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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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF AN IRREGULAR AWARD OF A TENDER FOR CLEANING SERVICES TO RABBI SOLUTIONS (PTY) LTD.

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EXECUTIVE SUMMARY

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

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of an irregular award of a tender and or contract for cleaning services to Rabbi Solutions (Pty) ltd. The complaint was lodged by Mr Ndo Maleho on 9 November 2017.

(iii) The investigation was conducted in terms of section 182(1)(a) of the Constitution which gives me the power to investigate any alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(iv) **In the main, the Complainant alleged as follows:**

(aa) Rabbi Solutions (Pty) Ltd (Rabbi Solutions) is owned by Ms Kedibone Dorothy Senne (hereinafter referred to as Ms Senne). Rabbi Solutions was awarded a tender for cleaning services due to the owner's close relationship with the Facilities and Operations Manager of ConHill: Mr Themba Ntuli (hereinafter referred to as Mr Ntuli).

(bb) In June 2016, a new cleaning tender was advertised as the existing contract was to end in September 2016.

(cc) In July 2016, Rabbi Solutions submitted their tender documents which were completed and compiled with the assistance of Mr Ntuli.

(dd) Four (4) months after Rabbi Solutions was established, it was awarded a tender for cleaning services by ConHill in August 2016, even though Rabbi Solutions did not have the requisite experience.

(v) **On analysis of the complaint, the following issues were identified and investigated:**

(aa) Whether ConHill irregularly or improperly awarded tender number CONHILL 09/2016/FAC to Rabbi Solutions as its cleaning service provider even though Rabbi Solutions lacked the requisite experience;

(bb) Whether Mr Ntuli is personally aligned or linked to Rabbi Solutions or Ms Senne and if so, whether this amounts to a conflict of interests; and

(cc) Whether the Complainant or any other person suffered improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act in the circumstances.

(vi) The investigation process included an exchange of correspondence and analysis of all relevant documents and application of all relevant laws, policies and related prescripts and interviews were also conducted with the Complainant and relevant officials of Conhill.

(vii) Key laws and policies taken into account to determine if there had been maladministration into allegations irregular award of a tender or contract for cleaning services to Rabbi Solutions (Pty) Ltd. Those were the following:

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

(b) Gauteng Growth and Development Agency Supply Chain Management Policy dated 01 May 2016;

(c) Public Finance Management Act, 01 of 1999 (PFMA); ;

(d) Promotion of Administration Justice Act, 3 of 2000 (PAJA).

(viii) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) **Regarding whether ConHill irregularly or improperly awarded tender number CONHILL 09/2016/FAC to Rabbi Solutions as its cleaning service provider even though Rabbi Solutions lacked the requisite experience.**

(aa) The allegation that ConHill irregularly or improperly awarded tender number CONHILL 09/2016/FAC to Rabbi Solutions as its cleaning service provider even though Rabbi Solutions lacked the requisite experience, is not substantiated, because no tender was ever awarded.

(bb) However, it appears from the evidence that the Request for Quotation (RFQ) was irregularly and improperly awarded to Rabbi Solutions. I also noted that the minimum five (5) year experience requirement for CONHILL 21/2016/FAC was waived.

(cc) Rabbi Solutions did not meet the mandatory functional/technical requirement of five (5) years' experience in cleaning services, contrary to the declaration by the ConHill Supply Chain Management officials.

(dd) Documentary evidence at my disposal indicates that Rabbi Solutions was only established and registered in April 2016. This meant that Rabbi Solutions existed for only four months at the time of the awarding of the RFQ in August 2016. Despite this, Rabbi Solutions was scored/marked as "Yes" during the bid evaluation process which inaccurately suggested that Rabbi Solutions had five (5) years' experience.

(ee) I find therefore that this procurement process was not only compromised by dishonesty, but also lacked fairness, competitiveness and transparency, as

ConHill's bid evaluation committee (BEC) members improperly implied that Rabbi Solutions had complied with the standard requirements of the tender.

(ff) Evidence also revealed that the BEC attempted to mitigate the lack of cleaning experience of Rabbi Solutions by referencing the owner's personal experience, the owner was not being evaluated in a personal capacity as a natural person, but rather Rabbi Solutions as a juristic person and potential service provider.

(gg) It is submitted therefore that the members of the BEC, namely: Mr Malatsi, Mr Ntuli, Mr Graham Palm and Mr Reuben Phasha violated section 217(1), section 195(1) and section 33(1) of the Constitution, Clause 15.3.2 of the Gauteng Growth Development Agency (GGDA) SCM Policy, Clause 7.1.3 of the GGDA SCM Policy and Clause 2.9 of the GGDA code of conduct when procuring the services of Rabbi Solutions through a RFQ.

(hh) Accordingly, the action by ConHill amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether Mr Ntuli is personally aligned or linked to Rabbi Solutions or Ms Senne and if so, whether this amounts to a conflict of interest.

(aa) The allegation that Mr Ntuli is personally aligned or linked to Rabbi or Ms Senne and if so, whether this amounts to a conflict of interest, is substantiated.

(bb) Evidence at my disposal indicates that Mr Ntuli was the Chairperson of the BEC and also wrote a positive reference letter for Rabbi Solutions which Rabbi utilized as part of the bid documents. I find that to be a clear endorsement of Rabbi Solutions by Mr Ntuli, who was the Chairperson of the BEC.

(cc) Mr Ntuli did not disclose nor recuse himself from the procurement process once he discovered that there might be a potential conflict of interest. The evidence shows that Mr Ntuli reconciled himself with the possibility of perceived conflict and he proceeded to chair the procurement process.

(dd) I find therefore that Mr Ntuli failed to manage a perceived conflict of interest in relation to his alignment with Rabbi Solutions as a company. As such, Mr Ntuli violated Clause 2.1 of the Code of Conduct contained in the GGDA Supply Chain Management Policy. However, evidence at my disposal could not establish an intimate relationship between Mr Ntuli and Ms Senne as alleged by Complainant.

(ee) Accordingly, the action by ConHill and in particular Mr Ntuli amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(c) Regarding whether the Complainant or any other service provider suffered any improper prejudice as a result of this alleged maladministration.

(aa) The allegation whether the Complainant or any other person suffered prejudice in the circumstances, is substantiated.

(bb) Rabbi Solutions was appointed in terms for an RFQ when it was clear that they did not meet the evaluation criteria. Subsequently, they were awarded a tender for a three (3) year period, while they were inexperienced.

(cc) Any prospective service providers were prejudiced by the inconsistent application of the evaluation criteria and bias afforded towards Rabbi Solutions.

(dd) The appointment of Rabbi Solutions, notwithstanding its lack of minimum experience resulted in improper prejudice suffered by the other qualifying

prospective service providers who ought to have been considered. Mr Malatsi, Mr Ntuli and the officials involved in the procurement process, violated section 217(1), section 33(1) of the Constitution, GGDA SCM Policy and by extension PFMA, which resulted in the improper appointment of Rabbi Solutions.

(ix) **The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution with a view to remedying the impropriety referred to in this report, is the following:**

(a) **THE CEO OF CONHILL**

(aa) To ensure that within ninety (90) working days from the date of this report, all ConHill officials who are involved in procurement processes, attend a workshop on the Public Finance Management Act and the ConHill Supply Chain Management Policy as well the code of conduct for supply chain management practitioners and Public Service Regulations governing procurement.

(bb) To ensure that within ninety (90) working days all members of the BEC involved in the appointment of Rabbi Solutions are subjected to an internal investigation and disciplinary steps are taken against those implicated in the improper conduct and/ or violation of procurement policies.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF AN IRREGULAR AWARD OF A TENDER FOR CLEANING SERVICES TO RABBI SOLUTIONS (PTY) LTD.

INTRODUCTION

1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(2A)(a) of the Public Protector Act 23 of 1994 (Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation and to implement remedial action:

1.2.1 The MEC of ECODEV, Dr KD Ramokgopa

1.2.2 The Chairperson of the Board of the GGDA, Mr Ernest Mahlaule

1.2.3 The CEO of Conhill, Ms Dawn Robertson

1.2.4 The Group CEO of GGDA, Ms Mosa Tshabalala

1.2.5 The Head of Department of ECODEV Ms Pumla Ncapayi and

1.2.6 A copy of the report is also provided to the Complainant to inform him about the outcome of the investigation.

2. THE COMPLAINT

2.1 The complaint was lodged with my office on 09 November 2017, by Mr Ndo Maleho (the Complainant) who alleged that ConHill irregularly awarded tender number **CONHILL 09/2016/FAC** to Rabbi Solutions (Pty) Ltd.

2.2 The Complainant alleged *inter alia* that:

2.2.1 Rabbi Solutions (Pty) Ltd (Rabbi Solutions) is owned by Ms Kedibone Dorothy Senne (hereinafter referred to as Ms Senne). Rabbi Solutions received a tender for cleaning services due to the owner's close relationship with the Facilities and Operations Manager of ConHill: Mr Themba Ntuli (hereinafter referred to as Mr Ntuli).

