

**CLOSING REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b)
OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION
8(1) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

***“Allegations of maladministration in the procurement of personal protective
equipment by the Free State Provincial Government”***

REPORT NO: 41 OF 2020/21

ISBN NO: 978-1-77630-008-2

**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION IN
THE PROCUREMENT OF PERSONAL PROTECTIVE EQUIPMENT BY THE FREE STATE
PROVINCIAL GOVERNMENT**

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Executive Summary

- (i) This is a closing report issued 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.
- (ii) The report relates to an own initiative investigation into the alleged failure by the Free State Provincial Government to follow legislative prescripts in the procurement of Personal Protective Equipment (PPE).
- (iii) In the main, various newspaper articles made allegations of maladministration in the procurement process for goods and/or services in respect of the COVID-19 pandemic by the Free State Provincial Government.
- (iv) All newspaper articles referred to companies which were awarded contracts and whose owners and/or directors are allegedly politically connected.
- (v) The Free State Department of Treasury (Provincial Treasury/the Department), which was tasked to procure PPE for the Free State Provincial Government Departments disputed the newspaper allegations and submitted that the underlying aim of the measures put in place by Provincial Treasury were to ensure that growth opportunities are realized for established and emerging companies; financial resources are distributed in a more cost-effective market and creating sustainable job opportunities in the province. The measures put in place by Provincial Treasury were compliant with the National Treasury instruction notes circulated at the time.
- (vi) On analysis of the complaint, the following issue was identified and investigated:

Whether the procurement process followed by the Free State Provincial Government complied with legislative prescripts and specifically with National Treasury Instruction Notes and if not, whether it constituted maladministration.

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- (vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- (a) Whether the procurement process followed by the Free State Provincial Government complied with legislative prescripts and specifically with National Treasury Instruction Notes, and if not, whether it amounted to maladministration**
- (aa) The allegation that the procurement process followed by the Free State Provincial Government did not comply with legislative prescripts and specifically with National Treasury Instruction Notes, is not substantiated.
- (bb) The perusal of the documents in respect of SCMQ1 to 11/2020-COVID 19 indicates that all processes and procedures required by procurement legislation and National Treasury Instructions Notes issued in respect of the procurement of PPE were adhered to.

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION IN THE PROCUREMENT OF PERSONAL PROTECTIVE EQUIPMENT BY THE FREE STATE PROVINCIAL GOVERNMENT

1. INTRODUCTION

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

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following parties to note the outcome of the investigation:

1.2.1. The Premier of the Free State Province, Ms SH Ntombela;

1.2.2. The Member of the Executive Council for Finance, Free State Province, Ms Gadija Abrahams Brown; and

1.2.3. The Head of the Department, Free State Provincial Treasury Department, Mr. MNG Mahlatsi.

1.3. The report relates to an own initiative investigation into the alleged failure to follow legal prescripts in the procurement of Personal Protective Equipment (PPE) by the Free State Provincial Government.

2. THE COMPLAINT

2.1 The President issued Proclamation No. R. 23 of 2020 in terms of the Special Investigating Units and Special Tribunals Act, no. 74 of 1996. The proclamation instructed the Special Investigation Unit (SIU) to investigate procurement of PPE which took place between 01 January 2020 and the date of publication of the Proclamation.

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- 2.2 During August/September 2020 the Public Protector Free State Provincial Office, observed a number of articles in newspapers containing allegations of maladministration in the procurement process for goods and/or services in respect of the Covid-19 pandemic by the Free State Provincial Government.
- 2.3 The newspaper articles all referred to companies who were awarded contracts, alleging that the company owners and/or directors are politically connected. The newspaper articles further alleged that the procurement processes followed were flawed.
- 2.4 Daily Maverick, reported on 31 July 2020 *“The Free State’s latest tender bulletin, published on 17 July, contains the names of around 70 businesses that received contracts for Covid-19-related goods and services, with a combined value of R173-million.”*
- 2.5 SABC News reported on 02 August 2020 *“Political and friendship ties have no bearing in the awarding of tenders. This is according to the Free State Treasury in response to reports that those close to former Free State Premier and current African National Congress (ANC) Secretary-General, Ace Magashule, have benefitted from Personal Protective Equipment (PPE) tenders worth millions in the province*

At least seven companies with links to those close to Magashule have been awarded PPE tenders in the province.

