

**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**

**REPORT NO: 147 OF 2019/2020**

**ISBN 978-1-990942-59-4**

***In the matter between the Democratic Alliance and the Free-State Department of  
Human Settlements***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND  
THE IRREGULAR AWARDED OF A CONTRACT FOR THE ERADICATION OF  
ASBESTOS ROOFS BY THE FREE-STATE DEPARTMENT OF HUMAN SETTLEMENTS**



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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, and section 8(1) of the Public Protector Act, 1994.
- (ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged maladministration in the awarding of a contract for the eradication of asbestos roofs in the Free-State Province to Black-Head Consulting Proprietary Limited/ Diamond Hill Trading 71 Proprietary Limited Joint Venture (the Service Provider) by the Free-State Department of Human Settlements (the Department) during the 2014/2015 financial year.
- (iii) The complaint was lodged with my Free State Provincial office on 22 October 2015. Ms L Kleynhans (the Complainant) is a member of the Democratic Alliance (DA) and a Member of the Free State Provincial Legislature. The Complainant raised specific concerns regarding a contract awarded by the Department to the Service Provider for the eradication of asbestos roofs in the Free State Province. In essence, the Complainant raised the following:
  - (iv) In the main, the complaint was that the contract for the eradication of Asbestos roofed houses in the Free State was irregularly awarded to the Service Provider as it was contrary to Treasury Regulation 16A 6.6.
  - (v) On analysis of the complaint, the following issues were identified and investigated:
    - (a) Whether the Department failed to follow proper procurement processes in awarding the contract to the Service Provider and whether such conduct was improper and unlawful and constituted maladministration;

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- (b) Whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract; and
- (c) Whether the advance payment made to the Service Provider was irregular and whether the invoices which the Department made payment on complied with the legislative prescripts.
- (vi) The investigation process was conducted through correspondence, meetings and interviews with the Complainant and relevant officials of the Free-State Department of Human Settlements, the Gauteng Department of Human Settlements, and the national office of the Auditor General, as well as the Free-State Provincial office of the Auditor General. There was also an inspection of all relevant documents and an analysis of all relevant laws, policies and related prescripts.
- (vii) Key laws and policies were taken into account to determine if there had been maladministration by the Department in the awarding of the contract
- (viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:
- (a) Regarding whether the Department failed to follow proper procurement processes in awarding the contract to the Service Provider and whether such conduct was improper and unlawful and constituted maladministration?**
- (aa) The allegation that there were irregularities and improprieties in the awarding of the contract for the eradication of Asbestos roofs in the Free State Province to the Service Provider, is substantiated.
- (bb) The Department participated in an expired contract of the Gauteng Department of Human Settlements (Gauteng Department) and did not conduct a due diligence



investigation before participating in this contract. The Department was in possession of the Gauteng Department's Service Level Agreement (SLA) which had clearly expired. This constitutes a contravention of the legislative precepts as interpreted in the Blue Nightingale case.<sup>1</sup> This conduct amounts to 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.

- (cc) The Head Of Department submitted in his response to the notice in terms of Section 7(9) of Public Protector Act, stating that although he holds final responsibility in terms of the applicable legislation, he was neither advised by his officials nor the Auditor General that he could renege on the contract. This explanation of the HOD cannot be accepted as the Auditor General (Free State) Report, declaring the procurement as irregular was released on 31 July 2015, yet the Department still made further payments of R139 million towards the service provider.
- (dd) The Department created the impression that they participated in a contract concluded by another state institution (Gauteng Department) while the services were not the same as specified in the existing contract and also the price was higher. This is in contravention of Treasury Regulation 16A6.6 and amounts to 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.
- (ee) Although the Department created the impression that they participated in a contract in terms of Treasury Regulation 16A6.6, while the submission made by the Service Provider was in fact an unsolicited proposal in terms of Treasury Practice Note No 11 of 2008/2009. The Practice Note required the Department to issue A Request for Qualification (RFQ) to test the market for the existence of other private entities capable of providing the product or services.

<sup>1</sup> *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* [2015] ZAECELLC 16, 24 November 2015 paragraph 43



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- (ff) The failure to issue an RFQ is in contravention of the Practice Note and Paragraph 12.13 of the Department's SCM Policy. It is further in contravention of Regulation 16A.9 and amounts to abuse of the procurement system. This conduct amounts to 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.
- (gg) The discrepancies between the services to be provided in the unsolicited proposal, the SLA and the letter of appointment created the impression that the appointment was for the assessment, removal of the asbestos material and replacement of asbestos roofs while the SLA only refers to assessment and removal. The IPW (Instruction to Perform Work) was only issued for the assessment. The SLA was in contravention of paragraph 12.20 of the Department's SCM policy as it was not an accurate reflection of the terms and conditions reflected in the unsolicited proposal or appointment letter. This conduct amounts to 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.
- (hh) The findings above indicate willful conduct and gross negligence in terms of section 86 of the Public Finance Management Act (PFMA) on the part of the Accounting Officer, Mr TN Mokhesi, in that he did not comply with Section 38 of the Public Finance Management Act. He failed to execute his fiduciary duties in terms of the Public Finance Management Act and the Supply Chain Management Policy of the Department. This conduct amounts to 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) Regarding whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract?**
- (aa) The allegation that the services provided were not cost effective and the Department did not receive value for money, is substantiated.

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- (bb) No evidence was submitted or found that the necessary skills to identify asbestos roofs were available within the Local Municipalities and Department.
- (cc) The R255 million paid to the service provider was not paid for the identification of 36 000 units/houses but for the assessment of 300 000 units at a price of R850 per unit. Eventually 36 344 units were identified as having asbestos roofs.
- (dd) The evidence and documents prove that the project was 100% completed and the reports generated by the ORI Group (company subcontracted by Mastertrade) at a fee of R21 391 489.30 while the service provider appointed was paid R230 million.
- (ee) The HOD submitted in his response dated 14 February 2020 to the Notice in terms of Section 7(9) of Public Protector Act, that although he holds final responsibility in terms of the applicable legislation, he was unaware that the Service Provider had subcontracted the contract. If the HOD had acted on the Auditor General's Report, released on 31 July 2015, the further payments of R139 million would have been avoided.
- (ff) The omission by the HOD to act on the report of the Auditor General released on 31 July 2015, amounts to gross negligence in terms of section 86 of the PFMA on the part of the Accounting Officer in that he did not comply with Section 38 of the Public Finance Management Act. He failed to execute his fiduciary duties in terms of the Public Finance Management Act and the Supply Chain Management Policy of the Department. This conduct amounts to 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.

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- (c) Regarding whether the advance payment made to the Service Provider was irregular and whether the invoices the Department made payment on to the Service Provider complied with the legislative prescripts?**
- (aa) The allegation that the advance payment made to the Service Provider was irregular, is substantiated. Treasury Regulations do allow for advance payments on contract amounts if required by the contractual arrangements with the supplier. The contract signed between the Service Provider and Department clearly provided for an advance payment of 40% of 50% of the Contract price. However, as the contract was irregularly procured the advance payment was irregular indeed, as also found by the Auditor General.
- (bb) The invoices submitted by the Service Provider to the Department did not comply with the Legislative Prescripts and the payment of these invoices by the Department was irregular. This conduct amounts to 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) In the light of the above findings the appropriate remedial action the Public Protector is taking in pursuit of section 182(1)(c), is the following:
- (a) The Premier to:**
- Take the appropriate steps to ensure that the conduct of the Accounting Officer and the Director Supply Chain Management is investigated in terms of Section 84 of the Public Finance Management Act and that the conduct is reported in terms of Section 86 of the Public Finance Management Act to the South African Police Service and the Directorate for Priority Crime Investigation (Hawks).



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**(b) The Head of the Department to:**

- (aa) Take the appropriate steps to ensure that the conduct of the Director Supply Chain Management is investigated in terms of Section 84 of the Public Finance Management Act;
- (bb) Take the appropriate steps to ensure that the Department's Supply Chain Management Policy is amended to correctly reflect the legislative prescripts; and
- (cc) Take appropriate steps to ensure that officials are properly trained in the legislative prescripts in respect of supply chain management.



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND  
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ASBESTOS ROOFS BY THE FREE STATE DEPARTMENT OF HUMAN SETTLEMENTS**

**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 section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people:
- 1.2.1. The Premier of the Free State Province, Ms SH Ntombela;
- 1.2.2. The Head of the Free State Department of Human Settlements, Mr TN Mokhesi;  
and
- 1.2.3. The Member of the Executive Council for Public Works, Infra-Structure and Human Settlements in the Free-State, Ms MA Koloi.
- 1.3. A copy of the report is also provided to the Complainant, Ms L. Kleynhans Member of the Free State Provincial Legislature, Democratic Alliance.
- 1.4. A copy of the report is also provided to the National Director of Public Prosecutions in terms of Section 6(4)(c)(i) of the Public Protector Act, 1994 to notify her that I am of the opinion that the facts disclose the commission of an offence.

