



**PUBLIC PROTECTOR  
SOUTH AFRICA**

Accountability • Integrity • Responsiveness

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6570

Per Email: [mm@kysna.gov.za](mailto:mm@kysna.gov.za)

Dear Mr Jonkers,

**INTERVENTION LETTER ON AN INVESTIGATION INTO ALLEGATIONS OF  
IMPROPER CONDUCT AND MALADMINISTRATION BY THE KNYSNA LOCAL  
MUNICIPALITY RELATING TO THE AWARDING OF THE INTEGRATED  
STRATEGIC DEVELOPMENT FRAMEWORK TENDER**

**1. INTRODUCTION**

1.1 The Public Protector's mandate is derived from section 182(1) of the Constitution of the Republic of South Africa (the Constitution) and the Public Protector Act, 1994 (the Public Protector Act) to promote accountability,

transparency and fairness in the public sector. The Public Protector continuously reviews and monitors the information gathered from complaints lodged with the Public Protector South Africa (PPSA) with the view to identifying the most probable underlying (root) causes of the problems, complaints and undesired events within relevant public bodies or authorities, with the aim of formulating and agreeing on corrective actions to at least mitigate, if not eliminate, those root causes and so produce significant long term improvements in the public administration.

- 1.2 This is an intervention letter in terms of section 8(1) of the Public Protector Act, 1994, to make known to any person any finding, point of view or recommendation in respect of a matter investigated by the Public Protector.
- 1.3 This intervention letter relates to an investigation into allegations of improper conduct and maladministration by the Knysna Local Municipality (the Municipality) relating to the awarding of the Integrated Strategic Development Framework (ISDF) Tender in 2013.
- 1.4 The point of departure is that any complaint might be the symptom of an underlying organisational failure in areas such as 'systems', 'procedures', 'human error' and so on. By addressing the underlying deficiencies in the systems that are the causes of the complaints, the Public Protector aims to reduce the number of individual complaints, in turn working collaboratively with stakeholders to get the problems resolved and provide constructive feedback that will enable it to address the root causes of complaints and prevent a recurrence.

## **2. THE COMPLAINT**

- 2.1 The complaint was lodged with the PPSA by Ms S Campbell on 3 July 2017.
- 2.2 On assessment of the complaint, it was found to be similar to a matter reported to the National Council of Provinces (NCOP) by Mr Mike Hampton in April 2015

as a petition, which was at the time still being considered by the NCOP's Standing Committee on Petitions and Executive Undertakings. On 11 September 2018, the NCOP referred Mr Hampton's complaint to the Public Protector for investigation.

2.3 Subsequently, the two complaints were consolidated into one investigation as they related to the same issues in which the Complainants allege amongst others that:

2.3.1 The Municipality awarded the ISDF tender to Knysna Creative Heads Consortium (KCHC) which had not scored the highest points or bided the lowest price during the tender evaluation process, instead of a Cape Town based Company, City Think Space, with highly skilled individuals and an impressive B-BBEE rating score, which had also tendered, but was unsuccessful.

2.3.2 The awarding of the aforesaid tender resulted in a public outcry and numerous objections were raised by the public of Knysna. The objectors were of the view that it was common cause that CMAI (one of the partners of the KCHC) is a major developer in Knysna and that their role in the process that determines development parameters poses a potential conflict of interest. According to the Complainants, the municipality contended that there was no factual basis for these objections, as insufficient information was available at the time of the evaluation of the bids to assess the likelihood of the risk materialising in the process and mitigate the risk options.

2.3.3 The objections were not dealt with by an independent body, as required in terms of the municipality's Supply Chain Management policy. It was only after the complaints were raised with the Provincial Treasury that the tender process was investigated and several irregularities were identified. The complainants further stated that the findings were reported to the municipality but the tender was in the meanwhile awarded to KCHC.

2.3.4 In essence, the Complainants alleged that the awarding of the ISDF tender to KCHC was not in accordance with the provisions of the Municipality's Supply Chain Management (SCM) policy.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.4 The Public Protector is further mandated by the Public Protector Act, 1994, to investigate and redress maladministration. The Public Protector is also given the power to resolve disputes through conciliation, mediation, negotiation advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 Section 6(4)(c)(ii) provides that the Public Protector “*shall be competent at any time prior to, during or after an investigation, if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting from or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.*”

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

#### **4. THE INVESTIGATION**

##### **4.1 The Investigation Process**

4.1.1 The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996, and sections 6 and 7 of the Public Protector Act, 1994. The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation.

4.1.2 The investigation process included correspondence with the Complainants and the Municipality; meetings with the Complainants and the Legal Department of the Municipality; analysis and evaluation of the documents obtained during the investigation and consideration; and application of the relevant laws and prescripts.

##### **4.2 The approach to the investigation**

4.2.1 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?

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

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 the awarding of the ISDF tender in 2013 by the municipality was in accordance with the relevant laws and prescripts, and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution, maladministration and/or undue delay as envisaged in section 6(4)(a) of the Public Protector Act.

4.3 **Based on the analysis of the complaint, information and documents received during the preliminary enquiries, the following issue was identified and investigated:**

4.3.1 Whether the awarding of the ISDF tender in 2013 by the Municipality was in accordance with the relevant laws and prescripts; and if not, whether such conduct amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a) of the Public Protector Act, 1994.

