



PUBLIC PROTECTOR  
SOUTH AFRICA

Accountability · Integrity · Responsiveness

# **YES, WE MADE MISTAKES!**

***Report on an investigation into the alleged  
improper procurement of communication services by  
the Department of the Premier of the Western Cape  
Provincial Government***

***Report No.1 of 2012/13***



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## Executive Summary

(i) “Yes We Made Mistakes” is a report of the Public Protector on an investigation of complaints received from four complainants namely:

- Mr S Stellenboom;
- Mr T Ehrenreich, the Western Cape Provincial Secretary of COSATU;
- Mr S Mjongile, the Provincial Secretary of the ANC: Western Cape; and
- The Senior Office and Research Coordinator of Ndifuna Ukwazi (a civil society organization).

The complaints were based on an article published by the *Sunday Times* on 14 August 2011. The gist of the complaints was that:

- (a) The Western Cape Premier, Ms Helen Zille (the Premier) awarded a “communications tender” (in December 2010) worth R1 billion to an advertising agency, TBWA / Hunt Lascaris (TBWA) without following proper procurement procedures and prescripts. The agency would apparently take over all the communication needs of the ten provincial government departments in the Western Cape.
- (b) The tender was not publicly advertised as is required by Treasury Regulations.
- (c) A review of the Provincial Treasury found that the process to appoint TBWA “revealed a lack of control measures and good governance principles”. It also raised questions about the appointment of *Yardstick*, a marketing and communications consultant, to run the entire selection process.
- (d) The tender committees that considered the bids included Special Advisers to the Premier and the Head of Strategic Communications of the Department. The involvement of the Premier’s Special Advisers in operational processes is against the Public Service Act prohibiting interference in the administration and management of departments. The compliance with Treasury Regulation 16 (and

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other applicable regulations) and the *Guide for Accounting Officers* issued by the National Treasury was also questioned.

- (e) The tender was initially described as a R1.5 million contract for the Premier's office when the agency was appointed. However, in June 2011, the Director-General of the Department of the Premier (DG) informed all provincial departments to participate in the contract to develop a common brand. This meant that the agency's mandate would be expanded, effectively increasing the amount agreed upon from R1.5 million to anything up to R500 million a year. To do this, a new tender process should have been initiated.
  - (f) Members of the Bid Adjudication Committee of the Department of the Premier (BAC) were replaced shortly before the bids in respect of the procurement of the communication services referred to above, were considered.
  - (g) The tender process was repeated three times resulting in fruitless and wasteful expenditure.
  - (h) Cautionary advice from the Provincial Treasury and Supply Chain Management Unit of the Department of the Premier (the Department) in respect of the procurement was repeatedly ignored.
  - (i) The scoring system was suspiciously riddled with anomalies and most of the panel members ignored scoring instructions which resulted in unclear determination of acceptability.
  - (j) A number of after-the-fact measures were taken in an attempt to conceal some of the deficiencies in the procurement process.
- (ii) The allegations were analysed resulting in four main issues that formed the basis of the investigation. These issues were:
- (a) Whether the Department employed proper demand management in respect of the procurement process;

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- (b) Whether failure by the Department to employ proper demand management resulted in fruitless and wasteful expenditure;
  - (c) Whether the Department kept proper records of the proceedings of the Bid Evaluation Committee that was involved in the procurement process; and
  - (d) Whether the appointment of the two Special Advisers to the Bid Evaluation Committee (BEC) was unlawful or improper.
- (iii) The investigation involved the perusal of the relevant documentation relating to the procurement of the contract; analyses of relevant legislation, policies and National Treasury prescripts; perusal of relevant newspaper reports; interviews with the complainants and senior officials of the Department of the Premier; consultation with National Treasury and other relevant parties. The Public Protector also obtained a legal opinion from independent senior counsel, Adv B R Tokota SC.
  - (iv) A Provisional Report on the investigation was issued on 16 April 2012 and the Department of the Premier, the Provincial Treasury and the complainants were afforded an opportunity to respond thereto. Comprehensive responses, including two legal opinions from Senior Counsel were submitted. The Public Protector also met with the Premier and the complainants in connection with the responses to the Provisional Report on 17 May 2012.
  - (v) The Provisional Report was leaked to the media during the weekend of 12-13 May 2012.
  - (vi) In a letter addressed to the Public Protector on 16 May 2012, the Premier, raised a number of concerns regarding the submission of the Provisional Report to certain parties, including the complainants and the subsequent leaking thereof to the media. She asserted that as a result of the leaking of the Provisional Report, the investigation has been compromised and the Provincial Government had been prejudiced.
  - (vii) The leaking of the Provisional Report was unfortunate and an unethical act by all the parties involved. However, the Public Protector did not allow this to compromise

