

**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(2A)(a)
OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT No. 16 of 2019/2020

ISBN NO. 978-1-928507-23-9

“Allegations of improper prejudice suffered as a result of the alleged unfair suspension of the Vuk’uphile Contractor Development/Incubation Programme for Contractor / Supervisor Development”

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE
SUFFERED AS A RESULT OF THE UNFAIR SUSPENSION OF THE VUK’UPHILE
CONTRACTOR DEVELOPMENT/INCUBATION PROGRAMME FOR CONTRACTOR
/SUPERVISOR DEVELOPMENT BY THE NORTH-WEST DEPARTMENT OF PUBLIC
WORKS AND ROADS**



INDEX

1. EXECUTIVE SUMMARY.....3

2. THE COMPLAINT.....3

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR7

4. THE PRELIMINARY INVESTIGATION.....12

5. MEDIATION AND CONCILIATION.....15

6. FINDINGS.....20

7. REMEDIAL ACTIONS.....20

8. MONITORING.....22

1. EXECUTIVE SUMMARY

- 1.1 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(2A)(a) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The complaint was resolved through mediation and conciliation in terms of section 6(4) (b) (i) of the Public Protector Act.
- 1.3 My findings and remedial actions are as a result of the outcome of the mediation and conciliation process.
- 1.4 The report relates to a matter between the Vuk'uphile Contractors and the Department of Public Works and Roads (the Department) regarding the alleged improper prejudice suffered as a result of the alleged unfair suspension of the Vuk'uphile Contractor Development/Incubation Programme for Contractor/Supervisor Development.

2. THE COMPLAINT

- 2.1 The complaints were lodged separately by the contractors (the Complainants) as follows:
 - 2.1.1 **Mr. David Sephai and 7 Others**

The Complainants are:

- (i) Mr. W.B. Godase on behalf of (obo) Batlhoki Projects CC;
- (ii) Mr. D. Sephai obo Miracle fitting Glass;
- (iii) Mr. R. Moagi obo Marenza Civils CC;
- (iv) Mr. K.M. Moagi obo Kemoa Civils CC;

- (v) Mr. M.P. Malebati obo Malapane Properties Services & Development;
- (vi) Mr. L. Sekano obo Tumilid Trading Enterprise CC;
- (vii) Mr. M.S. Sibeko obo Bex Trading and Labour Solutions CC; and
- (viii) Mr. J.M. Mphamo obo Mphamo Projects Trade & Sales.

2.1.1.1 The Complainants approached my office on 13 October 2016 alleging that the Department unlawfully terminated their Learnership Contract entered into, individually, between themselves and the Department. They made the following submissions:

"It is our submission that the learner contractors worked on the projects allocated to them and the following are the outstanding amount per contractor:

<i>Marenza Civil CC</i>	<i>R4 153 887.86</i>
<i>Miracle Fitting Glass & Projects CC</i>	<i>R4 016 964.19</i>
<i>Tumilid Trading Enterprise CC</i>	<i>R4 766 518.23</i>
<i>Kemoa Civils CC</i>	<i>R5 735 077.90</i>
<i>Mmapane Properties Sevices</i>	<i>R5 858 273.77</i>
<i>Bex Construction</i>	<i>R1 991 569.61</i>
<i>Batlhoki Projects CC</i>	<i>R3 328 735.29</i>
<i>Mphamo Projects Trade & Sales</i>	<i>R4 016 964.19</i>

We hereby demand that the abovementioned amount be paid. That the Department complies with their obligations in terms of the agreement and furthermore the two further projects be provided to each one of the Learner contractors.

Furthermore we request the appointment letters and the completion certificates.

We entered into a written, alternatively, partly written, partly oral, partly implied agreement with the Department of Public Works duly represented by Mr. Tundzi during 2013.

The programme was supposed to be for three years and we were assured of three projects, which is one project per year, which would increase their CIBD Grading by three levels above their CIBD grading.

