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

PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER AND IRREGULAR EXTENSION OR CANCELLATION OF CONTRACT NUMBERS GT/GDH/45/2005, GT/GDH/120/2008 AND GT/GHDSD/119/2011 AWARDED TO RORISANG TRADING CC FOR THE DISTRIBUTION OF MEDICAL SUPPLIES BY GAUTENG PROVINCIAL DEPARTMENT OF HEALTH

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EXECUTIVE SUMMARY

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

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper and irregular extensions of tender numbers GT/GDH/45/2005 and GT/GDH/120/2008 to Rorisang Trading CC (Rorisang) by Gauteng Department of Health (the Department) up until its termination on 30 June 2015.

(iii) The complaint was lodged with my office on 24 June 2013, by Mr Bekithemba Nicholas Kubeka (the Complainant), the Director of LSK Distributors (the Company).

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

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

(aa) Whether the Department irregularly extended or cancelled tender numbers GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 in favour of Rorisang;

(bb) Whether the Department or the Complainant suffered prejudice in the circumstances.

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

(vii) Key laws and policies taken into account to determine if there had been maladministration into allegations of improper and irregular extensions of tender numbers GT/GDH/45/2005 and GT/GDH/120/2008 to Rorisang Trading CC (Rorisang) up until its termination on 30 June 2015. Those were the following:

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

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

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

(d) Promotion of Administrative Justice Act (PAJA)

(e) National Treasury Regulation of 2005;

(f) National Treasury instruction note 32 of 2011;

(g) Department's SCM Policy Model, Clause 14;

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

(a) Regarding whether the Department irregularly extended or cancelled tender numbers GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 in favour of Rorisang;

(aa) The allegation that the Department improperly and irregularly extended or cancelled the above contracts in favour of Rorisang for the distribution of medical supplies is substantiated;

(bb) It is apparent from the evidence that the Department acted irregularly or unlawfully by continuously extending tender contracts number GT/GDH/45/2005, GT/GDH/120/2008 that had expired through the effluxion of time. Department further cancelled contract number GT/GHDSD/119/2011 while allowing Rorisang to continue rendering medical supplies on the other hand until 2015. These extensions constituted unlawful deviation from the envisaged normal procurement processes provided for in section 217 of the Constitution.

(cc) The only authorised exception to deviate from normal procurement process is when there existed impractical or urgent circumstances. In this case, the Department failed to show such exceptional or impractical circumstances.

(dd) Based on the evidence at hand it was neither impractical nor urgent to deviate from the normal tender processes. The extensions were a direct result of poor planning. The Department failed to adhere to section 217(1) of the Constitution, the Treasury Regulation 16A6.4, Clause 3.9 of the National Treasury Instruction note 32 of 2011} and Sections 38(1)(g) and 76(2)(e) of the PFMA and section 6(2) of PAJA.

(ee) Such failure by the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Whether the Department or the Complainant suffered prejudice in the circumstances:

(aa) The allegation that the Department or the Complainant suffered prejudice as a result of the conduct of the Department is substantiated;

(bb) The Department paid a combined total amount of R 24 314 500.00 to Rorisang for the contract extensions of the distribution of medical supplies. The costs incurred by the Department is therefore irregular since it is in breach of section 217(1) of the Constitution and in contravention of sections 1 and 51 of the PFMA, sections 6(2) and 3(1) of the Promotion of

Administrative Justice Act (PAJA) and Clause 14 of the Department's SCM Policy.

(cc) Accordingly, the conduct of the Department or its officials in respect of tender number GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 ,amounts to improper conduct in terms of section 182(1) of the Constitution and were improper and unfair as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

(dd) Such failure by the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

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

The Head of Department (HoD)

(a) Within thirty (30) working days from the date of this report, takes disciplinary steps against the all the Bid Evaluation Committee (BEC), Bid Adjudication Committee BAC) or Departmental Acquisition Council (DAC) members or any other official(s) who are still within the employ of the Department that were responsible for the unlawful extensions or cancellation of tender number GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 thereby violating the Constitution, the Treasury Regulations, National Treasury Instruction Note, PFMA,PAJA and Supply Chain Management Policy of the Department . The HoD shall further determine each member or its official that was part of the unlawful, irregular extensions or cancellation of the stated tenders/contracts before taking appropriate disciplinary steps.

(b) Within sixty (60) working days of the issuing of this report, ensure that the Department's officials who are involved in the procurement processes including all the senior management, attend a workshop on the Procurement Policy and related legal prescripts.

(c) Within sixty (60) working days from the date of this report, disclose the unauthorised, irregular as well as fruitless and wasteful expenditure to the National Treasury.

(d) Direct the CFO to amend the closing balance of the current financial statements to include the unauthorised and irregular in the 2019/2020 financial statements.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER AND IRREGULAR EXTENSION OF CONTRACT NUMBERS GT/GDH/45/2005, GT/GDH/120/2008 AND GT/GHDSD/119/2011 AWARDED TO RORISANG TRADING CC FOR THE DISTRIBUTION OF MEDICAL SUPPLIES BY GAUTENG PROVINCIAL DEPARTMENT OF HEALTH

1. INTRODUCTION

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

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to the following people to note the outcome of my investigation and implement remedial actions:

1.2.1 The Minister of the Department of Health, Dr Mkhize;

1.2.2 The Gauteng Department of Health, Acting Head of Department Prof Mkhululi Lukhele;

1.2.3 The National Department of Health, Director General Ms. MP Matsosto;

1.2.4 A copy of the report is also provided to the Complainant in terms of section 8(3) to inform him about the outcome of the investigation.

2. THE COMPLAINT

2.1 The complaint was lodged with my office on 24 June 2013 by Mr Bekithemba Nicholas Kubeka (the Complainant), the Director of LSK Distributors (the Company).