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the investigation. Responding to enquiries by the media, the Public Protector clearly stated that she does not comment on the contents of Provisional Reports, which are regarded as confidential documents. She explained that the status and purpose of Provisional Reports are to furnish all parties with the provisional views of the Public Protector in order to provide them with an opportunity to make final submissions on the facts, law or otherwise, to be considered by her for the purposes of the final report.

- (viii) As far as the availing of Provisional Reports to the respective parties involved, including the complainants, is concerned, it should be noted that section 7(1)(b)(i) of the Public Protector Act provides that the format and procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case. The Public Protector Act only prescribes that a notice of intention to make an adverse finding against a person implicated by the matter investigated must be provided to him/her in order to respond in connection therewith.. (Section 7(9)) Following the *Mail and Guardian* case the Public Protector decided to issue provisional reports in order to clear any factual, legal or other complications before articulating her findings in a final report. In fact, the issuing of provisional reports is not uncommon in Ombudsman institutions globally and is regarded by the UN Ombudsman Guidelines as good practice. The Public Protector applies this procedure to all reports and provisional findings have no status.
- (ix) The Department submitted a comprehensive response, which included legal opinions obtained from two independent senior counsel, to the contents of the Provisional Report. The Head Official of the Western Cape Provincial Treasury and the Secretary General of the ANC: Western Cape also submitted detailed comments. These responses, including the legal opinions, were extremely helpful and thoroughly considered in the drafting of this report. The views expressed at the two meetings, one with the Premier, the other with the complainants, were also considered.



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- (x) There was generally little disagreement on issues of fact. The engagements centered mainly around the interpretation of law and the weight to be assigned to some of the agreed facts.
- (xi) The key contentious issue raised in the responses to the Provisional Report was the lawfulness or otherwise of the appointment of the Special Advisers of the Premier as members of the BEC. In the end, the Public Protector had to make a determination on this matter. She took into account the following:
- (a) Arguments raised by the Secretary-General of the ANC: Western Cape who maintained the view that the appointment of the Special Advisers was unlawful as they were appointed only to advise and assist the Executive Authority. It was further stated that the Provincial Government should have known better as in 2001 a similar tender involving the same company and one of the Special Advisers was questioned and found to be unlawful by the Public Protector
  - (b) Opinions from the Office of the Accountant-General and the National Treasury which advised that only officials and persons specifically contracted for that purpose, should be appointed to a BEC. They further stated that Special Advisers were not allowed to be part of a BEC.
  - (c) A legal opinion obtained by the Public Protector from Adv B R Tokota, that advised that the appointment of Special Advisers of the Premier to the BEC is unlawful as it does not comply with instructions and guidelines issued by the National Treasury.
  - (d) Comments by the Department and the Provincial Treasury in terms of which the appointment of Special Advisers as members of the BEC is not unlawful.
  - (e) Two legal opinions from Adv O Rodgers SC and Adv G Budlender SC respectively, submitted by the Department in terms of which the appointment of the Special Advisers as members of the BEC was not unlawful. Adv Budlender expressed the view that it might have been improper.

