

**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 A COMPLAINT OF ALLEGED UNDUE
DELAY AND MALADMINISTRATION BY THE SOUTH AFRICAN SOCIAL SECURITY
AGENCY IN THE PROCUREMENT OF SERVICES FOR THE DISTRIBUTION OF**

FOOD PARCELS IN THE SOCIAL RELIEF OF DISTRESS PROGRAMME IN SIX PROVINCES

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EXECUTIVE SUMMARY

- (i) This is the report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- (ii) The report communicates the findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of undue delay and maladministration by the South African Social Security Agency (SASSA) in the procurement of services for the distribution of food parcels in the social relief of distress programme in six provinces.
- (iii) The complaint was lodged by Adv Paul Hoffman (Complainant), of the Institute for Accountability in South Africa, on 21 July 2020.
- (iv) In the main, the Complainant alleged that:
 - (a) SASSA advertised a tender for the appointment of new service providers for the distribution of food parcels for the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape provinces, from 14 June 2019 to 5 July 2019, but that the tender was subsequently cancelled by SASSA, as a result of technical problems.
 - (b) SASSA failed to finalise the tender process towards the end of 2019 and the tender was only re-advertised on 17 January 2020.

- (c) This obligated SASSA to request the previously appointed service providers to temporarily extend their services in the said provinces for a period of three months, i.e. for the period 01 September 2019 until the end of November 2019.
- (d) When it became apparent that the tender process was delayed, SASSA approached the National Treasury for a deviation in the tender process to temporarily contract service providers for another 6 months, whilst finalising the new tender process. The appointment of these service providers were approved by National Treasury, but were only concluded by SASSA in April 2020 and only for a three month period.
- (e) SASSA thus distributed no food parcels in the six provinces from November 2019 to March 2020.
- (f) The appointed service providers were stuck with huge stock piles of food in warehouses, due to the uncertainty about the extension of their contracts.
- (g) SASSA therefore failed to deliver services and the relief of social distress programme, as a large number of households were left without food parcels during a critical time.
- (h) In essence, the Complainant alleged that the failure or undue delay by SASSA in delivering food parcels to the poor and destitute in the six provinces *from November 2019 to March 2020 was improper, constitutes maladministration and caused prejudice.*
- (v) **Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:**

- (a) Whether there was undue delay by SASSA in awarding new contracts to service providers for the distribution of food parcels in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape provinces, resulting in a failure to distribute food parcels in the six provinces during the period November 2019 to March 2020, and if yes, whether such conduct was improper, constitutes maladministration and caused prejudice.
- (vi) The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Complainant and SASSA, an analysis of the relevant documentation and information obtained during the investigation and consideration and application of the relevant laws and prescripts.
- (vii) Having considered the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by SASSA, the Public Protector makes the following findings:
- (a) **Whether there was undue delay by SASSA in awarding new contracts to service providers for the distribution of food parcels in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape provinces, resulting in a failure to distribute food parcels in the six provinces during the period November 2019 to March 2020, and if yes, whether such conduct was improper, constitutes maladministration and caused prejudice.**
- (aa) The allegation that there was undue delay by SASSA in awarding new contacts to service providers for the distribution of food parcels in Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, resulting in a failure to distribute food parcels in

the four provinces during the period November 2019 to March 2020, is substantiated.

- (bb) The allegation that SASSA's conduct was improper, constitutes maladministration and caused prejudice, is also substantiated.
- (cc) There was a lack of proper planning to execute the bid evaluation and adjudication processes in respect of Bid no 08/19/GA, the closing date of which was 5 July 2019, which was aggravated by the lack of proper internal communication between Supply Chain Management (SCM), the Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC) with regards to who was responsible to extend the validity period of the bid.
- (dd) The fairness in the bidding process was compromised by the fact that SASSA gave inadequate time for bidders to respond to the extension of the 90 days validity period of bids. The request to agree to an extension was only sent to the bidders hours before the bid would expire. This was not in line with the constitutional imperatives of fairness and competitiveness as contemplated by section 217 of the Constitution, regulation 16A3.2 of the Treasury Regulations, section 1(a) of the Policy and the Guide.
- (ee) The compromised bidding process eventually culminated in the delay of the distribution of food parcels in the six provinces for a period of five months, which prejudiced the recipients thereof.
- (ff) SASSA incurred financial losses in terms of accommodation for two months and subsistence and travel allowances for nine BEC members at the St Georges Hotel, as well as transport costs to transport the tender documents from SASSA Head Office to the St Georges Hotel.