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- 1.5. A copy of the report is also provided to the Head of the Special Investigation Unit to investigate the possibility of the recovery of any fruitless and wasteful expenses in terms of the Proclamation issued by the President.
- 1.6. A notice in terms of section 7(9)(a) of the Public Protector Act 23, 1994 was previously issued to the Head of the Department, Mr TN Mokhesi.
- 1.7. The report relates to an investigation into the alleged maladministration in the irregular awarding of a contract to a joint venture comprising of Blackhead Consulting Proprietary Limited and Diamond Hill Trading 71 Proprietary Limited (Service Provider) by the Free State Department of Human Settlements (Department) for the eradication of asbestos roofs in the Free State Province.
- 2. THE COMPLAINT**
- 2.1 Ms L Kleynhans (the Complainant) is a member of the Democratic Alliance (DA) and a Member of the Free State Provincial Legislature. The Complainant raised specific concerns regarding a contract awarded by the Department to the Service Provider for the eradication of asbestos roofs in the Free State Province. In essence, the Complainant raised the following:
- 2..1.1 What motivated the Department to enter into the contract, without following tender procedures, with the Service Provider when there are necessary skills within the Department and Free State Municipalities for the eradication of asbestos roofs in the Free State Province;
- 2.1.2 An amount in excess of R100 million was paid and a further R255 million could still be paid. She mentioned the names of two contractors, namely C- Max Civil Construction and Ruwacon (Pty) Ltd who were paid an amount of R370 000.00 between November 2014 and March 2015 for the removal and replacement of

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asbestos rooftops of 37 houses amounting to R10 000 per house. These two companies could be used for the identification of asbestos roofs of pre-1994 housing;

- 2.1.3 According to a submission from the Service Provider dated 28 May 2014, they were to be appointed for the assessment/audit of houses roofed using asbestos material and the handling and disposal of asbestos sheets to an approved, designated disposal site. According to the submission, the rates were as follows:
- 2.1.3.1 Door to door assessment - R1 350.00 per house excluding Vat;
- 2.1.3.2 Removal and disposal to an approved designated site - R32 760.00, excluding Vat.
- 2.1.4 Why did the submission not talk of the replacement of the roofs and the costs involved as indicated in the service level agreement concluded between the Department and the Service Provider;
- 2.1.5 The Department participated in terms of Treasury Regulation 16A6.6 in a Gauteng Department of Human Settlements (Gauteng Department) contract with Blackhead Consulting Proprietary Limited (Blackhead) which the Gauteng Auditor General found to have been irregularly awarded in contravention of Treasury Regulations. The Free State Auditor General found the participation of the Department irregular in terms of Treasury Regulation 16A6.6. The Treasury Regulations require that the original contract should be awarded in terms of a competitive bidding process and therefore the payment of R76 million by the Department was identified as irregular expenditure in the 2014/2015 Annual Financial Statement of the Department. The question by the Complainant was whether the necessary authorisation was obtained from National Treasury before entering into this contract;

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- 2.1.6 The advertisement of the contract by the Gauteng Department was for the appointment of Professional Resource Teams (PRTs) to the Gauteng Department to assist them in fulfilling their mandate. The concern raised by the Complainant was that the advertisement did not specify the identification and removal of asbestos rooftops. What prompted the Department to appoint the Service Provider in terms of Treasury Regulation 16A6.6?
- 2.1.7 Whether the Service Level Agreement (SLA) between Blackhead and the Gauteng Department was still valid at the time when the Department participated in the same contract;
- 2.1.8 The SLA was signed on 14 September 2010 between the Gauteng Department and Blackhead and should have expired by 14 September 2013;
- 2.1.9 The SLA between Blackhead and the Gauteng Department also did not refer to the removal of asbestos roofs;
- 2.1.10. There was no value for money received by the Department in terms of this contract. The Service Provider would receive R255 million for the identification of only 36 000 asbestos roofed houses and this was extremely irresponsible and highly suspect; and
- 2.1.11. The advance payments made to the Service Provider were irregular and that the invoices submitted by the Service Provider did not comply with legislative prescripts.

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### **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 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 the power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 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.<sup>[1]</sup> 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,*

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*appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.<sup>[2]</sup>*

- 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).

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<sup>[2]</sup> *Supra* at para [73].

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- 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 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017)*, the Court held as follows:
- (a) *The Public Protector, in appropriate circumstances, has the power to direct the President to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (paragraphs 85 and 152).*



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- (b) *There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92).*
- (c) *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 (paragraphs 100 and 101).*
- (i) *Conduct an investigation.*
  - (ii) *Report on that conduct; and*
  - (iii) *To take remedial action.*
- (d) *The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (paragraph 104).*
- (e) *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).*
- (f) *The fact that there is 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 (paragraphs 107 and 108).*
- (g) *Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112)."*

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- 3.16 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. 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.
- 3.17 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. It is axiomatic 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 in the governing of public affairs. 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.
- 3.18 The Free State Department of Human Settlements 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.
- 3.19 My powers and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties

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

##### **4.1. Methodology**

4.1.1. The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (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(4) of the Public Protector Act, 1994, 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.

##### **4.2. Approach to the investigation**

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

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
- In the event of maladministration what would it take to remedy the wrong?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the Department acted improperly or irregularly in the awarding of the contract.

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- 4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration.
- 4.2.4 On 12 July 2019 the President of the Republic of South Africa issued Proclamation No. 39 of 2019 (Proclamation).<sup>2</sup> The Proclamation instructed the Special Investigating Unit (SIU) to investigate *inter alia* maladministration, improper and unlawful conduct, unlawful appropriation of public money, unlawful acquisitive acts, intentional or negligent loss of public money and offences referred to in chapter 2 of the Prevention and Combating of Corrupt Activities Act<sup>3</sup> which took place at the Department between 6 November 2013 and the date of publication.
- 4.2.5 The Schedule to the Proclamation specifically refers to the procurement, contracting for and services pertaining to the identification and removal of asbestos from houses within the Free State Province by or on behalf of the Department and payments made in respect thereof in a manner that was not fair, equitable, transparent, competitive or cost effective or contrary to legislative prescripts.
- 4.2.6 During a meeting between the Public Protector, Free State Provincial Office and the SIU (Free State) on 29 July 2019 it was agreed that I continue with the investigation in respect of the issues identified in paragraph 4.3 below and the SIU will investigate the recovery of any irregular or wasteful payments made.

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<sup>2</sup> Government Gazette No 42577 dated 12 July 2019, p52

<sup>3</sup> Act No 12 of 2004

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**4.3. On analysis of the complaint, the following were issues considered and investigated:**

4.3.1 Whether the Department failed to follow proper procurement processes in awarding the contract to the Service Provider and whether such conduct was improper and unlawful and constituted maladministration;

4.3.2 Whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract; and

4.3.3 Whether the advance payment made to the Service Provider was irregular and whether the invoices which the Department made payment on complied with the legislative prescripts.

**4.4 The Key Sources of information**

**4.4.1 Documents**

4.4.1.1 11 September 2009: Government Tender Bulletin Volume 531<sup>4</sup> (Pretoria) under reference HLA 4/2/4-2009/06: Gauteng Department of Local Government: Expression of Interest: *strategy to implement sustainable Human Settlements in line with government priorities of providing appropriate shelter as part of dealing with poverty alleviation;*

4.4.1.2 Undated attendance register of attendants to the compulsory briefing session which does not indicate a contract number date or particulars of goods/services to be provided;

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<sup>4</sup> Page 34 of bulletin

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- 4.4.1.3 15 March 2010: Gauteng Department appoints Blackhead Consulting JV as the PROFESSIONAL RESOURCE TEAMS (PRT's) for contract HLA 4/2/4-2009/06. The appointment period is from 1 April 2010 to 31 March 2012;
- 4.4.1.4 14 September 2010: Service Level Agreement (SLA) between the Gauteng Department and Blackhead Consulting JV. SLA provide for a 3 year agreement and the two main topics for implementation is eradication of informal settlements and development of viable and capacitated contractors who can compete in open market;
- 4.4.1.5 26 March 2014: IPW No: OPW -PRT2014/03/4089 for the 2010-2011 financial year. The Description of Service is for the Technical assessment of old township houses roofed with asbestos. The Contract price is R148 200 000 and the IPW was approved by the HOD on 23 March 2014. The region is indicated as Ekurhuleni and Blackhead Consulting PRT was appointed on project nr G14110008/1 for the period 17 March to 30 April 2014;
- 4.4.1.6 13 May 2014: letter from the Gauteng Department to Blackhead Consulting JV extends the contract for professional resources team's services from 1 April 2014 to 31 August 2014. The reference number is HLA 4/2/4 -2009/06. The letter states that the terms for provision of work are still the same;
- 4.4.1.7 28 May 2014: Letter from Blackhead Consulting to Free State Department of Human Settlements (Department). Audit, Handling of Hazardous Material, removal and disposal of asbestos roofed houses. Request to be appointed
- 4.4.1.8 19 June 2014: Head of the Department Mr Mokhesi addresses the Director General of the Department of Human Settlements (National Department), in a letter requesting the National Department to extend the services of Blackhead Consulting on a contract VA49/430 to the Free State Department in line with the