2.2 The Complainant alleged *inter alia* that:

2.2.1 The Gauteng Provincial Department of Health (the Department) advertised and awarded tender number GT/GDH/45/2005 for the distribution of medical supplies to Rorisang in 2006 for a period of two years and that the Department unlawfully extended the same tender for Rorisang;

2.2.2 In 2008, a new tender number GT/GDH/120/2008 for the distribution of medical supplies was advertised and awarded by the Department to Rorisang Trading CC in 2009 for a period of two years and that again the Department unlawfully extended the same contract tender for Rorisang;

2.2.3 In 2011, another new tender for the distribution of medical supplies with reference number GT/GHDSD/119/2011 was advertised. The Complainant submitted a bid on behalf of his company namely, LSK Distributors and he was shortlisted along with other bidders. However, this tender was cancelled by the Department without any reason being provided. Again, the Department unlawfully extended the contract tender for Rorisang.

2.2.4 In September 2012, all bid evaluations were concluded, however, no appointment was made by the Department; instead Rorisang's contract kept on being extended by the Department.

2.2.5 In brief, Rorisang's contracts with the Department started in 2006 up until 2015 due to irregular extensions by the Department. In essence Rorisang's contracts with the Department lasted for almost 10 years whilst there were other qualifying bidders, who were ignored by the Department. As a result, other companies, such as the Complainant's, were deliberately and unfairly denied an opportunity to manage the project. The Complainant is aggrieved by what he views as an irregular extension of the tender to Rorisang. According to the Complainant, this protracted extension of a tender amounts to bias and favouritism towards Rorisang. The Complainant wants the extension of the tender to Rorisang to be declared irregular, invalid and as an act of maladministration.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

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

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

3.5 In the *Economic Freedom Fighters* v *Speaker of the National Assembly and Others: Democratic Alliance* v *Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.[1] The Constitutional Court further held that: "*When remedial action is binding,*

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

compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

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

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

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

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

3.10 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70).

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

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

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

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

3.15 The Department is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector's mandate.

3.16 The jurisdiction of the Public Protector was not disputed by Department in this matter.

3.17 Regarding the exercise of my discretion in terms of section (9) to entertain matters which arose more than two(2) years from the occurrence of the incident, and in deciding what constitute '*special circumstances'*, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration ; whether I would be able to

successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident (s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalance of the past. What constitute *'special circumstances'* depends on the merits of the each case.

3.18 In terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints after two years of the date of an incident unless special circumstances exist. It is trite that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is a huge public interest in the public administration or governing of public affairs. Procurement in the public service generate huge public interest. The community, would be keen to know or enquire into the fairness of the processes followed in procuring the services or goods by public bodies.

4. THE INVESTIGATION

4.1. Methodology

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

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an

investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.

4.2. Approach to the investigation

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

4.2.1.1. What happened?

4.2.1.2. What should have happened?

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

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

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal[2] (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.3. In this particular case, the factual enquiry primarily focused on whether or not there is improper conduct and irregular extensions of tender numbers GT/GDH/45/2005 and GT/GDH/120/2008 to Rorisang Trading CC (Rorisang).

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

4.2.4. The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the Department to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been improper conduct and irregular extensions of tender numbers GT/GDH/45/2005 and GT/GDH/120/2008 to Rorisang Trading CC (Rorisang) and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Department or its officials.

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

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

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

4.3. On analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.3.1. Whether the Department irregularly extended or cancelled tender numbers GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 in favour of Rorisang;

4.3.2. Whether the Department or the Complainant suffered prejudice in the circumstances;

4.4. The Key Sources of information

Documents and Correspondence:

4.4.1 A copy of a completed complaint form from the complainant dated 24 June 2013;

4.4.2 A copy of the allegations letter dated 04 September 2013, to Mr David Selby, the Acting Director, Supply Chain Management;

4.4.3 A copy of a response letter dated 11 October 2013, signed by the former Head of Department (the HoD), Dr Hugh Gosnell addressed to the Public Protector;

4.4.4 A copy of a letter dated 30 March 2009, signed by the Director: Supply Chain Management (the SCM) addressed to the Chief Executive Officer: Mr S Lecholo;

4.4.5 A copy of a letter dated 06 April 2009, from the former HoD, Mr V Ramaano, addressed to Rorisang;

4.4.6 A copy of a letter dated 7 April 2009 from Mr Nehimane Maake, who is a representative of Rorisang;

4.4.7 A copy of a letter dated 10 October 2011 communicating the extension approval of the DAC to Dr C Mondzanga, the Chief Executive Officer (CEO) Medical Supplies Depot;

4.4.8 A copy of a letter dated 24 April 2012 from Mr D Selby, the Acting Director Supply Chain Management (SCM), to the CEO: Medical Supplies Depot advising him of the DAC's approval;

4.4.9 A copy of a letter dated 13 June 2012 from Mrs P Govender, the Acting Chief Director: SCM, addressed to Ms N Thipa, the Acting CEO: Medical Supplies Depot;

4.4.10 A copy of a letter dated 05 October 2012 from Mr Selby, addressed to Ms N Thipa;

4.4.11 A copy of a letter by the Bid Adjudication Committee (the BAC) dated 8 November 2012 from Mr Selby, addressed to Ms Thipa;

4.4.12 A copy of a letter dated 06 May 2013 from the Acting Chief Director SCM: Mr A Diljan, addressed to Ms N Thipa;

4.4.13 A copy of a notice of termination a letter dated 22 May 2015 from the Department addressed to Rorisang ;

4.4.14 A copy of the submission made by the Bid Evaluation Committee (the BEC) to the DAC dated 19 September 2012 recommending that tender number GT/GDHSD/119/2011 be awarded to LSK Distribution;

4.4.15 A copy of the minutes of the BAC meeting dated 05 November 2012;

4.4.16 A copy of the memorandum dated 10 May 2013 addressed to the Acting Chief Director of Supply Chain Management: Mr D Selby by Ms N Thipa (Ms Thipa) requesting approval of award of a tender to the recommended bidder;

4.4.17 Copy of a memorandum dated 9 July 2013 addressed to the Acting Chief Director of Supply Chain Management: Mr D Selby;

4.4.18 A copy of the allegations letter dated 05 May 2014, to Dr HE Gosnell; and

4.4.19 A copy of a letter from Prof M Lukhele, Head of Department, and Gauteng Department of Health dated 21 August 2018 responding to Section 7(9).