6.1.1 (gg) SASSA's conduct accordingly constitutes undue delay as envisaged in section 182(1) of the Constitution and in terms of section 6(4)(a)(ii) of the Public Protector Act.

(vii) The appropriate remedial action that Public Protector intends taking in terms of section 182(1)(c) of the Constitution is as follows:

The CEO of SASSA to:

- (a) Take the appropriate steps to ensure that all the SASSA officials involved in SCM processes, including members of the BEC's and BAC's are trained on the relevant provisions of section 217 of the Constitution, the PFMA, the Treasury Regulations, the Policy, the relevant Treasury Guidelines and Instructions and the role of each official in the SCM process, within 90 days from the date of this report of the Public Protector;
- (b) Initiate disciplinary action in accordance with the recommendations made in the internal investigation report, within 60 days from the date of this report.
- (c) Within 60 days from the date of this report, disclose the financial loss incurred by SASSA to National Treasury;
- (d) Submit a report on the implementation of the remedial action taken in paragraphs a and b to the Minister for Social Development and the Acting Director-General of the Department of Social Development within 60 days from the date of this report.

REPORT ON AN INVESTIGATION INTO A COMPLAINT OF ALLEGED UNDUE DELAY AND MALADMINISTRATION BY THE SOUTH AFRICAN SOCIAL SECURITY AGENCY IN THE PROCUREMENT OF SERVICES FOR THE DISTRIBUTION OF FOOD PARCELS IN THE SOCIAL RELIEF OF DISTRESS PROGRAMME IN SIX PROVINCES

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 8(1) and 8(3) of the Public Protector Act to the following persons to inform them of the outcome of my investigation:
- 1.2.1 Ms Lindiwe Zulu, the Minister for Social Development:
- 1.2.2 Ms BJ Memela Khambula, Chief Executive Officer (CEO) of the South African Social Security Agency (SASSA).
- 1.2.3 Mr Linton Mchunu, the Acting Director General for Social Development
- 1.2.4 A copy of the report is also provided to Adv Paul Hoffman, who lodged the complaint, to inform him about the outcome of the investigation.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector South Africa (PPSA) on 09 July 2020 by Adv Paul Hoffman SC (Complainant), the Director of the Institute for Accountability in South Africa.

2.2 In the main, the Complainant alleged that:

2.2.1 SASSA advertised a tender for the appointment of new service providers for the distribution of food parcels for in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape provinces, from 14 June 2019 to 5 July 2019, but that the tender was subsequently cancelled by SASSA, as a result of technical problems.

2.2.2 SASSA failed to finalise the tender process towards the end of 2019 and the tender was only re-advertised on 17 January 2020.

2.2.3 This obligated SASSA to request the previously appointed service providers to temporarily extend their services in the said provinces for a period of three months, i.e. for the period 01 September 2019 until the end of November 2019.

2.2.4 When it became apparent that the tender process was delayed, SASSA approached the National Treasury for a deviation in the tender process to temporarily contract service providers for another 6 months, whilst finalising the new tender process. The appointment of these service providers were approved by National Treasury in January 2020, but were only concluded by SASSA in April 2020 and only for a three month period.

2.2.5 SASSA thus distributed no food parcels in the six provinces from November

2019 to March 2020.

- 2.2.6 The appointed service providers were stuck with huge stock piles of food in warehouses, due to the uncertainty about the extension of their contracts.
- 2.2.7 SASSA therefore failed to deliver services in the relief of social distress programme, as a large number of households were left without food parcels during a critical time.
- 2.2.8 In essence, the Complainant alleged that the failure or undue delay by SASSA in delivering food parcels to the poor and destitute in the six provinces from November 2019 to March 2020 was improper, constitutes maladministration and caused prejudice.

3. POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides that:

“The Public Protector has the power as regulated by national legislation –

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.”

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

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

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

*“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*²

3.5 In the above-mentioned constitutional matter, Mogoeng CJ, stated amongst other things the following, when confirming the powers of the Public Protector:

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

² *Supra* at para [73].