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National Departments approved terms and conditions contained in the instruction;

- 4.4.1.9 19 June 2014: letter from Department to Blackhead Consulting RE: *“Appointment of professional resources team (PRT) to a Departmental Panel and Municipal Planning and implementation support to the Human Settlement Departments and Municipalities with specific regional areas.”* The letter refers to *“your proposal submitted to this Department and your appointment by the National Department of Human Settlements.”* The Department requests that the contract secured by National Department be extended to the Free State Department in terms of Regulation 16A6.6;
- 4.4.1.10. 20 June 2014: Blackhead confirms receipt of a letter from Gauteng Department in respect of their appointment in the Free State. Blackhead confirms that the company will be responsible for securing funds to roll out asbestos eradication project;
- 4.4.1.11. 15 July 2014 the Department addresses a letter to the Gauteng Department in respect of *“Appointment of a Professional Resource Team (3D Gauteng Asbestos Ekurhuleni - G14110008/1) for period 17 March 2014 to 30 April 2014)”* under Reference nr IPW - PRT2014/03/4089. The Department requests the extension of the services of Blackhead Consulting on the contract in terms of Regulation 16A6.6. The Gauteng Department is informed that concurrent approval was sought from Blackhead Consulting;
- 4.4.1.12 4 August 2014 the Gauteng Department informs the Department that approval was granted for participation in the contract subject to the approval of Blackhead Consulting;

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- 4.4.1.13 7 August 2014: Blackhead Consulting acknowledge receipt of the letter of 4 August 2014 in respect of appointment for the Asbestos Eradication Program in the Free State Province and accepts the contract;
- 4.4.1.14 11 August 2014: Department requests Blackhead consulting to formally agree that they will participate and extend their services in respect of the Asbestos Eradication Program in the Free State Province;
- 4.4.1.15 12 August 2014: Blackhead Consulting agrees to perform the required work in respect of the Asbestos Eradication Program in the Free State Province;
- 4.4.1.16 13 August 2014: National Department addresses a letter and informs the Department that participation in a contract arranged by another organ of state through a competitive bidding process is allowed in terms of Regulation 16A6.6;
- 4.4.1.17 11 September 2014: Letter to Provincial Treasury from the Department requesting permission to participate in the Gauteng Department Contract;
- 4.4.1.18 19 September 2014: A note made on the letter by Provincial Treasury states that approval is not necessary and states as follows: *The accounting officer has the power of approval provided he has satisfied himself /herself that the scm processes were duly followed and they comply with the legislation;*
- 4.4.1.19 1 October 2014: Department in a letter appoints Blackhead Consulting (Pty) Ltd JV as professional resource team (PRT) for eradication of asbestos in the Free State Province. The letter states the appointment is in consultation with the Gauteng Department and with approval of Provincial Treasury;
- 4.4.1.20 Undated: Service Level Agreement was signed but not dated between Blackhead and the Department;



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- 4.4.1.21 2 December 2014: Department issued instruction to perform work (IPW-001) to Blackhead to audit and assess pre-1994 houses;
- 4.4.1.22. Undated: SARS VAT certificate valid from 28 January 2014 to 28 January 2015 for Blackhead Consulting Income Tax nr 9209770156;
- 4.4.1.23. Undated: SARS Tax clearance certificate - tender: valid from 4 June 2014 to 4 June 2015 for Diamond Hill Trading 71 (Joint Venture Partner) Income Tax nr 9132135196;
- 4.4.1.24. 2 February 2015: Report on the *Eradication of Asbestos Roof Sheeting on Houses within the Free State Province* drafted by Service Provider;
- 4.4.1.25. 25 February 2015: *Report of houses to be prioritised: Eradication of asbestos roofs on houses within the Free State Province* drafted by Service Provider;
- 4.4.1.26. 31 July 2015: Auditor General report DEPARTMENT OF HUMAN SETTLEMENTS VOTE 13 NOTES TO THE ANNUAL FINANCIAL STATEMENTS for the year ended 31 March 2015 2014/15 Details of the non-compliance where an institution was not represented in a bid committee for contracts arranged by other institutions - Blackhead Consulting T/A Diamond Hill;
- 4.4.1.27 20 October 2014: Free State Department of Human Settlements business plan;
- 4.4.1.28 23 December 2014: Free State Department of Human Settlements revised business plan;
- 4.4.1.29. 19 December 2014: Payment documents on invoice 001 in the amount of R20 000 000.00;

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- 4.4.1.30 14 January 2015: Payment documents on invoice 002 in the amount of R31 000 000.00
- 4.4.1.31 25 March 2015: Part payment documents on invoice 3. Total of invoice R77 500 000.00 Amount paid R25 000 000.00;
- 4.4.1.32. 4 June 2015: Part payment documents on invoice 3. Total of invoice R77 500 000.00 Amount paid R15 000 000.00;
- 4.4.1.33 7 August 2015: Part payment documents on invoice 3. Total of invoice R77 500 000.00 Amount paid R36 500 000.00;
- 4.4.1.34 27 January 2016: Payment documents on invoice 004 in the amount of R10 000 000.00
- 4.4.1.35 28 April 2016: Payment documents on invoice 005 in the amount of R15 000 000.00
- 4.4.1.36 4 August 2016: Payment documents on invoice 007 in the amount of R45 000 000.00
- 4.4.1.37 4 August 2016: Payment documents on invoice 008 in the amount of R32 500 000.00
- 4.4.1.38 27 August 2015: Audit Report of the Auditor General in respect of the Gauteng Department of Human Settlements;
- 4.4.1.39 5 October 2017: Court papers in the matter between Blackhead Consulting (Pty) Ltd, and Diamond Hill Trading 71 (Pty) Ltd & others, North Gauteng High Court case number 68385/17;

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4.4.1.40 1 February 2019: Court papers in the matter between ORI Group (Pty) Ltd and Mastertrade 232 (Pty) Ltd, North Gauteng High Court case number 69173/18; and

4.4.1.41. 4 February 2020: Summons issued by the Service Provider against the Department in the Free State High Court, Case nr 471/2020.

#### **4.4.2 Interviews conducted**

4.4.2.1 10 July 2017: Meeting with Department

4.4.2.2 19 July 2017: Meeting with Complainant

4.4.2.3 7 September 2017: Meeting with Auditor General Free State

4.4.2.4 8 May 2018: Meeting with Complainant

4.4.2.5 9 May 2018: Meeting with Auditor General Free State

4.4.2.6 22 July 2019: Meeting with Auditor General Free State

4.4.2.7 24 July 2019: Individual interviews with the HOD of the Department, the Director Supply Chain Management of the Department and the Chief Financial Officer of the Department.

#### **4.4.3 Correspondence sent and received**

4.4.3.1 3 May 2016: Public Protector Letter to HOD of Department;

4.4.3.2 20 May 2016: HOD of Department response to letter of 3 May 2016;

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- 4.4.3.3 18 July 2016: Letter to the Auditor General South Africa;
- 4.4.3.4 13 April 2017: Auditor General South Africa response;
- 4.4.3.5 8 August 2017: Public Protector Letter to HOD of Department;
- 4.4.3.6 25 August 2017: The HOD of the Department responded to the Public Protector on further questions
- 4.4.3.7 20 April 2018: Public Protector Letter to HOD of Department;
- 4.4.3.8 3 May 2018: The HOD of the Department responded to the Public Protector on further questions;
- 4.4.3.9 2 January 2020: Section 7(9) letter in terms of the Public Protector Act, issued to Mr TN Mokhesi, Head of the Free State Department of Human Settlements; and
- 4.4.3.10. 17 February 2020: Response from Mr TN Mokhesi, Head of the Free State Department of Human Settlements on Section 7(9) letter in terms of the Public Protector Act.
- 4.4.4 Legislation and other prescripts**
- 4.4.4.1 The Constitution of the Republic of South Africa. 1996 (Constitution);
- 4.4.4.2 The Public Finance Management Act, Nr 1 of 1999 (PFMA);
- 4.4.4.3 Treasury Regulations for departments, trading entities, constitutional institutions and public entities, 2005 (Regulations);

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- 4.4.4.4 The Value Added Tax Act, Nr 89 of 1991 (VAT Act);
- 4.4.4.5 Financial Management Policy: Management of Supply Chain: Free State Department of Human Settlement;
- 4.4.4.6 The Housing Code, Part 3: Eradication of pre-1994 Residential Properties, National Department of Human Settlements, 2009;
- 4.4.4.7 National Treasury Practice Note No 11 of 2008/2009 on unsolicited proposals (PN 11);
- 4.4.4.8 National Treasury Circular "Implementation of Supply Chain Management" (27 October 2004 (NT Circular") which deals with *unsolicited bids*;
- 4.4.4.9 Basic Accounting Handbook for Government Departments, National Treasury, July 2010 (Accounting Handbook);
- 4.4.4.10 General Procurement Guidelines, Government of South Africa, undated
- 4.4.5 Case law**
- 4.4.5.1 *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* [2015] ZAECELLC 16, 24 November 2015.