4.4 **Key sources of information**

4.4.1 **Documents, letters and emails exchanged**

4.4.1.1 The original complaint, dated 03 July 2017;

4.4.1.2 The Municipality's ISDF Tender advertisement, dated 22 February 2013;

4.4.1.3 Calls for proposal for Tender No. 03/2013 ISDF advertisement, dated 22 February 2013;

4.4.1.4 The Municipality's BEC report for the ISDF tender to the BAC, dated 12 April 2013;

4.4.1.5 Municipality's BAC Committee Meeting Minutes, dated 15 April 2013;

4.4.1.6 Legal Opinion obtained by the Municipality from CDH Attorneys, dated 28 September 2016; and

4.4.1.7 Complainant's submission to the NCOP Standing Committee on Petitions and Executive Undertakings, dated 07 April 2017;

4.4.1.8 Standing Committee minutes and recommendations to the House of the NCOP, dated 11 December 2017;

4.4.1.9 Municipality's MPAC Meeting Minutes, dated 19 February 2018;

4.4.1.10 Municipality's MPAC Meeting Minutes, dated 08 March 2018;


4.4.1.11 Municipality's MPAC Meeting Minutes, dated 09 March 2018;

4.4.1.12 Municipality's MPAC Meeting Minutes, dated 31 May 2018;

4.4.1.13 Resolution and Report of the House: NCOP to the Public Protector, dated 15 June 2018;

4.4.1.14 Municipality's MPAC Meeting Minutes, dated 13 September 2018;

4.4.1.15 Municipality's MPAC Meeting Minutes, dated 28 November 2018;

- 4.4.1.16 PPSA letter addressed to the NCOP, dated 19 December 2018;
  - 4.4.1.17 Municipality's MPAC Meeting Minutes, dated 07 March 2019;
  - 4.4.1.18 Municipality's MPAC Meeting Minutes, dated 13 March 2019;
  - 4.4.1.19 Municipality's MPAC Meeting Minutes, dated 19 March 2019;
  - 4.4.1.20 Municipality's MPAC Meeting Minutes, dated 28 May 2019;
  - 4.4.1.21 Email from the Municipality to the PPSA, dated 03 June 2019;
  - 4.4.1.22 Municipality's MPAC Meeting Minutes, dated 23 July 2019;
  - 4.4.1.23 Municipality's MPAC Meeting Minutes, dated 13 August 2019;
  - 4.4.1.24 PPSA allegations letter addressed to Mr Dawid Adonis dated 12 March 2021;
  - 4.4.1.25 Municipality's MPAC Meeting Minutes, dated 29 January 2020;
  - 4.4.1.26 Municipality's MPAC Meeting Minutes, dated 04 March 2020;
  - 4.4.1.27 Municipality's Special MPAC Meeting Minutes, dated 12 March 2020;
  - 4.4.1.28 Municipality's MPAC Meeting Minutes, dated 19 March 2020;
  - 4.4.1.29 Municipality's MPAC Meeting Minutes, dated 28 July 2020;
  - 4.4.1.30 Municipality's MPAC Meeting Minutes, dated 16 October 2020
  - 4.4.1.31 Municipality's MPAC Meeting Minutes, dated 20 October 2020;
  - 4.4.1.32 Municipality's MPAC Meeting Minutes, dated 03 December 2020;
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4.4.1.33 PPSA request letter for additional information and/ or documentation to the Municipality, dated 24 March 2021;

4.4.1.34 PPSA email addressed to the Municipality, dated 10 June 2021;

4.4.1.35 Municipality's MPAC Meeting Minutes, dated 29 July 2021;

4.4.1.36 Terms of Reference for the Service Provider for the ISDF tender proposals, undated;

4.4.1.37 BEC ISDF Tender Evaluation Meeting, undated;

#### 4.4.2 **Legislation and other prescripts**

4.4.2.1 The Constitution of the Republic of South Africa, 1996;

4.4.2.2 The Public Protector Act No. 23 of 1994;

4.4.2.3 The Local Government: Municipal Finance Management Act No. 56 of 2003 (MFMA);

4.4.2.4 The Municipal Supply Chain Management Regulations made in terms of section 168 of the MFMA and promulgated on 01 July 2005 (Regulations);

4.4.2.5 The Municipality's Supply Chain Management Policy (SCM Policy); and

4.4.2.6 The National Treasury MFMA Circular 62 issued on 3 July 2013.

#### 4.4.3 **Jurisprudence considered**

4.4.3.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11;2016(3) SA 580(CC); and

4.4.3.2 *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP).

#### **4.5 Rule 41(1) Notice issued to the Complainants**

4.5.1 On 25 August 2022, notices in terms of Rule 41(1) of the Public Protector Rules were issued to the Complainants to provide them with an opportunity to make submissions in relation to the proposed closure of the investigation. Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding a complaint by means of a closing report provided for in Rule 40(b), the Complainant shall be informed in writing accordingly and be given an opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notification.

4.5.2 The Complainants did not respond to the notices by the deadline stipulated in the notices.

### **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 awarding of the ISDF tender in 2013 by the Municipality was in accordance with the relevant laws and prescripts; and if not, whether such conduct amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a) of the Public Protector Act, 1994

#### *Common cause issues*

5.1.1 The Terms of Reference/Work Specification of the ISDF tender reflect that its purpose was to review a number of the municipality's documents, including the

Spatial Development Framework, Integrated Human Settlement Plan, Economic Development Plan and the Strategic Environmental Assessment for the Knysna Municipal area. The reviewing of these documents would cover a time period of the next thirty (30) years, and would form the basis for all Council decision making.