4.5 Legislation and other legal prescripts

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

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

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

4.5.4 Promotion of Administrative Justice Act (PAJA)

4.5.5 National Treasury Regulation of 2005;

4.5.6 National Treasury instruction note 32 of 2011;

4.5.7 Department's SCM Policy Model, Clause 14;

4.6 Case law

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

4.6.2 Public Protector vs Mail and Guardian, 2011(4) SA 420 (SCA).

4.6.3 President of the RSA vs SARFU 1999(4) SA 147(CC).

4.7 Notices issued in terms of section 7(9) of the Public Protector Act

4.7.1 The Minister of the Gauteng Department of Health, Dr Mkhize, dated 07 August 2019;

4.7.2 The Gauteng Department of Health, Acting Head of Department Prof Mkhululi Lukhele, dated 07 August 2019;

4.7.3 The National Department of Health, Director General Ms. MP Matsosto, dated 07 August 2019;

4.7.4 Mr Bandile Masuku, Member of the Executive Committee(MEC for Health in Gauteng), dated 07 August 2019;

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

5.1 Whether the Department irregularly extended or cancelled tender numbers GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 in favour of Rorisang;

Common cause issues

5.1.1 The Department awarded tender number GT/GDH/45/2005 to Rorisang for the distribution of medical supplies for a period of two (2) years commencing from 1 August 2006 to 31 July 2008 and subsequently extended the same tender beyond the stipulated two (2) year period.

5.1.2 A new tender with reference number GT/GHD/120/2008 for the distribution of medical supplies was also advertised by the Department in 2008.This tender was also awarded to Rorisang for a period of two (2) years commencing from 1 August 2009 to 31 July 2011.

5.1.3 Another tender with reference number GT/GDHSD/119/2011, for the distribution of medical supplies was also advertised on 18 November 2011 with a closing date of 9 December 2011.

5.1.4 LSK Distributors submitted a bid for tender GT/GDHSD/119/2011 and the said tender was properly evaluated, however no appointment or tender award was made by the Department.

Issues in dispute

5.1.5 The Complainant argued that the Department awarded tender number GT/GDH/45/2005 in 2006 and tender number GT/GHD/120/2008 in 2009 respectively to Rorisang for the distribution of medical supplies for a two (2) year period in each case. However, the Department unlawfully extended the same tenders for Rorisang for a period of almost ten (10) years. The Complainant contended that such contract extensions in favour of Rorisang were improper, irregular and unfair as it denied other companies an opportunity to benefit from the project.

5.1.6 The Department in a letter dated 11 October 2013, which was signed by the former Head of Department (the HoD), Dr Hugh Gosnell, explained that the first tender, GT/GHD/45/2005, was awarded to Rorisang on 1 August 2006 for a two (2) year period, valued at **R10 302 034.08**, commencing from 1 August 2006 to 31 July 2008.

5.1.7 Furthermore, the former MEC for Health, Mr Hope Papo, during a question and answer session at the Gauteng Legislature on 1 November 2013, also advised and clarified that Rorisang was awarded tender number GT/GHD/45/2005 for the distribution of medical supply in 2006 and not in 2004 as was mistakenly submitted by the Complainant earlier.

5.1.8 The evidence submitted to my office by the Department's HoD (Dr Gosnell) on 11 October 2013, further shows that tender number GT/GHD/45/2005 was awarded to Rorisang for a two (2) year period commencing from 1 August 2006 to 31 July 2008. Evidence in a tabulated form herein below indicates that this tender (GT/GHD/45/2005) was extended for twelve (12) months in favour of Rorisang as follows:

Service Provider Rorisang	Period	Start	End	Payment
Award	Two years	01 Aug 2006	31 Jul 2008	R10 302 034.08

Extension Monthly rate (461 631.24)	Six months	01 Aug 2008	31 Jan 2009	R2 769 787.44
Extension Monthly rate (477 513.97)	Six months	01 Feb 2009	31 Jul 2009	R2 865 083.82

5.1.9 The total value of the extension for tender number GT/GHD/45/2005 during the twelve (12) months period was therefore R5 634 871.26.

5.1.10 In the same letter dated 11 October 2013, Dr Gosnell placed on record that tender number GT/GHD/120/2008 was advertised on 31 August 2008. The Department further clarified that the said tender was also awarded to Rorisang for two (2) years at a value of **R12 102 720.00** commencing from 1 August 2009 to 31 July 2011. In support of this submission, the Department submitted to my office, the following documents as evidence:

a) Rorisang's bid documents under RFP 011 for tender number GT/GHD/120/2008 lodged on 30 October 2008;

b) A letter dated 30 March 2009, signed by the Director: Supply Chain Management[3] (the SCM) addressed to the Chief Executive Officer: Mr S Lecholo (the CEO) wherein the Director of SCM was communicating a message that on 23 March 2009, the Departmental Acquisition Council (the DAC) approved the awarding of tender number GT/GHD/120/2008 to Rorisang valued R12 102 720.00;

c) A letter dated 6 April 2009, from the former HoD, Mr V Ramaano, addressed to Rorisang, wherein he informed Rorisang that their bid was successful and they were awarded tender number GT/GHD/120/2008; and

[3] The name does not appear on the face of this letter. Only a signature is appended.

d) A letter dated 7 April 2009 from Mr Nehimane Maake, who is a representative of Rorisang, wherein he accepted the award of tender number GT/GHD/120/2008 commencing from 1 August 2009 to 31 July 2011.

