made by Mr Tiyani. However, the Complainant did not provide new information to clarify this matter further.
- 5.1.4.5 In respect of the alleged irregular appointment of the Head of Legal, Mr Boetse Ramahlo, the Complainant indicated that he was disputing the date of appointment, however, due to the fact that the appointment was not irregular the date has no bearing on the investigation.
- 5.1.4.6 The Complainant did not submit any further evidence except the one provided by SAMSA and relied upon to disprove the supporting documentary evidence at my disposal.
- 5.1.4.7 In respect of the alleged irregular appointment of the Senior Manager: Strategic Sourcing, the Complainant submitted that he did not dispute the appointment but he indicated that he was disputing the manner through which he was reinstated. Allegedly, according to the Complainant there was an ongoing investigation against Mr Ramahlo.
- 5.1.4.8 The Complainant still did not submit any evidence to disprove the supporting documentary evidence at my disposal in this regard.

Conclusion

5.1.4.9 The Public Protector has considered the above submission made by the Complainant and is therefore persuaded that there is no evidence to refute the evidence submitted by SAMSA in this regard.

5.1.4.10 With regards to the Complainant's further representation concerning him disputing or questioning the manner in which Mr Ramahlo was reinstated by SAMSA, he has indicated that there is an ongoing investigation against Mr Ramahlo.

5.1.4.11 However, this is a new issue, in fact an issue creep to the original one. I therefore will not dwell into the allegation thereof as it was not part of my investigation herein.

5.2 Regarding whether the Executive Manager and the Company Secretary's salary increase of 100% was irregular and improper;

Common cause

5.2.1 It is common cause that the Executive Manager and Company Secretary received salary increases from SAMSA.

5.2.2 The issue for the Public Protector's determination was whether or not the Executive Manager and the Company Secretary received 100% salary increase and if the salary increase was irregular.

Issues in dispute

- 5.2.3 In their response of 23 July 2018, SAMSA conceded that payment for salary increase was effected to the Executive Manager and the Company Secretary, however, it was not 100% as alleged by the Complainant.
- 5.2.4 The increase of the Company Secretary's salary was approximately 35.04%, and was effected as a counter offer to Ms Mashishi as she was offered another position by the Limpopo Economic Development Agency (LEDA). SAMSA still needed to retain her for skills.
- 5.2.5 The allegation that Ms Mashishi, the Company Secretary appointed in January 2016, irregularly received 100% salary increase, within a period of 12 months, as she was only appointed in 2016/2017 financial year is therefore not substantiated.
- 5.2.6 Further allegation by the Complainant was that Mr Raphadu, the Executive Manager also received 100% irregular salary increase in 2016/2017 financial year.
- 5.2.7 Regarding the salary increase of the Executive Manager, SAMSA indicated that when he was appointed in June 2015 he raised the fact that the salary offer SAMSA presented to him was less than what he was earning, so his salary was reviewed to that of an entry level for Executive pay grade.
- 5.2.8 The salary increased with approximately 43.3%. This was in consultation with and approval of the Board Committee on Remuneration.

The Application of the relevant legal prescripts

- 5.2.9 In terms of section 23 (1) of the **Constitution of the Republic of South Africa, 1996** (Constitution) – "*Everyone has the right to fair labour practices*".

5.2.10 Chapter 8 section 186 (2) (a) of the **Labour Relation Act No 66 of 1995 as amended** (LRA) gives recognition to the notion of “unfair labour practice”. The Act defines the notion as any unfair act or omission which arises between employer and employee and which involves –

(a) “Unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to the employee; ...”

5.2.11 Section 191(1)(a) of the LRA provides that disputes about unfair labour practice may be referred in writing to the CCMA.

5.2.12 Section 49(1) and (3) of the Basic Conditions of Employment Act No 75 of 1997 (BCEA) provide the following:

(1)- “ A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act.”...

(3) - “An employer and an employee may agree to replace or exclude a basic condition of employment to the extent permitted by this Act or a sectoral determination”.

5.2.13 The evidence discussed above indicates that the salary increase of the Company Secretary was approximately 35.04%, the increase was effected as a counter offer to Ms Mashishi as she was offered another position and SAMSA still wanted to retain her.

5.2.14 The law allows employers to amend contracts of employees either based on the collective agreement or based on the contract entered into between the parties. The alterations are provided for in section 49(1) and (3) of the BCEA.