- 5.1.2 According to the records of the Municipality, the call for proposals for the establishment of an ISDF for the greater Knysna area was advertised under Tender No. T03/2013, with a closing date of 22 February 2013.
- 5.1.3 The advertisement requesting proposals was published in the “Die Burger; Action Ads Knysna/Plet Herald; the Municipality’s website; and on the Municipality’s notice boards.
- 5.1.4 On 13 February 2013, the municipality facilitated a compulsory briefing session with potential bidders, prior to the closing date of 22 February 2013.
- 5.1.5 The General Information for the Call for Proposals regarding the tenderers stated: “that the lowest or any bid will not necessarily be accepted, and the Municipality reserves the right to accept the whole or portion of a bid.” However, the Preference Points claim form indicated that the “90/10 points system shall be applicable” and that the bidder obtaining the highest number of total points will be awarded the contract.
- 5.1.6 The Terms of Reference/Work Specification set out a “Bid Evaluation Schedule”, which indicated that the bidders must receive a minimum of 150 out of 200 points for functionality. A maximum of 25 points would be allocated to the total functionality score for “Demonstrated experience of working in the Knysna Municipal area and understanding the local dynamics.”
- 5.1.7 The Terms of Reference/Work Specification concludes that the “Applicants meeting the minimum criteria for functionality will progress to the next phase of the evaluation and the final score will only consist of the Broad-Based Black Economic Empowerment (B-BBEE) and price criteria”.

- 5.1.8 Amongst the bids received was one from the KCHC, a consortium owned by a local developer (Dr Mulder) and another bid from a Cape Town based company, "City Think Space", with an adequate B-BBEE rating and which tendered at the lowest price.
- 5.1.9 On 22 February 2013, after the tender closing date, the Municipality processed the tender applications whereby it was documented that only five (5) proposals were received and forwarded for evaluation, via the relevant tender Committees.
- 5.1.10 The Municipality's Bid Evaluation Committee (BEC) convened on 12 April 2013 and according to the minutes, assessed the received proposals against the set functionality criteria.
- 5.1.11 During the evaluation of the bids by the BEC, one bidder did not receive the requisite 150 points for functionality. City Think Space, with a price of two million, six hundred twenty eight thousand, five hundred eighty four rand (R2 628 584,00) obtained 98 preference points and KCHC, with a price of two million, seven hundred forty nine thousand, three hundred thirty eight rand (R2 749 338,00) was allocated 90.87 preference points.
- 5.1.12 The BEC recommended that the bid be awarded to KCHC with legal reliance being placed on the Preferential Procurement Regulations, 2011, made in terms of section 5 of the Preferential Procurement Policy Framework Act, Act 5 of 2000 (PPPFA) which provides, *inter alia*, that a bid on reasonable and justifiable grounds, can be awarded to a tenderer that did not score the highest number of points; and that the justification can be based on objective criteria of achieving Council objectives, which are recorded in its Preferential Procurement Strategy.
- 5.1.13 The recommendations were then forwarded to the Municipal Bid Adjudication Committee (BAC) which held a meeting on 15 April 2013 and concurred with the BEC that the tender should be awarded to KCHC, with the rationale that it

was aligned with the objectives of the Council, the details of which were not stated.

- 5.1.14 The Municipality issued letters, dated 18 April 2013, to all the bidders informing them that the tender was awarded to KCHC.

*Issues in dispute*

- 5.1.15 The issue for determination is whether the awarding of the ISDF tender in 2013 by the Municipality was improper and constituted maladministration.

*The Complainants' version*

- 5.1.16 The Complainants contended that the Municipality awarded the ISDF tender to KCHC, which had not scored the highest points or bided the lowest price during the tender evaluation process, instead of a Cape Town based Company, City Think Space, with highly skilled individuals and an impressive Black Economic Empowerment (BEE) rating score, as required by the PPPFA and other regulating framework.

- 5.1.17 It is the view of the Complainants that the awarding of the ISDF tender to KCHC was therefore not in accordance with the relevant legislative and policy prescripts regulating procuring of goods and services by the Municipality.

*The municipality's version*

- 5.1.18 The Municipality was informed about the investigation conducted by the Public Protector South Africa (PPSA) in a letter dated 12 March 2021, addressed to the then Acting Municipal Manager of Knsyna Municipality Mr Dawid Adonis. In the letter, the Municipality was requested to respond to the allegations in the complaint and provide substantive evidence by no later than 24 March 2021.

- 5.1.19 The Municipality's Legal Advisor, Ms Marilyn Botha, stated in an e-mail dated 24 March 2021 that the matter concerned was not discussed at the previous Council meetings and that it was to serve before the next Ordinary Council meeting, which was scheduled for the end of March 2021. The Minutes of the Ordinary Council Meeting held on 03 December 2020 under item: C11/12/2020: REPORT ON IRREGULAR EXPENDITURE DURING THE 2013/2014 FINANCIAL YEAR: MPAC RESOLUTION 02/02/18 AND 01/02/18 DATED FEBRUARY AND 11/10/20 DATED 16 OCTOBER 2020, states that *"it was unanimously resolved that the matter be withdrawn and that the report and recommendation, inclusive of the amounts be written off as irrecoverable, be resubmitted to the next Municipal Council meeting, for consideration."* In her response Ms Botha made referred to copies of MPAC 01/02/18 and MPAC 02/02/18, the CHD report, National Treasury Circular No 68 and Council's approved Credit Control Policy submitted to the Public Protector.
- 5.1.20 The Municipality contended during the investigation that the awarding of the ISDF tender to KCHC was the basis of strategically providing support to local contractors<sup>1</sup>.
- 5.1.21 According to the Municipality, the minutes of the Bid Adjudication Committee (BAC) meeting held on 15 April 2013 indicate that although City Think Space scored the highest points, the BAC decided to award the tender to the bidder scoring the second highest points with the rationale being that it was intended to meet the objectives of Council.
- 5.1.22 Further that on 18 April 2013, the unsuccessful bidders were advised in writing of the outcome of the tender process and their right to lodge an appeal against