The provincial treasury maintains the procurement processes were followed in line with the instruction notes of the National Treasury for emergency procurement of COVID-19 PPE.

Provincial Chief Director for Assets and Liabilities, Tshepo Mabilo, says nothing prohibits family members of government employees from doing business with the state.”

- 2.6 The Office of the Public Protector took a decision that the Public Protector South Africa will conduct its own initiative investigation into the PPE procurement. An own initiative investigation was thus registered on 09 September 2020.
- 2.7 The Public Protector’s Free State Provincial Office met with the SIU, the Auditor General Free State and The Directorate for Priority Crime Investigation on 31 August 2020. It was decided that the Public Protector’s Free State Provincial Office will investigate the process followed to procure the PPE by the Provincial Treasury on behalf of the Free State Provincial Government.
- 2.8 Subsequent to 31 August 2020, weekly meetings were held between the Public Protector’s Free State Provincial office, the SIU and The Directorate for Priority Crime Investigations until November 2020. The South African Revenue Service also attended meetings during November 2020.

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:

“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 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’s Office 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.”*²
- 3.4 Section 182(2) directs that the Public Protector’s Office has additional powers and functions as prescribed by legislation.
- 3.5 The Public Protector’s Office is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. This office is also given powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.6 The Free State Provincial Government is an organ of state and its conduct amounts to conduct in state affairs as a result, the matter falls within the ambit of the Public Protector’s mandate.

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

² *Supra* at para [73].

3.7 The Public Protector's powers and jurisdiction to investigate this matter and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1. Methodology

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

4.1.2. The Public Protector Act confers on this office the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2. Approach to the investigation

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

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
- In the event of maladministration what would it take to remedy the wrong or to place affected parties as close as possible to where they would have been but for the 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. In this particular case, the factual enquiry principally focused on

whether or not the Department followed a proper procurement process when it procured PPE for the Free State Provincial Government.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration.

4.3. **On analysis of the complaint, the following issue was considered and investigated:**

4.3.1 Whether the procurement process followed by the Free State Provincial Government complied with legislative prescripts and specifically with National Treasury Instruction Notes and if not, whether it amounted to maladministration

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 31 July 2020: Copy of Newspaper report of the Daily Maverick;

4.4.1.2 2 August 2020: Copy of SABC News report;

4.4.1.3 12 May 2020: Advertisement Free-State Provincial Treasury: Establishment of a data base for the procurement of PPE by the Free State Provincial Government;

4.4.1.4 23 and 24 March 2020: Record of Free State Provincial Executive Committee meeting: Centralise procurement of PPE with Provincial Treasury;

4.4.1.5 28 March 2020 to July 2020: SCMQ 1 to 11/2020 – COVID-19 procurement document: The following was submitted for each procurement number:

(a) Needs assessments for all Provincial Departments on required PPE;

- (b) Request for approval to deviate from Treasury Regulation 16A6.4, signed by the HOD;
- (c) Bid documents submitted by all service providers;
- (d) Compliance sheets drafted by Emergency Procurement Task Team and submitted to the Quotation Committee together with a Compliance Report addressed to the Quotation Committee;
- (e) Minutes of the Quotation Committee Meetings;
- (f) Approval of the successful bidders by the HOD;
- (g) Letters of acceptance of bid to the elected service providers; and
- (h) Confirmation of Order documents issued to service providers.

4.4.1.6 10 July 2020: Free State Province Tender Bulletin: Publishing of names of successful bidders for SCMQ 1/2020-Covid 19;

4.4.1.7 31 August 2020: Free State Province Tender Bulletin: Publishing of names of successful bidders for SCMQ 5 – 9/2020-Covid 19; and

4.4.1.8 31 August 2020: Auditor General Report: Procurement of Personal Protective Equipment for all the departments in the province for the period up to 31 August 2020.