- 5.2.15 The salary increase of the Executive Manager was triggered by a submission in which he raised concerns when he was appointed in June 2015 that the salary presented by SAMSA was less than what he was previously earning.
- 5.2.16 SAMSA reviewed his salary to that of an entry level for Executive pay grade. The remuneration policy in terms of paragraph 7 subparagraph 7.1 and 7.3 allows for a salary review to at least the minimum of the entry level which was the case herein.

Conclusion

- 5.2.17 The Public Protector has considered the evidence submitted by SAMSA in respect of the irregular and improper allegations of salary increase and the law applicable, and in light of the afore-going, the Public Protector could not find evidence to substantiate the allegations made by the Complainant in this regard.
- 5.2.18 **Submissions made by the Complainant in response to the discretionary notice dated 26 November 2019 on 04 December 2019.**
- 5.2.18.1 The Complainant was informed on 26 November 2019 of the intended closure of the investigation of the complaint that he had raised, based on the evidence obtained and the application of the relevant laws and prescripts referred to above, and provided with an opportunity to respond thereto or to submit further or additional information.
- 5.2.18.2 In his response to the Discretionary notice dated 04 December 2019 the Complainant made the following submissions:

At paragraph 5.2.1 – 5.2.8 of the response

5.2.18.3 Regarding whether the Executive Manager and the Company Secretary's salary increase was irregular and improper, the Complainant did not provide any contradictory evidence to rebut the evidence at hand on this matter.

5.2.18.4 In conclusion the Public Protector is therefore persuaded that there is no evidence to refute the evidence submitted by SAMSA in this regard.

5.3 Regarding whether SAMSA irregularly extended a security services tender to Fidelity ADT Security Company;

Common issues

5.3.1 It is not in dispute that SAMSA appointed Fidelity ADT in 2015 through a competitive bidding process.

5.3.2 The issue for the Public Protector's determination was whether or not SAMSA appointed Fidelity ADT irregularly in 2015.

Issues in dispute

5.3.3 The Complainant alleged that the Security Services tender awarded to ADT Security Company by SAMSA in 2009 was not advertised.

5.3.4 In their response dated 23 July 2018, SAMSA submitted evidence which indicates that Fidelity ADT was a Security Company which was appointed in 2015 following a competitive bidding process and not in 2009 as alleged by the Complainant.

5.3.5 The above-mentioned contract of 2015 was extended through approval from National Treasury for a period of four (4) months from 1 March 2017 to 30 June 2017.

5.3.6 The contract was however terminated by SAMSA before the expiry of the extended period thereof, being 4 May 2017. No other contract was entered into with the service provider in 2009 as alleged by the Complainant.

5.3.7 **The Application of the relevant legal prescripts**

5.3.7.1 Section 217 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 and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.*”

5.3.7.2 The Public Finance Management Act 1 of 1999 as amended by Act 29 of 1999 (PFMA) regulates financial management in the national and provincial government and provides, inter alia, that National Treasury may make Regulations or issue instructions, applicable to all institutions to which the PFMA applies, concerning –

... “*the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective*”. As provided for in section 76 (4) (c) of the PFMA.

5.3.7.3 The regulations in terms of the PFMA (PFMA Regulations) have been promulgated¹ and the Supply Chain Management Regulations (PFMA SCM Regulations),² in particular, make provision for the implementation of supply chain management systems by organ of state for the acquisition of goods and services.

¹ National Treasury: Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities: issued in terms of the Public Finance Management Act 1999, GG No 27388 of 15 March 2005.

² Regulation 16A of the PFMA Regulations.

5.3.7.4 The National Treasury has issued guidelines and instruction or practice notes on various issues relating to procurement, the aim being to ensure uniform minimum norms and standard within government. Of particular reference is Practice note number 8 of 2007/2008, issued in terms of section 76 (4) (c) of the PFMA and is intended to regulate the threshold values within which accounting officers may procure goods, works and services by means of petty cash, verbal/ written price quotation or competitive bids.

5.3.7.5 The National Treasury Instruction SCM Instruction Note 3 of 2016/17, provide guidance on measures to prevention and combating abuse in the supply chain management system. Paragraph 9 sub para 9.1 and 9.2 of the Practice note provide the following:

“9.1. The accounting officer/accounting authority must ensure that contracts are not varied by more than 20% or R 20 million (including VAT) for construction related goods, works and or services and 15% or R15 million (including VAT) for all other goods and or services of the original contract value.