5.1.11 The Department further clarified that tender number GT/GHD/120/2008 had a lifespan of two years commencing from 1 August 2009 to 31 July 2011. Upon the expiry date of the said tender, it was extended from 1 August 2011 to 30 September 2013 (26 months) as follows:

a) Six (6) months extension commencing from 1 August 2011 to 31 January 2012 valued at R7 000 000.00. This is evidenced by a letter dated 10 October 2011 communicating the extension approval of the DAC to Dr C Mondzanga, the Chief Executive Officer (CEO) Medical Supplies Depot;

b) Two (2) months and five (5) days extension commencing from 1 February 2012 to 5 April 2012 valued at R1 649 000.00. This is evidenced by a letter dated 24 April 2012 from Mr D Selby, the Acting Director Supply Chain Management (SCM), to the CEO: Medical Supplies Depot advising him of the DAC's approval;

c) Five (5) months extension commencing from 6 April 2012 to 31 August 2012 valued at R4 947 000.00. The DAC had approved a further extension of the contract as evidenced by the letter dated 13 June 2012 from Mrs P Govender, the Acting Chief Director: SCM, addressed to Ms N Thipa, the Acting CEO: Medical Supplies Depot;

d) Two (2) months extension of the contract from 1 September 2012 to 31 October 2012 valued at R1 649 000.00. The DAC approved a further extension as evidenced by a letter dated 5 October 2012 from Mr Selby, addressed to Ms N Thipa;

e) Three (3) months extension of the contract from 1 November 2012 to 31 January 2013 valued at R2 473 500.00. The Bid Adjudication Committee

(the BAC) approved a further extension as evidenced by a letter dated 8 November 2012 from Mr Selby, addressed to Ms Thipa; and

f) Six (6) months extension of the contract from 1 April 2013 to 30 September 2013 valued at R4 947 000.00. The decision of the BAC is evidenced by a letter dated 6 May 2013 from the Acting Chief Director SCM: Mr A Diljan, addressed to Ms N Thipa.

5.1.12 The table below reflects the breakdown of extensions of tender number GT/GHD/120/2008 from 1 August 2011 to 30 September 2013 based on the evidence supplied by Department to my office:

Service Provider Rorisang	Period	Start	End	Payment
Award	Two years	01 Aug 2009	31 Jul 2011	R12 102 720.00
Extension	Six months	01 Aug 2011	31 Jan 2012	R7 000 000
Extension Monthly 824 500.00	Two months	01 Feb 2012	05 Apr 2012	R1 649 000
Extension Monthly 824 500.00	Five months	06 Apr 2012	31 Aug 2012	R4 947 000
Extension Monthly 824 500.00	Two months	01 Sep 2012	31 Oct 2012	R1 649 000
Extension Monthly 824 500.00	Three months	01 Nov 2012	31 Jan 2013	R2 473 500
Extension Monthly 824 500.00	Two months	01 Feb 2013	31 Mar 2013	R1 649 000
Monthly 824 500.00	Six months	01 Apr 2013	30 Sep 2013	R4 947 000

5.1.13 A notice of termination in the form of a letter dated 22 May 2015 from the Department addressed to Rorisang shows that tender number GT/GDH/120/2008 was extended beyond 2013 and was only terminated on 30 June 2015.

5.1.14 The Complainant further argued that the outcome of tender number GT/GDHSD/119/2011 was not communicated and that the same tender was not awarded despite being advertised and evaluated.

5.1.15 The Department argued in its response dated 11 October 2013 to my office that tender number GT/GDHSD/119/2011 was not awarded to any service provider because the Department was re-engineering its systems.

5.1.16 Evidence at my disposal comprising of bid documents relating to tender number GT/GDHSD/119/2011, shows that thirteen (13) bids were received and further that Rorisang submitted its bid documents late after the closing date.

5.1.17 The evidence further shows that on 19 September 2012, a submission was made by the Bid Evaluation Committee (the BEC) to the DAC recommending that tender number GT/GDHSD/119/2011 be awarded to LSK Distributors for a period of two years, valued at **R23 335 202.88.**

5.1.18 The minutes of the BAC meeting dated 5 November 2012, shows that a request was made for the BAC to approve the awarding of tender number GT/GDHSD/119/2011 to LSK Distributors for a period of two (2) years however the BAC declined the request.

5.1.19 The Acting CEO: Medical Supplies: Ms N Thipa (Ms Thipa) requested, in a memorandum dated 10 May 2013 addressed to the Acting Chief Director of Supply Chain Management: Mr D Selby, that tender number GT/GHDSD/119/2011 be awarded effective from 1 July 2013 because the distribution method/model of the Depot remained unchanged by the re-engineering process.

5.1.20 Ms Thipa made another request in a memorandum dated 9 July 2013 addressed to the Acting Chief Director of Supply Chain Management: Mr D Selby in which she reiterated that tender number GT/GHDSD/119/2011 be awarded to the recommended bidder because the distribution model remained

unchanged and further that she met with the reengineering team, who were also of the view that a successful bidder should be appointed.

5.1.21 In a letter dated 16 July 2013 from Mr D Selby addressed to the BAC, also requested the BAC to approve the awarding of tender number GT/GHDSD/119/2011 to LSK Distributors for two (2) years in light of the submission made by Ms Thipa referred to above.

5.1.22 In the minutes of the BAC dated 24 July 2013, it was indicated that the BAC did not approve the awarding of tender **GT/GDHSD/119/2011**.

5.1.23 Instead, it appears that tender number GT/GHDSD/119/2011 was cancelled while tender GT/GDH/120/2008 was extended in favour of Rorisang beyond 2013 and was only terminated on 30 June 2015.

Application of the relevant legal prescripts

5.1.24 Section 217(1) of the Constitution provides as follows:

"When an organ of state in the national, provincial and local sphere of government, or any other institution identified in the national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective"

5.1.25 Upon the cessation of tender number GT/GHD/45/2005 for the distribution of medical supply through the effluxion of time, the Department ought to have already advertised for a new tender. However, the Department advertised for a new tender on 31 August 2008 which was a month after the lapse of the tender that was in place, as a result the Department extended the contract on 31 August 2008 for a further twelve (12) months because there was no new tender in place to provide for the service. Similarly with tender GT/GDH/120/2008, the Department engaged in similar extensions of the contract as indicated above.

5.1.26 These extensions seriously impeded the objectives and the spirit envisaged in section 217 of the Constitution which demands fairness and competitiveness when procuring or contracting for goods or services.

5.1.27 National Treasury Regulation of 2005, regulation 16A6.4[4] provides as follows:

"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 competitive bids must be recorded and approved by the accounting officer or accounting authority".

5.1.28 The exception to competitive bidding is applicable in instances where it is impractical to invite competitive bids or in an emergency or urgent situation[5]. The evidence at my disposal shows that, this exception does not apply to this matter as the Department only advertised the new tender on 31 August 2008 whilst the contract in place had expired on 31 July 2008.