- 3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.5.2 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);
- 3.5.3 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 the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);
- 3.5.4 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);
- 3.5.5 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);
- 3.5.6 The Public Protector's power to take 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);

- 3.5.7 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 the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a);
- 3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d); and
- 3.5.9 “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).
- 3.6 In the matter of the *President of the Republic of South Africa vs Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows, when confirming the powers of the Public Protector:
- 3.7 The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the constitution (para 71);
- 3.8 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);

- 3.9 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):
- a) Conduct an investigation;
 - b) Report on that conduct and
 - c) To take remedial action;
- 3.10 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);
- 3.11 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105);
- 3.12 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108); and
- 3.13 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).
- 3.14 The SASSA 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.
- 3.5 The Public Protector's jurisdiction to investigate the allegations was not disputed by SASSA.

4. THE INVESTIGATION

4.1 Methodology

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

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.

4.2 Approach to the Investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong and what action should be taken?

- 4.2.2 In terms of the guidelines issued and principles laid down by the Courts³ the Public Protector is not entitled to be passive, supine and static in her approach when conducting an investigation. The Courts emphasised that the Public Protector, as an investigator, is expected to do more than merely to weigh what is placed before him/ her and make a decision in favour of the party that produces more evidence. He/ she is expected and is under a duty to actually look for evidence either way. Where an investigation is required, it should be conducted as comprehensively as possible, in order to inspire public confidence that the truth has been discovered, that his/ her reports are accurate, meaningful and reliable, and that the remedial action that he/ she takes is appropriate.
- 4.2.3 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 how SASSA managed the contract with food parcel service providers
- 4.2.4 The enquiry regarding what should have happened, focuses on the law and the unwritten legal principles and general principles of good governance, that inform the legal and constitutional responsibilities of SASSA to properly manage the relationship and obligations to the parties involved in terms of its contractual commitment, relevant prescripts, as well the Constitutional norms and standards applicable to public authority, even when it is engaged in what could primarily be regarded as activities of a commercial nature.

3 In matters such as *Public Protector v Mail & Guardian Ltd* [2011] ZASCA 108; 2011 4 SA 420; *Democratic Alliance v Public Protector*; *Council for the Advancement of the South African Constitution v Public Protector* (11311/2018; 13394/2018) [2019] ZAGPPHC 132

4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and/or maladministration, where possible and appropriate.

4.2.6 The investigation process included correspondence with the Complainant and SASSA, an analysis of the relevant documentation and information obtained during the investigation and consideration and application of the relevant laws and prescripts

4.3 Based on the analysis of the complaint the following issue was identified to inform and focus on during the investigation:

4.3.1 Whether there was undue delay by SASSA in awarding new contracts to service providers for the distribution of food parcels in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape provinces, resulting in a failure to distribute food parcels in the six provinces during the period November 2019 to March 2020, and if yes, whether such conduct was improper, constitutes maladministration and caused prejudice.

4.4 The Key Sources of information

4.4.1 Documents

4.4.2 A newspaper article from Amabhungane, dated 09 July 2020, titled "*What happened to the SASSA food parcels?*"

4.4.3 An internal investigation report submitted by SASSA, titled' *INVESTIGATION REGARDING THE PROCESS FOLLOWED IN THE EXTENSION OF THE VALIDITY PERIOD FOR THE ISSUING AND SUPPLY OF SOCIAL RELIEF OF DISTRESS (SRD) PARCELS FOR THE EASTERN CAPE, GAUTENG,*

*KWA-ZULU NATAL, LIMPOPO, MPUMALANGA AND WESTERN CAPE
REGIONS FOR A PERIOD OF FOUR YEARS: SASSA 08/19/GA.”*

4.4.4 Correspondence:

- 4.4.4.1 Letter of complaint , Adv Paul Hoffman, dated 09 July 2020;
- 4.4.4.2 SASSA letter to National Treasury, dated 31 October 2019;
- 4.4.4.3 National Treasury letter to SASSA, dated 07 September 2020;
- 4.4.4.4 SASSA response to PPSA, dated 18 November 2020;
- 4.4.4.5 National Treasury letter to SASSA, dated 22 November 2020 ;
- 4.4.4.6 SASSA letter to National Treasury, dated 19 December 2020;
- 4.4.4.7 National Treasury letter to SASSA, dated 31 January 2020;
- 4.4.4.8 SASSA response to PPSA, dated 17 March 2021; and
- 4.4.4.9 SASSA response to PPSA, dated 12 May 2021.

