

**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 matter between Mr Radle and the Free-State
Treasury Department”***

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION
WHEREIN THE FREE-STATE TREASURY DEPARTMENT CANCELLED A BID AFTER
ACCEPTANCE LETTERS WERE ISSUED TO SUCCESSFUL BIDDERS**

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Executive Summary

- (i) This is a closing report of the Office of the Public Protector 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 investigation into alleged maladministration by the Free-State Department of Treasury (the Provincial Treasury) in that a bid was cancelled after the Provincial Treasury issued acceptance of their bids, to the successful bidders. The complaint was lodged with the Office of the Public Protector on 6 October 2020.
- (iii) Mr G Radle, the Complainant, alleged that a Request for Quotation bid was cancelled after the Provincial Treasury issued acceptance of their bids to the successful bidders.
- (iv) In the main, the complaint was that: 1) the cancellation of the bid by the Provincial Treasury was contrary to legislative prescripts, and 2) despite the bid being cancelled, the Provincial Treasury issued orders to certain companies.
- (v) The Provincial Treasury disputed the allegations and submitted that the bid was cancelled in terms of legislative prescripts and that no orders were issued on the cancelled bid.
- (vi) **On analysis of the complaint, the following issues were identified and investigated:**
 - (a) Whether the decision by the Free State Provincial Treasury to cancel the bid was in terms of the legislative prescripts and if not, whether it amounts to maladministration; and
 - (b) Whether the Provincial Treasury issued any orders on the cancelled bid.
- (vii) The investigation process was conducted through meetings and interviews with Complainant and relevant officials of the Department as well as inspection of all relevant

documents and analysis and application of all relevant laws, policies and related prescripts.

(viii) Key laws and policies taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Department or its officials when processing claim documents for compensation. Those are the following:

- a. Section 38 of the Public Finance Management Act No.1, 1999;
- b. Regulation 16A6.4 of Treasury Regulations, 2005;
- c. National Treasury SCM Instruction Note 8 of 2007/08;
- d. National Treasury Instruction Note 5 of 2020/21; and
- e. National Treasury issued Instruction Note 11 of 2020/2021

(ix) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Whether the decision by the Free State Provincial Treasury to cancel the bid was in terms of legislative prescripts and if not, whether it amounts to maladministration

(aa) The allegation that the Provincial Treasury cancelled the bid contrary to legislative prescripts, cannot be substantiated.

(bb) The bid was cancelled on 14 September 2020 before any of the successful bidders signed the required contract in terms of the acceptance of the quotation letters issued on 15 June 2020.

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- (cc) On 18 June 2020, the Free State Provincial Executive Committee (EXCO) took a decision No. 2.5 to decentralise all emergency procurement of PPE's to the individual Provincial Departments.
- (dd) National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020 which repealed Instruction Note 5 of 2020/2021 and instructed that Departments must comply with existing procurement procedures.
- (b) Whether the Provincial Treasury issued any orders on the cancelled bid**
- (aa) The allegation that the Provincial Treasury issued orders on the cancelled SCMQ2/2020-COVID bid, cannot be substantiated.
- (bb) The bidders awarded contracts as advertised in the Tender Bulletin, which the Complainant referred to, submitted quotations on a different bid, namely SCMQ 2/2020/2021, as advertised on 7 April 2020. The Complainant did not submit a quotation on this request.
- (x) In light of the above findings, the Office of the Public Protector will not taking any remedial action as contemplated in section 182(1)(c) of the Constitution.

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1. INTRODUCTION

- 1.1. This is a closing report of the Office 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 people to note the outcome of the Office of the Public Protector's investigation:
 - 1.2.1. The Premier of the Free-State Province, the honourable Ms SH Ntombela;
 - 1.2.2. The Member of the Executive Council for Finance, Free-State, Ms Gadija Abrahams Brown; and
 - 1.2.3. The Head of the Department of the Free-State Provincial Treasury, Mr MNG Mahlatsi.
- 1.3. A copy of the report is also provided to Mr Radle (the Complainant) to inform him about the outcome of the investigation.
- 1.4. A Discretionary Notice was previously issued to the Complainant on 11 March 2021, to enable him to respond to the provisional findings on the unsubstantiated allegations. A response in this regard was received on 15 March 2021.