5.1.29 The Department did not plan ahead and properly to ensure that upon the expiry of tender number GT/GHD/45/2005 through the effluxion of time, a new tender would be in place. The Department had two (2) years to plan for the succession of tender number GT/GHD/45/2005, however it failed hence Regulation 16A6.4 does not apply to these circumstances because it was never impractical nor can it be said that it was an emergency or an urgent situation. Similarly with tender GT/GDH/120/2008, the Department did not plan properly in order to procure the goods through competitive bidding as required by law.

5.1.30 National Treasury instruction note 32 of 2011 under Management of expansions or variation of orders against the original contract provides as follows:

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[4] Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the Public Finance Management Act, 1999. National Treasury Republic of South Africa March 2005

[5] www.saflii.org "Grounds for dispensing with public tender procedures in Government Contracting" [2006] PER 7

5.1.30.1 "*It is recognised that, in exceptional cases, an accounting officer or accounting authority may deem it necessary to expand or vary orders against the original contract*".

5.1.30.2 "*The absence of a prescribed threshold for the expansion or variation of orders against the original contract has, however, led to gross abuse of the current SCM system*".

5.1.30.3 "*In order to mitigate against such practices, accounting officers and authorities are directed that, from the date of this instruction note taking effect, contracts may be expanded or varied by not more than 20% or R20 million (including all applicable taxes) for construction related goods, works and/or services and 15% or R15 million (including all applicable taxes) for all other goods and/or services of the original value of the contract, whichever is the lower amount. The relevant treasuries may, however, decrease these thresholds for institutions reporting to them*".

5.1.31 Tender number GT/GHD/45/2005 was valued at R10 302 034.08 and the extension amounted to R5 634 871.26 which is approximately a 50% variation, which is in excess of the 15% variation as stipulated in 5.1.30.3 above. Similarly, with tender number GT/GDH/120/2008 which was valued at R12 102 720.00, the extension amounted to R24 314 500 from August 2011 to September 2013, which is approximately a 50% variation, in excess of the 15% variation as stipulated above.

5.1.32 Furthermore, an accounting authority, under exceptional circumstances, has the powers to expand or vary an original contract, but is required not to exceed the allowed threshold. In these circumstances, the argument put forward by the Department claiming that it was reengineering its systems, was flippant and lacked substance as the Department ought to have known that the contract was ending and could have planned ahead in terms of advertising and appointing a new service provider before the expiry of the initial contract.

5.1.33 Section 51 of Public Finance Management Act No. 1 of 1999 (the PFMA) provides for the general responsibilities of accounting authorities:—

"(1) An accounting authority for a public entity—

(a) Must ensure that public entity has and maintains—

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

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

5.1.34 In this instance, the unlawful and repeated extension of the tenders in favour of Rorisang could not be reconciled with provision of section 51(a)(iii) of the PFMA as indicated above.

5.1.35 Irregular expenditure is defined as expenditure incurred as a result of the institution procuring goods or services by other means than through competitive bids and where reasons for deviating from inviting competitive bids have not been recorded and approved by the functionary to whom the power has been delegated by the accounting officer or accounting authority. (Contravention of Treasury Regulation 16A6.4)[6].

5.1.36 XIn this case the Department extended same tenders in favour of Rorisang thereby procuring goods without engaging in competitive bids and further did so in the absence of reasons for deviating from inviting competitive bids being recorded and approved by the functionary to whom the power has been delegated by the accounting officer or accounting authority,

5.1.37 Clause 14 of the Department's SCM Policy Model provides for the following pillars of procurement:

[6] National Treasury guideline on irregular expenditure, May 2014

"14.1 value for money;

14.2 open and effective competition;

14.3 ethics and fair dealing;

14.4 accountability and reporting, and

14.5 equity".

5.1.38 The Department was aware that the contracts of Rorisang would come to an end, hence it embarked upon a competitive bidding process. But the DAC did not approve the awarding of tender number GT/GDHSD/119/2011 instead the Department repeatedly extended tender number GT/GDH/120/2008 for forty-seven (47) months.

5.1.39 Clause 14.3 of the SCM Policy, pertaining to ethics and fair dealing provides that the Department was required *"to deal with suppliers even handedly."*

5.1.40 This was not done as it is evident that Rorisang benefitted more than other potential suppliers through these repeated extensions. I am therefore unable to hold that all suppliers were dealt with even-handedly in this case.

5.1.41 Section 33 of the Constitution provides that:

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

b) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

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

5.1.43 A number of requests were made to the DAC requesting that a successful bidder be appointed in respect of the 2011 tender. The evidence shows that such requests were made on 19 September 2012; 5 November 2012; 10 May 2013; 9 and 15 July 2013 to the DAC and/or BAC to approve the awarding of

the tender, but the requests were ignored without a valid cause. Such indifference by the DAC did not accord with the above provisions of PAJA which demands procedural fairness as well as lawfulness in handling public affairs.

5.1.44 Section 6(2) of PAJA provides that a court or tribunal has power to judicially review an administrative action if:

a) "The administrator who took it:

i. was not authorised to do so by the empowering provision

ii. ...

iii. was biased or reasonably suspected of bias

b) .....

c) the action was procedurally unfair

d) .....

e) The action was taken:

a) ...

b) For an ulterior purpose or motive

c) Because irrelevant considerations were taken into account or relevant considerations were not considered

d) ...

e) In bad faith or

f) Arbitrarily or capriciously

f) The action itself:

a) contravenes the law or is not authorised by the empowering provisions

g) The action concerned consists of a failure to take a decision,

h) The exercise of the power or the performance of a function authorised by the empowering provisions in pursuance of which the administrative action was taken is so unreasonable that no reasonable person could have so exercised the power or performed the function or

i) The action is otherwise unconstitutional or unlawful"

5.1.45 Evidence traversed above shows that the Department or its officials were not authorised by any legal instrument or empowering provisions to repeatedly extend the contract of Rorisang. In the absence of any empowering legal provisions, this means that it was *ultra-vires* for any functionary of the Department to exceed his or her power by exercising power which he or she was not lawfully authorised to wield.