4.4.2 Interviews conducted

4.4.2.1 31 August 2020: Meeting with Special Investigation Unit, the Auditor General Free State and The Directorate for Priority Crime Investigation;

4.4.2.2 14 September 2020: Head of the Provincial Treasury, the Chief Financial Officer and Chief Director – Assets and Liability Management at Provincial Treasury;

4.4.2.3 07 October 2020: Head of the Provincial Treasury; and

4.4.2.4 02 November 2020: Head of the Provincial Treasury, the Chief Financial Officer and Chief Director – Assets and Liability Management at Provincial Treasury.

4.4.3 Correspondence sent and received

- 4.4.3.1 09 September 2020: Letter from Public Protector South Africa, Free State Provincial Office to HOD Provincial Treasury; and
- 4.4.3.2 11 September 2020: Response from HOD Provincial Treasury, confirming meeting scheduled for 14 September 2020.

4.4.4 Websites consulted/ electronic sources

- 4.4.4.1 09 September 2020: <http://www.treasury.fs.gov.za>
- 4.4.4.2 06 November 2020: <http://ocpo.treasury.gov.za/COVID19/Pages/Reporting-Dashboard.aspx>

4.4.5 Legislation and other prescripts

- 4.4.5.1 The Constitution of the Republic of South Africa, 1996;
- 4.4.5.2 The Public Protector Act, specifically sec 6(4) of Act No. 23 of 1994;
- 4.4.5.3 The Public Finance Management Act, No 1 of 1999 (PFMA);
- 4.4.5.4 Treasury Regulations for departments, trading entities, constitutional institutions and public entities, 2005 (Regulations);
- 4.4.5.5 National Treasury SCM Instruction 8 of 2007/08 dated 29 November 2007;
- 4.4.5.6 National Treasury Instruction No. 8 of 2019/20: Emergency Procurement in Response to the National State of Disaster dated 19 March 2020;
- 4.4.5.7 National Treasury Instruction No. 5 of 2020/21: Emergency Procurement in Response to the National State of Disaster dated 28 April 2020;
National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020;
- 4.4.5.8 Department of Public Service and Administration issued Circular 7 of 2020 dated 16 March 2020; and

4.4.5.9 Free State Provincial Treasury: Supply Chain Management Policy: 2018/2019 approved on 18 February 2019.

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

5.1 Whether the procurement process followed by the Free State Provincial Government complied with legislative prescripts and specifically with National Treasury Instruction Notes and if not, whether it amounted to maladministration

Common cause issues

5.1.1 It is common cause that on 15 March 2020, in order to support the declaration by President Cyril Ramaphosa regarding the COVID-19 pandemic, National Treasury issued an Instruction Note 5 of 2019/20 applicable to the Public Finance Management Act (PFMA) institutions, to speed up the procurement of goods/commodities required to reduce and control the spread of the Corona Virus.

5.1.2 On 23 and 24 March 2020, the Free State Provincial Executive Committee (EXCO) took decision number 1.16, to centralise all emergency procurement of PPE with Free-State Provincial Treasury (Treasury). Initially, the procurement was centralised in the Office of the Chief Financial Officer (CFO) but on 5 May 2020, the Head of Treasury, Mr Mahlatsi, took a decision to appoint a Task Team to be responsible for all the procurement processes. Eleven (11) Procurement Projects were registered as SCMQ 1 to 11/2020 – COVID-19. Furthermore, an Emergency Procurement Task Team was appointed. Technical Advisors for sample testing and a Quotation Committee were also appointed.

5.1.3 It is further common cause that the SIU uplifted all original documents pertaining to the procurement of PPE from Treasury during September 2020. The Public Protector South Africa was supplied with copies of all these procurement files. Documents relating to SCMQ 1 to 11 /2020 – COVID-19 were perused and analysed.

Issues in dispute

5.1.4 It is alleged by different newspaper articles that those close to the former Free State Premier and current African National Congress (ANC) Secretary-General, Mr. Ace Magashule, have benefited from Personal Protective Equipment (PPE) tenders worth millions in the province.