4.5 Legislation and other legal prescripts

- 4.5.1 The Constitution of the Republic of South Africa, 1996;
- 4.5.2 The Public Protector Act, 23 of 1994;
- 4.5.3 The Public Finance Management Act 1 of 1999 (PFMA);
- 4.5.4 The Treasury Regulations;
- 4.5.5 Supply Chain Management Guide For Accounting Officers / Authorities issued by National Treasury in 2004;
- 4.5.6 The South African Social Security Agency Supply Chain Management Policy, 2016 (Policy) and
- 4.5.7 Social Assistance Act 59 of 1992

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). X*

4.6.2 *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017).*

4.7 Notices issued in terms of section 7(9) of the Public Protector Act, 23 of 1994.

4.7.1 A notice was issued in terms of section 7(9) of the Public Protector Act to the CEO of SASSA, who responded on 23 August 2021.

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 there was undue delay by SASSA in awarding new contracts to service providers for the distribution of food parcels in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape provinces, resulting in a failure to distribute food parcels in the six provinces during the period November 2019 to March 2020, and if yes, whether such conduct was improper, constitutes maladministration and caused prejudice.

Common cause issues

5.1.1 From the information and evidence provided to the PPSA by SASSA during the investigation, it is common cause that the tender for the appointment of

service providers for the supply of social relief of distress in the form of food parcels for a period of four (4) years in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape was advertised by SASSA under Bid number 04/19/GA on the e-Tender Publication Portal on 26 April 2019.

- 5.1.2 The tender had a closing date of 28 May 2019, and was accompanied by a detailed project plan, which would have ensured that the evaluation and awarding of the tender would take place upon the expiration of the earlier contracts, at the end of August 2019.
- 5.1.3 It is not in dispute that a malfunction in the e-Tender portal occurred in the period 03 to 20 May 2019. This was not within the control of SASSA. It was decided to re-advertise the tender to ensure that prospective tenderers all had an equal and fair opportunity to respond to the tender. The tender was re-advertised on 14 June 2019 in the Government Tender Bulletin as bid 08/19/GA, with the new closing date as 5 July 2019.
- 5.1.4 According to SASSA, the bid evaluation process commenced on 5 August 2019, subsequent to the completion of all administrative processes related to the bid process.
- 5.1.5 A total of 2708 bid proposals were received and had to be evaluated by the Bid Evaluation Committee (the BEC).
- 5.1.6 SASSA was unable to timeously deal with the number of bids received and it was clear that the bid validity period of 90 days would expire on Saturday 5 October 2019.

- 5.1.7 SASSA decided on Friday 4 October 2019 to approach all bidders, requesting an agreement to the extension of the bid validity period. This was done by way of an electronic mail that was sent to all bidders. Bidders were requested to respond to this request by Saturday 5 October 2019, i.e. the next day.
- 5.1.8 An audit of the feedback received on the request for an extension of the bid validity period revealed that only 825 bidders responded by the closing date given (5 October 2019), 1160 bidders responded after the closing date (between 08 October and 18 October 2019) and 286 emails were undelivered. The difference of 437 unaccounted bidders were as a result of a situation where one bidder submitted bid proposals for more than one region/province.
- 5.1.9 The BEC submitted the report with recommendations of all bidders who met the functionality requirements to the Bid Adjudication Committee (the BAC) on 24 October 2019.
- 5.1.10 On 8 November 2019, SASSA approached the National Treasury, requesting advice as to whether the process that was followed (giving bidders only a day to respond to the request for the extension of the bid validity period, was fair, or whether it should be regarded as an irregular process.
- 5.1.11 The National Treasury responded on 22 November 2019, advising SASSA to again advertise the bid for a shorter period and to finalise the process as a matter of urgency. SASSA then cancelled Bid 08/19/GA
- 5.1.12 Subsequently, in a letter dated 19 December 2019, SASSA requested approval from the National Treasury to deviate from a competitive bidding process and proposed that SASSA be allowed to source quotations for the

supply and issuing of food parcels for a period of six (6) months, from the list of service providers who qualified in terms of functionality during the evaluation process of Bid 08/19/GA. (This request was lodged, since the "closed" period for advertising tenders from 15 December 2019 to 15 January 2020, meant that the tender could only be re-advertised on 17 January 2020, when the Government Printing Works re-opened.)