We submit that we complied with all the obligations in terms of these agreement. The Department has not complied with their obligations in terms of the agreement.”
[sic]

2.1.2 Mr. Vincent Tsietsi Miya and 5 Others

The Complainants are:

- (i) Naniki B. Modisi obo Kopanang Construction CC;
- (ii) Billy Monaisa obo Mooketsi Contractors CC;
- (iii) Boihang Ramotsongwa obo Ke-Tshimologo Trading CC;
- (iv) Mpule Mathobela obo M&M Mining;
- (v) Matshidiso Mangwane obo Angwane General Construction; and
- (vi) Fetsang Mokoka obo Fetsang General Trading & Projects

2.1.2.1 The Complainants made the following submissions:

“The Department unlawfully terminated the Vukúphile Contractor Development/Incubation Programme for Contractor/Supervisor Development per the contract entered into between ourselves and the Department of Public Works & Roads, as a result they suffered prejudice in that:

- (a) we were supposed to have been trained and given mentoring for the period of three years,*
- (b) we were promised trucks and they were never delivered;*
- (c) we were promised financial support which also never materialised;*
- (d) There was training of Supervisors which was not alone and we had to let them go.” [sic]*

2.1.3 Mr Tshepo Dichaba and Others

The Complainants are:

- (i) Mr. Tshepo Dichaba obo Ditshepo Construction & Maintenance;
- (ii) Mr. Brian Mamabolo obo Moreosele Trading & Projects CC;
- (iii) Mr. Moses Phadi Ditshaba obo Machabi DMP Projects CC; and
- (iv) Mr. Graham Sipho Zwane obo Sindiphola Projects & Construction CC.

2.1.3.1 The Complainants made the following submissions:

2.1.3.1.1 In 2013, they responded to an advertisement to be included into the Vukuphile Contractor Development Programme;

2.1.3.1.2 After the selection process, they were accepted into a three (3) year programme and subsequently awarded twelve (12) months contracts to supervise, monitor and transport Expanded Public Works Programme (EPWP) beneficiaries;

2.1.3.1.3 Aurecon was appointed by the Department as Agents, Project Managers, Training Providers and Consultants from the commencement of the programme until their relationship with the Department deteriorated leading to an unresolved impasse;

2.1.3.1.4 The contract lasted for five (5) months and in November 2014, they, individually, received letters dated 07 November 2014 from Aurecon, instructing them to

suspend all works with immediate effect, in terms of clause 39 of the General Conditions of Contract for Construction Works 2004. The letter further advised that the Employer, the Department, had indicated that it would, by the following week, invite all Contractors to a meeting to discuss the way forward; and

2.1.3.1.5 In January 2015, they contacted Mr. Mbulelo Thundzi, the representative of the Department and responsible for the Vukuphile Programme. He did not provide clarity on the way forward as Aurecon had ceased all its work and responsibility.

2.1.4 **Mr Renny Moagi**

2.1.4.1 The Complainant alleges unfair treatment by officials of the Department towards him and submitted that:

2.1.4.1.1 His Company, Marenza Civils CC, was unfairly treated by the Department in failing and/or refusing to effect payment of Preliminaries and Generals (P's and G's) and subjected to the legal standoff between Aurecon and the Department whereas all learners, including those who were never allocated sites, were paid.

2.2 Although I initially received complaints from the above mentioned Complainants listed in 2.1.1 to 2.1.4, it later came to my attention that the Vuk'uphile Contractor Development/Incubation Programme for Contractor/Supervisor Development (Vuk'uphile Programme) constituted of 65 contractors who were all affected by its suspension.

2.3 In the main, the Complainants alleged that the Department caused them to suffer improper prejudice as a result of the unfair suspension of the Vuk'uphile Programme.

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 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.
- 3.5 In terms of section 6(4)(b)(i) of the Public Protector Act, *“the Public Protector shall, be competent to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation.”*
- 3.6 In *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

- 3.7 In the above-mentioned matter of the ***Economic Freedom Fighters v Speaker of the National Assembly and Others***, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:
- 3.7.1 Complaints are lodged with the Public Protector to **cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (paragraph 65);
- 3.7.2 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);
- 3.7.3 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 that effect, if it is the best attempt at curing the root cause of the complaint** (paragraph 68);
- 3.7.4 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);

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

² *Supra* at para [73].