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<sup>1</sup> In the "ANNUAL STATE OF THE TOWN ADDRESS" by the then Executive Mayor, Councillor G Wolman's, on 29 May 2012 it was stated, inter alia, that: "We are targeting local contractors for Council business and paying an acceptable premium to use them...It is the intention to increase the local spend to 60%, or to in excess of R120 million next year. The historically disadvantaged will be a minimum of 30% of the total spend as opposed to the current 18%. To ensure the targets are met we will be introducing management processes into our supply chain management at the evaluation phase...Only local business that offer us realistic, affordable prices and whose standards and quality match our requirements will be supported" .

the awarding of the tender within fourteen (14) days upon receipt of the letter. The Municipality stated that no appeals were received.

5.1.23 The Municipality indicated that several objections were thereafter raised regarding the awarding of the ISDF tender and the Municipality sought a legal opinion from CJ Ballan Attorneys regarding the objections received in connection with the awarding of the ISDF tender. The CJ Ballan Attorneys reviewed the objections and advised the Municipality in a letter dated 26 April 2013<sup>2</sup> that:

5.1.23.1 The objections were mainly based on the awarding of the tender to KCHC and the involvement of Dr Mulder, a local developer and therefore a conflict of interest based on the fact that he was in the past involved in development projects with the municipality. It was further found that the objections appeared to be a personal attack on Dr Mulder and not an objection raised in terms of paragraph 49 of the Municipality's SCM Regulations, 2005.

5.1.23.2 The legal opinion further stated that the Municipal BEC members noted that, although KCHC did not obtain the highest score for the B-BBEE criteria, KCHC did receive the highest scores for functionality and the best technical proposal criteria and that *"the difference in price between the successful tenderer and City Think Space who scored the highest score was a mere 4.8%, well within the 11% premium allowed for the deviation in terms of the Supply Chain Management guidelines issued by the National Treasury"*.

5.1.23.3 The Municipal BAC members noted Dr Mulder's past developments and after carefully considering the available information, were of the view that even though his position posed a potential conflict of interest, there was insufficient

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<sup>2</sup> CJ Ballan Attorneys communicated the outcome of the objections to the awarding of the tender to the Municipality through a letter dated 26 April 2013 titled Re: ISDF-Appointment of KCHC-To all interested parties.

information available at the time of evaluation to support the possibility of any risk to the evaluation process.

5.1.24 The Municipality further stated that on 17 May 2013, it informed the aggrieved individuals (objectors), in writing, regarding the outcome of their objections lodged against the awarding of the ISDF tender to KCHC.

5.1.25 It is the Municipality's submission that due to the concerns raised by the residents of Knysna, the then Executive Mayor of the Municipality requested the erstwhile Western Cape MEC for Agriculture, Economic Development and Tourism (MEC) to conduct a comprehensive review of the tender process and investigation into the awarding of the ISDF tender to the KCHC and the matter was subsequently referred to the Western Cape Provincial Treasury (Provincial Treasury) for an investigation.

5.1.26 The Municipality stated further that it sought another legal opinion from Cliffe Dekker Hofmeyer Attorneys, following the findings of irregular expenditure by the Auditor-General of South Africa (AGSA) relating to the tenders sampled during the 2013/14 financial year, including the ISDF tender. It is the Municipality's submission that the legal opinion from Cliffe Dekker Hofmeyer Attorneys dated 28 September 2016 concluded, *inter alia*, that:

*"In evaluating and adjudicating the tenders, awarding the contract and implementing the Procurement Strategy, the Municipality did not comply with the applicable SCM policy or the relevant provisions of the MFMA and the regulatory framework promulgated thereunder. This non-compliance has, to date, not been condoned by the relevant authorities. Accordingly, the Municipality's expenditure flowing from the tenders is 'irregular' within the meaning of the MFMA";*

*"A local authority that incurs irregular expenditure must determine whether such expenditure should be recovered from officials liable thereof. An official*



*is only liable if he or she acted deliberately or negligently in making, committing or authorizing the irregular expenditure...”; and*

*“...Regarding the ISDF tender, the high costs of recovery and the bona fides of the members of the BAC outweigh the fairly minimal benefits to that the Municipality would gain from instituting recovery proceedings. We are therefore of the view that the irregular expenditure in relation to this tender should be certified as irrecoverable by the Council and written off”.*

5.1.27 The Municipality submitted that the Municipal Public Accounts Committee (MPAC) resolved on 19 February 2018, under item 02/02/18 of its Minutes, *inter alia*, that with regard to the irregular expenditure related to the ISDF tender, the Chief Financial Officer (CFO) and the Legal Officer, determine the irregular Rand value to be recovered from the members of the BAC in line with the legal opinion obtained from CDH Attorneys, National Treasury MFMA Circular No. 68 of June 2019 and the Municipality’s Credit Control Policy;

5.1.28 In addition, the Municipality conceded that no report was submitted to the Council meeting held on 16 March 2018<sup>3</sup> but that the issue pertaining to the irregular expenditure had taken priority and was being driven by the new Acting Chief Financial Officer, Mr Jacques Carstens.