- 5.1.13 On 31 January 2020 National Treasury approved the request by SASSA for a deviation and the appointment of service providers for a period of six months using a quotation process.
- 5.1.14 The approval date however left SASSA with only five months left for the distribution of food parcels.
- 5.1.15 SASSA again sought clarity on the time frames from the National Treasury, as the processes of Requests for Quotations (RFQ), closing and evaluation of quotations, as well as adjudicating and awarding of successful service providers had to be concluded.
- 5.1.16 The time spent on the above processes accounts to SASSA deliberating the matter from 03 February 2020 until 20 February 2020. Letters to bidders were drafted during 21 to 25 February 2020 and sent to them on 26 February 2020. The closing date was determined as 28 February 2020.
- 5.1.17 On 3 March 2020, SASSA followed a RFQ process to source quotations from the bidders who had passed the functionality test during the evaluation process followed from August to October 2019. The suppliers were appointed from 30

March to 6 April 2020 for the remaining 4 month period approved by National Treasury (end July 2020).

- 5.1.18 SASSA subsequently took a strategic decision not to continue with the provision of social relief through food parcels and therefore cancelled the original tender. This decision was confirmed in a letter addressed to National Treasury dated 14 August 2020. National Treasury supported the cancellation of the tender for food parcels in their letter to SASSA dated 07 September 2020.

Issues in dispute

- 5.1.19 Mr Petrus Mabula, the Senior Manager: SCM Acquisition Management of SASSA, approached the Office of the Chief Procurement Officer at the National Treasury on 31 October 2019, “requesting advice from National Treasury on whether the process of giving the bidders only a day to respond to the request to extend the bid validity period will not render the whole process to be irregular taking into account the fact that the emails requesting to extend the bid validity period were only sent to bidders after 06:00 pm on Friday (04 October 2019) and the bidders were expected to respond by Saturday (05 October 2019).”
- 5.1.20 In his response, Mr B Duiker, Chief Director: SCM Governance, Monitoring and Compliance of the National Treasury stated that the short notice given to bidders compromised the fairness of the bidding process and was in contravention of section 217 of the Constitution and the PFMA. He further advised that the accounting officer had to investigate the reasons for notifying bidders with such short notice and to take appropriate action against those who were responsible. Mr Duiker further indicated that in view of what

happened, SASSA had to re-advertise the bid for a shorter period and finalise it as a matter of urgency.

5.1.21 The conduct of the BEC officials involved in the tender evaluation process and the short notice given to bidders to respond on the request for an extension of the validity period of the tender, was internally investigated by SASSA.

5.1.22 A copy of the report titled: "INVESTIGATION REGARDING THE PROCESS FOLLOWED IN THE EXTENSION OF THE VALIDITY PERIOD FOR THE ISSUING AND SUPPLY OF SOCIAL RELIEF OF DISTRESS (SRD) PARCELS FOR THE EASTERN CAPE, GAUTENG, KWA-ZULU NATAL, LIMPOPO, MPUMALANGA AND WESTERN CAPE REGIONS FOR A PERIOD OF FOUR YEARS: SASSA 08/19/GA (the Report) was provided to the Public Protector. The Report was internally submitted to the CEO of SASSA on 4 February 2021.

5.1.23 The Report deals extensively with the events that took place since the bid was advertised on 14 June 2019. The closing date was 05 July 2019. The validity period of the bids received was 90 days, thus expiring on 5 October 2019.

5.1.24 The Report concluded that officials of the BEC were negligent by not advising the BAC timeously to extend the validity period of the bid. This conduct compromised the fairness of the bidding process.

5.1.25 The report furthermore concluded that the Project Manager failed to plan the process properly and started the process a month late. This left the BEC only 60 days to implement the process, instead of 90 days.

5.1.26 The Report also finds that the roles and duties of the BEC members and the Supply Chain Management (SCM) representatives involved in the process,

were not clearly defined and generally there had been different understandings on this. The BEC members maintained that the responsibility for the extension of the validity period was that of the SCM Unit. The Report recommended that this issue needs to be addressed to avoid similar occurrences in the future.

- 5.1.27 The Report further concluded that SASSA “incurred financial losses in terms of accommodation for two (2) months and S&Ts for all 9 BEC members as well as transport costs to ferry the tender documents to St Georges Hotel and back to SASSA Head Office.”
- 5.1.28 It was recommended by the Chief Financial Officer (CFO) that disciplinary action should be taken against members of the BEC, which was supported by the CEO in her comments in the Report ” *Regard the amended comments of the CFO as appropriate to ensure that we continue to build corrective approaches as we do implement consequence management*” .
- 5.1.29 The response of the CEO of SASSA to the section 7(9) notice confirmed that SASSA had no further evidence to submit, “*save to reiterate that the statement that the failure to provide food parcels in six provinces for the period November 2019 to March 2020 caused prejudice to potential clients is not accepted. It should be noted that, in terms of the Social Assistance Act, 2004, as amended. social relief of distress may be provided, within available budget, to citizens who meet the criteria as set out. There is no legislated method in which the relief must be provided.*

SASSA at the time provided social relief in the form of food parcels, vouchers and /or cash. The absence of one of these forms of social relief thus did not stop the social relief programme, as assistance could still be provided through

one of the other forms of relief. This meant that SASSA was still able to provide support to citizens who qualified for this in terms of the legislated provisions.”