- 3.7.5 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);
- 3.7.6 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);
- 3.7.7 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 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);
- 3.7.8 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (paragraph 71(d));
- 3.7.9 "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));
- 3.8 In the matter of the *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)*, the court held as follows, when confirming the powers of the Public Protector:
- 3.8.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);

-
- 3.8.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question (paragraph 82 of the judgment);
- 3.8.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (paragraphs 100 and 101 of the judgment):
- (a) Conduct an investigation;
 - (b) Report on that conduct; and
 - (c) To take remedial action.
- 3.8.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (paragraph 104 of the judgment);
- 3.8.5 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 (Paragraph 105 of the judgment);
- 3.8.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108 of the Judgment); and
- 3.8.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).

- 3.9 The Department is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of my mandate. Accordingly, I have the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.
- 3.10 The power and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of the parties.
- 3.11 Regarding the exercise of my discretion in terms of section 6(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 Complainants and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute 'special circumstances' depends on the merits of each case.

4. THE PRELIMINARY INVESTIGATION PROCESS

4.1 Methodology

- 4.1.1 The preliminary investigation was conducted for the purposes of determining the merits of the complaint, allegation or information as provided for in section 7(1)(a) of the Public Protector Act.

4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act authorises me to resolve a matter or remedy an act or omission through alternative dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory instruments, including constitutional provisions, legislation, regulations, as well as a hearing consequent to section 7(5) of the Public Protector Act.

4.2 Approach

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?

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been, but for the maladministration or improper conduct?

4.3 **On analysis of the complaint, the following issues were identified for the assessment of the complaint and for preliminary investigation:**

4.3.1 Whether the Department unfairly and/or unduly suspended and/or discontinued the Vuk'uphile Contractor Development/Incubation Programme for Contractor/Supervisor Development ; and

4.3.2 Whether the Complainants were improperly prejudiced by the Department of Public Works' conduct under the circumstances.

4.4 Preliminary findings

4.4.1 On 03 July 2018, I conducted a hearing with both parties, at the Rustenburg Civic Centre, regarding the complaints received from the Complainants to establish the gist of the dispute. Submissions were made by both parties. The Department, duly represented by the MEC for the Department, Honourable Mmule Johanna Maluleke, indicated her willingness to resolve issues raised by the Complainants. Amongst the resolutions of the hearing, were the following:

4.4.1.1 That the Department would provide my office in Mahikeng with a costed spreadsheet per individual contractor reflecting amounts owed for P's and G's as well as any other monies due and payable in line with the General Conditions of Contract (GCC) and the Joint Building Contracts Committee Guidelines (JBCC) where applicable by Friday, 06 July 2018.

4.4.1.2 That the Complainants would also indicate the prejudice they suffered by the same date to my office in Mahikeng;

4.4.1.3 That these would then form the basis of a Settlement Agreement to be signed by 11 July 2018;

4.4.1.4 Further, that given the fact that the Vuk'uphile Programme was suspended in the North-West Province, it should be revived so that the training and uplifting of emerging contractors can be realised, which is the objective of the programme. This would also entail the provision of projects to the Contractors which has implications for their Construction Industry Development Board (CIDB) grading;

- 4.4.1.5 The Complainants indicated their willingness to go back on site should they be given projects to complete the remainder of the contract amounts they were initially given so that there is value for money for the State and taxpayer. The completion of works also has a direct impact on their CIDB grading; and
- 4.4.1.6 The MEC and her team were agreeable to a Settlement Agreement along these lines, but once again raised the issue of the Department being under a National Intervention in the Provincial Administration in terms of section 100 of the Constitution as well as the availability of funds.
- 4.4.2 Having had submissions from both parties, I resolved to engage, as per a letter dated 09 July 2018, the Minister of Public Works, Mr TW Nxesi (the Minister). In his response, as per a letter dated 13 July 2018, the Minister reiterated the commitment by the Department to resolving the complaints raised by the contractors and also the will to resuscitate the Vuk'uphile contractor development programme.
- 4.4.3 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act authorises me to resolve a matter or remedy an act or omission through alternative dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

5. MEDIATION AND CONCILIATION

- 5.1 Having considered the evidence uncovered during the preliminary investigation of the Complainants, including the hearings as well as the submissions by the Minister and the fact that the Complainants were prejudiced as a result of the unfair termination of the Vuk'uphile Programme especially with regard to their CIDB grading and outstanding amounts due and payable, I made a determination, in terms of section 7(1)(b)(i) of the Public Protector Act, to endeavour to resolve and/or rectify the

conduct and/or omission complained about by the Complainants through Mediation and Conciliation in accordance to section 6(4)(b)(i) of the Public Protector Act.