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

**5.1 Whether the Department failed to follow proper procurement processes in awarding the contract to the Service Provider and whether such conduct was improper and unlawful and constituted maladministration**

*Common cause issues*

- 5.1.1 It is not disputed that a Service Provider was appointed on 1 October 2014 by the Department as Professional Resource Team (PRT) for the eradication of asbestos roofs on houses in the Free State Province. The appointment letter further stated that the appointment is in consultation with the Gauteng Department and with approval of the Free State Provincial Treasury (Provincial Treasury).
- 5.1.2 It is also not disputed that a Service Level Agreement (SLA) was signed between the Service Provider and the Department, which document is undated. The Service Provider was further issued with an Instruction to Perform Work (IPW) on 2 December 2014 and the Service Provider completed the work during February 2015.
- 5.1.3 The Department submitted that the appointment and SLA was the first phase of the project (Audit/Assessment/GPS) and phase 2 and 3 (removal, disposal and replacement) was not proceeded with after the Auditor General's findings on 31 July 2015. The Department submitted that phase 2 and 3 will be advertised as a tender.

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- 5.1.4 It is further not disputed that the Department participated in terms of Treasury Regulation 16A6.6 in a Gauteng Department contract, procured through a tender process, with Blackhead Consulting (Pty) Ltd (Blackhead), which contract the Gauteng Auditor General found to be irregularly awarded and in contravention of Treasury Regulations. The Department, however concluded their contract with the Service Provider which was a joint venture that included Blackhead.
- 5.1.5 The Free State Auditor General also found the participation of the Department in a contract concluded by the Gauteng Department, with Blackhead, to be irregular in terms of Treasury Regulation 16A6.6. This section requires that the original Gauteng Department contract was awarded in terms of a competitive bidding process. Therefore, the payment of R76 million up to 25 March 2015 by the Department was identified as irregular expenditure in the 2014/2015 Annual Financial Statement of the Department.
- 5.1.6 It should be noted that the Head of the Department (HOD) submitted that at the time of participation in the Gauteng Department contract he was unaware of the Gauteng Auditor General's findings on the Gauteng Contract.

Issues in dispute

- 5.1.7 The Complainant submitted that contractors, *inter alia* C-Max Civil Construction and Ruwacon (Pty) Ltd were paid an amount of R370 000.00 each, between November 2014 and March 2015, for the removal and replacement of asbestos rooftops of 37 houses amounting to R10 000.00 per house. However, the Department submitted that C-Max Civil Construction and Ruwacon (Pty) Ltd were appointed to build houses and submitted the contracts signed with the two companies.

- 5.1.8 The Complainant further indicated that it does not appear as though the necessary authorisation was obtained from National Treasury before entering into a participation contract in terms of Treasury Regulation 16A6.6. However, the Department submitted proof that although authorisation from Provincial Treasury was not required they were informed of the participation contract.
- 5.1.9 The Complainant also submitted that Blackhead was appointed by the Gauteng Department as a PRT to the Gauteng Department to assist it in fulfilling its mandate. The Gauteng Department's tender advertisement<sup>5</sup> for the appointment of PRT's did not specify the identification and removal of asbestos rooftops. The SLA between the Gauteng Department and Blackhead also did not mention the eradication of asbestos rooftops. The Gauteng Department's contract had also expired at the time of participation by the Department on 1 October 2014. The Department contracted with a joint venture and not with Blackhead.
- 5.1.10. It was further submitted that the SLA concluded between Blackhead and the Gauteng Department was not valid at the time when the Department participated in the same contract. The Complainant submitted that the SLA was signed on 14 September 2010 and should have expired by 13 September 2013. The Complainant submitted that the price of the services for the Gauteng Department is lower than the price paid by the Department which is contrary to legislative prescripts.
- 5.1.11. The Department submitted that C-Max Civil Construction and Ruwacon (Pty) Ltd were appointed to build houses and not to remove asbestos roofs from pre-1994 houses. The Department submitted copies of the contracts with the companies which clearly indicate the scope of work as the building of houses.

<sup>5</sup> Vol. 531 Pretoria, 11 September 2009 No. 2599 GOVERNMENT TENDER BULLETIN, page 34 GAUTENG DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING HLA 4/2/4-2009/06 EXPRESSION OF INTEREST



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- 5.1.12 The HOD of the Department was requested in writing and during an interview with the Public Protector Investigation Team, on 24 July 2019 to indicate the due diligence followed to ensure compliance with legislative prescripts in respect of participating in a contract procured by another State Institution.
- 5.1.13. The HOD of the Department responded that the Head of the Gauteng Department assured him of the validity of the contract and that a Supply Chain Management Practitioner of the Department also confirmed this. He further indicated the differences in requirements for National and Provincial Departments and Municipalities.
- 5.1.14. The contract that the Department participated in expired on 31 March 2013 according to the Gauteng Department's appointment letter or at latest on 13 September 2013 according to the SLA signed between the Gauteng Department and Blackhead Consulting. The Gauteng Contract was extended by the Gauteng Department on 13 May 2014 for the period 1 April 2014 to August 2014. This is illegal according to legislative prescripts and the Gauteng and Free State Auditor General's findings.
- 5.1.15. The HOD of the Department and the Director Supply Chain during an interview with the Public Protector Investigation Team, on 24 July 2019 both indicated that the fact that the contract expired does not bar them from participating in terms of the requirement of the PFMA or the Regulations thereto. They were not aware of the Court decisions in respect of the interpretation of the Regulations regarding participating in a contract procured by another State Institution. The HOD of the Department indicated that there is a difference in opinion regarding the interpretation of Regulation 16A.6.6 between the Auditor General and the State Law Advisors. During the meeting he was made aware of the court's interpretation of the legislative prescripts.

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- 5.1.16. The Gauteng Department contract that the Department participated was concluded with Blackhead and the Department's contract was concluded with the Service Provider who was a joint venture. The HOD of the Department and the Director Supply Chain Management during an interview with the Public Protector Investigation Team, on 24 July 2019 both indicated that this is not a requirement in terms of the PFMA or the Regulations thereto. They were not aware of the Court decisions in respect of the interpretation of the Regulations in respect of participating in a contract procured by another State Institution.
- 5.1.17. The Department further submitted that an IPW in Gauteng Province entailed the technical assessment of old township houses roofed with asbestos whilst in the Free State the scope of work required auditing, assessment and geographically referencing all pre 1994 government housing units.
- 5.1.18. The HOD of the Department responded to a question in writing that the difference in the fee structure between the Gauteng Contract and the Department's contract was as a result of the location and layout of the areas to be assessed.
- 5.1.19. During an interview between the Public Protector Investigation team and Mr Matlakala the Director Supply Chain Management of the Department on 24 July 2019, he indicated that the Gauteng Department's contract was only for the identification of units, while the Department's contract included the GPS co-ordinates of the houses and therefore the increase in price per unit. Mr Matlakala was unaware of the fact that Regulation 16A6.6 to be adhered to, requires the exact same company, price and services when participating in a contract procured by another Government Institution.

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- 5.1.20. The letter of 28 May 2014 submitted by the Service Provider to the Department quoted a price of R1350 per house for assessment, and R32 760.00 for the handling, removal and disposal of hazardous material.
- 5.1.21. The appointment letter dated 1 October 2014 appoints the Service Provider as a PRT to assist the Department to eradicate asbestos in the Free State Province. The letter further states that the Service Provider is exclusively appointed for the audit and assessment of asbestos, handling and disposal of hazardous material, removal and disposal of asbestos contaminated rubble and replacement with SABS approved material in the Free State Province. The Undated SLA states that the Service Provider is appointed to assess/audit houses roofed with asbestos material, handling and disposal of asbestos sheets to an approved, designated disposal site.
- 5.1.22. The IPW of 2 December 2014 states that the Service Provider should audit, assess and GPS all pre-1994 government housing units in the Province at a rate of R850 per unit up to a maximum of 300, 000 units and the total project cost is R255 million.
- 5.1.23. The Department submitted that the appointment and SLA was the first phase of the project (Audit/Assessment/GPS) and phase 2 and 3 (removal disposal and replacement) was not proceeded with after the Auditor Generals findings. He submitted that phase 2 and 3 will be advertised as a tender.