*Western Cape Provincial Treasury’s version*

5.1.29 The Provincial Treasury indicated that, on 19 to 21 August and 28 August 2014, it conducted an investigation and interviewed officials of the Municipality. The outcome of the investigation was communicated to the Municipality indicating that the *“...assessment revealed that there are procedural deficiencies in adherence to the Supply Chain Management prescripts and regulations”*.

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<sup>3</sup> MPAC Resolution on 19 February 2018, under item 02/02/18.

- 5.1.30 The Provincial Treasury stated that it forwarded its findings to the MEC's Office and the MEC in turn notified the Municipality on 25 November 2014. The MEC's office contended that the awarding of the ISDF tender to KCHC was considered to be compliant with the Supply Chain Management prescripts and regulations, however, certain deficiencies were identified.
- 5.1.31 The response further indicated that the nine administrative deficiencies identified by the Provincial Treasury included, amongst others that; there was no breakdown of thresholds for evaluation criteria used to ensure consistency in the allocation of points to bidders in accordance with expertise and resourcefulness and no reasons were indicated as to why the tender was not awarded to the highest bidder.

*Evidence sourced by the Public Protector Investigation Team*

- 5.1.32 The Public Protector Investigation Team also sourced independent evidence from the Auditor-General South Africa (AGSA) and found that:
- 5.1.32.1 During 2014, the Auditor General South Africa (AGSA) sampled tenders and reviewed fifty-one (51) of the eighty nine (89) tenders, which were awarded by the Municipality during the 2013/2014 financial year. The AGSA findings were issued on 17 October 2014. One of the tenders reviewed by the AGSA was the ISDF tender;
- 5.1.32.2 The AGSA concluded that the Municipality incurred irregular expenditure in awarding the ISDF tender because the Municipality awarded the tender to a local service provider as opposed to the bidder who scored the highest number of points, in terms of the points' allocation system as prescribed by the PPPFA;
- 5.1.32.3 The AGSA's audit outcome found that the Municipality materially failed to comply with the provisions of the PPPFA;

- 5.1.32.4 The findings made by AGSA were disputed<sup>4</sup> by the Municipality whereby the Municipality highlighted that the findings impinged on section 153 of the Constitution, which obliges a Municipality to promote the social and economic development of its community; awarding of the tender was based on, *inter alia*, cost effectiveness and considering the demographics of Knysna; the Council adopted a preferential procurement strategy to ensure sustainable procurement by promoting the local economy within the municipal area; the Municipality specified local content as an objective criterion because it was subject to Council strategy; the Municipality acted in accordance with National Treasury guidelines as the “*Supply Chain Management Guide for Accounting Officers dated February 2004*” prescribed maximum premium to be allowed to local content; both the White Paper on Local Government and the “*model National Treasury policy*” provide for preference to be given to local suppliers when municipalities procure goods and services; and “*protection of the environment*” and “*the notion of sustainable development constitute objective criteria*” upon which a municipality award a contract in terms of section 2(1) (f) of the PPPFA;
- 5.1.33 On 12 March 2021, the Public Protector investigation team forwarded an enquiry to the Municipality, requesting confirmation whether the Municipal Council had received a report from the Municipal Manager pertaining to the determination of the irregular expenditure.
- 5.1.34 When the Public Protector Investigation Team did not receive a response from the Municipality an intention to issue a subpoena was the then Acting Municipal Manager conveyed to the Municipality in June 2021. The Municipality thereafter responded and indicated that the matter relating to the determination of the irregular expenditure in connection with the ISDF tender would be raised at the next Ordinary Council Meeting in July 2021.

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<sup>4</sup> This disputed findings by the Municipality against the AGSA findings on the tenders resulted in the Municipality seeking a legal opinion from Cliffe Dekker Hofmeyer Attorneys, which opinion was obtained on 28 September 2016.

- 5.1.35 The Municipality indicated in a response letter dated 21 June 2021 to the Investigation team, that the non-finalisation of the matter was attributed to many internal and leadership challenges experienced by the Municipality and that since the February 2018 MPAC resolution, an item on irregular expenditure relating to the ISDF tender for the 2013/2014 financial year, served before Council during December 2020.
- 5.1.36 On 29 July 2021, an Ordinary Council Meeting was held and the ISDF tender matter was presented to Council under Item No. C02/07/21 whereby the Council unanimously resolved that the irregular expenditure for the awarding of the ISDF tender to KCHC for an amount of two million, seven hundred and forty nine thousand three hundred and thirty eight rand only (R2, 749 338.00), on 15 April 2013 was noted. The recommendation by MPAC that the irregular expenditure was irrecoverable and written off was certified and that the Acting CFO record this amount as written off by Council in the Notes to the 2020/2021 Annual Financial Statements; and that a workshop be arranged with the Mayoral Committee to discuss the ISDF matter.

Application of the applicable law

- 5.1.37 The Constitution is the highest law of the Republic of South Africa and any law inconsistent with it may be declared unconstitutional and invalid<sup>5</sup>. Public finances and more specifically procurement are provided for in terms of section 217 of the Constitution. Section 217(1) of the Constitution states that “*when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*”.
- 5.1.38 Section 217(3) of the Constitution further determines that “*National Legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.*” The “*system*” referred to above is the Municipality’s

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<sup>5</sup> Section 2 of the Constitution.