1.5. The closing report relates to an investigation into allegations of maladministration by the Free-State Department of Treasury (the Provincial Treasury) in that a bid was cancelled after the Provincial Treasury issued acceptance of their bids to the successful bidders.

2. THE COMPLAINT

2.1 The Complainant, Mr Radle, approached the Office of the Public Protector on 06 October 2020.

2.2 The Complainant alleged that his company, HLABOLLANG LEFATSHE (Pty) Ltd, submitted a quotation for the delivery of Personal Protective Equipment (PPE's) on a Request for Quotation (RFQ), number SCMQ2/2020-COVID 19, by the Provincial Treasury.

2.3 The Complainant received an acceptance letter from the Provincial Treasury dated 15 June 2020, which was signed by the Head of the Provincial Treasury, Mr. Mahlatsi (HOD). This letter stated that no services should be rendered until an official order is received. The letter stated furthermore that the successful companies should avail a duly authorised person to sign the Standard Government Contract (SBD7.2). The Complainant submitted that his company never received an official order from the Provincial Treasury.

2.4 The Complainant submitted that his company was informed that the bid was cancelled on 14 September 2020. He further referred to a Free-State Government Tender Bulletin dated 31 July 2020, wherein bid SCMQ2/2020/2021 is indicated as awarded, alleging that indeed certain companies whose quotations were accepted by the Provincial Treasury, received letters of acceptance, and those companies received orders. The Complainant submitted that six companies received orders under SCMQ 2/2020/2021.

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 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*

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

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 has additional powers and functions prescribed by legislation.
- 3.5 The Office of the Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.6 The Free State Provincial Treasury 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.
- 3.7 The Office of the Public Protector’s power 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.

² *Supra* at para [73].

4.1.2. The Public Protector Act confers on the Office of the Public Protector 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 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 the Complainant 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 Provincial Treasury acted improperly in the cancellation of the contract and whether or not orders were issued on the cancelled contract.

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 issues were considered and investigated:

4.3.1 Whether the decision by the Provincial Treasury to cancel the bid was in terms of the legislative prescripts and if not, whether it amounted to maladministration; and

4.3.2 Whether the Provincial Treasury issued any orders on the cancelled bid.

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 2020-10-06: Complainant's email lodging a complaint.

4.4.1.2 2020-04-08: Advertisement Free-State Provincial Treasury: Establishment of a data base for the procurement of PPE's by the Free State Provincial Government;

4.4.1.3 2020-03-23/24: Record of Free State Provincial Executive Committee meeting: Centralise procurement of PPE's with Provincial Treasury;

4.4.1.4 2020-04-03 Needs assessments for all Provincial Departments on required PPE's;

4.4.1.5 2020-04-07: Request for approval to deviate from Treasury Regulation 16A6.4, signed by the HOD;

4.4.1.6 2020-05-08: Request for Quotations on SCMQ2/2020-COVID 19. The closing date for submission of documents was 13 May 2020 and samples had to be submitted by 15 May 2020.

4.4.1.7 2020-05-15: Evaluation list of quotations received;

4.4.1.8 2020-06-15: Approval of the successful bidders by the HOD;

4.4.1.9 2020-06-15: Letters of acceptance of bid to the elected service providers;

4.4.1.10 2020-06-18: EXCO decision nr. 2.5 to decentralise all emergency procurement of PPE's to the individual Provincial Departments; and

4.4.1.11 2020-09-14: Publication of cancellation of SCMQ 2/2020-Covid 19.

4.4.2 Interviews conducted

- 4.4.2.1 2020-10-07: Head of the Provincial Treasury; and
- 4.4.2.2 2020-11-02: 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 2020-10-07: Letter to Complainant: Intention to close investigation;
- 4.4.3.2 2020-10-19: Response Email from the Complainant with further allegations;
- 4.4.3.3 2021-03-03: Discretionary letter in terms of Rule 42 of the Public Protector Rules to Complainant; and
- 4.4.3.4 2021-03-15: Complainant's response to the Discretionary notice in terms of Rule 42 of the Public Protector Rules.