5.1.46 The Constitutional Court[7] made it clear that the rule against biasness applies in all types of decisions. This should be understood to include administrative decisions taken by government officials. Absolute neutrality on the part of administrative officers should be achieved in the execution of their official duties. It is common cause that the Acting Chief Director: Supply Chain Management was advised in two separate memoranda that tender number GT/GHDSD/119/2011 should be awarded to LSK Distributors with effect from 01 July 2013 because the distribution method/model of the Depot remained unchanged by the reengineering process. However, the Acting Chief Director Supply Chain Management did not heed this advice and offered no valid counter argument in response thereto. To this end, I am persuaded to believe that there is a reasonable apprehension that the Acting Chief Director: Supply Chain Management: Mr D Selby x was biased against LSK Distributors.

5.1.47 The conduct of the Department in the circumstances constitutes an administrative action as envisaged in section 1 of PAJA which is failure to make a decision when there was an obvious reason to do so. The reasons behind the non-awarding were inconceivable since tender number GT/GDH/120/2008 continued to be extended despite the re-engineering of the system being explained by the Acting CEO of Medical Supplies Depot.

5.1.48 Regulation 9.1.1 of the National Treasury Regulation of 2005, based on section 38(1)(g) read with section 76(2)(e) of the PFMA provides as follows:

"*The accounting officer of an institution must exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure,*

[7] President of the RSA vs SARFU 1999(4) SA 147(CC) para 35

and must for this purpose implement effective, efficient and transparent processes of financial and risk management"[8].

5.1.49 Tender number GT/GDH/120/2008 was awarded to Rorisang for a period of two (2) years commencing from 1 August 2009 to 31 July 2011 however, Rorisang continued to offer its services and was paid until June 2015 for a contract that had expired in July 2011. Therefore the payments made to Rorisang resulting from the repeated extensions constituted irregular expenditure, which should have been apprehended by the Accounting Authority – (Dr H Gosnell)).

5.1.50 **Responses received from (insert names of people here) to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994**

5.1.51 On 07 August 2019, I signed off and subsequently issued to the current HoD Prof M Lukhele, Ms MP Matsoso: Director General in the Department of Health, MEC for Health in Gauteng: Dr B Masuku and Minister of Department of Health Dr Z Mkhize a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond to the allegations against the Department , particularly in relation to the role they played in this matter. Section 7(9)(a) of the Public Protector Act provides that: -

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

5.1.52 I now turn to consider the responses submitted regarding the section 7(9) notices. I have however, not dealt with each and every aspect raised in the responses but focused rather on what I deemed to be relevant to the issues, that should not be misconstrued as an admission of any kind of the averments contained therein.

[8] Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the Public Finance Management Act, 1999. National Treasury Republic of South Africa March 2005

5.1.53 A response was received by my office on 21 August 2019, from Prof M Lukhele (Prof Lukhele), the current Gauteng Head of Department of Health.

5.1.54 In his response Prof Lukhele admitted that the Department extended contract number GT/GDH/45/2005 which was awarded to Rorisang for the distribution of medical supplies.

5.1.55 He also admitted that in 2008, a new tender number GT/GDH/120/2008 for the distribution of medical suppliers was advertised and awarded by the Department to Rorisang Trading CC in 2009 for a period of two (2) years and again the Department extended the contract without following all due processes.

5.1.56 A response was received by my office on 28 August 2019, from Ms MP Matsoso the Director General in the Department of Health.

5.1.57 In her response, Ms Matsoso advised that the complaint investigated by my office is a matter for the Gauteng Provincial Department of Health and as such the Section 7(9) notice should be sent to Prof M Lukhele, the Acting Head of Department.

5.1.58 She further submitted that issues of procurement in a hospital (health facilities) are the responsibilities of the Provincial Departments of Health and in this regard, the Gauteng Department of Health. Furthermore, the Head of Department or anyone acting in that capacity is the accounting officer in terms of the Public Finance Management Act, 1999 (Act No 1 of 1999) (PFMA).

5.1.59 Ms Matsoso further went to clarify Section 36 (2) of the PFMA which stipulates that *"the head of Department must be the accounting officer of the Department".*

She further quoted Section (6) of the PFMA which define *the Department as a National of Provincial Department or a National or Provincial government component. Therefore the head of the Provincial Department of Health in Gauteng is the accounting authority on his own right and is therefore accountable for whatever happens in his Department.*

5.1.60 In brief, the Department's response to my notice as made by the current HoD Prof Lukhele is in agreement with my findings in as far as they relate to the unlawful extensions of contracts in favour of Rorisang.

Conclusion

5.1.61 Taking into account the evidence and considerations referred to above, I am persuaded to conclude that the contract extensions for Rorisang by the Department amounted to an unlawful deviation from the prescribed normal procurement process, and bias in order to benefit one supplier namely, Rorisang.

5.1.62 The Department itself also conceded that the Department extended Rorisang contract number GT/GDH/45/2005 and GT/GDH/120/2008 without following due processes. The Department further failed to award tender GT/GDHSD/119/2011 despite due procurement process having been done. Instead, Rorisang was allowed to continue rendering medical supplies the Department until 2015.

5.1.63 Responding to my section 7(9) notice, the submission of the Department by Prof Lukhele is essentially in agreement with my main findings.

5.2 Regarding whether the Department and Complainant suffered prejudice as a result of the conduct of the Department in the circumstances:

Common Cause Issues

5.2.1 Rorisang was awarded tender number GT/GHD/45/2005 for the distribution of medical supplies and the said tender was extended beyond the stipulated two (2) year period.

5.2.2 Tender number GT/GHD/120/2008 for the distribution of medical supplies was advertised and awarded to Rorisang and it was similarly extended beyond the stipulated two (2) year period as well.

5.2.3 Another tender number GT/GDHSD/119/2011 for the distribution of medical supplies was advertised on 18 November 2011, with a closing date of 9 December 2011.

5.2.4 LSK Distributors submitted a bid for the abovementioned tender namely, GT/GDHSD/119/2011 and the said tender was evaluated however no appointment was made, despite the evaluation having found LSK to have been the best bidder.

5.2.5 The Department did not appoint and/or award tender number GT/GDHSD/119/2011 but extended the existing tender number GT/GHD/120/2008 until 2015.