5.1.30 The Executive Manager: Grants Administration of SASSA provided the following information on 06 October 2021 in this regard:

5.1.30.1 Eastern Cape

The region issued food parcels using 2 service providers appointed on a quotation basis. A total of 3 532 food parcels and 495 school uniforms were distributed.

5.1.30.2 Gauteng Region

Gauteng Region did not have service providers contracted for provision of food parcels during the period of January, February and March 2020.

5.1.30.3 Kwa Zulu Natal

The region did not have service providers for food parcels for the period under review.

5.1.30.4 Limpopo region

The region did not have contracted service providers for food parcels during the period under review.

5.1.30.5 Mpumalanga Region

The region did not have service providers for food parcels, and the district did not have service providers to redeem vouchers during the period under review.

5.1.30.6 Western Cape Region

The region did not have service providers for food parcels, but a total of 733 beneficiaries received cash payments in this period,

- 5.1.31 This explanation provided by SASSA indicates that the social assistance they supplied during this period was limited to the Eastern and Western Cape provinces. No proof was supplied to the Public Protector that the affected citizens in the other 4 provinces received alternative forms of relief during this period.

Application of the relevant legal framework

- 5.1.30 Section 195(1)(a) of the Constitution requires that a high standard of professional ethics must be promoted and maintained in the public administration in general. Section 195(1)(f) provides that the public administration must be accountable.
- 5.1.31 Section 217 of the Constitution provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 5.1.32 All constitutional obligations must, in terms of section 237 of the Constitution, be performed diligently and without delay.
- 5.1.33 SASSA is a National Public Entity listed in Schedule 3A to the Public Finance Management Act, 1999 (PFMA).
- 5.1.34 Section 49(1) of the PFMA stipulates that every public entity, which includes SASSA, must have an authority which must be accountable for the purposes of this Act.

- 5.1.35 Section 49(2)(b) states that if the public entity does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity, unless specific legislation applicable to that public entity designates another accounting authority.
- 5.1.36 SASSA has a Chief Executive Officer that is its accounting authority, as contemplated by section 49(2)(b) of the PFMA.
- 5.1.37 Section 51(1)(a)(iii) of the PFMA requires an accounting authority for a public entity to ensure that that public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- 5.1.38 The Treasury Regulations, issued in terms of the PFMA (Treasury Regulations) apply, with certain exceptions, to National Public Entities, such as SASSA.
- 5.1.39 Regulation 16A2.1 of the Treasury Regulations provides that the SCM framework set out in Regulation 16A applies to public entities listed in Schedule 3A, such as SASSA.
- 5.1.40 In terms of Regulation 16A3.1 of the Treasury Regulations, the accounting officer or accounting authority of an institution to which these Regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution.
- 5.1.41 Regulation 16A3.2 provides that the supply chain management system referred to in paragraph 16A.3.1 must be fair, equitable, transparent, competitive and cost effective; be consistent with the Preferential Procurement Policy

Framework Act, 2000 (Act No. 5 of 2000); be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and must provide for at least the following; demand management; acquisition management; logistics management; disposal management; risk management; and the regular assessment of supply chain performance.

- 5.1.42 Regulation 16A6.1 stipulates that procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.
- 5.1.43 Regulation 16A6.2 provides that a supply chain management system must, in the case of procurement through a bidding process, provide for –
- (a) the adjudication of bids through a bid adjudication committee;
 - (b) the establishment, composition and functioning of bid specification, evaluation and adjudication committees;
 - (c) the selection of bid adjudication committee members;
 - (d) bidding procedures; and
 - (e) the approval of bid evaluation and/or adjudication committee recommendations.
- 5.1.44 The South African Social Security Agency Supply Chain Management Policy, 2016 (the Policy) regulates the procurement of goods and services by SASSA, as contemplated by the Treasury Regulations and the PFMA.
- 5.1.45 The Policy aims to ensure that the manner in which SASSA procures goods and services is fair, equitable, transparent, competitive and cost effective as envisaged in section 217 of the Constitution and section 51(1)(a)(iii) of the PFMA and complies with the PFMA and the Treasury Regulations or Treasury

Instructions regarding supply chain management and other applicable regulations or instructions in terms of the PFMA.