*Other documentary evidence received*

- 5.1.24. I embarked on a timeline analysis of documentation received from different sources. The analysis of these documents reveal the process and timelines of concluding this contract.

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- 5.1.25. On 11 September 2009 the Gauteng Department placed an invitation in the Government Tender Bulletin Volume 531<sup>6</sup> (Pretoria) under reference HLA 4/2/4-2009/06 for the appointment of PRTs in order to assist the Gauteng Department in fulfilling its mandate.
- 5.1.26. On 15 March 2010 the Gauteng Department appoints Blackhead as the PRT for contract HLA 4/2/4-2009/06. The appointment period is from 1 April 2010 to 31 March 2013.
- 5.1.27. A SLA between the Gauteng Department and Blackhead was concluded on 14 September 2010 and provide for a 3 year agreement. The two main topics for implementation is the eradication of informal settlements and the development of viable and capacitated contractors who can compete in the open market. No mention is made of asbestos eradication in any of the pricing schedules (A to G) attached to the SLA. Annexure 2 to the SLA is a Milestones document and no mention of asbestos eradication is made in this document.
- 5.1.28. The Gauteng Department submitted IPW No: OPW -PRT2014/03/4089 dated 26 March 2014 for the 2010-2011 financial year issued to the Service Provider. The Description of Service is for the Technical assessment of old township houses roofed with asbestos. The Contract price is R148 200 000 and the IPW was approved by the Gauteng Department's Accounting Officer on 23 March 2014. The region is indicated as Ekurhuleni and Blackhead Consulting PRT was appointed on project nr G14110008/1 for the period 17 March to 30 April 2014.
- <sup>7</sup> The Gauteng Auditor General found this IPW to be irregular.

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<sup>6</sup> Page 34 of bulletin

<sup>7</sup> Contract period for SLA HLA 4/2/4-2009/06 and contract PRT2014/03/4089 expired on 13 September 2013

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- 5.1.29. On 13 May 2014 a letter from the Gauteng Department to the Service Provider extends the contract for PRT's services (concluded in 2010 and expired in 2013) from 1 April 2014 to 31 August 2014. The reference number is HLA 4/2/4 - 2009/06. The letter states that the terms for provision of work are still the same.
- 5.1.30. The Service Provider addressed a letter to the Department on 28 May 2014 inter alia requesting to be appointed for the Audit, Handling of Hazardous Material, removal and disposal of asbestos roofed houses. The letter further states that *"The Free State Provincial Government will task the Free State Department of Human Settlements to embark on a project to eradicate asbestos roofs from all housing units in the province."*
- 5.1.31. On 19 June 2014 the Head of the Department Mr Mokhesi addresses the Director General of the Department of Human Settlements (National Department), in a letter referring to *"Appointment of professional resources team (PRT) to a Departmental Panel and Municipal Planning and implementation support to the Human Settlement Departments and Municipalities with specific regional areas."* He requests the National Department to extend the services of Blackhead on a contract VA49/430 to the Free State Department in line with the National Department's approved terms and conditions contained in the instruction.
- 5.1.32. During an interview with the HOD on 24 July 2019 he was requested to explain the letter and why the Gauteng Department was approached before he received a response from the National Department. He explained that this letter is a mistake and meant for Gauteng.
- 5.1.33. However on 19 June 2014 the Department also addressed a letter to the Service Provider requesting that the contract VA49/430 secured by the National

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Department be extended to the Free State Department in terms of Regulation 16A6.6.

- 5.1.34. On 15 July 2014 the Department addresses a letter to the Gauteng Department in respect of "Appointment of a Professional Resource Team (3D Gauteng Asbestos Ekurhuleni - G14110008/1) for period 17 March 2014 to 30 April 2014)" under Reference nr IPW - PRT2014/03/4089. The Department requests the extension of the services of Blackhead on the contract in terms of Regulation 16A6.6. The Gauteng Department is informed that concurrent approval was sought from Blackhead.
- 5.1.35. On 4 August 2014 the Gauteng Department informs the Department that approval was granted for participation in the contract subject to the approval of Blackhead.
- 5.1.36. On 11 August 2014 the Department requests Blackhead to formally agree that they will participate and extend their services in respect of the Asbestos Eradication Program in the Free State Province.
- 5.1.37. On 12 August 2014 Blackhead agrees to perform the required work in respect of the Asbestos Eradication Program in the Free State Province.
- 5.1.38. On 13 August 2014 the National Department responds to the Department's letter of 19 June 2014. The National Department informs the Department that participation in a contract arranged by another organ of state through a competitive bidding process is allowed in terms of Regulation 16A6.6.
- 5.1.39. On 11 September 2014 the Department seeks approval from Provincial Treasury to participate in a Gauteng Department contract. A note dated 19

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September 2014 made on the letter by the HOD of Provincial Treasury, Mr Mahlatsi, states that approval is not necessary and states as follows:

*"The accounting officer has the power of approval provided he has satisfied himself /herself that the scm processes were duly followed and they comply with the legislation."*

- 5.1.40. On 1 October 2014 the Department in a letter appoints the Service Provider as PRT for eradication of asbestos in the Free State Province. The letter states the appointment is in consultation with the Gauteng Department and with approval of Provincial Treasury.
- 5.1.41. A SLA was signed but not dated between the Service Provider and the Department. The SLA contains a definition of the project namely *"Project means appointment of the Service Provider to assess/audit houses roofed using asbestos material, handling and disposal of asbestos sheets to an approved, designated disposal site."*
- 5.1.42. On 2 December 2014 the Department issued instruction to perform work (IPW-001) to the Service Provider and contains the following instructions:  
*"Audit Assess and GPS all pre 1994 units @ R850 vat exclusive per unit up to maximum of 300 000 units Total cost: R255 million excl VAT."*
- 5.1.43. On 25 January 2018 Mr Pheane Edwin Sodi sole shareholder and director at Blackhead Consulting (Pty) Ltd approached the South Gauteng High Court under case nr 68385/17 claiming half of the last payment made by the Department in the amount of R77, 5 million from his Joint Venture Partner, Diamond Hill Trading 71 (Pty) Ltd. Mr PE Sodi (sole shareholder and director of Blackhead Consulting) in his founding affidavit makes certain averments under oath;

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- 5.1.43.1 In paragraph 11 he submits that prior to May 2014 the joint venture with Diamond Hill Trading 71 (Pty) Ltd was formed to pursue similar (to Gauteng Contract) opportunities in the Free State.
- 5.1.43.2 In Paragraph 12 he submits that on 28 May 2014 on request from the Department for a proposal, he submitted the letter to the Department with the proposal for the assessment and removal of asbestos roofs.
- 5.1.43.3 In Paragraph 24 he states that the final payment made by Department to the Service Provider in terms of the SLA was on 4 August 2016 in the amount of R77, 5 million. He did not receive his share from his partner in the Joint Venture in terms of the Joint Venture agreement.
- 5.1.43.4 In Paragraph 31 he states that his Joint Venture partner was informed by the Department that the *“Public Protector intended recovering approximately R60 000 000, 00 (sixty million) of the amount paid by the Free State Department on the basis that the Free State Department had been ‘overcharged’.* “
- 5.1.43.5 In Paragraph 36 he states that on 6 September 2016 he made enquiries at the Department and was informed that the Public Protector made enquiries about the appointment in terms of Section 32 (*sic*) of the Public Finance Management Act.
- 5.1.44. On 13 June 2019 the attorneys representing Blackhead Consulting in the South Gauteng High Court case No 68385/17 was informed that I am investigating the process followed by the Free State Department of Human Settlements to procure the services of the Service Provider for the identification of asbestos roofed houses in the Free State Province.



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- 5.1.45. The attorneys were requested to obtain a response to two questions in the form of an affidavit from their client Mr Pheane Edwin Sodi. The following questions were submitted:
- 5.1.45.1. In Paragraph 12 of the founding affidavit Mr Sodi avers that the proposal marked FA2 (28 May 2014 unsolicited proposal) attached to the affidavit was addressed to the Department in response to a request for a proposal. We would like to enquire as to the name of the official who requested him/them to make the proposal?
- 5.1.45.2. *In the letter of 28 May 2014 (FA2) to the Department in the second paragraph on page 2 of the letter (Marked 20) the Joint Venture informs the Department that the Free State Provincial Government will task the Free State Department of Human Settlements to embark on a project to eradicate asbestos roofs from all housing units in the province. Who informed Mr Sodi that the Provincial Government will issue the instruction to the Department?*
- 5.1.46. The affidavit dated 11 July 2019 by Mr Sodi responded to the questions as follows:
- 5.1.46.1. Mr Sodi submitted that he did not know the name of the official as these aspects were attended to by his partner in the Joint Venture.
- 5.1.46.2. Mr Sodi indicated that it was his understanding that it is the Cabinets position to eradicate asbestos roofs in “black townships” in all provinces. He submitted that no single person advised him of this and in his affidavit he was referring to the process to be followed.