4.4.4 Case law

- 4.4.4.1 *Barkhuizen v Napier* (CCT 72/05) [2007] ZACC 5;
- 4.4.4.2 *Waymark Infotech (Pty) Ltd v Road Traffic Management Corporation* (Case No. 36811/2014) [2016] ZAGPPHC 1027;
- 4.4.4.3 *Lepogo Construction (Pty) Ltd v The Govan Mbeki Municipality* (623/13) [2014] ZASCA 154;
- 4.4.4.4 *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province* (20800/2014) ZASCA 61
- 4.4.4.5 *Trecon Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another* [2015] ZACC 22; and
- 4.4.4.6 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

4.4.5 Websites consulted/ electronic sources

4.4.5.1 2020-11-06: <http://www.treasury.fs.gov.za>

4.4.5.2 2020-11-06: <http://ocpo.treasury.gov.za/COVID19/Pages/Reporting-Dashboard.aspx>

4.4.6 Legislation and other prescripts

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

4.4.6.2 The Public Protector Act, specifically sec 6(4) of Act No. 23 of 1994;

4.4.6.3 The Public Finance Management Act, No. 1 of 1999 (PFMA);

4.4.6.4 Treasury Regulations for departments, trading entities, constitutional institutions and public entities, 2005 (Regulations);

4.4.6.5 The Preferential Procurement Policy Framework Act, No 5 of 2000 (PPPFA);

4.4.6.6 National Treasury SCM Instruction 8 of 2007/08 dated 29 November 2007;

4.4.6.7 National Treasury Instruction No. 8 of 2019/20: Emergency Procurement in Response to the National State of Disaster dated 19 March 2020 and the revised versions dated 5 May 2020, 20 May 2020 and 3 July 2020;

4.4.6.8 National Treasury Instruction No. 5 of 2020/21: Emergency Procurement in Response to the National State of Disaster dated 28 April 2020;

4.4.6.9 National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020;

4.4.6.10 Department of Public Service and Administration Circular 7 of 2020 dated 16 March 2020; and

4.4.6.11 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 decision by the Provincial Treasury to cancel the bid was in terms of legislative prescripts 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 virus.
- 5.1.2 It is further common cause that on 8 May 2020, a Request for Quotations on SCMQ2/2020-COVID 19 was issued by Provincial Treasury for the supply and delivery of PPE's. The closing date for submission of documents was 13 May 2020 and samples had to be submitted by 15 May 2020.
- 5.1.3 Various bids were disqualified for different reasons, and then on 15 June 2020, the Department issued letters to the accepted bidders. The letters stated that no services should be rendered until a written official order was issued, and it further stated that the successful companies should avail a duly authorised person to sign the Standard Government Contract (SBD7.2).
- 5.1.4 It was on this request that the Complainant submitted a quotation and received a letter of acceptance on 15 June 2020. This appointment was cancelled on 14 September 2020.
- 5.1.5 The Complainant submitted that the cancellation of the acceptance of the quotation was irregular and amounts to maladministration.

Issues in dispute

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- 5.1.6 The HOD submitted, during a meeting with the investigation team on 7 October 2020, that he took a decision to cancel SCMQ2/2020-COVID 19 as no Standard Government Contract (SBD7.2) was signed by any of the successful bidders at that stage. SCMQ2/2020-COVID 19 was cancelled on 14 September 2020 and the cancellation was published in the Provincial Treasury Website and also published in the October 2020 Provincial Tender Bulletin.
- 5.1.7 The HOD submitted that initially on 23 and 24 March 2020, the Free State Provincial Executive Committee (EXCO) took decision No. 1.16, to centralise all emergency procurement of PPE's with Provincial Treasury. Initially, the procurement was centralised at the Office of the Chief Financial Officer (CFO).
- 5.1.8 On 18 June 2020, the EXCO took decision No. 2.5 to decentralise all emergency procurement of PPE's to the individual Provincial Departments.