2.2.2 Ms Senne worked closely with Mr Ntuli while she was in the employ of Marble Arch, the company which had the cleaning tender for ConHill previously.

2.2.3 Rabbi Solutions was established and registered with the Companies and Intellectual Property Commission (CIPC) in April 2016.

2.2.4 In June 2016, a new cleaning tender was advertised because the existing contract was ending in September 2016 (Marble Arch's contract).

2.2.5 In July 2016, Rabbi Solutions submitted their tender documents which were completed and compiled with the assistance of Mr Ntuli.

2.2.6 Four (4) months after Rabbi Solutions was established, it was awarded a tender for cleaning services by ConHill in August 2016, even though Rabbi Solutions did not have the requisite experience.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that: "*The Public Protector has the power as regulated by national legislation:*

(a) To investigate any conduct in state affairs, or in the Public Administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) To report on that conduct; and
(c) To take appropriate remedial action."

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector's powers are further regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.

3.5 In the *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.[1] The Constitutional Court further held that: "*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.*

3.6 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.7 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);

3.8 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68).

3.9 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69).

3.10 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action

1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at paragraph [76].

taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70).

3.11 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71).

3.12 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (paragraph 71(a).

3.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d).

3.14 "*Appropriate*" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e).

3.15 The remedial action taken by the Public Protector has a binding effect (para 76). The Constitutional Court further held that: "*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences*" (paragraph 73).

3.16 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence

of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.17 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. It is axiomatic that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is a huge public interest in the public administration or in the governing of public affairs.

3.18 ConHill is a subsidiary of the Gauteng Growth Development Agency (GGDA) which is the implementation arm of the Gauteng Department of Economic Development and it assists the Department to lead, facilitate and manage sustainable job creation and inclusive economic growth and development in the Gauteng City Region. ConHill is an organ of state as contemplated in section 239 of the Constitution and its conduct amounts to conduct in state affairs and as a result of this, the matter falls within the ambit of the Public Protector's mandate.

3.19 The jurisdiction of the Public Protector was not disputed by ConHill in this matter.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a), (b) and (c) of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.2.2 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

4.2.3 The Supreme Court of Appeal[2] (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice.

4.2.5 In this particular case, the factual enquiry primarily focused on whether or not ConHill failed to follow proper procurement processes when it awarded Rabbi Solutions the cleaning tender.

4.2.6 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by ConHill to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been improper conduct and irregular awarding of a cleaning tender to Rabbi Solutions and prejudice to the prospective service providers were principally those imposing administrative standards that should have been complied with by ConHill or its officials.

[2] *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA),*

4.2.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct, corruption, conflict of interests and irregular appointment. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the ConHill or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.2.8 In the case of conduct failure as was the case in this matter, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

4.2.9 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

4.3 **On analysis of the complaint, the following issues were identified and investigated:**

4.3.1 Whether ConHill irregularly or improperly awarded tender number CONHILL 09/2016/FAC to Rabbi Solutions as its cleaning service provider even though Rabbi Solutions lacked the requisite experience;

4.3.2 Whether Mr Ntuli is personally aligned or linked to Rabbi Solutions or Ms Senne and if so, whether this amounts to a conflict of interest.

4.3.3 Whether the Complainant or any other person suffered improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act, in the circumstances.

4.4 The Key Sources of information

4.4.1 Documents:

4.4.1.1 A copy of the completed complaint from the Complainant dated 10 November 2017;

4.4.1.2 A copy of the allegations letter dated 17 January 2018, to Ms Dawn Robertson, the Chief Executive Officer of ConHill;

4.4.1.3 A copy of an email dated 15 February 2018 containing Rabbi Solutions bid documents reference number CONHILL/21/2016/FAC and copies of the tender documents for reference number 09/2016/FAC including BEC submission from Ms Dawn Roberts, the CEO of ConHill;

4.4.1.4 A copy of a letter dated 20 February 2018, from the Public Protector, addressed to Chief Executive Officer, Ms Dawn Robertson;

4.4.1.5 A copy of an email correspondence to Mr Solly Malatsi dated 11 October 2018;

4.4.1.6 A copy of an email correspondence to Mr Solly Malatsi dated 12 October 2018 attached thereto was pack for the RFQ;

4.4.1.7 Copies of email correspondence from Mr Solly Malatsi to the Public Protector dated 07 November 2018 for the two months emergency request for quotations;

4.4.1.8 A copy of email correspondence from Mr Solly Malatsi to the Public Protector dated 08 November 2018 containing the database

4.4.2 Correspondence that was exchanged between the Public Protector and:

4.4.2.1 Ms Dawn Robertson, the Chief Executive Officer of ConHill dated 13 February 2018;

4.4.2.2 Mr Mpfariseni Mulaudzi, dated 01 March 2018 with attachments of the BEC scoring sheets; and

4.4.2.3 Ms Kedibone Senne, the owner of Rabbi: a subpoena issued in terms of section 7(4)(a) and (b) of the Public Protector Act, dated 17 May 2018.

4.4.3 **Legislation and other legal prescripts**

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

4.4.3.2 The Public Protector Act, 23 of 1994 (the PPA);

4.4.3.3 The Public Finance Management Act 01 of 1999 (PFMA); and

4.4.3.4 Promotion of Administrative Justice Act 3 of 2000; and

4.4.1 The Gauteng Growth and Development Agency Supply Chain Management Policy dated 01 May 2016;

4.4.4 **Case law**

4.4.4.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);

4.4.4.2 Public Protector vs Mail and Guardian, 2011(4) SA 420 (SCA);

4.4.4.3 *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd*[3] [2009] ZASCA 8; 2009 (4) SA 628 (SCA) 2009 (8) BCLR 813 (SCA); [2009] 2 All SA 513 (SCA) (13 March 2009) President of the RSA vs SARFU 1999(4) SA 147(CC).

4.4.5 **Notices issued in terms of section 7(9) of the Public Protector Act:**

4.4.5.1 A notice was issued to Ms Dawn Robertson, the Chief Executive Officer of Conhill dated 10 February 2020.

4.4.5.2 The MEC of ECODEV , Dr KD Ramokgopa;

4.4.5.3 The Chairperson of the Board of the GGDA, Mr Ernest Mahlaule;

4.4.5.4 The CEO of Conhill, Ms Dawn Robertson;

4.4.5.5 The Group CEO of GGDA, Ms Mosa Tshabalala; and

[3] [2009] ZASCA 8; 2009 (4) SA 628 (SCA) 2009 (8) BCLR 813 (SCA) ; [2009] 2 All SA 513 (SCA) (13 March 2009) on paragraph [17].

4.4.5.6 The Head of Department of ECODEV Ms Pumla Ncapayi

4.4.6 **Responses to the Notice in terms of section 7(9) of the Public Protector Act, 1994:**

4.4.6.1 Response to my section 7(9) notice received from Ms Dawn Robertson, the Chief Executive Officer of ConHill, dated 06 March 2020.

4.4.6.2 Email correspondence from Mr Siyabonga Hlongwane, dated 09 March 2020 containing the BAC minutes of 04 November 2018.

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

5.1 Regarding whether ConHill irregularly or improperly awarded tender number CONHILL 09/2016/FAC to Rabbi Solutions as its cleaning service provider even though Rabbi Solutions lacked the requisite experience.

Common cause issues

5.1.1 Rabbi Solutions was established and subsequently registered with CIPC in April 2016, under registration number 2016/154952/07. According to CIPC records, Ms Senne is the sole director of Rabbi Solutions.

5.1.2 Ms Senne is a former employee of Marble Arch, the Company which previously had the cleaning tender at ConHill and whose contract terminated on 15 August 2016.

5.1.3 On 07 August 2016, Rabbi Solutions was invited by Ms Solly Malatsi, the Supply Chain Officer of ConHill to provide a quote for the provision of cleaning services for two months namely, August – September 2016.

5.1.4 In order to avoid an interruption of service delivery during the two months period, ConHill embarked on a temporary Request for Quotations (RFQ) by inviting service providers to send quotes, and Ms Senne of Rabbi Solutions duly submitted a quote.

5.1.5 Immediately after the termination of the previous tender on 15 August 2016, Rabbi Solutions was appointed in terms of the RFQ to render cleaning services at ConHill. On 16 August 2016, Rabbi Solutions was on site rendering cleaning services to ConHill.

5.1.6 A copy of the RFQ Document received by my office on 07 November 2018 from Mr Solly Malatsi: SCM Officer at ConHill specified that the RFQ requirements shall be for the provision of cleaning, hygiene and pest control services for a period of two months and stipulated *inter alia:*

"All bid responses that do not meet the minimum technical mandatory requirements will be disqualified and will not be considered for further evaluation on pricing".