9.2. Any deviation in excess of the prescribed thresholds will only be allowed in exceptional cases subject to prior written approval from the relevant treasury.”

5.3.7.6 Evidence at my disposal shows that the appointment of the Fidelity ADT security service was concluded through a competitive process and that the contract was extended/ varied subject to prior written approval from the relevant treasury.

5.3.7.7 No other evidence was found suggesting that SAMSA extended the contract of Fidelity ADT security service more than once before termination of the contract on 4 May 2017.

5.3.8 In his response to the Discretionary notice dated 04 December 2019 the Complainant made the following submissions:

At paragraph 5.3.1 – 5.3.5 of the response

5.3.8.1 The Complainant submitted that Fidelity ADT is a Security Company which was appointed since 2009 and has had its term of contract extended several times without the approval from Treasury and that the termination was as a result of pressure from Treasury.

5.3.9 Submissions made by the Complainant in response to the discretionary notice dated 26 November 2019 on 04 December 2019.

5.3.9.1 The Complainant did not provide any contradictory evidence to rebut the evidence at hand on this matter of the Fidelity ADT Security Company.

5.3.9.2 In conclusion the Public Protector is therefore persuaded that there is no evidence to support the Complainant's allegations on the alleged existence of the contract of 2009 and the possible extension alleged to have occurred several times without approval from Treasury.

5.3.9.3 The Complainant was informed on 26 November 2019 of the intended closure of the investigation of the complaint that he had raised, based on the evidence obtained and the application of the relevant laws and prescripts referred to above, and provided with an opportunity to respond thereto or to submit further or additional information.

5.4 Regarding whether there was an inflated bidding price for the satellite dish tender issued in 2016.

Common issues

5.4.1 It is common cause that the tender for Satellite Automatic Identification System (SAT-AIS) for ship surveillance in the Maritime Domain was issued in 2016.

5.4.2 The issue for the Public Protector's determination was whether or not the bidding price was inflated.

Issues in dispute

5.4.3 On analysis of the tender documents before the Public Protector it is confirmed that the bidders who submitted their proposals of the tender were only two (2), which are Exact Earth Europe and Orbcomm.

5.4.4 The bid for ship surveillance in the Maritime Domain was for a period of three (3) years.

5.4.5 Exact Earth Europe tendered for an amount of R7 287 989.00 while Orbcomm tendered for R14 148 819.30. Exact Earth Europe was appointed for the same amount for which they tendered on 05 December 2017.

The Application of the relevant legal prescripts

5.4.5.1 In terms of the Preferential Procurement Regulation, 2001 pertaining to the Preferential Procurement Policy Framework Act No 5 of 2000 (PPPFA). "Firm price" is defined on section 1(g) of the regulations as "*the price that is only subject to adjustments in accordance with actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty and any other duty, levy or tax which, in terms of a law or regulation is binding on the contractor and demonstrably has an influence on the price of any suppliers, or the rendering costs of any service, for the execution of the contract.*"

5.4.5.2 The PPPFA prescribes that the lowest acceptable bid must receive 80 or 90 points for price. A bid is regarded as acceptable if:

(a) It complies in all respect with the specification and conditions of the bid;

- (b) The bidder completed and signed all the prescribed bid forms to enable the principal to evaluate the submitted bid;
- (c) The bidder submitted the required tax clearance certificate and other clearance/registration forms as prescribed by various acts and/ or in the bid documentation; and
- (d) The bidder has the necessary capacity and ability to execute the contract.

5.4.5.3 Practice note Number SCM 2 of 2006 regarding prohibition of set-aside and the use of cost estimates as benchmarks. This practice note provides as follows:

“Bids should only be evaluated in accordance with the evaluation criteria stipulated in the bid documentation. Deviation by more than a predetermined percentage from the cost estimates of the project/ commodity cannot be regarded as justifiable reason for the rejection of a bid and has, therefore not been approved by the National Treasury as an evaluation norm or criteria”.

5.4.6 The evidence discussed above indicates that only two companies tendered, Exact Earth Europe tendered for an amount of R7 287 989.00 while Orbcomm tendered for R14 148 819.30. Exact Earth Europe was appointed for the same amount for which they tendered on 05 December 2017.