5.1.5 The HOD of Treasury, Mr Mahlatsi submitted that the underlying aim of the measures put in place by Treasury was to ensure that growth opportunities are realized for established and emerging companies, financial resources are distributed in a more cost-effective market, and creating sustainable job opportunities in the province. The measures put in place by Treasury had to be compliant with the National Treasury Instruction Notes circulated at the time.

Documentary evidence considered:

5.1.6 The SIU uplifted all original documents pertaining to the procurement of PPE from Treasury during September 2020. The Public Protector South Africa was supplied with copies of all the procurement files. Documents relating to SCMQ 1 to 11 /2020 – COVID-19 were perused and analysed.

5.1.7 On 05 May 2020, the HOD of Treasury took a decision to appoint a Task Team to be responsible for all the procurement processes. Eleven (11) Procurement Projects were registered as SCMQ 1 to 11/2020 – COVID-19. Furthermore, an

Emergency Procurement Task Team was appointed. Technical Advisors for sample testing and a Quotation Committee were also appointed.

- 5.1.8 The HOD of Treasury approved the Deviation dated 07 April 2020 for procurement in relation to the centralised provincial departments' procurement. In line with the National Treasury guidelines, the request was to deviate and to obtain quotes as per the instruction contained in par. 3.7.6 of National Treasury Instruction 8 of 2019/20.
- 5.1.9 Paragraph 3.7.6 of National Treasury Instruction 8 of 2019/20 allows departments to approach any other supplier for quotations on condition that the prices are equal or lower than specified in Annexure A to the note, the items adhere to the specifications of the National Department of Health and the supplier is registered on the Central Supplier Database (CSD)
- 5.1.10 Appointment letters signed by the HOD, were issued to the different members of the Emergency Procurement Task Team on 04 May 2020, and the Quotation Committee on 18 May 2020 for SCMQ 1 to 11 /2020 – COVID-19.
- 5.1.11 Interested suppliers were invited through an advertisement that was placed on the website of the Free State Provincial Treasury to register in the Provincial COVID-19 database. The advertisement, outlined the process in brief as was stated in paragraph 3.7.6 of National Treasury Instruction No 8 of 2019/20.
- 5.1.12 Also part of this process of capacity building was informing the potential service providers to submit samples of their COVID-19 items for testing in line with specifications as determined by the National Department of Health. Samples that did not pass the vigorous testing would not be procured and distributed for use.

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- 5.1.13 The National Treasury price list for products needed to combat the spread of the Corona Virus was published on the National Treasury website and it became public knowledge what maximum prices were acceptable in terms of National Treasury guidelines.
- 5.1.14 A total of 476 suppliers, registered on the CSD also registered on the Free-State data base (PPE Supplier Database) created for the procurement of PPE.
- 5.1.15 The Free State provincial departments submitted their requirements for PPE to Treasury.
- 5.1.16 Service providers from the PPE Supplier Database at Provincial Treasury were requested to submit quotations and samples of the products.
- 5.1.17 The Emergency Procurement Task Team:
- 5.1.17.1 Assessed the samples submitted by potential service providers to the guidelines and standards as determined by the National Department of Health. Treasury appointed health officials from Provincial Department of Health to assist with the sample verifications;
 - 5.1.17.2 Provided an assessment report for each sample received and subjected to testing;
 - 5.1.17.3 Ensured that potential suppliers are registered on the CSD and are tax compliant; and
 - 5.1.17.4 Ensured that the potential service providers or its Directors are not listed as restricted.
- 5.1.18 The Emergency Procurement Task Team then compiled a report on each bidder in terms of product compliance and pricing in terms of Treasury Instruction Note 5 2020/2021 and its amendments and submitted the report to the Quotation Committee.