Supply Chain Management (SCM) policy which is the legal framework in terms of which a municipality issues invitations to tender, evaluate bids, selects preferred bidders and concludes contracts for the provision of goods and services.

- 5.1.39 The objectives of the Local Government: Municipal Finance Management Act, No 56 of 2003 (MFMA), are to ensure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government; to establish treasury norms and standards for the local sphere of government; and to provide for matters connected therewith<sup>6</sup>, having a commencement date of 1 July 2004 (i.e. before the ISDF tender was awarded to KCHC).
- 5.1.40 The objects of the MFMA include the establishment of “*norms and standards and other requirements*” for “*ensuring transparency*”, “*accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and for supply chain management*”. These objectives are accomplished through the application of the MFMA along with the constitutional standards of fairness, equity, transparency, competitiveness and cost effectiveness, by *inter alia* stipulating minimum standards for a municipality’s SCM policy<sup>7</sup>.
- 5.1.41 The MFMA further defines “*irregular expenditure*”<sup>8</sup>, *inter alia*, as: “*expenditure incurred by a municipality in contravention of or that is not in accordance with a requirement of the MFMA or the supply chain management policy of the municipality and which has not been condoned.*”
- 5.1.42 Section 60(a) of the MFMA provides that the Municipal Manager of a municipality is the accounting officer of the municipality and, as accounting officer, must exercise the functions and powers assigned to an accounting

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<sup>6</sup> Preamble of the MFMA.

<sup>7</sup> Chapter 11 of the MFMA – Goods and Services: Part 1: Supply Chain Management.

<sup>8</sup> Section 1 of the MFMA.

officer in terms of the Act. These functions and powers entail that tenders which are awarded need to be in accordance with the relevant legal prescripts.

- 5.1.43 In terms of section 62(1)(d) of the MFMA, the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure that unauthorised, irregular and wasteful expenditure and other losses are prevented.
- 5.1.44 Each municipality must, in terms of section 111 of the MFMA have and implement a supply chain management policy, which gives effect to the provisions of the Act. The Municipality has a Supply Chain Management Policy prescribing the procedure to be followed when awarding tenders.
- 5.1.45 Section 112 of the MFMA requires that the supply chain management policy must be fair, equitable, transparent and cost effective whilst complying with the prescribed regulatory framework for municipal supply management.
- 5.1.46 In terms of section 32(2) of the MFMA, a municipality must recover unauthorised, irregular, fruitless and wasteful expenditure from the person liable for it, unless the expenditure in the case of irregular or fruitless and wasteful expenditure is (i) authorized in the adjustments budget or (ii) certified by the municipal council, after an investigation by a council committee, as irrecoverable and written off by the council.
- 5.1.47 Section 32(4) of the MFMA provides that the accounting officer of a municipality must promptly inform the mayor, the MEC for Local Government in the province and the Auditor-General, in writing of, *inter alia*, any irregular expenditure incurred by the municipality, whether any person is responsible or under investigation for such irregular expenditure and the steps that have been taken to recover such expenditure and to prevent a recurrence thereof.
- 5.1.48 A municipality must, in terms of section 171(4) investigate allegations of financial misconduct against the accounting officer, the chief financial officer,

a senior manager or other official of the municipality and in terms of section 171(4)(b), if the investigation warrants such a step, institute disciplinary proceedings.

- 5.1.49 Section 171(1)(c) of the MFMA provides that the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently makes or permits, or instructs another official of the municipal entity to make an irregular or fruitless and wasteful expenditure.
- 5.1.50 Section 173(1)(a)(i) of the MFMA provides that the accounting officer of a municipality is guilty of an offence if that accounting officer deliberately or in a grossly negligent way contravenes or fails to comply with the provision of 62(1) of the same Act. In this case the evidence indicated that no steps were taken.
- 5.1.51 The MFMA in essence regulates the “*supply chain management processes*”, “*procedures and mechanisms for each process*”, “*open and transparent pre-qualification processes for tenders or other bids*”, “*competitive bidding processes in which only pre-qualified persons may participate*”, “*bid documentation, advertising of an invitation for contracts*” and “*procedures and mechanisms for the evaluation of bids to ensure value for money*” and there is a legal duty placed on the accounting officer to consistently ensure that in all instances whereby irregular expenditure has been identified the above mentioned steps are applied.
- 5.1.52 The Municipal Supply Chain Management Regulations<sup>9</sup> (Municipal SCM Regulations) contain the regulatory framework anticipated by the MFMA.
- 5.1.53 The Municipal SCM Regulations provides that a municipality may not “*act otherwise than in accordance with its supply chain management policy when procuring goods or services*”<sup>10</sup>; a SCM policy must ensure that “*bid*

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<sup>9</sup> Municipal Supply Chain Management Regulations, published under General Notice 868 in the Government Gazette 27636 of 30 May 2005.

<sup>10</sup> Id regulation 2(3)(a).

*documentation, evaluation and adjudication criteria, and general conditions of a contract, are in accordance with any applicable legislation*<sup>11</sup>; goods and services must be procured “*by way of a competitive bidding process for procurements above a transaction value of two hundred thousand rand only (R200,000.00) (VAT included)*”<sup>12</sup>; transaction values may not be artificially lowered by splitting a particular procurement into “*parts or items*”<sup>13</sup>; and a SCM policy must provide procedures for the various stages of a competitive bidding process, including “*the compilation of bidding documentation*”<sup>14</sup>, “*the public invitation bids*”<sup>15</sup>, “*the handling of bids submitted in response to public invitation*”<sup>16</sup> and “*the award of the contracts*”<sup>17</sup>.