- 5.1.46 Paragraph 6.2.1(g) of the Policy provides that all procurement above the transaction value of R500 000 must be processed through competitive bids.
- 5.1.47 Bid documents must, in terms of paragraph 8.4.1 of the Policy be compiled, making use of Standard Bid Documents, General Conditions of Contract and/or Special Conditions of Contract and relevant Terms of Reference or Specifications.
- 5.1.48 Competitive bids must, in terms of paragraphs 6.2.1(h) and 8.4.2 of the Policy be advertised in the Government Tender Bulletin and in any other appropriate media, if deemed necessary by the Accounting Authority, for a period of at least 21 days before the closing date, *“to promote competition, fairness and transparency.”*
- 5.1.49 The BEC is, in terms of paragraph 8.3 of the Policy, responsible for the evaluation of bids received in accordance with the criteria specified in the bid documentation.
- 5.1.50 In this case, the bid documents specified that the bid submitted was valid for 90 days. The closing date for Bid 08/19/GA was 5 July 2019 and it was therefore valid until 5 October 2019,
- 5.1.51 The bids evaluation process by the BEC started on 05 August 2019. Its report was submitted to the BAC who in turn recommended to the BEC that the validity period of the bid should be extended.

- 5.1.52 Paragraph 21.2 of the Policy states that any deviation to this Supply Chain Management Policy must be approved by the Accounting Officer or relevant delegated official in terms of SASSA SCM delegations of authority.
- 5.1.53 There is no provision in the PFMA, the Treasury Regulations and the Policy in terms of which the criteria specified in the bid documentation, such as the period of validity, can be changed or extended.
- 5.1.54 The *National Treasury: Supply Chain Management: A Guide for Accounting Officers/Authorities* 2004 (Guide) states that:
- “Bidders should be required to submit bids valid for a period specified in the bidding documents. The period should be sufficient to enable the institution to complete the comparison and evaluation of bids, review the recommendation and award the contract. An extension of bid validity, if justified in exceptional cases, should be requested in writing from all bidders before the expiration date. The extension should be for the minimum period required to complete the evaluation, obtain the necessary approvals and award the contract.”*
- 5.1.55 The evidence and information obtained in the investigation show that the request to agree to an extension was only sent by SASSA to the bidders after business hours on 4 October 2019, less than a day before the expiry date, and requiring them to respond on the date that the bids would expire, i.e. 5 October 2019, which was a Saturday.
- 5.1.56 The responses provided by SASSA during the investigation indicated that the bid was advertised with the closing date being 05 July 2019. Members of the BEC were appointed on 21 July 2019. The BAC commenced work on 05 August 2019 and concluded the process on 24 October 2019. On 26

September 2019 the initial evaluation process was concluded and the first report was submitted to the BAC for consideration, i.e. 6 business days before the bids expired. No exceptional circumstances existed that warranted a request to all the bidders for an extension of the validity period, as contemplated by the Guide.

- 5.1.57 The BEC was aware of the fact that it had to evaluate 2708 bid proposals in the time frame available to them, but failed to plan ahead to deal with all the bids within the time frame available.
- 5.1.58 All the bidders did not respond to SASSA's request to extend the period of validation. When SASSA raised the matter with National Treasury, they were advised by the Chief Director: SCM Governance, Monitoring and Compliance that the short notice given to bidders compromised the fairness of the bidding process and was in contravention of section 217(1) of the Constitution and section 38(1)(a)(iii) of the PFMA.
- 5.1.59 Paragraph 21 of the Policy states that an employee who fails to comply with the policy, may be guilty of financial misconduct and that the Accounting Authority must ensure that disciplinary steps are taken against such employees.