5.1.7 The technical evaluation criteria in terms of the RFQ Document required a service provider to have a minimum of five (5) years' experience in rendering cleaning services as shown in the table below:

NO	Quality Criteria	Sub Criteria	Points Allocation
a.	Service Provider's Experience Please provide the company profile and at least 5 traceable client references of services rendered in an office environment similar to Constitutional Hill and/or Constitutional Court.	a) Experience of the service provider in rendering cleaning services- minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub-criterion. Points will be allocated on a sliding scale of two points for each positive contactable client reference (10) b) Experience of the service provider in rendering hygiene services- minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub-criterion. Points will be allocated on a sliding scale of two points for each positive contactable client reference (5) c) Experience of the service provider in rendering pest control- minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub-criterion. Points will be allocated on a sliding scale of two points for each positive contactable client reference (5).	

		d) Experience of the service provider in rendering high-access window cleaning services- minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub-criterion. Points will be allocated on a sliding scale of two points for each positive contactable client reference (5). e) Experience of the service provider in rendering cleaning services for events- minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub-criterion. Points will be allocated on a sliding scale of two points for each positive contactable client reference (5) NOTE: proof accompanied by correspondence from referees indicating that similar projects were executed as well as their contactable references. Failure to attach copies, bidders will forfeit points in this category	

5.1.8 The score sheet for the RFQ reflected as follows:

Bid No	**Quote/Bid 1**	**Quote/Bid 2**	**Quote/Bid 3**	**Quote/Bid 4**
Supplier Name	Clean Care Mobile	Rabbi Solutions	Ulwando Bush Clearing	Imvula Services (unable to provide service)
Compliance Criteria				
Original & valid Tax Clearance Certificate	Yes	Yes	Yes	No
Declaration of interest Completed and Considered	Yes	Yes	Yes	No
Declaration of Bidders Past SCM Practices (SBD8) Completed & Considered	Yes	Yes	Yes	No
Certificate of Independent Bid Determination (SBD9) Completed & Considered	Yes	Yes	Yes	No
Other Prescribed Forms	Yes	Yes	Yes	No

Completed and Signed				
Meets Functional/ Technical Requirements	Yes	Yes	No	No
Quote/Bid is responsive	Yes	Yes	Yes	No
Price				
Comparative Price	R567 107	R433 450	R461 963	R-
Lowest Bid R433 450 90:10 or 80:20 80				
Price Score Per Supplier	55.33	80.00	74.74	0.00
Preference Points 20				
BEE Level	1	1	1	Non-compliant
Preference Score	20:00	20:00	20:00	0.00
Total Score 100	75.33	100.00	94.74	0.00
Highest score 100.00 Not Restricted by Dept. or National Treasury Recommended Supplier Rabbi Solutions Price 433 450 signed by Evaluator on 16 August 2016.				

5.1.9 On 10 June 2016, CONHILL advertised a tender with reference number ConHill 09/2016/FAC, with a closing date of 01 July 2016.

5.1.10 The requirements, technical evaluation criteria and weighting for functionality of this tender were as follows:

	Technical Criteria	Points (100)	Description
Functionality	Service Providers Experience	25	
	Experience of Key Personnel	5	
	Site Supervisor and Cleaning Staff Experience	5	
	Detailed Project Plan on date of awarding	10	
	Provision of Comprehensive Cleaning (work plan)	35	
	Contingency Plan	5	
	Provision of Adhoc Services for events	5	
	Quality of Proposal received from Bidder	5	
	Compliance to the Labour Regulations	5	

5.1.11 The bids were evaluated on a two phase process, which is the functionality and price.

The evaluation sheet reads as follows:

No	Quality Criteria	Sub Criteria	Points Allocated	Evaluated Points	Comments
a)	Service Providers Experience. Please provide the company profile and at least 5 traceable	a) Experience of the service provider in rendering cleaning services-minimum of 5 years relevant	25		

	client references of services rendered in an environment similar to Constitutional Hill and/or Constitutional Court.	experience is a pre-requisite in order to be scored on this sub criterion. Points will be allocated on sliding scale of one point of each positive contactable client reference.*(5 points).* b) Experience of the service provider in rendering hygiene services- minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub criterion. Points will be allocated on sliding scale of one point of each positive contactable client reference.*(5 points).* c) Experience of the service provider in rendering pest control services-. Minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub criterion. Points will be allocated on sliding scale of one point of each			

		positive contactable client reference.*(5 points).* d) Experience of the service provider in rendering high access window cleaning- minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub criterion. Points will be allocated on sliding scale of one point of each positive contactable client reference.*(5 points).* e) Experience of the service provider in rendering for events-Minimum of 5 years relevant experience is a pre-requisite in order to be scored on this sub criterion. Points will be allocated on sliding scale of one point of each positive contactable client reference.*(5 points)* NOTE: proof accompanied by correspondence from			

		referees indicating that similar project was executed as well as their contactable references. Failure to attach copies. bidders will forfeit points in this category			
b)	Experience of Key Personnel Please provide a comprehensive CV of personnel to be dedicated to Constitution Hill contract	Experience of Service Delivery in managing the contract/account Maximum points will be awarded for the SDM who has 5 years and more experience. Points will be allocated on a sliding scale of one point per year. *(5 points)*	5		
c)	Site Supervisor and Cleaning Staff Experience Please provide a comprehensive CV of personnel to be dedicated to Constitution Hill contract	a) Site Supervisor must have three (3) years' experience in cleaning services. (3 points). b) Cleaning staff must have at least two (2) years in cleaning services. (2 points). c) CV's of the Site Supervisor and cleaning staff must be attached to the technical proposal as proof. Failure to attach copies.	5		

		bidders will forfeit points in this category			
d)	Detailed Project Plan on date of awarding	Detailed Project and Execution plan and Management should be attached. Failure to attach copies bidders will forfeit points in this category. Points will be allocated on a sliding scale of two points of each of the below. a) Cleaning schedule (daily, weekly, monthly, 6 monthly). b) Hygiene schedule (installation, weekly, monthly, 3 monthly). c) Carpet cleaning schedule (monthly.3 monthly, 6 monthly). d) Pest control schedule (monthly, 3 monthly). e) Management meetings schedule	10		
e) e	Provision of Comprehensive Cleaning (work plan) In line with the proposed standard cleaning, hygiene and pest	Provide a plan depicting a comprehensive detail pertaining to the proposed cleaning, hygiene and pest control service	35		

	control methods stated above	regimen/ schedule to be employed. a) Cleaner allocation Plan indicating the number of cleaners and supervisors that will be employed and colour coded cleaning equipment for designated area.(5). b) Provide a resource plan indicating the number of supervisory/management and cleaning staff on site per shift. The team organogram must be provided as well. (5). c) Provide details of the deployment/recruitment and training plan.(3) d) Provide the work plan for the provision of hygiene services (material data safety sheets, equipment register) (2). e) Provide the work plan for the provision of pest control services (material data safety sheets,			

		equipment register) (2). f) Provide the work plan for the provision of high access window cleaning (material data safety sheets, equipment register) (4). g) Provide a detailed proposal for the implementation of a waste management plan (removal of waste, sorting waste, recycling) (10). h) Provide a consumable usage of template for monitoring and evaluation (2). i) Provide a draft template of the monthly meetings with the Facilities Management team (2).			
f)	Contingency Plan	Contingency plan must be attached to the proposal. Failure to attach copies. bidders will forfeit points in this category	5		

5.1.12 As evidenced by the table above, the Bid Evaluation Committee report for tender CONHILL 09/2016/FAC required a service provider to have a minimum of five (5) years' experience as part of technical evaluation criteria and weighting for functionality.

5.1.13 Bids were received and only a total of fourteen (14) companies were evaluated on 14 September 2016. Masana Hygiene Services was subsequently recommended by the Bid Evaluation Committee (BEC). The Bid Adjudication Committee (BAC) sat on 31 October 2016 and referred the bid back to the BEC on the basis that the recommended bidder's price exceeded the budget. The BAC further raised technical evaluation questions that had to be addressed. Subsequent to the BAC raising technical evaluation questions, the tender was cancelled on 02 December 2016. Subsequently, tender number CONHILL 21/2016/FAC was advertised on 09 December 2016.

5.1.14 Rabbi Solutions was subsequently appointed as the successful bidder for ConHill tender number 21/2016/FAC.

5.1.15 Mr Ntuli, who is the Facilities and Operations Manager and was also the Acting Chief Executive Officer (CEO) at ConHill from June 2014 to November 2015, also acted as the Chairperson of the BEC for tender CONHILL 21/2016/FAC.