- 5.2 On 23 July 2018, I facilitated an ADR session between the Complainants and the Department. The outcome of the above-mentioned Conciliation and Mediation is recorded in the attached Settlement Agreement, concluded between the Complainants, duly represented by Mr Monnapula Joseph Mathobela and the Department, represented by Mr Makgothi Samuel Thobakgale, in his capacity as the Administrator.

Settlement Agreement

- 5.3 The parties agreed to resolve any dispute or rectify any act or omission on the following basis:
- 5.3.1 The Administrator, in consultation with the Minister of Public Works, shall resuscitate the Vuk'uphile Contractor Development/Incubation Programme within 20 days of signing the Settlement Agreement;
- 5.3.2 The Administrator undertakes to assign a project to each Complainant, after having assisted each Complainant with statutory compliance, such as COIDA and Tax compliance, and sign the relevant contract with them within 15 days of resuscitation of the programme;
- 5.3.3 The Administrator shall appoint, within 30 working days of signing this Settlement Agreement, a suitable and reputable firm of Quantity Surveyors (QS), to assess the amount due and payable (P's and G's and Standing Times in accordance with the GCC and JBCC) to the Complainants;
- 5.3.4 The Administrator must, within 30 working days of signing this Settlement Agreement, meet with each Complainant and determine the quantum of the prejudices suffered

based on the evidence provided to him by each Complainant. Payment of prejudices, if any, either in the form of *ex gratia*, shall be effected within 30 working days of determination;

- 5.3.5 The QS must submit the assessment report to the Administrator and the Public Protector within 30 working days of appointment;
- 5.3.6 The Administrator must implement the QS' report within 15 working days of receipt of the QS' report;
- 5.3.7 The QS' report shall be final and binding to both parties;
- 5.3.8 Both parties shall provide all the documentations/claims which may be required by the QS, e.g. appointment letters, contracts, payments certificates/progress payment to the QS within 15 working days of signing this Settlement Agreement, to enable him/her to assess the claims;
- 5.3.9 The parties agree that this Settlement Agreement constitutes the findings and remedial action of the Public Protector in terms of section 182(1)(c) of the Constitution, and therefore binding on the parties; and
- 5.3.10 This Settlement Agreement does not affect the Public Protector's discretion to investigate the conduct of any person responsible with the termination of the projects.

5.4 **Monitoring of the implementation of the Settlement Agreement**

- 5.4.1 Having facilitated the ADR session, it is incumbent that I monitor the implementation process of the Settlement Agreement. In this regard, I requested submission of the implementation plan with time frames on the Department's approach towards the implementation of the Settlement Agreement with dates they commit to. I further

requested progress reports from the Administrator on a monthly basis in respect of the implementation plan.

5.4.2 On 22 August 2018, the Administrator submitted the first progress report, together with the resuscitation plan. Below is the undertaking per the implementation plan in respect of the resuscitation of the Vuk'uphile Contractor Development plan:

4						
5 NORTH WEST DEPARTMENT OF PUBLIC WORKS AND ROADS EPWP VUK'UPHILE LEARNERSHIP PROGRAMME – PROGRAMME OF ACTIVITIES FOR REISTATEMENT						
6 PROGRESS AS OF: 21 AUGUST 2018						
7 Prepared by: Vuk'uphile Presentation Panel						
ITEM	ACTIVITY SCHEME	RESPONSIBILITY	DURATI ON (DAYS)	DATE		COMMENT
				START	END	
1.	DPWR VUK'UPHILE PANEL					
1.1	Presentation by Vuk'uphile Contactors	Vuk'uphile Panel	20	26-Jul-18	15-Aug 18	
1.2	Presentation of Panel's Report to Administrator	Vuk'uphile Panel	1	20-Aug-18	20-Aug-18	
2.	COMMITTEE APPOINTMENTS/ POLICY APPROVALS					
2.1	Appointment of Executive Committee (EXCO)	NW DPWR/NDPW	7	01-Sep-18	08-Sep-18	The appointment of EXCO / MANCO should be done correctly
2.2	Appointment of Management Committee (MANCO)	NW DPWR/NDPW	7	01-Sep-18	08-Sep-18	The appointment of EXCO / MANCO should be done correctly
2.3	Approval Terms of Reference of Committees (EXCO / MANCO)	NW DPWR/NDPW	7	09-Sep-18	16-Sep-18	
2.4	Approval of Contractor / SMME Development Policy	NW DPWR/NDPW	7	09-Sep-18	16-Sep-18	
3.	FORMAL AGREEMENTS					
3.1	MOA between NDPW and Financial Service Provider	NDPW				In place
3.2	MOA between NDPW and NW DPWR, including an approved by Project List for the remainder of the programme	NW DPWR,NDPW	15	09-Sep-18	24-Sep-18	
4.	APPOINTMENT OF SERVICE PROVIDERS					
4.1	Appointment of CIDB (Assessment of Contractors)	NW DPWR/NDPW	20	01-Sep-18	30-Sep-18	

4.2	Appointment of Training Service Provider	NW DPWR/NDPW	90	01-Sep-18	30-Nov-18	
4.3	Appointment of Mentors	NW DPWR/NDPW	90	01-Sep-18	30-Nov-18	
4.4	Appointment of Quality Survey Team	NW DPWR/NDPW	30	01-Sep-18	01-Oct-18	
5. IMPLEMENTATION OF PROJECTS						
5.1	Contractor Skills Assessment	CIBD	11	24-Sep-18	05-Oct-18	
5.2	Contractor Statutory Compliance Assessment (CIPC,CIBD, COIDA, SARS)	DPWR	5	27-Aug-18	31-Aug-18	
5.3	Engagement of CIPC, CIBD, COIDA, SARS on Compliance	DPWR		03-Sep-18	07-Sep-18	
5.4	Contractor Assessment Report Preparation	CIDB	4	08-Oct-18	11-Oct-18	
5.5	Contractor Assessment Presentation	CIDB	1	12-Oct-18	12-Oct-18	
5.6	Signing of Learnership agreement between DPWR, Learners and Training Provider	NW DPWR/NDPW	5	01-Dec-18	06-Dec-18	Can only happen once training provider is appointed
5.7	Signing of Directors agreements between Learner Contractors, DPWR and NDPW	NW DPWR/NDPW	5	01-Dec-18	06-Dec-18	
5.8	Nedbank: Setting up of banking facilities with contracting firms	NEDBANK	14	01-Dec-18	15-Dec-18	
5.9	Applications for Bridging Finance (Overdraft Facility)	NEDBANK	14	01-Dec-18	15-Dec-18	Can only happen after DPWR has issued appointment letters to learners and Contracts between DPWR and Learner Contracting Companies (LCC) have signed
6 CLASSROOM TRAINING						
6.1	Approval of Classroom training venue	NDPW/DPWR/TRAINER/CETA	5	11-Feb-19	16-Feb-19	
6.2	Class Room Training 1	Trainer / CETA	90	01-April-19	30-June-19	Dependent on CIBD Assessment (5.1). A different kind of training might be identified through assessment of contractors and supervisors
6.3	Monitoring of Classroom Training	NDPW/DPWR/TRAINER/CETA	5	01-April-19	06-April-19	The theoretical Training implementation plan will be forwarded to the CETA to allow them time to plan their monitoring visits. NDPW Training

						Manager to monitor Trainer to ensure that training is done in terms of CETA requirements
6.4	Classroom Training 2	NDPW/DPWR/TR AINER/CETA	90	01-Jul-19	29-Sep-19	Dependent on CIDB Assessment (5.1). A different kind of training might be identified through assessment of the contractors and supervisors.