Issues in Dispute

5.2.6 The Complainant argued that his Company, LSK Distributors submitted a bid for tender number GT/GDHSD/119/2011 and the said tender was evaluated however no appointment was made.

5.2.7 The Complainant further argued that the Department instead of appointing a new service provider opted to extend the existing contract *ad infinitum* thereby unfairly denying him an opportunity to benefit from the project.

5.2.8 The Department however argued that they did not award tender number GT/GDHSD/119/2011 because they were re-engineering their services at the Medical Supplies Depot.

5.2.9 The Acting CEO of the Medical Supplies Depot: Ms N Thipa (Ms Thipa) recommended that tender number GT/GHDSD/119/2011 be awarded to LSK Distributors effective from 1 July 2013, as the distribution method/model of the

Depot remained unchanged by the re-engineering process. However, SCM did not award the tender to LSK Distributors notwithstanding a fair evaluation and adjudication process.

5.2.10 Tender number GT/GHD/120/2008 had a lifespan of two (2) years commencing from 1 August 2009 to 31 July 2011. The said tender, was extended by the Department from 1 August 2011 to 30 September 2013 (26 months). Rorisang was appointed in 2009 and continued providing the service for another two (2) years after the expiration date of the tender on 31 July 2011.

Application of the relevant legal prescripts

5.2.11 Section 217(1) of the Constitution provides as follows:

"*When an organ of state in the national, provincial and local sphere of government, or any other institution identified in the national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective*".

5.2.12 The conduct of the Department in the non-awarding of tender number (GT/GDHSD/119/2011) was not in line with the spirit of fairness, equity, transparency and competitiveness as envisaged by section 217 of the Constitution. The Department continued to repeatedly extend a contract when there were no justifiable grounds not to award the tender to LSK Distributor who was recommended as a successful bidder by the BEC. The reasons forwarded, namely of re-engineering were fully responded to and being inconceivable and did not prohibit the awarding of the tender to a recommended bidder. As a result such reasons did not make sense since the contract was nonetheless extended in favour of Rorisang despite the process of re-engineering.

5.2.13 Section 51 of the PFMA outlines the general responsibilities of accounting authorities as follows.—

"(1) An accounting authority for a public entity—

(a) must ensure that that public entity has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

b) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

5.2.14 The evidence shows that tender number (GT/GDHSD/119/2011) was advertised, evaluated however the DAC/BAC failed to make a decision initially raising issues of re-engineering of their systems as a reason for not awarding, however they continued to extend the existing contract without appointing a new service provider who could have provided the service. It is patently clear that there was a need for medical supplies which was achieved by continuously extending the contract of Rorisang instead of appointing another service provider as recommended by the BEC.

5.2.15 In the circumstances, the non-awarding of tender number GT/GHDSD/119/2011 to the recommended bidder who happens to be the Complainant, cannot be said to have been fair, transparent, equitable and competitive as envisaged in the subsection. This inference is to be drawn from the factual evidence which showed that the Acting CEO of the Medical Supplies Depot recommended that the tender be awarded to LSK Distributors as the distribution method/model of the Depot remained unchanged by the re-engineering process but still the tender was not awarded thereby prejudicing the Complainant.

5.2.16 In essence, if the distribution method/model of the Depot remained unchanged by the re-engineering process there was no need for the Department to extend Rorisang's contract but appoint the recommended bidder. The reasons for not awarding or delaying to award fell away and could no longer apply hence the conduct of the Department was prejudicial;

5.2.17 Section 1 of the PFMA defines "irregular expenditure" as expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

5.2.18 The continuous extensions of the Rorisang contracts were made in contravention of the PFMA. Inevitably, such conduct by the Department resulted in irregular expenditure to the finances of the Department as defined above.

5.2.19 The Department's Supply Chain Management (SCM) Policy Model, clause 14 provides for pillars of procurement. The Department was aware that the contracts of Rorisang would come to an end hence they embarked upon a competitive bidding process but the DAC/BAC at the Department did not approve the awarding of tender number GT/GDHSD/119/2011 instead they repeatedly extended tender number GT/GDH/120/2008 for forty seven (47) months which is not in line with Clause 14.3 of the Policy which pertains to ethics and fair dealing. The non-appointment of a new service provider was unfair and had an adverse effect on the Complainant and all service providers who participated in the tender process.

5.2.20 The Department is required to "*deal with suppliers even handedly*". This was not done as it is evident that Rorisang benefitted more than the other potential suppliers through these unfair repeated extensions. This uneven handed conduct and bias caused the Complainant prejudice, although the Complainant did not suffer any actual loss, he was however prejudiced by the Department's failure to make an appointment especially taking into account that the BEC recommended his Company as the successful bidder.

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

5.2.22 A number of requests/memo were made to the DAC requesting that a successful bidder be appointed. The evidence shows that such requests were

made on 19 September 2012, 5 November 2012, 10 May 2013, 09 and on 15 July 2013 to the DAC/ BAC respectively to approve the awarding of the tender however the requests were not met favourably.

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

5.2.24 A response was received by my office on 21 August 2019, from Prof M Lukhele (Prof Lukhele), the Gauteng Head of Department of Health.

5.2.25 In his response Prof Lukhele conceded that the Department indeed cancelled tender number GT/GHDSD/119/2011 for the distribution of medical supplies which was advertised but the cancellation was due to the re-engineering process which the Department was undertaking.

5.2.26 Prof Lukhele argued that it was necessary to cancel the tender and re advertise it with new specifications due to changed circumstances and that it is permissible in terms of the Implementation Guide Paragraph 15 of the Preferential Procurement Regulations, 2011 pertaining to the Preferential Procurement Policy Framework, Act 5 of 2000.

5.2.27 It was also indicated by Prof Lukhele that in September 2012, all the bid evaluations were concluded however, no appointment was made by the Department instead Rorisang`s contract kept on being extended. He further advised that Complainant was not in any way prejudiced by the non-awarding of the tender as the Bid Evaluation Committee (BEC) only recommends the deserving or highest bidder to the Bid Adjudication Committee (BAC) for the final awarding of the tender and therefore the tender was not awarded to any supplier.