5.1.16 The requirements, technical evaluation criteria and weighting for functionality of this tender were as follows:

Functionality Criteria Phase 1		Points Allocated
1.	Capacity and Ability to execute and deliver on the scope of this contract The bidder is required to provide motivation of their company's suitability with respect to its capacity/ability to execute and deliver on the project, based on the bidder's track record, of same/similar (previous) work having been undertaken within the scope and scale of this project. Statements made in the motivation must be verifiable.	30
a)	Letter of completion for current or previous work on the PROVISION OF CLEANING SERVICES projects/contracts detailing the VALUE OF THE PROJECT, on appropriate letterhead and signed by the client, must be attached. Letter must detail the scope of work undertaken, project value undertaken, date of award and completion,	10

	and location where work was carried out. Failure to attach the required documents shall lead to forfeiture of points. No projects-0 points 1 to 2 projects=2 points 3 to 4 projects=4 points 5 and above projects=10 points	
b)	Letter of completion for current or previous work on the PROVISION OF CARPET CLEANING SERVICES projects/contracts detailing the VALUE OF THE PROJECT, on appropriate letterhead and signed by the client, must be attached. Letter must detail the scope of work undertaken, project value undertaken, date of award and completion, and location where work was carried out. Failure to attach the required documents shall lead to forfeiture of points. No projects-0 points 1 to 2 projects=2 points 3 to 4 projects=4 points 5 and above projects=10 points	5
c)	Letter of completion for current or previous work on the PROVISION OF LAUNDRY SERVICES projects/contracts detailing the VALUE OF THE PROJECT, on appropriate letterhead and signed by the client, must be attached. Letter must detail the scope of work undertaken, project value undertaken, date of award and completion, and location where work was carried out. Failure to attach the required documents shall lead to forfeiture of points. No projects-0 points 1 to 2 projects=2 points 3 to 4 projects=4 points 5 and above projects=10 points	5
d)	Letter of completion for current or previous work on the PROVISION OF SPECIALISED HIGH ACCESS WINDOW CLEANING SERVICES projects/contracts detailing the VALUE OF THE PROJECT, on appropriate letterhead and signed by the client, must	5

	be attached. Letter must detail the scope of work undertaken, project value undertaken, date of award and completion, and location where work was carried out. Failure to attach the required documents shall lead to forfeiture of points. No projects-0 points 1 to 2 projects=2 points 3 to 4 projects=4 points 5 and above projects=10 points	
e)	Letter of completion for current or previous work on the PROVISION OF SPECIALISED CLEANING SERVICES EVENTS projects/contracts detailing the VALUE OF THE PROJECT, on appropriate letterhead and signed by the client, must be attached. Letter must detail the scope of work undertaken, project value undertaken, date of award and completion, and location where work was carried out. Failure to attach the required documents shall lead to forfeiture of points. No projects-0 points 1 to 2 projects=2 points 3 to 4 projects=4 points 5 and above projects=10 points	5
2.	Company Experience, expertise and Ability	25
a)	Capability to clean size of the buildings as per bid requirements-square metres of bidder's past/current project site(s) to be assessed. Letter of completion from client shall seek to confirm the size of the building where bidder successfully completed a cleaning contract OR letter of appointment for current cleaning project. NOTE: Letter of appointment or completion for current or previous work on PROVISION OF CLEANING SERVICES projects/contracts detailing the VALUE OF THE PROJECT & SIZE OF THE BUILDING, on appropriate letterhead and signed by the client, must be attached. Failure to attach the required documents shall lead to forfeiture of points.	5

	Less than 50 000 m^2 = 0 points 50 001 m^2 to 75 000 m^2= 1 point 75 001 m^2 to 99 999 m^2 =2 points 100 000 m^2 and above= 5 points	
b)	A company profile depicting the entity's core business, goods sourced and its major suppliers, as well as previous and current major client is required. The Company profile must also contain the entity's organizational structure, a staff organogram, as well as a project resources plan for this project detailing key staff, their experience and achievements. NOTE: proposed project resource schedule (please identify each resource, and specify role in the project). Failure to attach the required documents shall lead to forfeiture of points. I. Company profile including project organogram listing all resources allocated to the project (5 points) II. Roles and responsibilities including the basis of engagement (e.g. if subcontracted/full/part time) (5 points) III. Attached a brief CV of the Service Delivery Manager (1 pager) indicating: ➢ Qualifications • No qualifications- 1 point • Certification in Project Management – 3 points • Any tertiary level qualification- 5 points ➢ Experience qualification • 1 to 3 years- 1 point • to 5 years- 3 points • 6 years and above- 5 points	
3.	Project Plan The supplier/manufacturer is required to provide a thirty six (36) months project plan taking into account fabrication, delivery, assembly and fitting onto consideration, as well as any possible milestones in order to meet the timelines provided. A strategy to deal with the milestones would also be required.	20

a)	Bidders should provide an estimated project schedule/programme of the works (preferably using a grant chart), with major item descriptions and time indicating a commitment to perform the works within the time specified (weekly meetings, monthly meetings, 6 monthly meetings, issuance of PPE, pay slip issuance, salary dates, activities during pre-project implementation phase, activities during project implementation phase, activities during close out phase, etc.) I. Work plan or project schedule is inadequate or o information provided (0 points) II. Work plan or project schedule is poor or poorly demonstrated (4 points) III. Work plan or project schedule is adequate, i.e. shows estimated start and finish dates, major milestones and critical path (8 points) IV. Work plan or project schedule is adequate, i.e. shows estimated start and finish dates, major milestones and critical path and estimated duration and logic to reach works completion (12 points) V. Work plan or project schedule is adequate, i.e. shows estimated start and finish dates, major milestones and critical path and estimated duration and logic to reach works completion. Work plan or project schedule also contains information on execution integration and redundancy for unforeseen delays or occurrences (15 points)	20
4.	Equipment and other Consumables to be provided for the duration of the contract	10
a)	List all the General Cleaning Chemicals and Equipment to be used during project execution (as per bid document)	2
b)	List all the Cleaning Consumables to be used during project execution (cleaning consumables)	2
c)	List all the General Tools and Equipment to be used during project execution (as per bid document)	2

d)	Attach templates for execution of tasks, e.g. daily tasks, routine list, collection of waste bin schedule etc. (all services)	4
5.	Contingency Plan	10
a)	Contingency plan (measures to be implemented during industrial actions, leave and absenteeism) must be attached to the proposal. Failure to attach copy of contingency plan, bidders will forfeit points in this category. I. Plan is inadequate or no information provided (0 points) II. Plan is poor or poorly demonstrated (2 points) III. Plan is adequate, also contains information on execution integration and redundancy for unforeseen delays or occurrences, specifically for ConHill. (10 points)	
6.	Training Strategy/Plan	5
a)	Bidders to provide training strategy before and during project implementation. Failure to attach copy of contingency plan, bidders will forfeit points in this category. I. Plan is inadequate or no information provided (0 points) II. Plan is poor or poorly demonstrated (2 points) III. Plan is adequate, and is specifically prepared for ConHill. (5 points)	
Score/Total		100
Minimum Stipulated Threshold to be met prior to site inspection		70%

5.1.17 As evident in the table above, the five year requirement in cleaning services seems to have been waived in the CONHILL 21/2016 FAC tender.

5.1.18 The BEC for this tender sat on 30-31 January 2017 and Rabbi Solutions was recommended and subsequently approved by the BAC.

5.1.19 Rabbi Solutions was consequently awarded a cleaning services tender commencing from 01 May 2017 to 30 April 2020 for tender number CONHILL 21/2016/FAC for three (3) years, worth R8 million (eight million rands), which became the bone of contention.

Issues in dispute

5.1.20 The Complainant alleged that Rabbi Solutions was awarded a cleaning tender number (CONHILL 09/2016/FAC) even though it had no previous work experience and no references from any previous clients. In essence, the Complainant argued that Rabbi Solutions had no cleaning, hygiene and pest control track record.

5.1.21 In a response letter dated 13 February 2018, by ConHill CEO: Ms Dawn Robertson (Ms Robertson) she clarified that Rabbi Solutions did not bid for tender reference number CONHILL 09/2016/FAC at all and same was withdrawn and cancelled on 02 December 2016.

5.1.22 Ms Robertson further indicated that tender reference number CONHILL 09/2016/FAC was replaced by tender reference number CONHILL 21/2016/FAC which was advertised on 09 December 2016. The allegation by the Complainant was therefore refuted as being factually incorrect with regard to the tender number awarded to Rabbi Solutions.

5.1.23 However, the requirements in terms of tender CONHILL 21/2016/FAC had been notably relaxed when compared to the withdrawn tender CONHILL 09/2016/FAC which clearly required five years' experience.

Applicable legal prescripts

5.1.24 Section 239 of the Constitution[4] provides *inter alia* —

[4] Constitution of the Republic of South Africa, 1996.

"organ of state" means—

(a) *any department of state or administration in the national, provincial or local sphere of government*; or

(b) *any other functionary or institution—*

(i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution*; or

(ii) *exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer*;

5.1.25 ConHill is a subsidiary of the Gauteng Growth Development Agency (GGDA) which is the implementation arm of the Gauteng Department of Economic Development and it assists the Department to lead, facilitate and manage sustainable job creation and inclusive economic growth and development in the Gauteng City Region. It is submitted therefore that ConHill is an organ of state as contemplated in section 239 of the Constitution.