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- 5.1.19 The Quotation Committee ensured that:
- 5.1.19.1 All bid documents were submitted;
 - 5.1.19.2 Recommendations of the bidders who were deemed non-responsive were justified and that valid and accountable reasons were provided;
 - 5.1.19.3 The declarations of interest for both bidders and members were submitted and noted;
 - 5.1.19.4 Verify the administrative compliance of bid documents;
 - 5.1.19.5 Evaluate the bids in accordance with the criteria specified in the bid documents and the PPPFA Regulations;
 - 5.1.19.6 Apply the scoring applicable to the quote making use of the relevant formula being 80/20 for all quotes below R50 000 000 and 90/10 for all quotes above R50 000 000;
 - 5.1.19.7 Evaluate each bidder's capacity to deliver on the service upon appointment;
 - 5.1.19.8 Ensure that the potential service providers or its Directors are not listed as a restricted bidder or tender defaulter; and
 - 5.1.19.9 Report to and make recommendations to the Accounting Officer.
- 5.1.20 Once the HOD had approved the appointment of the service providers, Treasury would place an order for the PPE by means of a Confirmation of Order document.
- 5.1.21 The Quotation Committee submitted that National Treasury issued predetermined market related prices to ensure value for money on the items procured. The Quotation Committee applied an 80/20 rule in the allocation of orders. The 80/20 methodology was applied as follows:
- 5.1.21.1 80% of the allocation of items were shared by all approved service providers who submitted quotations;
 - 5.1.21.2. The supplier with the highest scoring on the evaluation of the quotations received an additional 50% of the 20% left for allocation;

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- 5.1.21.3. The supplier with the 2nd highest scoring on the evaluation of the quotations received an additional 30% of the 20% left for allocation;
- 5.1.21.4. The supplier with the 3rd highest scoring on the evaluation of the quotations received an additional 50% of the 20% left for allocation;
- 5.1.22 The procurement of PPE started on 28 March 2020 and the last tender executed by Treasury was done in July 2020. Treasury confirmed that the procurement of PPE from this last tender was then decentralised to each department.
- 5.1.23 The Auditor General also performed an audit on the procurement and discovered that awards to the value of R5, 31 million were made to suppliers whose tax matters per the CSD report provided was non-compliant. This would result in irregular expenditure to the value of R5, 31 million. These matters were handed to the South African Revenue Services for further action.
- 5.1.24 The SIU investigated the delivery of the goods ordered. Initially the service providers would deliver the PPE to the offices of the Treasury, however, Treasury did not have sufficient space and it was more cost effective to have the service providers deliver the PPE at the relevant department or its warehouse.
- 5.1.25 Treasury submitted that regardless of where the delivery address was, the Treasury officials were directed to always take delivery of the PPE consignment by ensuring that a Treasury official was on hand to verify that the PPE that was ordered was in fact the PPE that was delivered.
- 5.1.26 In the event it happened that the Treasury officials were not at the premises when the items/goods are received, the Treasury officials were requested to validate with their counterparts (Health officials) on the specific delivery.

- 5.1.27 One consignment was found to be not of the quality ordered, namely surgical gowns were delivered instead of sterile surgical gowns. Treasury suspended payment on the total consignment and the matter was handed to the Directorate for Priority Crime Investigation for possible criminal prosecutions.

Application of the relevant law

- 5.1.28 Section 217(1) of the Constitution requires an organ of state to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’.
- 5.1.29 These constitutional values on procurement are repeated in section 38(1)(a)(iii) of the PFMA, which provides in relevant parts:

“ (1) the accounting officer for a department, trading entity or constitutional institution –

(a) Must ensure that the department, trading entity or constitutional institution has and maintains –

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

(c) must take effective and appropriate steps to—

(i) ...

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and ...”

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- 5.1.30 Regulation 16A6.4 of the Treasury Regulations provides that, *“if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”*
- 5.1.31 Paragraph 3.2 of National Treasury SCM Instruction 8 of 2007/08 dated 29 November 2007 states: *“Accounting officers / authorities may procure requirements by obtaining at least three (3) verbal or written quotations from, where applicable, a list of prospective suppliers. The order should, however, be placed against written confirmation from the selected supplier if the quotation was submitted verbally”.*
- 5.1.32 The National Treasury issued various instructions since the Disaster was declared. The Instruction Notes applicable to the PFMA environment are the following:
- 5.1.32.1 National Treasury Instruction No. 8 of 2019/20: Emergency Procurement in Response to the National State of Disaster dated 19 March 2020. This Instruction facilitated the procurement of PPE items that were already on National Treasury’s Transversal Contracts. It also made provision for a list of suppliers from previous transversal contracts who, after consultations with National Treasury, gave National Treasury quotations on bulk supply for items not on the current Transversal Contracts. It also allows Accounting Officers and Accounting Authorities to place orders directly with the suppliers listed in Table 2 of the note.
- 5.1.32.2 Paragraph 3.7.6 of National Treasury Instruction 8 of 2019/20 dated 19 March 2020 states; *“Institutions may approach any other supplier to obtain quotes and may procure from such suppliers on condition that –*