Conclusion

- 5.1.60 SASSA did not perform their duties diligently and without delay in terms of section 237 of the Constitution.
- 5.1.61 SASSA did not comply with section 195(1)(a) of the Constitution that requires that a high standard of professional ethics must be promoted and maintained in the public administration in general. Section 195(1)(f) provides that the public administration must be accountable.
- 5.1.62 Based on the evidence gathered it is concluded that there was a lack of proper planning to execute the bid evaluation and adjudication processes in respect of Bid no 08/19/GA, the closing date of which was 5 July 2019.
- 5.1.63 There is no evidence that the BEC requested approval from the Accounting Authority for a deviation in terms of the Policy as prescribed in Paragraph 21.2 of the Policy, regarding the extension of the bid validity period.
- 5.1.64 The fairness in the bidding process was compromised by the fact that SASSA gave inadequate time for bidders to respond to the extension of the 90 day validity period of bids. The request to agree to an extension was only sent to the bidders hours before the bid would expire. This was not in line with the constitutional imperatives of fairness and competitiveness as contemplated by section 217 of the Constitution, the Treasury Regulations, the Policy and the Guide.
- 5.1.58 The compromised bidding process eventually culminated in the delay of the distribution of food parcels in the 4 provinces for a period of five months, which prejudiced the recipients thereof.

5.1.59 Although SASSA submitted that no prejudice was suffered by potential clients, there is no evidence that people regularly receiving food parcels in the six provinces were even aware of, or had access to the alternative forms of social relief of distress.

6. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that SASSA should have complied with, the following adverse findings are made from the investigation:

6.1 Whether there was undue delay by SASSA in awarding new contracts to service providers for the distribution of food parcels in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga and Western Cape provinces, resulting in a failure to distribute food parcels in the six provinces during the period November 2019 to March 2020, and if yes, whether such conduct was improper, constitutes maladministration and caused prejudice.

6.1.2 The allegation that there was an undue delay by SASSA in awarding new contracts to service providers for the distribution of food parcels in the , Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga provinces, resulting in a failure to distribute of food parcels in the four provinces during the period November 2019 to March 2020, is substantiated.

6.1.3 The allegation that SASSA's conduct was improper, constitutes maladministration and caused prejudice, is also substantiated.

- 6.1.4 There was a lack of proper planning to execute the bid evaluation and adjudication processes in respect of Bid no 08/19/GA, the closing date of which was 5 July 2019,
- 6.1.5 The fairness in the bidding process was compromised by the fact that SASSA gave inadequate time for bidders to respond to the extension of the 90 day validity period of bids. The request to agree to an extension was only sent to the bidders hours before the bid would expire. This was not in line with the constitutional imperatives of fairness and competitiveness as contemplated by section 217 of the Constitution, regulation 16A3.2 of the Treasury Regulations, section 1(a) of the Policy and the Guide.
- 6.1.6 The compromised bidding process eventually culminated in the delay of the distribution of food parcels in the 4 provinces for a period of five months, which prejudiced the recipients thereof.
- 6.1.7 SASSA incurred financial losses in terms of accommodation for two months and subsistence and travel allowances for nine BEC members at the St Georges Hotel, as well as transport costs to transport the tender documents from SASSA Head Office to the St Georges Hotel. x
- 6.1.8 SASSA's conduct accordingly constitutes undue delay as envisaged in section 182(1) of the Constitution and in terms of section 6(4)(a)(ii) of the Public Protector Act.

7. REMEDIAL ACTION

The appropriate remedial action that Public Protector intends taking in terms of section 182(1)(c) of the Constitution is as follows:

7.1 The CEO of SASSA to:

7.1.1 Take the appropriate steps to ensure that all the SASSA officials involved in SCM processes, including members of the BEC's and BAC's are trained on the relevant provisions of section 217 of the Constitution, the PFMA, the Treasury Regulations, the Policy, the relevant Treasury Guidelines and Instructions and the role of each official in the SCM process, within 90 days from the date of this report.

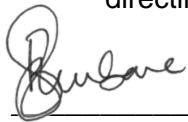
7.1.2 Initiate disciplinary action in accordance with the recommendations made in the internal investigation report, within 60 days from the date of this report.

7.1.3 Within 60 days from the date of this report disclose the financial loss incurred by SASSA to National Treasury;

7.1.4 Submit a report on the implementation of the remedial action taken in paragraphs 7.1.1 and 7.1.2 to the Minister for Social Development and the Acting Director-General of the Department of Social Development within 60 days from the date of this report.

8. MONITORING

- 8.1 The CEO of SASSA must within twenty one (21) days from the date of this report, furnish a report to the Public Protector on the implementation of the remedial action referred to in paragraph 7 of this report.
- 8.2 The implementation of the remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in the report.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 22/10/2021

Assisted by Ms Marina Fourie _ Senior Investigations