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

5.1.27 ConHill as an organ of state is required by law to contract for goods and services in manner that is fair, equitable, transparent, competitive and cost effective.

5.1.28 The technical evaluation criteria for the RFQ required a service provider to have a minimum of five (5) years' experience in rendering cleaning services. Rabbi Solutions existed for only four (4) months when it was awarded the two months RFQ which was later extended for three months.

5.1.29 Tender number CONHILL 09/2016/FAC had a requirement of five (5) years' experience and it was cancelled on 02 December 2016. Subsequently, tender

number CONHILL 21/2016/FAC was advertised on 09 December 2016 and it lacked the five (5) years' experience requirement.

5.1.30 Section 3(1) of the Promotion of Administrative Justice Act (PAJA)[5] provides amongst other things, as follows:

"The administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair."

5.1.31 Section 33 (1) of the Constitution of the Republic of South Africa provides as amongst other things as follows:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

5.1.32 Whereas Company experience, expertise and ability was part of the criteria and it is evident that at the time of the RFQ, Rabbi Solutions had just been registered on CIPC in April 2016 as an entity and was four (4)months old at the time of their appointment in August 2016. The technical criteria for a prospective service provider required a minimum of five (5) years' experience.

5.1.33 In the *Eskom Holdings Limited and Another v New Reclamation Group (Pty) Ltd*[6] (*Eskom case*) the court held *that the overriding consideration that applies to every tender process is that of fairness* (emphasis added).

5.1.34 Both tender number CONHILL 09/2016/FAC and the RQF had a five (5) years' experience requirement. However, in the Memorandum to the Audit and Risk Committee (ARC) of ConHill, the BEC noted in the said report that Rabbi Solutions had less experience in the cleaning industry. The BAC also debated Rabbi Solutions's experience. In terms of the said memo, ConHill countered

[5] Act 3 of 2000.
[6] [2009] ZASCA 8; 2009 (4) SA 628 (SCA) 2009 (8) BCLR 813 (SCA) ; [2009] 2 All SA 513 (SCA) (13 March 2009) on paragraph [17].

the lack of experience of Rabbi Solutions by asserting that Ms Senne had more than seven (7) years' personal experience in the cleaning industry.

5.1.35 The BEC and the BAC considered extrinsic factors which were not part of the evaluating criteria. The personal experience of Ms Senne as a natural person was not part of the evaluation criteria. The evaluation criteria related to a company as a juristic person.

5.1.36 Section 195(1) of the Constitution of 1996, provides as follows:

"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) .....
(c).....
(d) Services must be provided impartially, fairly, equitably and without bias".

5.1.37 ConHill was required to promote and maintain a high standard of professional ethics when dealing with prospective service providers during the procurement process. Further, this section envisages that all prospective service providers will be treated fairly, impartially and apply the process objectively and must not have any hint of bias.

5.1.38 Rabbi Solutions existed for four (4) months in August 2016 when it was appointed for a temporary two month cleaning contract. The RFQ technical or functional criteria required five (5) years of cleaning experience.

5.1.39 The cancelled tender under number CONHILL 09/2016/FAC had a five (5) years' experience requirement, but the subsequently advertised tender number CONHILL21/2016/FAC which was awarded to Rabbi Solutions, excluded the standard number of year's requirement as was the norm.

5.1.40 In the *Eskom case*[7] the Court stated as follows:

"The final offer price is meaningless without the tenderer, Kwanda, being in a position to provide proof that it, not one of its shareholders, is in a position to comply with its obligations in terms of the tender. This it failed to do".

5.1.41 The same rationality is applicable in this instance. ConHill had to consider and assess if Rabbi Solutions was in a position to render cleaning services and comply with its obligations. However ConHill instead relied on the owners experience and capacity, to comply with the obligations.

5.1.42 The panel recommended the appointment of Rabbi Solutions by relying on the personal experience of the owner, and that did not form part of the evaluation criteria.

5.1.43 Clause 15.3.2 of the GGDA Supply Chain Management Policy dated 01 May 2016 provides as follows:

"This requires that the SCM Practitioner and all other officials involved in the GGDA's SCM must be able to provide documentary evidence that their actions were transparent, fair, equitable, competitive and cost effective".

5.1.44 A copy of the RFQ Document provided to my office by the SCM Practitioner, Mr Solly Malatsi, clearly shows that the technical/functionality requirement was set at a minimum of five (5) years.

5.1.45 The Bid score sheet for the RFQ was marked "yes" under technical/functionality requirement which relates to a minimum of five (5) years' experience.

[7]2009] ZASCA 8; 2009 (4) SA 628 (SCA) 2009 (8) BCLR 813 (SCA) ; [2009] 2 All SA 513 (SCA) (13 March 2009) on paragraph [17 at para [43].

5.1.46 Clause 7.1.3 of the GGDA SCM Policy which regulates ethics and fair dealing provides as follows:

"In a procurement, if all parties comply with ethical standards they can: conduct *their business in a fair and reasonable manner with integrity.*

All GGDA and its subsidiaries staff associated with procurement, particularly the SCM Practitioner, commit themselves to deal with suppliers even–handedly.

To ensure fair dealings and impartiality in the conduct of bid evaluations or selection of suppliers where a quotation or petty expense system of procurement is used"

5.1.47 The above-mentioned provision places an obligation on all staff of ConHill who are associated with procurement to commit themselves to deal with suppliers in an even handed manner. Therefore the SCM staff is required to act objectively and fairly when conducting bid evaluations or selecting suppliers where a quotation system of procurement is used.

5.1.48 The technical/functionality requirement for the two months RFQ was set at a minimum of five (5) years and Rabbi was only four months old when it was appointed in August 2019 for the cleaning services contract.

5.1.49 The cancelled tender (CONHILL 09/2016/FAC) had a five (5) years' experience requirement but the new tender (CONHILL21/2016/FAC) had no number years of experience requirement.

5.1.50 Clause 2.9 of the Code of Conduct embedded in GGDA SCM Policy provides as follows:

"Practitioners should be fair and impartial in the performance of their functions. They should at no time afford undue preferential treatment to any group or

individual or unfairly discriminate against any group or individual. They should not abuse the power and authority vested in them".

5.1.51 The SCM practitioners are therefore expected to perform their functions with fairness and impartiality. They are also prohibited from affording any person or group undue preferential treatment and an SCM practitioner is cautioned against any abuse of power and authority vested in them.

5.1.52 The BEC had to consider and assess whether Rabbi Solutions was in a position to render cleaning services and comply with its obligations, however they relied on the owners experience and capacity in awarding the tender.

5.1.53 The SCM practitioner appointed Rabbi Solutions, a company which was four (4) months old whilst the functionality threshold was a minimum of five (5) years' experience.

Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

5.1.54 On 10 February 2020, I issued Ms Dawn Robertson and the Chairperson of the Board with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond to my provisional findings. Section 7(9)(a) of the Public Protector Act provides that: -

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

5.1.55 I now turn to consider the responses submitted regarding the section 7(9) notices (hereinafter referred to as notice). I have however, not dealt with each and every aspect raised in the responses but that should not be misconstrued as an admission of any kind of the averments contained therein.

5.1.56 A response was received by my office on 03 March 2020 from Ms Dawn Robertson, the Chief Financial Officer. In her response, Ms Robertson disputed my provisional finding that CONHILL 09/2016/FAC tender was irregularly awarded to Rabbi Solutions.

5.1.57 Ms Robertson argued that my provisional findings in relation to the irregular awarding of RFQ was that the minimum qualifying score was 70 percent of the overall total score of 100 including other technical evaluation criteria. Therefore the five (5) years' experience was considered as a sub criterion to achieve the minimum qualifying score of 70 percent.

5.1.58 It was Ms Robertson's contention that my office only considered the five (5) year minimum criteria instead of the functionality criteria in totality in that the entire RFQ requirements in particular, the section dealing with the minimum qualifying score for functionality is 70% for any bidder to be considered on pricing and BEE evaluation.

5.1.59 Ms Robertson conceded that Rabbi Solution did not meet the 5 year sub criteria requirements, but that ConHill had an obligation to evaluate them on all other sub criteria requirements.

5.1.60 After the issuing of the Section 7(9) notice, my investigation team held a meeting with Mr Hlongwane, the Chief Financial Officer on 06 March 2020 and he advised that that tender reference number CONHILL09/2016/FAC which the Complainant alleged was awarded to Rabbi Solutions was cancelled.

5.1.61 In the meeting held with my team on 06 March 2020 with Mr Hlongwane, the issue of the tender CONHILL 09/2016/FAC was clarified. It is correct that the

CONHILL 09/2016/FAC tender was never awarded and the tender that was subject to our investigation was with regards to CONHILL 21/2016/FAC. Therefore the finding that the tender was irregularly awarded was in relation to CONHILL 21/2016/FAC.