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*Response from HOD of Department to Section 7(9) Notice*

- 5.1.47. In his response the HOD admitted that he holds final responsibility for actions and omissions in his Department. He further submits that “...*you should realise that one person in the form of myself as Head of Department has a number of other employees of the Department who have specific tasks to perform in their respective roles.*”
- 5.1.48. The HOD further submitted that he was not made aware nor advised of the irregularity of the contract concluded. He submitted that he was not made aware by his own Supply Chain Management nor the Auditor General that he could renege on the contract with the Service Provider.
- 5.1.49. The HOD further submits that if he was advised by his Supply Chain Management or the Auditor General he would have reneged on the contract and would not have made any further payments.
- 5.1.50. However, the Auditor General report for the 2014/2015 Financial Year was released on 31 July 2015 wherein he declared the contract concluded with the Service Provider as irregular. Despite the declaration of the contract between the Department and the Service Provider to be irregularly procured, the Department proceeded to make another 5 payments to the Service Provider in the total amount of R139 million.

*Application of the relevant law*

- 5.1.51. Section 217(1) of the Constitution requires an organ of state to contract for goods or services ‘in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’.

- 5.1.52. These constitutional values on procurement are repeated in section 38(1)(a)(iii) of the PFMA, which provides in relevant parts:
- " (1) the accounting officer for a department, trading entity or constitutional institution –*
- (a) Must ensure that the department, trading entity or constitutional institution has and maintains –*
- (i) ...*
- (iii) An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective...*
- (c) must take effective and appropriate steps to—*
- (i) ...*
- (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and ..."*
- 5.1.53. Section 86 of the PFMA determines that an accounting officer is guilty of an offence if the accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40 of the PFMA.
- 5.1.54. Section 1(b) of the PFMA defines *"executive authority"— in relation to a provincial department, means the member of the Executive Council of a province who is accountable to the provincial legislature for that department"* and Section 36(2)(a) of the PFMA provides that the head of a department must be the accounting officer for the department.
- 5.1.55. Regulation 9.1.1 states that the *"accounting officer of a department must exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure, and must for this purpose implement effective, efficient and transparent processes of financial and risk management."*



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- 5.1.56. Regulation 16A6.4 of the Treasury Regulations provides that, *“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 inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”*
- 5.1.57. Regulation 16A6.6: PFMA SCM Regulations also allow a state body or entity to participate in a contract arranged by any other state body with similar needs. Departments may procure goods or services in this way, if they believe the contract was procured according to the prescribed processes and there are clear and measurable discounts or benefits. Both the provider and the original state body must give their written approval.
- 5.1.58. National Treasury Practice Note No 11 of 2008/2009 (“the Practice Note”) issued in terms of the PFMA regulates unsolicited proposals. An unsolicited proposal is defined as: *“A proposal / concept received by an institution outside its normal procurement process that is not an unsolicited bid.”*
- 5.1.59. An unsolicited bid is defined as *“A product or service that is “innovative”, “unique” and “provided by a sole provider.”* Unsolicited bids are regulated by National Treasury Circular *“Implementation of Supply Chain Management”* dated 27 October 2004.
- 5.1.60. If an unsolicited proposal is accepted by the relevant institution, the decision to consider the proposal must be communicated in writing to the proponent. Negotiations are then entered into to conclude an unsolicited proposal agreement. If an unsolicited proposal agreement is concluded then the Department must issue a Request for Qualification (RFQ) to test the market for the existence of other private entities capable of providing the product or



service. In the event of no response to the RFQ an institution may enter into direct contractual negotiations with a proponent outside of a tender process. If a response is received to the RFQ, an ordinary competitive bidding process must followed.

- 5.1.61. The Department's SCM Policy in paragraph 12.7 prescribes the procurement methods with threshold and sub-paragraph (a)(vii) unsolicited bidding appears. Sub-paragraph (a)(viii) states that the processes prescribed will apply in general but the Director: SCM may decide to use alternative methods more aligned to the nature of the purchase.
- 5.1.62. The SCM Policy in paragraph 12.13 prescribes the procurement process in respect of unsolicited bids. However the contents of the paragraph then continues to refer to unsolicited proposals. Sub-paragraph (c) states that – *"If the Department decides to proceed with the unsolicited proposal, the accounting officer must negotiate an unsolicited proposal agreement with the proponent. The sole purpose of the unsolicited proposal agreement is to guide the process in terms of NATIONAL TREASURY PRACTICE NOTE NO 11 OF 2008/2009 between the institution and the proponent."*
- 5.1.63. The SCM Policy further in paragraph 12.20 prescribes that a written contract must be a reflection of the terms and conditions.
- 5.1.64. In *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality*<sup>8</sup> in paragraph 37 in respect of participation in a contract procured by another organ of state the court remarks that *"I cannot conceive compliance with the constitutional imperatives unless the goods or services procured by the*

<sup>8</sup> [2015] ZAECELLC 16, 24 November 2015

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*second organ of state are the same as that required by the first organ of state, and the contract price is the same."*

- 5.1.65. The Judge finds in paragraph 43 that "...the procurement of goods and services under a contract secured by that other organ of state ...Such contract is the SLA and the section requires the procurement under such contract, or at least under the terms of such contract. When the SLA was cancelled and/or the material terms thereof were amended, the goods and services could no longer be procured under the SLA or under its terms and the exemption allowed ..... came to an end."

Conclusion

- 5.1.66. I am persuaded by the evidence and legislative prescripts, to conclude that this was an unsolicited proposal and not a participation contract. A participation contract requires the same service provider, the same services and the same price. The Department could also not demonstrate benefits as required by Treasury Regulation 16A6.6.
- 5.1.67 The Gauteng Department SLA expired during 2013, so participation was not an option anymore. The extension of the contract during 2014 by the Gauteng Department was irregular as the contract had expired.
- 5.1.68 The submission made by the Service Provider on 28 May 2014, was on his own evidence submitted to the South Gauteng High Court, made on request by the Department. This submission is in effect according to legislative prescripts an unsolicited proposal.
- 5.1.69 Subsequent to receiving the proposal, the Department did not follow the processes prescribed in Practice Note 11 of 2008/2009.

5.1.70. After receipt of the proposal from the Service Provider, the Department first endeavoured to participate in a contract awarded to Blackhead by the National Department. Before receiving a response from the National Department, the Department wrote to the Gauteng Department to participate in their expired contract with Blackhead.

5.1.71. The Department maneuvered themselves in a contractual setting for the procurement of goods and services with a contract value of R255 million, without being subjected to any prescribed legislative tender procedure or process, and out of reach of the provisions of section 217 of the Constitution and of the legislative prescripts.

**5.2 Whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract**

*Issues not in dispute*

5.2.1 The Service Provider was appointed by the Department on 1 October 2014 and the appointment letter states the Service Provider is appointed as Professional Resource Team (PRT) for eradication of asbestos in the Free State Province. They were duly appointed for Audit and Assessment, handling of hazardous material, removal and disposal, and replacement of asbestos roofs. They were expected to sign a SLA.

5.2.2 An undated SLA was concluded and signed. The SLA contains a definition of the project namely *"Project means appointment of the Service Provider to assess/audit houses roofed using asbestos material, handling and disposal of asbestos sheets to an approved, designated disposal site."*

- 5.2.3 On 2 December 2014 the Department issued an Instruction to Perform work number IPW – 0001, (IPW) which states that the Service Provider must audit, assess and GPS pre-1994 government housing units at a rate of R850 per unit. The IPW further states that the maximum number of houses to be audited is 300, 000. The appointed is for the period 1 December 2014 to 31 March 2015.