5.4.3 The Administrator submitted eight (8) progress reports on the implementation of the Settlement Agreement.

5.4.4 The following represents the current status per the progress report from the Administrator, as at 08 April 2019:

5.4.4.1 Twenty one (21) Contractors underpaid P's and G's were paid on 02 and 05 April 2019, respectively;

5.4.4.2 Twelve (12) Contractors successfully completed their projects and their P's and G's payments were concluded at the time of lodging the complaint. However, variation payments are still pending and under Departmental evaluation;

5.4.4.3 Twelve (12) Contractors were overpaid P's and G's, however, their final accounts were not received and the Department is continuing to engage with the QS for finalisation of the assessment of amounts due and payable;

5.4.4.4 Twenty six (26) Contractors have been handed sites for construction;

5.4.4.5 Eight (8) Contractors' Bill of Quantities for new projects are being evaluated;

-
- 5.4.4.6 Thirteen (13) Contractors are busy with the pricing of Bill of Quantities for new projects;
- 5.4.4.7 Eighteen (18) projects have been identified and allocation is in the process and Bill of Quantities are being developed; and
- 5.4.4.8 To date, the Department has allocated projects to forty seven (47) Contractors and seventeen (17) Contractors are still to be allocated projects.
- 5.4.5 Having made a determination on the quantum of the prejudices suffered based on the evidence provided to him by each Complainant, the Administrator has considered payment of *ex gratia* in the form of allocation of an additional project, to a maximum of R4 000 000.00, to all sixty four (64) Contractors based on their CIDB grading.

6. FINDINGS

- 6.1 It is my considered view that although there was no adherence to the agreed timeframes contained in the Settlement Agreement as well as the submitted Implementation plan by the Administrator, there is progress in respect of the implementation of the Settlement Agreement.

7. REMEDIAL ACTIONS

- 7.1 The Settlement Agreement concluded between the Complainants and the Department, in accordance with section 6(4)(b)(i) of the Public Protector Act constitutes my findings and remedial actions and therefore legally binding on all the parties to the Settlement Agreement.
- 7.2 Having considered the achieved targets as well as the ongoing progress in respect of the implementation of the Settlement Agreement, the appropriate remedial actions

that I am taking, in accordance with the above-mentioned Settlement Agreement, as contemplated in section 182(1)(c) of the Constitution, are the following:

7.3 The Administrator must:

- 7.3.1 In consultation with the Minister of Public Works and in compliance with an undertaking to resuscitate the Vuk'uphile Programme, issue each individual Contractor with the re-appointment letter, which clearly indicates the duration of the Vuk'uphile Contractor Development/Incubation Programme within 15 working days of this Report;
- 7.3.2 Ensure, within 15 working days of this Report, that all Contractors who are yet to be assisted with statutory compliance, such as COIDA and Tax compliance, are so assisted;
- 7.3.3 Assign projects meant for *ex-gratia* consideration to Contractors, i.e. payment of *ex gratia* in the form of allocation of an additional project, to a maximum of R4 000 000.00, to all sixty four (64) Contractors based on their CIDB grading, within 15 days of completion of the currently allocated Vuk'uphile Projects;
- 7.3.4 Ensure that the evaluation of the variation payments pending for the twelve (12) Contractors who successfully completed their projects, is finalised within 15 working days of this Report and payment effected within 10 days of finalisation of the evaluation;
- 7.3.5 Ensure that the assessment of the amounts due and payable to the twelve (12) Contractors who were overpaid P's and G's and whose final accounts were not received is finalised within 15 working days of this Report;
- 7.3.6 Ensure that the eight (8) Contractors whose Bill of Quantities for new projects are being evaluated, are handed sites within 15 working days of this Report;

-
- 7.3.7 Ensure that the thirteen (13) Contractors who are busy with the pricing of Bill of Quantities for new projects, are handed sites within 20 working days of this Report; and
- 7.3.8 Ensure that the seventeen (17) Contractors who are still to be allocated projects, are allocated projects within 15 working days of this Report.

8 MONITORING

- 8.1 The Administrator must submit to my office, an **implementation Report** of the remedial action contained in paragraph 7.3.1 to 7.3.8 within seven (7) working days of publication of this Report.
- 8.2 The Administrator must submit for my approval, an **Implementation Plan, which is inclusive of the budget**, of the remedial actions contained in paragraph 7.3.1 to 7.3.8 above, within 14 working days of publication of this Report.



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

DATE: 06/05/2019