5.1.62 During the same meeting Mr Hlongwane further indicated that the five (5) year minimum requirement for CONHILL 21/2016/FAC tender was waived by the GGDA BAC in order to open the market for new entrants and it was captured in the minutes of the BAC dated 04 November 2014.

5.1.63 All other arguments advanced by ConHill officials in this instance is unpersuasive and therefore they do not take this issue forward.

5.1.64 In my view, the first qualifying criteria in the RFQ document was clear and specific in that it required the service provider to have a minimum of five (5) years' experience (Core) in rendering cleaning services, hygiene, pest control services, high access cleaning services and cleaning services for events and Rabbi Solutions as a service provider did not possess the five (5) year experience required at the time they were appointed through the RFQ to show that they have the required 5 years' experience in doing the work. ConHill did also concede that Rabbi lacked the 5 years required experience.

5.1.65 The first qualifying criteria relates to the core of the service hence the service provider's experience is assessed on capacity to deliver. The other qualifying criteria are relevant but not as critical and essential in complying with the inherent requirements of the work to be executed.

5.1.66 The view of Conhill is equated to implying that any service provider without the five (5) year experience would qualify as long as they scored 70 points under functionality which does not include the service Provider's experience, which is key and the reason the tender would have been advertised. The argument by ConHill is clearly irrational because the 30 points were allocated under

service provider's experience sub criterion requiring a minimum of five (5) years' experience which denotes its importance and relevance. If it was not important or relevant to require a minimum of five (5) years it ought to have been omitted as a functionality requirement.

5.1.67 I have also noted that when Rabbi Solution was appointed through the RFQ, it did not meet the 5 years' experience but it was nonetheless appointed. However, the requirements in terms of tender CONHILL 21/2016/FAC had been notably relaxed when compared to the withdrawn tender CONHILL 09/2016/FAC which clearly required five years' experience.

5.1.68 With regards to the GGDA BAC minutes submitted by Mr Hlongwane, there is no indication that the BAC resolved to waive the five (5) year minimum requirements in order to open the market to new entrants, instead the minutes show that that the BAC referred the tender back to the BEC in relation to the finances in the recommendation to award the tender to Masana Hygiene Service.

Conclusion

5.1.69 Rabbi Solutions did not have five (5) years' experience as prescribed in the RFQ evaluation criteria.

5.1.70 The probable conclusion to be drawn is that ConHill unfairly relaxed the five (5) year minimum requirements when advertising tender number CONHILL 21/2016/FAC to suit Rabbi Solutions which was only nine (9) months old at the time they submitted a bid for the said tender.

5.1.71 The RFQ process and the SCM personnel of ConHill failed to observe the pillars of the SCM Policy and the Constitution. The process was neither fair nor equitable. The prospective service providers were treated unjustly and preference was afforded to Rabbi Solutions.

5.1.72 The appointment of Rabbi Solutions was not based on competitive bidding but rather on factors that were never part of the evaluation criteria, such as the consideration of the personal experience of Ms Senne. This in indicative of a process that was unfair and bias because same was not afforded to other bidders. It is patent that Rabbi Solutions had lesser experience as it was only nine (9) months old at the time of appointment.

5.1.73 The competitive bidding process was flawed and procedurally unfair. It failed to meet the standard set by law in relation to the principle of fairness and objectivity.

5.2 Whether Mr Ntuli is personally aligned or linked to Rabbi Solutions or Ms Senne and if so, whether this amounts to a conflict of interests

Common cause issues

5.2.1 Mr Ntuli is the Facilities and Operations Manager and was further the Acting CEO at ConHill during 2016.

5.2.2 Mr Ntuli was the Chairperson of the BEC during the awarding of tender number CONHILL21/2016/FAC.

5.2.3 Mr Ntuli wrote four reference letters dated 06 January 2017 for the following periods: (01 January 2017-28 February 2017) (16 October 2016 -31 December 2016), (15 August 2016 -28 February 2017) and (16 August 2016 -15 October 2016), for Rabbi for the services rendered in terms of the RFQ.

5.2.4 Ms Senne is a former employee of Marble Arch, the Company which had won the same cleaning tender at ConHill prior to the award to Rabbi Solutions until it was terminated on 15 August 2016.

5.2.5 Rabbi Solutions (Ms Senne) was awarded a cleaning services tender and they rendered cleaning services at ConHill from August 2016 to date.

Issues in dispute

5.2.6 The Complainant claimed that Rabbi Ms Senne was awarded a tender because Ms Senne has an intimate relationship with Mr Ntuli, whom she met while she was an employee at Marble Arch.

5.2.7 During the interview held on 18 April 2018 with Mr Ntuli, he rejected the assertion that he has an intimate relationship with Ms Senne. He explained that he interacted with Ms Senne while she was acting as interim Service Delivery Manager for Marble Arch around June 2015.

5.2.8 Thereafter, Ms Senne was replaced by Ms Petro De Groote during 2016; with whom he interacted and had no further engagements with Ms Senne.

5.2.9 Prior to Ms Senne being appointed as the interim Service Delivery Manager he only engaged with her when she would send quotations to ConHill for other services except cleaning. Mr Ntuli explained that the cleaning contract that had been awarded to Marble Arch would include extra work, in addition to the cleaning contract, for which they would be paid separately.

5.2.10 Mr Ntuli conceded that there was conflict of interest in that as the Chairperson of the BEC he evaluated letters of reference that were signed by him on behalf of Rabbi Solutions.

Applicable legal prescripts

5.2.11 Clause 7.1.3 of the GGDA SCM Policy which regulates ethics and fair dealing provides as follows:

"All GGDA and its subsidiaries staff associated with procurement, particularly the SCM Practitioner, commit themselves:
to recognize and deal with actual or potential conflicts of interest;
to avoid conflict of interest or a perception of bias;
to ensure fair dealings and impartiality in the conduct of bid evaluations or selection of suppliers where a quotation or petty expense system of procurement is used";

5.2.12 The above mentioned provision requires the staff of GGDA and its subsidiaries to recognise, avoid any conflict of interest or any perception of bias.

5.2.13 Mr Ntuli, as Chairperson of the BEC evaluated and assessed the bid from Rabbi Solutions, using a letter of reference that he had written.

5.2.14 Clause 2.1 of the Code of Conduct for SCM practitioners and officials provides as follows:

"Practitioners should recognise and disclose any conflict of interest that they may be aware of as soon as they become aware of such conflict".

5.2.15 This provision places an obligation on the part of the officials to recognise and disclose any conflict of interest as soon as they become aware of it.

5.2.16 Based on the interview held by my investigation team with Mr Ntuli, he failed to disclose the conflict of interest emanating from the reference letter in support of Rabbi Solutions' bid, contrary to the Code of Conduct.

5.2.17 <u>THE PUBLIC PROTECTOR TOUCHSTONES</u>

5.2.18 The Public Protector further relied on investigation reports previously issued dealing with conflict of interest, such as the IEC report titled "Inappropriate Moves" and "To be or not to be in conflict" report also commonly known as the

"Hitachi" report, to determine whether there was any impropriety in the manner in which Rabbi Solutions was awarded the cleaning tender by ConHill.

5.2.19 "Inappropriate Moves" Report Number 13 of 2013/2014

5.2.20 The report dealt with whether or not a business partner in a different company than the one bidding, presented a conflict of interest for the Chief Electoral Officer who was central to the bid process.

5.2.21 The finding was that it would have been prudent for the Chief Electoral Officer to disclose such a relationship despite the fact that it was not related to the bid in question so as to eliminate any suspicions of conflict of interest and that officials performing a public function should understand that things that can undermine objectivity transcend financial interests.

5.2.22 *"To Be or Not To Be In Conflict"* Report Number 9 of 2011/2012

5.2.23 The investigation determined whether or not being a President of a powerful professional body presented a potential conflict of interest for a Director-General of the Department of Labour.

5.2.24 The finding was that there was a perceived conflict of interest that needed to be managed.

5.2.25 *"Hitachi Report"* A Report of the Public Protector on an investigation into allegations of improper conduct in connection with the awarding of a contract: Report Number: 30 of 2008/2009.

5.2.26 The allegations of improper conduct related to a contract by a public entity that was awarded to a company in which a political party had an interest.

5.2.27 At the time of the awarding of the contract, the Chairperson of the Board of the public entity was also a member of the highest decision making body of the

political party and as a result thereof, it was alleged that he had a conflict of interest.

5.2.28 The finding was that there was an unmanaged conflict of interest between the personal interest of the public official in the political party and his duty towards the public entity at the time when a resolution was taken to award the contract to the Hitachi Consortium, in which the political party had an interest.