*Issues in dispute*

- 5.2.4 The Complainant submitted that there are necessary skills within the Department and Free State Municipalities for the identification of asbestos roofed pre-1994 houses. She indicated that for example the Councillors of the Local Municipalities can identify the houses with asbestos roofs.
- 5.2.5 The Complainant further submitted that two contractors, namely C- Max Civil Construction and Ruwacon (Pty) Ltd which were paid an amount of R370 000 between November 2014 and March 2015 for the removal of asbestos rooftops of 37 houses amounting to R10 000 per house.
- 5.2.6 The Complainant also submitted that the Service Provider will receive R255 million for the identification of only 36 000 asbestos roofed houses and this is extremely irresponsible and highly suspect.
- 5.2.7 The Department submitted that C-Max Civil Construction and Ruwacon (Pty) Ltd were appointed to build houses and not to remove asbestos roofs from pre-1994 houses. The Department submitted copies of the contracts with the companies which clearly indicate the scope of work as the building of houses.
- 5.2.8 The Department further submitted that the Service Provider had to assess approximately 300 000 houses at a rate of R850 per house and they identified and assessed 36 344 houses which had asbestos roofs.



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- 5.2.9 The identification of asbestos requires expertise as modern materials sometimes have the appearance of asbestos type material.
- 5.2.10. On 18 July 2019 I came into possession of documents relating to the Department's eradication of asbestos roofs contract from an anonymous source. The documents relate to Court papers in a matter between ORI Group (Pty) Ltd and Mastertrade 232 (Pty) Ltd, North Gauteng High Court case number 69173/18. The analysis of the documents revealed the following:
- 5.2.10.1 A letter dated 20 August 2014 from the Service Provider to Master Trade Consulting (Master Trade) accepting the quotation of Master Trade dated 10 August 2014 for assessment of 150 000 units in the Free State for the asbestos eradication project. The letter further states that the services will commence when an IPW is received from the Department but the Service Provider is on target to commence on 1 October 2014.
- 5.2.10.2 A letter dated 31 October 2019 from Master Trade to the Director ORI Group (Pty) Ltd (ORI Group) in the form of a contract appointing the ORI Group for professional service in the Free State eradication of asbestos roofs audit for 300 000 residential units.
- 5.2.10.3. The contract states that the Project Budget and value of the ORI Group appointment shall not exceed R21, 391,489.30 (incl vat).
- 5.2.10.4. Paragraph 4.1 states that the Project Management fee is R11, 408, 539.30 (incl vat) and the expense budget detailed in 23 items amounts to R9, 982,950.00 (incl vat).



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- 5.2.10.5. Paragraph 7 states that all payments due to the ORI Group will be paid within 5 working days by Master Trade once the Department has made payment to Blackhead Consulting JV.
- 5.2.10.6. On 31 October 2014 in a letter from the ORI Group to Master Trade the ORI Group accepts the appointment.
- 5.2.10.7. On 1 November 2014 Master Trade submits an invoice to Blackhead Consulting in respect of the Free State Province Asbestos Eradication Program for 10% payment of R44 208 856.79.
- 5.2.10.8. On 18 December 2014 Master Trade submits an invoice to Blackhead Consulting in respect of the Free State Province Asbestos Eradication Program for 30% payment of R44 208856.79.
- 5.2.10.9. On 3 March 2015 Master Trade submits an invoice to Blackhead Consulting in respect of the Free State Province Asbestos Eradication Program for 60% payment of R44 208856.79 (Final Payment Due).
- 5.2.10.10. On 14 February 2015 the ORI Group sends emails to Master Trade and Diamond Hill trading attaching the final report to be checked and further informs that the maps were printed and backed up. The ORI Group inform them that they are ready to deliver the Final Report to the Department on the following Monday.
- 5.2.10.11. On 3 August 2015 in a letter the ORI Group informs Master Trade of the 100% finalisation of the project and that all documents were submitted to all stakeholders. They request reconciliation of the project finances to determine the outstanding amount due to the ORI Group.



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- 5.2.11 On 18 July 2019 the above documents were attached to emails sent to the ORI Group and Master Trade requesting them to confirm that the documents are authentic.
- 5.2.12. On the same date AK Manyike on behalf of the ORI Group responds as follows:
- "I confirm that what you attached are the documents pertaining to my Company, I was involved on the project and I will like to indicate that the contracted amount has not been received in full."*
- 5.2.13. On further enquiries to the ORI Group I was informed to address any further queries to their attorney and that the account will be for my payment. A response was not received from Master Trade.
- 5.2.14 From the filing notice under case number 69173/18 between the ORI Group as Plaintiff and Master Trade as defendant it appears from the documents that the ORI Group received an amount of R6 113 716.00 and claims an amount of R15 277 773.30 from Master trade in terms of their contract dated 31 October 2014.
- 5.2.15 The HOD of the Department and the Director Supply Chain Management during an interview with my Investigation Team, on 24 July 2019 both indicated that they were totally unaware of these documents. Both in retrospect admitted that the Department overpaid for the services rendered.
- Response from HOD of Department to Section 7(9) Notice*
- 5.2.16 The HOD responded to the Section 79) notice issued, that he and his Department was unaware of the fact that the Service Provider sub-contracted

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the contract. He further states that the price paid for the assessment/audit of 300 000 houses seemed reasonable.

*Application of the relevant law*

- 5.2.17 Paragraph 8.2 of Financial Management Policy: Management of Supply Chain: Free State Department of Human Settlement relating to SCM procedures states that value for money remains the essential test against which procurement outcomes must be justified. It further states that it is the basis for comparing procurement alternatives and offers from suppliers in order to identify the one that meets the needs in the most cost effective manner.
- 5.2.18 Section 38(1)(a)(iii) of the PFMA states that an accounting officer for a department, must have an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- 5.2.19 Regulation 9.1.1 of the Treasury Regulation states that the *“accounting officer of a department must exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure, and must for this purpose implement effective, efficient and transparent processes of financial and risk management.”*
- 5.2.20 The General Procurement Guidelines states that proper and successful government procurement rests upon certain core principles of behaviour of which one is value for money. This is an essential test against which a department must justify a procurement outcome.



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Conclusion

- 5.2.21 The Department did not appoint C-Max Civil Construction and Ruwacon (Pty) Ltd for the removal of asbestos roofs and no evidence was found that the necessary skills to identify asbestos roofs are present within the Local Municipalities or your Department.
- 5.2.22 The R255 million was not paid for the identification of 36 000 units but for the assessment of 300 000 units at a price of R850.00 per unit.
- 5.1.23. The documents confirm that the Service Provider subcontracted the total contract to Master Trade for an amount of R44 208 567.90. Master Trade further subcontracted the total contract to the ORI Group. The documents in my possession and confirmed authentic by the ORI Group, prove that the project was 100% completed and the reports generated by the ORI Group for a fee of R21 391 489.30.
- 5.2.24. I can come to no other conclusion that the services provided were not cost effective and that the Department did not receive value for money.
- 5.3 Whether the advance payment made to the Service Provider was irregular and whether the invoices which the Department made payment on complied with the legislative prescripts**

Issues not in dispute

- 5.3.1 The following payments were made by the Department to the Service Provider:



| No. | Date       | Invoice Nr | Invoice Amount | Amount Paid  |
|-----|------------|------------|----------------|--------------|
| 1   | 2014-12-19 | 1          | R 20 000 000   | R 20 000 000 |
| 2   | 2015-01-14 | 2          | R 31 000 000   | R 31 000 000 |
| 3   | 2015-03-25 | 3          | R 77 500 000   | R 25 000 000 |
| 4   | 2015-06-04 | 3          | R 77 500 000   | R 15 000 000 |
| 5   | 2015-08-07 | 3          | R 77 500 000   | R 36 500 000 |
| 6   | 2016-01-27 | 4          | R 10 000 000   | R 10 000 000 |
| 7   | 2016-04-28 | 5          | R 15 000 000   | R 15 000 000 |
| 8   | 2016-08-04 | 7          | R 45 000 000   | R 45 000 000 |
| 9   | 2016-08-04 | 8          | R 32 500 000   | R 32 500 000 |

5.3.2 The Contract with the Service Provider states that the commencement period of the contract is 1 December 2014 and that 40% of 50% of the project costs which amounts to R51 million is payable on commencement of the project subject to the submission of a valid tax invoice.

Issues in dispute

5.3.3 The Complainant submitted that the advance payments made to the Service Provider were irregular and that the invoices submitted by the Service Provider did not comply with legislative prescripts.

5.3.4 The Complainant submitted that the proposal letter dated 28 April 2014 from the Service Provider to the Department stated that *"Kindly note that as the project is undertaken on a Risk basis, Diamond Hill/Blackhead consulting will identify and secure funds on behalf of the Free State Provincial Government for the above costs."*



5.3.5 The current Chief Financial Officer, Ms N Molikoe of the Department submitted the payment documents on request from my Investigation team. An assessment of the invoices that payments were made on, and submitted by the Department revealed that the name, address of the supplier appear on the invoice but none contain a VAT registration number. The legal or trading name, address and registration number of the recipient does not appear on any invoice. All the invoices are from Blackhead addressed to Blackhead Consulting JV and not addressed to the Department.