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- (a) The items are to the specifications as determined by the National Department of Health;*
 - (b) The prices are equal or lower than the prices in Annexure A; and*
 - (c) The supplier is registered in the Central Supplier Database.”*

5.1.32.3 National Treasury Instruction No. 05 of 2020/21: Emergency Procurement in Response to the National State of Disaster dated 28 April 2020 and the revised version dated 5 May 2020, 20 May 2020 and 03 July 2020. This instruction put in place certain conditions that had to be applied by all PFMA entities in making use of the Emergency Procurement regulations. These conditions were:

- (a) PPE items must be to the specifications of the World Health Organization (WHO), National Department of Health (NDOH) and the Department of Trade and Industry and Competition (DTIC) for cloth masks;
- (b) The Prices must be equal to or lower than the benchmark prices set by National Treasury;
- (c) Suppliers / Manufacturers must be registered on the Central Supplier Database (CSD); and
- (d) Items must meet the stipulated minimum threshold percentage for local production for the textiles, clothing, and leather and footwear sectors.

5.1.32.4 Instruction note 05 also provided a list of possible suppliers and/or manufacturers supplied by the Department of Small Business as well as from the National Bargaining Council for the Clothing Industry with whom all PFMA entities could deal with.

5.1.33 Department of Public Service and Administration issued Circular 07 of 2020 dated 16 March 2020, in respect of containment and/or management of COVID-19 in the public sector. The Circular explicitly states that it is compulsory for all departments to procure sufficient hand sanitisers, soap, gloves, masks, tissues and temperature scanners. The Circular provides the scope of items that must be procured under the specific circumstances.

5.1.34 National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020, after consultation with Departments on 05 August 2020. Instruction Note 11 informed Departments that normal procurement processes should be followed for procuring of PPE. The note stated in paragraph 1

‘The purpose of the instruction is to-

(a) inform institutions of the repeal of Instruction Note 5 of 2020/2021 and they must comply with existing procurement procedures:’

Conclusion

5.1.35 The documents perused during the course of the investigation and discussed herein indicate that the prescripts in respect of deviation from normal procurement procedures were followed as prescribed by the Public Finance Management Act, the Regulations and Instruction Notes issued by National Treasury in respect of the procurement of PPE by Treasury for the Free State Provincial Government.

5.1.36 The Auditor General (Free State Office) during their audit found that a total of R5, 31 million in orders were issued to companies who were not tax compliant. This information was submitted to the South African Revenue Services for further investigation.

5.1.37 The Department reported to the SIU that one consignment of PPE delivered did not adhere to the specifications on the quotation and the order issued by Treasury. Treasury suspended all payment on the consignment and the matter was submitted to the Directorate Priority Crime Investigations.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the following findings are made:

6.1 Whether the procurement process followed by the Free State Provincial Government complied with legislative prescripts and specifically with National Treasury Instruction Notes and if not, whether it amounted to maladministration

6.1.1 The allegation that the procurement process followed by the Free State Provincial Government did not comply with legislative prescripts and specifically with National Treasury Instruction Notes, cannot be substantiated.

6.1.2 The analysis of the documents in respect of SCMQ1 to 11/2020-COVID 19 indicates that all processes and procedures required by procurement legislation and National Treasury Instructions Notes issued in respect of the procurement of PPE were adhered to.

7. REMEDIAL ACTION

7.1 In the light of the above finding this office is not taking any remedial action as contemplated in section 182(1)(c) of the Constitution.

8. MONITORING

8.1 In the absence of any remedial action taken, there will be no monitoring.



**ADV. KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA**

DATE: 05 March 2021

Assisted by: Adv. ST Mlonyeni, Adv. E Cilliers and Mr MJ Seitsang