Documentary evidence received

- 5.1.9 The Special Investigating Unit (SIU) uplifted all original documents pertaining to the procurement of PPE's from Provincial Treasury during September 2020. The Office of the Public Protector were supplied with copies of all these procurement files. Documents relating to SCMQ 2/2020 – COVID-19 were perused and analysed by the Public Protector Investigation team in the Free State.
- 5.1.10 On 5 May 2020, the HOD of Provincial 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.

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- 5.1.11 On 8 May 2020, a request for Quotations on SCMQ2/2020-COVID 19 was issued. The closing date for submission of documents was 13 May 2020 and samples had to be submitted by 15 May 2020. Various bids were disqualified for different reasons, and then on 15 June 2020 the Department issued letters to the accepted bidders.
- 5.1.12 The letters stated that no services should be rendered until a written official order is issued and it further stated that the successful companies should avail a duly authorised person to sign the Standard Government Contract (SBD7.2).
- 5.1.13 On 18 June 2020, the EXCO took decision No. 2.5 to decentralise all emergency procurement of PPE's to the individual Provincial Departments.
- 5.1.14 National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020, after consultation with Departments on 5 August 2020. Instruction Note 11 informed Departments that normal procurement processes should be followed for the procurement of PPE's.
- 5.1.15 The HOD then took a decision to cancel SCMQ2/2020-COVID 19 as no Standard Government Contract (SBD7.2) was signed by any of the successful bidders at that stage. SCMQ2/2020-COVID 19 was cancelled on 14 September 2020 and the cancellation was published in the Provincial Treasury Website and also published in the October 2020 Provincial Tender Bulletin.
- 5.1.16 A Discretionary Notice was sent to the Complainant on 11 March 2021 and he responded on 15 March 2021 to the Notice in terms of Rule 42 of the Public Protector Rules, as follows:

“The HOD submitted during a meeting with our Free State Provincial Office, on 7 October 2020 that he took a decision to cancel SCMQ2/2020-COVID 19 as no

Standard Government Contract (SBD7.2) was signed by any of the successful bidders at that stage. “How can since from 15 June 2020 till to 7 October 2020 no one called to sign SBD 7.2. It was the duty of Free State Provincial Treasury to call the suppliers because of they (sic) issued the acceptance letter on the 15 June 2020”.

Since from 15 June 2020 Free State Provincial Treasury give us the acceptance letter they issued us with cancelled letter for the SCMQ2/2020 Covid-19 on 14 September 2020, why did Free State Provincial Treasury took almost four months to issue SBD 7.2 to us ?

*On 18 June 2020 the EXCO took decision no. 2.5 to decentralise all emergency procurement of PPE's to the individual Provincial Departments. **N.B** The HOD of Provincial Treasury he had a chance to tell the EXCO that he's office has already issued Acceptance letter to the Suppliers, also they had an option to split all the suppliers to different Departments not to cancel our Appointment Letter. We haven't done anything wrong to be cancelled.” (sic)*

5.1.17 The assertion by the Complainant that the Provincial Treasury took about 4 months to issue the SBD 7.2 does not impose an obligation to the Department to sign the contract. Generally, there is no procurement contract if the conditions imposed for the conclusion of the procurement contract have not been complied with. In this instance only a letter of acceptance was issued. The contract was neither signed, nor was an official order issued.

5.1.18 The Complainant confirmed that no official order was received and that no contract was signed, but that he and his company were prejudiced.

Application of the relevant law

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- 51.19 Section 38(1) (a) (iii) of the 15 Public Finance Management Act (PFMA) describes the general responsibilities of an accounting officer. It states that: “(1) *The accounting officer for a department, trading entity or constitutional institution— (a) must ensure that that department, trading entity or constitutional institution has and maintains...*
- (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;...*”
- 5.1.20 Regulation 16A6.4 of Treasury Regulations for Departments prescribes that if in a specific case it is impractical to invite competitive bids, the accounting officer 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.
- 5.1.21 Regulation 8.6 of the Treasury Regulations provides for the cancellation and variation of contracts. It provides that “*no contract (excluding personnel contracts) may be cancelled or changed to the detriment of the state without the prior approval of the relevant treasury*”. This confirms the right of termination of the procurement contracts by the organs of state, subject to the relevant treasury’s approval before exercising such right of termination.³
- 5.1.22 The Preferential Procurement Policy Framework Act, as amended and its Regulations as enacted in 2017 (the “Regulations”) regulates the cancellation of procurement contracts. From the Regulations, it is apparent that a procurement contract may be cancelled at any time before it is awarded, in certain circumstances. The circumstances are: if there is no longer a need for the goods and services specified in the tender invitation; if funds are no longer available to

³ Regulation 15 of the Preferential Procurement Regulations.

cover the total envisaged expenditure; if no acceptable tender is received; or if there is material irregularity in the tender process.