5.2.29 The golden thread running across all the above touchstones and general principles, dealing with the question as to whether it is wrong to have a conflict of interests, is indeed that public officials should, where reasonably possible, avoid conflict between his/her personal interest and the public interest. However, where conflicts of interest cannot reasonably be avoided, an official has a responsibility to identify and declare same to his/her supervisor. In this case, Mr Ntuli should have declared his involvement in the bid submitted by Rabbi Solutions.

Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

5.2.30 I received a response from Ms Dawn Robertson, the CEO of ConHill on 06 March 2020.

5.2.31 In her response, Ms Robertson argued that based on the interpretation of the concept of "conflict of interest" and the meeting they recently had with Mr Ntuli. ConHill disagrees with the findings that Mr Ntuli had a personal relations with Rabbi Solution and Ms Senne which led to conflict of interest.

5.2.32 Ms Robertson contends that Mr Ntuli only had a professional relationship with Ms Senne. He met her while she was a Service Delivery Manager of Marble Rach and she had to report to him as the Facility and Operations Manager.

5.2.33 With regards to the reference letter signed by Mr Ntuli on behalf of Rabbi Solutions, Ms Robertson argued that ConHill is not disputing the fact that Mr Ntuli signed the letters. However, she disputed that the letters were signed to unfairly Rabbi Solutions to win the tender.

5.2.34 She further also indicated that it is standard practice for all official documents to be signed by the CEO.

5.2.35 Regarding the allegations that Mr Ntuli had failed to recuse himself or disclose to the BEC is disputed by Ms Robertson because according to Mr Ntuli, he did not recuse himself or disclose that he signed the letters as it was public knowledge to all the BEC members that Rabbi Solutions provided services to ConHill. Mr Ntuli maintained that he had nothing to benefit or had no interest in Rabbi Solutions or Ms Senne.

5.2.36 All other arguments advanced by ConHill officials in relation to the Public Protector Touchstones are noted however they do not move this issue forward as the investigation process was based on the facts which determined what happened and what should have happened.

5.2.37 The assertion by Ms Roberson is in essence failing to address the issue about managing perception of bias. It has already been established that Mr Ntuli had direct interactions with Ms Senne as both a Service Delivery Manager of Marble Arch and owner of Rabbi Solutions. It might have been public knowledge to the BEC members that Rabbi Solutions rendered cleaning services to ConHill but not every member of the BEC served as a reference for Rabbi Solutions and further, the decision of the BEC should not be based on common cause issues. It was only Mr Ntuli who served as a reference.

5.2.38 **Apparent (or perceived) conflicts** are existing situations or relationships that reasonably could appear to other parties to involve a conflict of interest. Mr Ntuli had a duty to disclose or declare for the purposes of managing a perceived conflict of interest not because he had anything to gain.

5.2.39 There was an obligation on Mr Ntuli as the BEC Chairperson and Facility and Operations Manager to manage a perception of bias by disclosing that he had acted as a reference to Rabbi Solutions and completely recused himself from the evaluation process.

5.2.40 The issue about the reference letter is not whether or not they gave glowing references or not but that it was part of the bid requirements. A Bidder had to use reference letters in their bids hence they form part of the focus of the investigation. In this instance, all the reference letters were drafted and signed by Mr Ntuli for Rabbi Solutions in preparation of the impending tender. Therefore, the inference drawn is that if Rabbi Solutions needed a reference letter regarding the work already done with ConHill, they could have requested the reference letter immediately after the work was completed.

Conclusion

5.2.41 It can be concluded that Mr Ntuli had interactions with Ms Senne whilst she was employed at Marble Arch but there is no proof of an intimate relationship.

5.2.42 I am persuaded to provisionally conclude that Mr Ntuli failed to avoid or manage a perception of bias or perceived conflict of interest by not recusing or disclosing that he had served as a reference for Rabbi Solutions.

5.3 Regarding whether other service providers suffered any improper prejudice as a result of this alleged maladministration.

Common cause issues

5.3.1 Rabbi Solutions was established and registered with the Companies and Intellectual Property Commission (CIPC) in April 2016, under registration number 2016/154952/07, with Ms Senne as the sole Director.

5.3.2 Ms Senne is a former employee of Marble Arch, the Company that had previously won the same cleaning tender at ConHill and whose tender was terminated on 15 August 2016.

5.3.3 On 07 August 2016, Rabbi Solutions was invited by Ms Solly Malatsi of ConHill to provide a quote for the provision of cleaning services for two month (Aug – Sept 2016).

5.3.4 Immediately after the termination of the previous tender on 15 August 2016, Rabbi Solutions was appointed in terms of an RFQ to render cleaning services at ConHill. On 16 August 2016, Rabbi Solutions was on site ready to render cleaning services.

5.3.5 As indicated above, Mr Ntuli was the Facilities and Operations Manager, Acting Chief Executive Officer (CEO) at ConHill from June 2014 to November 2015 and further served as the Chairperson of the Bid Evaluation Committee (BEC) for tender CONHILL 21/2016/FAC at the time.

5.3.6 Rabbi Solutions was awarded a cleaning services tender commencing from 01 May 2017 to 30 April 2020 for tender number CONHILL 21/2016/FAC.

5.3.7 The new tender number CONHILL 21/2016/FAC, had relaxed requirements compared to the withdrawn tender number CONHILL 09/2016/FAC, which required five (5) years' experience. The latter was cancelled and replaced by a new one sans the five years' experience requirement.

Issues in Dispute

5.3.8 Complainant alleged that Rabbi Solutions did not qualify to be appointed for the cleaning services tender because they did not possess the requisite experience in the cleaning industry. But they were nonetheless appointed by ConHill.

5.3.9 Mr Ntuli during his interview on 18 April 2018 stated that Rabbi Solutions was the least experienced bidder out of all the bids submitted for tender number CONHILL 21/2016/FAC. However their pricing was good and it was recommended to the Bid Adjudication Committee (BAC) that they be appointed because they could deliver the service.

5.3.10 Mr Solly Malatsi during his interview on 20 September 2018, advised that Rabbi Solutions was first appointed on 15 August 2016 in terms of a temporary Request for Quotation (RFQ) for two months and further that they were on ConHill's database.

5.3.11 Mr Solly Malatsi further indicated that Rabbi Solutions was appointed because of their pricing based on specifications. Further, that they complied with all other requirements such as Black Economic Empowerment and tax clearance.

Application of the relevant legal prescripts

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

5.3.13 The standard set by the law required ConHill to contract for good services in manner that is fair, equitable, transparent, competitive and cost effective.

5.3.14 The RFQ criteria also required a minimum of five (5) years' experience which Rabbi Solutions did not possess in August as it was only four (4) months old.

5.3.15 The RFQ and tender number CONHILL 09/2016/FAC had a minimum requirement of five (5) years' experience.

5.3.16 This standard requirement only changed in tender number CONHILL 21/2016/FAC after tender number CONHILL 09/2016/FAC had been cancelled.

5.3.17 It has already been noted in evidence that Rabbi Solutions was the least experienced of all the bidders and ConHill considered mitigating factors to justify its appointment. However, the evaluation criteria only assessed and applied to the Company experience and not the owners' experience.

5.3.18 In terms of section 1 of the Public Finance Management Act[8] (PFMA) "irregular expenditure" means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

5.3.19 Section 45 of PFMA which regulates the responsibilities of other officials provides as follows—

"An official in a department, trading entity or constitutional institution—

...

...

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".

5.3.20 The implication of the above provisions is that other officials at ConHill as a trading entity carried an obligation to prevent irregular, unauthorised, wasteful and fruitless expenditure as defined above.

5.3.21 Similarly, section 38 of PFMA which regulates the general responsibilities of accounting officers provides as follows—

[8] Act 1 of 1999.

"The accounting officer for a department, trading entity or constitutional institution—

(c) must take effective and appropriate steps to—

(i) …

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board.

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

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

5.3.22 It is evident that, the accounting officer of ConHill had an obligation to ensure that all expenses incurred by ConHill are not irregular, unauthorised, wasteful or fruitless as prohibited by the PFMA. The amount of the contract value which ConHill is still paying Rabbi Solutions for its services is R 8 878 950.80 (eight million, eight hundred and seventy eight thousand rand). This expenditure has to be in line with the above provisions of the PFMA.

5.3.23 Section 3(1) of the Promotion of Administrative Justice Act (PAJA) 3 of 2000 provides as follows: *"the administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair."*

5.3.24 Section 33 (1) of the Constitution of the Republic of South Africa provides as follows:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

5.3.25 In the Eskom case at paragraph [17] it is stated that *"the overriding consideration that applies to every tender process is that of fairness"*.

5.3.26 Rabbi Solutions had just been registered on CIPC April 2016 as an entity and existed for four (4) months at the time of their appointment in August 2016 in terms of RFQ. The technical criteria for a prospective service provider required a minimum of five (5) years' experience.

5.3.27 During the assessment and adjudication of tender number CONHILL 21/2016/FAC, the BEC and BAC considered personal experience of the owner of Rabbi Solutions as a means to mitigate the lack of experience.