5.1.54 The Municipal SCM Regulations further provide that “*the bid documentation for the competitive bidding process must...include evaluation and adjudication criteria, including any criteria required by other applicable legislation*”<sup>18</sup>; the specifications compiled by the Bid Specification Committee (BSC) “*must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity*”<sup>19</sup>; and BEC must evaluate bids in accordance with the specifications for a specific procurement and the points system must be set out in the supply chain management policy of the municipality or municipal entity in terms of the Municipal SCM Regulation 27(2)(f) and as prescribed in terms of the PPPFA<sup>20</sup>.

5.1.55 The Preamble of the PPPFA enshrines its legal framework required to give effect to section 217(3) of the Constitution for the implementation of the procurement policy. Section 2(1)(d) and (e) of the PPPFA further states that

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<sup>11</sup> Id regulation 11(1)(d).

<sup>12</sup> Id regulation 12(1)(d)(i).

<sup>13</sup> Id regulation 12(3)(b).

<sup>14</sup> Id regulation 20(a).

<sup>15</sup> Id regulation 20(b).

<sup>16</sup> Id regulation 20(d).

<sup>17</sup> Id regulation 20(f).

<sup>18</sup> Id regulation 21(b).

<sup>19</sup> Id regulation 27(2)(f).

<sup>20</sup> Id regulation 28(1)(a).



*“an organ of state must determine its preferential procurement policy and implement it within the framework whereby the specified goals may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; and implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994 and any specific goal for which a tender may be awarded, must be clearly specified in the invitation to submit a tender.”*

- 5.1.56 In terms of policy obligations, section 2(1)(f) of the PPPFA states that “the organ of state in its policy must also ensure that a contract is awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.” (emphasis added)
- 5.1.57 The Preferential Regulations, 2011 (Regulations) pertaining to the PPPFA, were promulgated to give further guidance to the contents of the PPPFA. Regulation 2(1) of the Regulations state that these Regulations apply to all organs of state.
- 5.1.58 Regulation 6(5) of the Regulations provides that “*subject to Regulation 7, the acquisition of services, works or goods with a Rand value above one million rand only (R1 000,000.00) must be awarded to the tenderer who scored the highest number of points.*
- 5.1.59 Regulation 7(1) provides that: “*A contract may be awarded to a tenderer that did not score the highest number of points, only in accordance with section 2(1)(f)*” of the PPPFA.
- 5.1.60 Section 2(1)(f) of the PPPFA stipulates that an organ of state must determine its preferential procurement policy and implement it within a framework, including that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer.

- 5.1.61 The National Treasury issued an Implementation Guide to the Preferential Procurement Regulations, 2011 on 1 December 2011. Paragraph 16 of the Implementation Guide provides that:

*“16.1A contract must be awarded to the bidder who scored the highest total number of points in terms of the preference point systems.*

*16.2 In exceptional circumstances a contract may, on reasonable and justifiable grounds, be awarded to a bidder that did not score the highest number of points. The reasons for such a decision must be approved and recorded for audit purposes and must be defensible in a court of law.”*

- 5.1.62 The Municipality’s SCM Policy serves as the benchmark in terms of required standards and was approved by the Municipal Council on 30 May 2013, effectively from 01 July 2013.

- 5.1.63 Clause 3.1 of the General Conditions in the tender document indicated that “the bidder obtaining the highest number in total points will be awarded the contract.” The tender document also indicated that “...the bids will be evaluated according to the 90/10 points system.”

### Conclusion

- 5.1.64 The evidence and the information obtained from the investigation established that the Municipality sought to procure a service provider to review the Municipality’s critical documents, which included the Spatial Development Framework, Integrated Human Settlement Plan, Economic Development Plan and the Strategic Environmental Assessment for the Knysna Municipal area.

- 5.1.65 The objective of the ISDF tender was to assist Council with its decision making processes and in particular to cover a time period of thirty (30) years, from the time of being approved by the Council.

- 5.1.66 Due to the tender amount exceeding the threshold of two hundred thousand rand only (R200 000.00), a competitive bidding process was required, which the Municipality executed.
- 5.1.67 The ISDF tender was advertised with a closing date of 22 February 2013 and later processed through the BEC and BAC phases, with the unsuccessful bidders being informed of the outcome of their tender applications on 18 April 2013.
- 5.1.68 The BAC members convened on 15 April 2013 whereby after deliberating on the BEC recommendations, the BAC concurred that the tender should be awarded to the KCHC on the basis that it was aligned to the objectives of Council, which were not specified, recorded and approved.
- 5.1.69 The Municipality thereafter issued letters dated 18 April 2013 to all the bidders informing them on the outcome of the tender bid process and that the tender was awarded to the KCHC.
- 5.1.70 The Municipality awarded the ISDF tender to KCHC on 15 April 2013 for an amount of two million, seven hundred and forty nine thousand three hundred and thirty eight rand only (R2, 749 338.00) who had not scored the highest points or bid the lowest price during the tender evaluation process instead of a Cape Town based Company, City Think Space which had scored the highest points during the tendering process.
- 5.1.71 Objections were received by the Municipality regarding the awarding of the ISDF tender to KCHC and the Municipality sought a legal opinion from CJ Ballan Attorneys and opinion was communicated to the Municipality in a letter dated 26 April 2013.
- 5.1.72 The CJ Ballan Attorneys communicated its opinion on the objections to the ISDF tender to the Municipality recommending amongst others that the KCHC partner, a certain Dr Mulder, a local developer whom it was alleged had a

conflict of interest due to his past involvement in development projects with the Municipality was baseless and rather appeared to be personal attack on him.