5.1.23 National Treasury Instruction Note 5 of 2019/20 on 28 April 2020 is restricted to commodities required to limit the spread of the virus, effective on the signed date and will terminate once a pronouncement is made to declare the end of the disaster or once National Treasury retracts the said instruction note. The Instruction Note permitted National and Provincial Departments to deviate from normal procurement procedures if approved by HOD's of Departments.

5.1.24 National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020, after consultation with Departments on 5 August 2020. Instruction Note 11 informed Departments that normal procurement processes should be followed for procuring of PPE's. 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 the must comply with existing procurement procedures:

5.1.25 In ***Lepogo Construction (Pty) Ltd v The Govan Mbeki Municipality***, the Court stated that *"an invitation of procurement of goods and services from an organ of state and the processing is governed by the Promotion of Administrative Justice Act 3 of 2000, the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA), the Preferential Procurement Policy Framework Act 5 of 2000, Local Government: Municipal Finance Management Act No. 56 of 2003, Municipal Supply Chain Management Regulation, 2005, and the preferential procurement policy by the organ of state, in which this system is intended to provide for a fair,*

equitable, transparent, competitive and cost effective process as contemplated in section 217(1) of the Constitution.”⁴

- 5.1.26 Organs of state are entitled to terminate any procurement contract and such termination may be based on any form of a contractual breach, or if a contract has been concluded in contravention with an applicable legislation or against public policy.⁵
- 5.1.27 As organs of state are not expected to conclude procurement contracts which are inconsistent with the applicable legislation and they are also not expected to enforce procurement contracts which have been concluded in breach of an applicable legislation.⁶
- 5.1.28 Government owes no legal duty to tenderers to avoid losses. The Constitutional Court⁷ extended this reasoning to both initially successful and unsuccessful tenderers and in relation to loss of profits, out-of-pocket expenses in preparing the tender and *“financial loss on the strength of the award which is subsequently upset on review by a court order”* .

Conclusion

- 5.1.29 In general legal terms, it can be stated that there is no procurement contract if the conditions imposed for the conclusion of the procurement contract have not been complied with. In this instance only a letter of acceptance was issued. The contract was never signed, and no official order was issued.

⁴ (623/13) [2014] ZASCA 154 (29 September 2014) at para [28]

⁵ Barkhuizen v Napier (CCT 72/05) [2007] ZACC 5 paras [28-30]

⁶ Trecon Construction (Pty) Limited v Industrial Development Corporation of South Africa and Another [2015] ZACC 22 at para 75.

⁷ Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC). para 54

5.1.30 Based on the strength of the evidence perused and discussed above, the legislative prescripts and the case law, the Office of the Public Protector can conclude that the HOD acted in terms of the legislative prescripts and instructions issued by EXCO and National Treasury to cancel the appointments. By the time when the appointments were cancelled no successful bidders had signed a contract as required in the appointment letters.

5.2 Whether the Provincial Treasury issued any orders on the cancelled bid

Common cause issues

5.2.1 It is common cause that SCMQ2/2020-COVID 19 was cancelled on 14 September 2020 and that the cancellation was published in the Provincial Treasury Website and also published in the October 2020 Provincial Tender Bulletin.

Issues in dispute

5.2.2 The Complainant referred to the Provincial Tender Bulletin of 31 July 2020, wherein SCMQ2/2020/2021 is indicated as awarded. Six companies, who were published in this bulletin, were awarded the contracts for delivery of PPE's on SCMQ2/2020/2021.