5.3.28 Section 195(1) of the Constitution of 1996, provides as follows:

"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) .....
(c).....
(d) *Services must be provided impartially, fairly, equitably and without bias*".

5.3.29 ConHill was required to promote and maintain a high standard of professional ethics when dealing with prospective service providers during the procurement process.

5.3.30 The cancelled tender under number CONHILL 09/2016/FAC had a five years' experience requirement but the new advertised tender number

CONHILL21/2016/FAC which was awarded to Rabbi did not specify the number of years required as was the norm.

Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

5.3.31 I received a response from Ms Dawn Robertson, the CEO of ConHill on 06 March 2020.

5.3.32 I now turn to consider the responses submitted regarding the section 7(9) notices (hereinafter referred to as notice). I have however, not dealt with each and every aspect raised in the responses but that should not be misconstrued as an admission of any kind of the averments contained therein.

5.3.33 In her response to my Section 7(9) notice, Ms Roberson argued that the fact that ConHill had decided to change the tender specification was based on the CONHILL 09/2016/FAC was mainly affordability and that the cheapest proposed bidder had exceeded the cleaning budget by 100%.

5.3.34 This also indicated that the BAC instructed ConHill to revise the tender specification for purposes of making it easier for small enterprises to access the industry as the clear promise by the government at the time to Small Micro and Medium Enterprises(SMME`s) and township enterprises. Further, the terms of Reference (ToR) significantly changed from the expected delivery to the evaluation criteria. Change did not occur on the evaluation criteria only as per the emphasis of my section 7(9).

5.3.35 Ms Roberson's argument was that ConHill had decided to change specification on tender CONHILL 09/2016/FAC was mainly based on affordability and that the cheapest proposed bidder had exceeded the cleaning budget by 100% stands to be rejected. In any tender evaluation, the evaluation is not only

based on pricing but on the experience, capacity and ability of the service provider to deliver.

5.3.36 With regards to the assertion that the BAC resolved to revise the tender specification for purposes of making it easier for small enterprises to access the industry, the argument does hold water as I have perused the BAC minutes and there is no evidence in the BAC minutes to substantiate Ms Robertson's assertion.

5.3.37 When evaluating a tender, the allocation of points on assessment for functionality should concentrate on the capacity and ability of the service provider to deliver the service. Therefore the majority of points should be allocated to the service provider's experience as opposed to higher percentage on 35% on provision of comprehensive cleaning services (work plan).

5.3.38 It is therefore evident that the RFQ required a minimum of 5 years' experience and in this instance Rabbi Solutions did not meet the required specifications but was nonetheless appointed, thereby prejudicing other prospective service providers who would have full complied with the required specifications of five (5) years.

Conclusions

5.3.39 As outlined above, the process of appointing Rabbi Solutions, either through the RFQ process or tender CONHILL 21/2016/FAC, was flawed and in contravention of the Constitution and GGDA SCM policy. This has invariably rendered payments made to Rabbi Solutions to be irregular expenditure under the PFMA, since the process followed in appointing Rabbi Solutions was done in contravention of applicable legislative framework.

5.3.40 The process of appointing Rabbi Solutions, both through RFQ or tender processes, failed to meet the standards set by law and the tender had lower

or relaxed requirements. New factors were introduced during the evaluation process such as personal experience which was not part of the criteria.

6. FINDINGS

Having careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been complied with, I make the following adverse findings against the ConHill.

6.1 Regarding Whether ConHill irregularly or improperly awarded contract number CONHILL 09/2016/FAC to Rabbi Solutions as its cleaning service provider even though Rabbi Solutions lacked the requisite experience.

6.1.1 The allegation that ConHill irregularly or improperly awarded tender number CONHILL 09/2016/FAC to Rabbi Solutions as its cleaning service provider even though Rabbi Solutions lacked the requisite experience, is not substantiated, because no tender was ever awarded.

6.1.2 However, it appears from the evidence that the Request for Quotation (RFQ) was irregularly and improperly awarded to Rabbi Solutions. I also noted that the minimum five (5) year experience requirement for CONHILL 21/2016/FAC was waived.

6.1.3 Rabbi Solutions did not meet the mandatory functional/technical requirement of five (5) years' experience in cleaning services, contrary to the declaration by the ConHill Supply Chain Management officials.

6.1.4 Documentary evidence at my disposal indicates that Rabbi Solutions was only established and registered in April 2016. This meant that Rabbi Solutions existed for only four months at the time of awarding the RFQ in August 2016. Despite this, Rabbi Solutions was scored/marked as "Yes" during the bid

evaluation process which inaccurately suggested that Rabbi Solutions had five (5) years' experience.

6.1.5 I find therefore that this procurement process was not only compromised by dishonesty, but also lacked fairness, competitiveness and transparency, as ConHill's bid evaluation committee (BEC) members improperly implied that Rabbi Solutions had complied with the standard requirements of the tender.

6.1.6 Evidence also revealed that the BEC attempted to mitigate the lack of cleaning experience of Rabbi Solutions by referencing the owner's personal experience, the owner was not being evaluated in a personal capacity as a natural person, but rather Rabbi Solutions as a juristic person and potential service provider.

6.1.7 It is submitted therefore that the members of the BEC, namely: Mr Malatsi, Mr Ntuli, Mr Graham Palm and Mr Reuben Phasha violated section 217(1), section 195(1) and section 33(1) of the Constitution, Clause 15.3.2 of the Gauteng Growth Development Agency (GGDA) SCM Policy, Clause 7.1.3 of the GGDA SCM Policy and Clause 2.9 of the GGDA code of conduct when procuring the services of Rabbi Solutions through a RFQ.

6.1.8 Accordingly, the action by ConHill amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether Mr Ntuli is personally aligned or linked to Rabbi Solutions or Ms Senne and if so, whether this amounts to a conflict of interests.

6.2.1 The allegation that Mr Ntuli is personally aligned or linked to Rabbi or Ms Senne and if so, whether this amounts to a conflict of interest, is substantiated.

6.2.2 Evidence at my disposal indicates that Mr Ntuli was the Chairperson of the BEC and also wrote a positive reference letter for Rabbi Solutions which Rabbi utilized as part of the bid documents. I find that to be a clear endorsement of Rabbi Solutions by Mr Ntuli, who was the Chairperson of the BEC.

6.2.3 Mr Ntuli did not disclose nor recuse himself from the procurement process once he discovered that there might be a potential conflict of interest. The evidence shows that Mr Ntuli reconciled himself with the possibility of perceived conflict and he proceeded to chair the procurement process.

6.2.4 I find therefore that Mr Ntuli failed to manage a perceived conflict of interest in relation to his alignment with Rabbi Solutions as a company. As such, Mr Ntuli violated Clause 2.1 of the Code of Conduct contained in the GGDA Supply Chain Management Policy. However, evidence at my disposal could not establish an intimate relationship between Mr Ntuli and Ms Senne as alleged by Complainant.

6.2.5 Accordingly, the action by ConHill and in particular Mr Ntuli amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether other service provider suffered any improper prejudice as a result of this alleged maladministration.

6.3.1 The allegation whether the Complainant or any other person suffered prejudice in the circumstances, is substantiated.

6.3.2 Rabbi Solutions was appointed in terms for an RFQ when it was clear that they did not meet the evaluation criteria. Subsequently, they were awarded a tender for a three (3) year period, while they were inexperienced.

6.3.3 Any prospective service providers were prejudiced by the inconsistent application of the evaluation criteria and bias afforded towards Rabbi Solutions.

6.3.4 The appointment of Rabbi Solutions, notwithstanding its lack of minimum experience resulted in improper prejudice suffered by the other qualifying prospective service providers who ought to have been considered. Mr Malatsi, Mr Ntuli and the officials involved in the procurement process, violated section 217(1), section 33(1) of the Constitution, GGDA SCM Policy and by extension PFMA, which resulted in the improper appointment of Rabbi Solutions.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

7.1 THE CEO OF CONHILL

(a) To ensure that within ninety (90) working days from the date of this report, all ConHill officials who are involved in procurement processes, attend a workshop on the Public Finance Management Act and the ConHill Supply Chain Management Policy as well the code of conduct for supply chain management practitioners and Public Service Regulations governing procurement.

(b) To ensure that within ninety (90) working days all members of the BEC involved in the appointment of Rabbi Solutions are subjected to an internal investigation and disciplinary steps are taken against those implicated in the improper conduct and/or violation of procurement policies.

8. MONITORING

8.1 The CEO of ConHill should submit a progress report comprising of the enforcement of the abovementioned remedial action to my office within 90 working days from the date of this report indicating how the remedial action referred to in paragraph 7 above were implemented.

8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter **of Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others[2016]ZACC 11,** and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Head of the Department, unless they obtain an Interim Interdict or Court Order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30/03/2020

ASSITED BY
MS LERATO MOTAUNG
INVESTIGATOR
GAUTENG PROVINCIAL OFFICE