*Response from HOD of Department to Section 7(9) Notice*

5.3.6 In response to the Section 7(9) letter issued to the HOD of the Department, he submitted that *"Being not responsible for the accounting side of things it should surely have been the responsibility of the Finance Department to identify the irregularity in the Invoices."*

*Application of the relevant law*

5.3.7 Section 38 (1) (e) of the PFMA states that the accounting officer for a department must *"comply with any tax, levy, duty, pension and audit commitments as may be required by legislation."*

5.3.8 Tax invoices payable has to adhere to certain requirements. Sub-section 20(4) of the Value Added Tax Act (89 of 1991) in particular is very specific in this regard. A tax invoice (full tax invoice) shall be in the currency of the Republic and **shall** contain the following particulars:

*"(a) The words 'tax invoice' in a prominent place;*

*(b) The name, address and VAT registration number of the supplier;*

*(c) The legal or trading name, address and registration number of the recipient;*

- (d) An individual serialized number and the date upon which the tax invoice is issued;*
- (e) Full and proper description of the goods (indicating, where applicable, that the goods are second-hand goods) or services supplied;*
- (f) The quantity or volume of the goods or services supplied;*
- (g) Either*
  - (i) The value of the supply, the amount of tax charged and the consideration for the supply; or*
  - (ii) Where the amount of tax charged is calculated by applying the tax fraction to the consideration, the consideration for the supply and either the amount of the tax charged, or a statement that it includes a charge in respect of the tax and the rate at which the tax was charged."*

5.3.9 Treasury Regulation 15.1.10.2 (c) states that accounting officers should avoid "prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services), unless required by the contractual arrangements with the supplier;"

Conclusion

5.3.10 Based on the strength of the evidence discussed above, I am persuaded to conclude that the contract between the Service Provider and the Department includes the payment of an advance which is valid in terms of Treasury Regulation 15.10.1.2(c). However as the contract is null and void the advance payment was irregular as also found by the Auditor General.

5.3.11. Further, none of the invoices comply with the requirements of section 20(4) of the VAT Act.



## **6. FINDINGS**

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

### **6.1 Regarding whether the Department failed to follow proper procurement processes in awarding the contract to the Service Provider and whether such conduct was improper and unlawful and constituted maladministration**

6.1.1 The allegation that there were irregularities and improprieties in the awarding of the contract for the Eradication of Asbestos Roofs in the Free State Province to the Service Provider is substantiated.

6.1.2 The Department participated in an expired contract of the Gauteng Department of Human Settlements (Gauteng Department) and did not conduct a due diligence investigation before participating in this contract. The Department was in possession of the Gauteng Department's Service Level Agreement (SLA) which had clearly expired. This constitutes a contravention of the legislative prescripts as interpreted in the Blue Nightingale case.<sup>9</sup> This conduct amounts to 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.

6.1.3 The Head of Department submitted in his response to the notice in terms of Section 7(9) of Public Protector Act, stating that although he holds final responsibility in terms of the applicable legislation, he was neither advised by his officials nor the Auditor General that he could renege on the contract. This

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<sup>9</sup> *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality* [2015] ZAECELLC 16, 24 November 2015 paragraph 43

explanation of the HOD cannot be accepted as the Auditor General (Free State) Report, declaring the procurement as irregular was released on 31 July 2015, yet the Department still made further payments of R139 million towards the service provider?.

- 6.1.4 The Department created the impression that they participated in a contract concluded by another state institution (Gauteng Department) while the services were not the same as specified in the existing contract and also the price was higher. This is in contravention of Treasury Regulation 16A6.6 and amounts to 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.
- 6.1.5 Although the Department created the impression that they participated in a contract in terms of Treasury Regulation 16A6.6, while the submission made by the Service Provider was in fact an unsolicited proposal in terms of Treasury Practice Note No 11 of 2008/2009. The Practice Note required the Department to issue A Request for Qualification (RFQ) to test the market for the existence of other private entities capable of providing the product or services.
- 6.1.6. The failure to issue a RQF is in contravention of the Practice Note and Paragraph 12.13 of the Department's SCM Policy. It is further in contravention of Regulation 16A.9 and amounts to abuse of the procurement system. This conduct amounts to 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.
- 6.1.7 The discrepancies between the services to be provided in the unsolicited proposal, the SLA and the letter of appointment created the impression that the appointment was for the assessment, removal of the asbestos material and



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replacement of asbestos roofs while the SLA only refers to assessment and removal. The IPW (Instruction to Perform Work) was only issued for the assessment. The SLA was in contravention of paragraph 12.20 of the Department's SCM policy as it was not an accurate reflection of the terms and conditions reflected in the unsolicited proposal or appointment letter. This conduct amounts to 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.

6.1.8 The findings above indicate willful conduct and gross negligence in terms of section 86 of the Public Finance Management Act) PFMA on the part of the Accounting Officer, Mr TN Mokhesi, in that he did not comply with Section 38 of the Public Finance Management Act. He failed to execute his fiduciary duties in terms of the Public Finance Management Act and the Supply Chain Management Policy of the Department. This conduct amounts to 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 Regarding whether the services provided were cost-effective and whether the Department received value for money in the execution of this contract**

6.2.1 The allegation that the services provided were not cost effective and the Department did not receive value for money, is substantiated.

6.2.2 No evidence was submitted or found that the necessary skills to identify asbestos roofs were available within the Local Municipalities and Department.

6.2.3 The R255 million paid to the service provider was not paid for the identification of 36 000 units/houses but for the assessment of 300 000 units at a price of R850 per unit. Eventually 36 344 units were identified as having asbestos roofs.



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- 6.2.4 The evidence and documents prove that the project was 100% completed and the reports generated by the ORI Group (company subcontracted by Mastertrade) at a fee of R21 391 489.30 while the service provider appointed was paid R230 million.
- 6.2.5 The HOD submitted in his response dated to the Notice in terms of the Section 7(9) of Public Protector Act, that although he holds final responsibility in terms of the applicable legislation, he was unaware that the Service Provider had subcontracted the contract. If the HOD had acted on the Auditor General Report, released on 31 July 2015, the further payments of R139 million would have been avoided.
- 6.2.6 The omission by the HOD to act on the report of the Auditor General released on 31 July 2015, amounts to gross negligence in terms of section 86 of the PFMA on the part of the Accounting Officer in that he did not comply with Section 38 of the Public Finance Management Act. He failed to execute his fiduciary duties in terms of the Public Finance Management Act and the Supply Chain Management Policy of the Department. This conduct amounts to 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.
- 6.3 Regarding whether the advance payment made to the Service Provider was irregular and whether the invoices which the Department made payment on complied with the legislative prescripts**
- 6.3.1 The allegation that the advance payment made to the Service Provider, is not substantiated in terms of the SLA concluded. Treasury Regulations do allow for advance payments on contract amounts if required by the contractual arrangements with the supplier. The contract signed between the Service Provider and Department clearly provided for an advance payment of 40% of



50% of the Contract price. However as the contract was irregularly procured the advance payment was irregular indeed, as also found by the Auditor General South Africa.

- 6.3.2 However, the invoices submitted by the Service Provider to the Department did not comply with the Legislative Prescripts and the payment of these invoices by the Department this sentence seems incomplete. This conduct amounts to 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 the Public Protector is taking in pursuit of section 182(1)(c), is the following:

### **7.1 The Premier must:**

- 7.1.1 Take the appropriate steps to ensure that the conduct of the Accounting Officer is investigated in terms of Section 84 of the Public Finance Management Act and that the conduct is reported in terms of Section 86 of the Public Finance Management Act to the South African Police Service and the Directorate for Priority Crime Investigation (Hawks) within 60 days.

### **7.2 The Head of the Department must:**

- 7.2.1 Take the appropriate steps to ensure that the conduct of the Director Supply Chain Management and the Chief Financial Officer is investigated in terms of Section 84 of the Public Finance Management Act, within 60 days;

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7.2.2 Take the appropriate steps to ensure that the Department's Supply Chain Management Policy is amended to correctly reflect the legislative prescripts; and

7.2.3 Take appropriate steps to ensure that officials are properly trained in the legislative prescripts in respect of supply chain management.

## **8. MONITORING**

8.1 The Premier and Head of the Department required to take remedial action, must acknowledge receipt of the Public Protector's report within thirty (30) days of the receipt thereof.

8.1.2 The Premier and Head of the Department must present an action plan on the implementation of the Public Protector's report within sixty (60) working days of the receipt thereof, and thereafter submit bi-monthly reports on the progress made with the implementation of the above-mentioned corrective measures.



8.2 In line with the Constitutional Court judgment in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others: 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 Administrator, the Municipal Manager and the MEC unless a Court order directing otherwise is obtained.

**ADV. BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA**  
DATE: 20/03/2020

*Assisted by: Mr. MJ Seitsang*