- 5.1.73 The AGSA found that the awarding of the tender to the KCHC was not in line with the relevant procurement legislation and prescripts and concluded that the Municipality incurred irregular expenditure in awarding the ISDF tender to the KCHC, a local service provider as opposed to the bidder who scored the highest number of points, in terms of the points allocation system, as prescribed by the PPPFA.
- 5.1.74 The findings by the AGSA were disputed by the Municipality resulting in it seeking legal opinion from Cliffe Dekker Hofmeyer Attorneys which opinion was obtained on 28 September 2016. The legal opinion concluded amongst others that the awarding of the ISDF tender did not comply with the SCM Policy and other regulatory framework, and constituted irregular expenditure, as contemplated by the MFMA.
- 5.1.75 The Cliffe Dekker Hofmeyer Attorneys legal opinion further advised the Municipality that the high cost of recovery and the bona fides of the members of the BAC outweigh the fairly minimal benefits that the Municipality would gain from instituting recovery proceedings.
- 5.1.76 The Municipality did not deny during the investigation that the awarding of the ISDF tender to KCHC was not in line with the relevant prescripts regulating procurement by the Municipality and did not dispute that it constituted irregular expenditure.
- 5.1.77 The awarding of the ISDF tender by the Municipality was not in accordance with the relevant laws and prescripts that regulate the procurement of goods and services by the Municipality. The conduct of the Municipality in this regard was therefore improper conduct and constituted maladministration and resulted in irregular expenditure, as contemplated in the MFMA.

- 5.1.78 It was also established that the Municipal Managers that were responsible as the accounting officers when the tender was awarded and when a report was required by Council to attend to the matter; have since left the employ of the Municipality.
- 5.1.79 Even though MPAC resolved on 19 February 2018, under item 02/02/18 that the irregular expenditure related to the ISDF tender should have the Rand value determined by the CFO and the Legal Officer in line with the CDH, National Treasury MFMA Circular no 68 and the Municipality's Credit Control Policy, the Municipality delayed the determination process and Council only dealt with the matter on 29 July 2021, whereby it was resolved that in terms of section 32(2)(b) of the MFMA, the recommendation previously made by MPAC with regard to the irregular expenditure of ISDF tender, be certified as irrecoverable and be written off.
- 5.1.80 In addition to the above, it has further been brought to the Public Protector's attention that since the ISDF tender was awarded, the Municipality has implemented internal controls and mechanisms to detect and/ or prevent similar incidents from occurring which includes, *inter alia*:
- 5.1.80.1 The Procurement Strategy which was applicable at the time of the ISDF award was since revoked;
- 5.1.80.2 The Municipality has conducted various training on supply chain management with the relevant officials involved in procurement processes. This includes the required Municipal Regulations on Minimum Competency Levels 2007, as enacted under the MFMA;
- 5.1.80.3 Except for the BAC members, members of the BSC and BEC are appointed in writing from a list approved by the Municipal Manager;
- 5.1.80.4 The Municipality's Code of Conduct for Supply Chain Management Practitioners and other Role players has been incorporated into their SCM

policy, which is reviewed on an annual basis. In terms of the Code of Conduct, all officials and other role players involved in supply chain management are to ensure that they perform their duties efficiently, effectively and with integrity, in accordance with the relevant legislation, policies and guidelines;

5.1.80.5 The bid committees have also been strengthened with qualified SCM officials who participate and provide assistance to ensure that tenders are awarded to the highest bidder; and

5.1.80.6 Legal Services department has also been instructed to assist the committee with queries, this includes the provision of legal opinions when required.

## **6. ROOT CAUSE PROBLEM IDENTIFIED**

6.1 After assessing all the evidence and information obtained during the investigation, the Public Protector has taken cognisance of the responses received from the Municipality. Whilst taking note that the administrative deficiencies relate to a historical period (2013), it's worth mentioning that the issues identified in the awarding of the ISDF tender to KCHC stem primarily from non-compliance with the legal provisions of section 2(1)(f) of the PPPFA and clause 3.1 of the Municipality's SCM Policy.

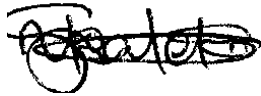
## **7. INTERVENTION**

7.1 It is therefore recommended, in terms of section 6(4)(c)(ii) of the Public Protector Act, that the Acting Municipal Manager of the Knsyna Municipality within thirty (30) days from the date of this letter intervene and ensure that:

7.1.1 The outcome of the investigation is communicated to all affected departments (Legal Services and SCM) within the Municipality for closure and with the objective of sharing lessons learnt during the Public Protector's enquiry; and

7.1.2 All staff of the Municipality involved in the SCM processes for the procurement of goods and services receive ongoing and appropriate training on the provisions of section 217 of the Constitution, the MFMA, the Regulations, section 2(1)(f) of the PPPFA and the SCM Policy.

Yours sincerely,



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**ADV KHOLEKA GCALEKA  
ACTING PUBLIC PROTECTOR OF  
THE REPUBLIC OF SOUTH AFRICA  
DATE: 30 SEPTEMBER 2022**

*Assisted by: Mr M Lamula,  
Provincial Representative: Western Cape*