5.2.3 The HOD submitted during a meeting with the Office of the Public Protector, Free-State Provincial Office on 7 October 2020, that no service providers were appointed on SCMQ2/2020-COVID 19, but 10 bidders were approved and appointed on SCMQ2/2020/2021, which is a different bid altogether.

Documentary evidence received

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- 5.2.4 The Special Investigating Unit (SIU) uplifted all original documents pertaining to the procurement of PPE's from Provincial Treasury during September 2020. The Office of the Public Protector was supplied with copies of all these procurement files.
- 5.2.5 The documents revealed that initially, all procurement was centralised in the Office of the Chief Financial Officer (CFO) of Provincial Treasury. On 7 April 2020, the CFO registered SCMQ 2/2020/2021. The deviation was approved by the HOD and a process to obtain quotations was followed.
- 5.2.6 On 28 April 2020, the list of suppliers was approved and suppliers were issued with letters of acceptance of their quotations. A total of ten (10) companies were approved.
- 5.2.7 On 5 May 2020, the HOD of Provincial 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.
- 5.2.8 The documents perused by the Public Protector investigation team indicate that the Complainant submitted a quotation on SCMQ2/2020-COVID 19, advertised on 8 May 2020 and not on SCMQ 2/2020/2021 advertised on 7 April 2020, which is a different bid altogether. The Complainant did not submit a quotation on SCMQ 2/2020/2021 advertised on 7 April 2020.

Application of the relevant law

- 5.2.9 National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020, after consultation with Departments on 5 August 2020. Instruction Note 11 informed Departments that normal procurement processes should be followed for procuring of PPE's. 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

- 5.2.10 The documents perused indicate that the Complainant submitted a quotation on SCMQ2/2020-COVID 19 advertised on 8 May 2020 and not on SCMQ 2/2020/2021 advertised on 7 April 2020.
- 5.2.11 The bidders awarded contracts as advertised in the Tender Bulletin which the Complainant referred to, submitted quotations on SCMQ 2/2020/2021 advertised on 7 April 2020 which is not the bid on which the Complainant submitted his quotation. The Complainant did not submit a quotation on the SCMQ2/2020/2021 request.
- 5.2.12 The documents and evidence perused indicated that the Complainant submitted his quotation on SCMQ2/2020-COVID 19 advertised only on 8 May 2020. SCMQ2/2020-COVID 19 was cancelled on 14 September 2020 before any of the successful bidders signed the required contract in terms of the acceptance of the quotation letters issued on 15 June 2020.
- 5.2.13 The Complainant clearly became confused by the bid reference numbers.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Office of the Public Protector makes the following findings:

6.1 Regarding whether the decision by Provincial Treasury to cancel the bid was in terms of legislative prescripts and if not, whether it amounted to maladministration

6.1.1 The allegation that Provincial Treasury cancelled the bid contrary to legislative prescripts, cannot be substantiated.

6.1.2 The bid was cancelled on 14 September 2020 before any of the successful bidders signed the required contract in terms of the acceptance of the quotation letters issued on 15 June 2020 and before any official orders were issued.

6.1.3 On 18 June 2020, the EXCO took decision No. 2.5 to decentralise all emergency procurement of PPE's to the individual Provincial Departments.

6.1.4 National Treasury issued Instruction Note 11 of 2020/2021 dated 25 August 2020 which repealed Instruction Note 5 of 2020/2021 and instructed that Departments must comply with existing procurement procedures.

6.2 Regarding whether the Provincial Treasury issued any orders on the cancelled bid

6.2.1 The allegation that Provincial Treasury issued orders on the cancelled SCMQ2/2020-COVID bid, cannot be substantiated.

6.2.2 The bidders awarded contracts as advertised in the Tender Bulletin which the Complainant referred to, submitted quotations on SCMQ 2/2020/2021 advertised on 7 April 2020. The Complainant did not submit a quotation on this request.

7. REMEDIAL ACTION

7.1 In the light of the above findings the Office of the Public Protector will not be 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, there will be no need for monitoring.



**ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA**

DATE: 29/04/2021

Assisted by:



Mr MM Mashinini



Adv. E Cilliers



Mr MJ Seitsang