5.2.28 With regards to the allegations of the protracted extensions of the tender being biased towards Rorisang, Prof Lukhele denied that the extensions of the tender were biased to Rorisang but averred that the extensions had to happen as the Department was not ready to have a contract in place due to ineffective planning

for the supply processes to start on time and also due to the re-engineering process.

5.2.29 In support of his response Prof Lukhele submitted a comparison of advertisements of the tenders which was advertised in 2011 and 2014 respectively.

5.2.30 It is worth noting that despite the re-engineering process that the Department was undertaking, the Department ought to have included all the required tender specifications in the tender before the tender was advertised to avoid fruitless and wasteful expenditure in the advertisement of a tender which was never awarded.

5.2.31 The arguments raised by Dr Lukhele regarding the Department not being ready to have a contract in place due to ineffective planning for the supply processes to start on time do not necessarily warrant to be intermittently discussed further herein, save to say that they do not move this issue forward and as a result stand to be rejected. However, this does not necessarily indicate that due regard was not given to submissions submitted by the Department but such arguments cannot be regarded as superseding my preliminary findings. Instead, they remain unpersuasive. I am inclined to believe that there was indeed severe prejudice to the complainant as he was the recommended bidder to the 2011 tender. Furthermore, the protracted extensions with heavy financial implications caused severe prejudice to the Department's finances.

5.2.32 In the light of the above extrapolated evidence, I am therefore inclined to accept the version of the Complainant.

5.2.33 A response was received by my office on 28 August 2019, from Ms MP Matsoso the Director General in the Department of Health.

Conclusion

5.2.34 In the absence of any lawful, reasonable and justifiable reasons, I am persuaded to accept that the extensions of Rorisang's contract in respect of tender number GT/GDH/120/2008 were unfair, biased and arbitrary. Similarly the decision not to award contract number GT/GDHSD/119/2011 to LSK Distributors was without valid legal or factual grounds because the distribution model never changed in the Department. In the light of the above extrapolated evidence, I am therefore inclined to accept the version of the Complainant.

5.2.35 It should however be noted that the evidence in my possession indicate that tender number GT/GHD/45/2005 awarded to Rorisang terminated on 31 July 2008. The tender was subsequently extended from 1 August 2008 and terminated on 31 July 2009 and a new tender number GT/GDH/120/2008 was later awarded to Rorisang on 1 August 2009. Therefore the tender number GT/GHD/120/2008 was not awarded in 2004 as erroneously alleged by the Complainant in his original complaint to my office.

6 FINDINGS

Having carefully examined the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been complied with, I make the following adverse findings against the Department:

6.1 Regarding whether the Department irregularly extended or cancelled tender numbers GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 in favour of Rorisang;

6.1.1 The allegation that the Department improperly and irregularly extended or cancelled the above contracts in favour of Rorisang for the distribution of medical supplies is substantiated;

6.1.2 It is apparent from the evidence that the Department acted irregularly or unlawfully by continuously extending tender contracts number GT/GDH/45/2005, GT/GDH/120/2008 that had expired through the effluxion of time. Department further cancelled contract number GT/GHDSD/119/2011 while allowing Rorisang to continue rendering medical supplies on the other hand until 2015. These extensions constituted unlawful deviation from the envisaged normal procurement processes provided for in section 217 of the Constitution.

6.1.3 The only authorised exception to deviate from normal procurement process is when there existed impractical or urgent circumstances. In this case, the Department failed to show such exceptional or impractical circumstances.

6.1.4 Based on the evidence at hand it was neither impractical nor urgent to deviate from the normal tender processes. The extensions were a direct result of poor planning. The Department failed to adhere to section 217(1) of the Constitution, the Treasury Regulation 16A6.4, Clause 3.9 of the National Treasury Instruction note 32 of 2011} and Sections 38(1)(g) and 76(2)(e) of the PFMA and section 6(2) of PAJA.

6.1.5 Such failure by the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Whether the Department or the Complainant suffered prejudice in the circumstances:

6.2.1 The allegation that the Department or the Complainant suffered prejudice as a result of the conduct of the Department is substantiated;

6.2.2 The Department paid a combined total amount of R 24 314 500.00 to Rorisang for the contract extensions of the distribution of medical supplies. The costs incurred by the Department is therefore irregular since it is in breach of section 217(1) of the Constitution and in contravention of sections 1 and 51 of the

PFMA, sections 6(2) and 3(1) of the Promotion of Administrative Justice Act (PAJA) and Clause 14 of the Department's SCM Policy.

6.2.3 Accordingly, the conduct of the Department or its officials in respect of tender number GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 amounts to improper conduct in terms of section 182(1) of the Constitution and were improper and unfair as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

6.2.4 Such failure by the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

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

The Head of Department (HoD)

7.1.1 Within thirty (30) working days from the date of this report, takes disciplinary steps against the all the Bid Evaluation Committee (BEC), Bid Adjudication Committee BAC) or Departmental Acquisition Council (DAC) members or any other official(s) who are still within the employ of the Department that were responsible for the unlawful extensions or cancellation of tender number GT/GDH/45/2005, GT/GDH/120/2008 and GT/GHDSD/119/2011 thereby violating the Constitution, the Treasury Regulations, National Treasury Instruction note, PFMA,PAJA and Supply Chain Management Policy of the Department The HoD shall further determine each member or its official that was part of the unlawful, irregular extensions or cancellation of the stated tenders/contracts before taking appropriate disciplinary steps.

7.1.2 Within sixty (60) working days of the issuing of this report, ensure that the Department's officials who are involved in the procurement processes including all the senior management, attend a workshop on the Procurement Policy and related legal prescripts.

7.1.3 Within sixty (60) working days from the date of this report, disclose the unauthorised, irregular as well as fruitless and wasteful expenditure to the National Treasury.

7.1.4 Direct the CFO to amend the closing balance of the current financial statements to include the unauthorised and irregular in the 2019/2020 financial statements.

8 MONITORING

8.1 The HoD should submit a progress report comprising of the enforcement of the abovementioned remedial actions to my office within thirty (30) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above were implemented.

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

ADV. BUSISIWE MKHWEBANE

PUBLIC PROTECTOR OF THE

REPUBLIC OF SOUTH AFRICA

DATE: 16/09/2019