5.4.7 The tender was evaluated based on the PPPFA which prescribes that the lowest acceptable bid must receive 80 or 90 points for price and the bid registered was acceptable in accordance to the specifications and conditions of the bid.

5.4.8 No evidence was found to prove that there was any inflation of prices as alleged by the Complainant in that Exact Earth Europe submitted a quote which

provided a “*firm price*” as required by the PPPFA. The price was the lowest in comparison with the one submitted by Orbcomm.

5.4.9 It should be noted that Price is not the only factor that regulates a tender process, other factors play a role. The evaluation on price becomes the last criterion of the tender process.

5.4.10 Submissions made by the Complainant in response to the discretionary notice dated 26 November 2019 on 04 December 2019.

5.4.10.1 The Complainant was informed on 26 November 2019 of the intended closure of the investigation of the complaint that he had raised, based on the evidence obtained and the application of the relevant laws and prescripts referred to above, and provided with an opportunity to respond thereto or to submit further or additional information.

5.4.10.2 In his response to the Discretionary notice dated 04 December 2019 the Complainant made the following submissions:

At paragraph 5.4.1 – 5.4.7 of the response

5.4.10.3 Regarding whether the bidding price for the satellite dish tender issued in 2016 was inflated, the Complainant did not provide any contradictory evidence to rebut the evidence at hand on this matter.

5.4.11 In conclusion the Public Protector is therefore persuaded that there is no evidence to support the Complainant’s allegations on the possible inflation of prices by SAMSA on the tender awarded to Exact Earth Europe for surveillance in the Maritime Domain for three (3) years.

5.4.12 Further Submissions made by the Complainant on allegations which were not part of my investigation.

5.4.12.1 The Complainant further raised new allegations involving abuse of power by the CEO of SAMSA in relation to his dismissal which emanated from a discovery he alleged to have made.

5.4.12.2 The allegations deals with the corruption involving under-recording of marine funds, which he indicated to have reported to the Minister of Transport on 25 May 2017, but later retracted these allegations in writing after he was threatened. He further submitted that he reported the matter to SAPS and SIU.

5.4.12.3 He also admitted to have reported the matter to the City Press. He further alleged abuse of power by the CEO relating to his dismissal after the CCMA made an order.

5.4.13 The above issues that were not investigated which the Complainant raised on paragraph 5.4.11 are considered new issues and can only be addressed accordingly in line with our processes for the registration of new complaints.

6 REASONS FOR CLOSURE

6.1. Having considered all the evidence as well as the applicable legal prescripts, the Public Protector has come to the following conclusion:

6.1.1 The allegation that the CEO irregularly appointed the Senior Manager Maritime, Mr Camp, Head of Legal, Mr Ramathlo and Senior Manager: Strategic Sourcing, Mr Vuma is unsubstantiated;

- 6.1.2 The allegation that the Executive Manager and the Company Secretary's salary increase were irregular is unsubstantiated;
- 6.1.3 The allegations that SAMSA irregularly awarded a security services tender to ADT Security Company in 2015 is unsubstantiated; and
- 6.1.4 The allegation that there was an inflation of the bidding price for the satellite dish tender issued in 2016 is unsubstantiated.
- 6.1.5 The Complainant was informed on 26 November 2019, through a Discretionary notice of the intention to close the investigation on the complaints that he had raised, based on the evidence obtained and provided with an opportunity to respond thereto or to submit further or additional information.
- 6.1.6 In his response to the Discretionary notice, the Complainant repeated some of his original complaints, raised new complaints and failed to submit any further or additional information or evidence that had not been considered during the investigation.
- 6.1.7 However, based on the evidence obtained and the application of the relevant laws and prescripts referred to above no evidence was found to corroborate the above allegations brought by the Complainant.

7 CONCLUSION

- 7.1 Having regard to the evidence received, and for the reasons advanced herein above, I am unable to pursue the matter any further and am inclined to conclude that the allegations of maladministration, irregular recruitment and procurement as well as irregular increase of salaries by SAMSA are unfounded.

- 7.2 Should there be any enquiries or responses to this closing report, kindly contact Mr. Rodney Mataboge, the Chief Investigator: Good Governance and Integrity of the Public Protector South Africa at rodneym@pprotect.org and/or Ms Pfunzo Mhelembe, the Senior Investigator: Good Governance and Integrity at Pfunzom@pprotect.org.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 8 / 12 /2020

Assisted By: Ms Pfundzo Mhelembe