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- (xii) The key issue for the Public Protector's determination was the legal status of a Circular and a Guide issued by the National Treasury that dealt with Supply Chain Management issues, such as the composition of the BEC. She had to consider whether the violation of the Circular and the Guide constituted unlawfulness. Beyond lawfulness, the Public Protector also had to determine the propriety of such action from the point of view of good administration, which is the opposite of maladministration. An issue that weighed heavily in this regard, was the reasonableness of a perception that, where the Special Adviser is, the will of the Premier is. The Public Protector's finding in this regard is contained in the specific findings below.
- (xiii) The Public Protector also took into account the report of the Provincial Treasury on the procurement process and its transversal nature, which made a number of negative findings against the Department. However, although it was concluded that TBWA would in any event have been awarded the contract, the Supply Chain Management process revealed a lack of control measures and good governance principles.
- (xiv) The **general findings** of the Public Protector are that:
- (a) The Department identified the need for a single brand identity and communication strategy for the Western Cape Provincial Government prior to 2010. The objective of this initiative was to procure a transversal term contract that would have been applicable to all provincial departments. A single brand for the Provincial Government was, however, only endorsed by the Provincial Cabinet on 13 April 2011, some months after the tender had been awarded.
  - (b) The procurement process embarked on by the Department was not facilitated by the Provincial Treasury, as required by Treasury Regulation 16.A6.5. The Provincial Treasury only became aware of the procurement of the services of TBWA after concerns were raised by the Heads of Departments regarding their Departments' participation in the transversal agreement, and the associated costs.

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- (c) The bid for the development of a brand and brand delivery strategy for the Provincial Government was advertised by the Department on three occasions. The first two advertisements had to be cancelled due to a failure on the part of the Department to implement a proper demand management process.
- (d) The allegation that the tender for the procurement referred to in this report was not properly advertised is inconsistent with the evidence and information obtained during the investigation. The tender for the Department of the Premier was found to have been duly advertised. The *Sunday Times* also retracted this allegation on 21 August 2011.
- (e) The Department employed the services of Yardstick to facilitate the procurement process on the advice of the ACA. No evidence of any impropriety in respect of the appointment of Yardstick could be found during the investigation. The Provincial Treasury found the appointment of Yardstick as a facilitator of the procurement process to have been prudent under the circumstances where two previous attempts to procure the intended service failed.
- (f) The Provincial Review Report identified that there were some anomalies in the score sheets. The Provincial Treasury indicated that it was not clear whether there were discussions by the BEC to establish the reasons why that was the case. These anomalies had no impact on the ultimate finding of the Report in respect of the regularity of the process. The grand totals of two BEC members during shortlisting revealed stricter scoring, which explained low scores of certain BEC members. The comments of the Provincial Treasury and the evidence and information obtained during the investigation do not support the allegation that the scoring was “*riddled with anomalies*”.
- (g) The investigation revealed that the Department failed to keep proper records of the proceedings of the BEC.
- (h) The composition of the BAC changed before the bid was adjudicated. The explanation that it related to improving the operational efficiency of the Committee and that it was applicable to all subsequent bids, was acceptable.

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- (i) The allegation that the communications tender awarded to TBWA was worth R1 billion is not supported by the evidence and information obtained during the investigation. The contract provides for a total fixed remuneration in the amount of R1 520 000 for the once-off deliverables. The total cost of communication services for the Provincial Government as a whole (including the costs associated with the execution of the contract) was limited, according to a decision taken by the Executive Authority of the Department, to R70 million per annum.
- (j) Certain after-the-fact steps were taken in an attempt to deal with some of the deficiencies of the procurement process, in that the Provincial Treasury had to intervene to address the non-compliance by the Department with Treasury Regulation 16A6.5 in respect of transversal term agreements.
- (k) On the advice of the Provincial Treasury the botched attempt by the Department to conclude a transversal term agreement was managed by applying the provisions of Treasury Regulation 16A.6.6 to the agreement with TBWA. The impact thereof was that the accounting officers of other provincial departments could opt to participate in the contract between the Department and TBWA. At the time of the conclusion of the investigation, four other provincial departments were already participating in the agreement. Their participation resulted in extending the value of the agreement between the Department and TBWA.
- (l) The allegation that cautionary advice from the Provincial Treasury and the SCM Division of the Department was ignored is not supported by the evidence. The Department explained that it engaged Yardstick prior to receiving a formal quotation in order to measure the nature of the service provided by Yardstick as well as an indication regarding pricing. The intervention of the Provincial Treasury was only requested after the tender had already been awarded to TBWA. However, it was noted in the Provincial Treasury Review Report that issues of distrust and “*dissention in the ranks*” amongst the officials involved

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delayed the conclusion of the procurement process. This might have created a perception of indifference to issues that were raised.

- (m) No evidence or information was presented or found during the investigation indicating that the Premier participated in the procurement process. Her involvement did not impact on the tender, was after the fact and was limited to the Provincial Cabinet meeting held on 13 April 2011, i.e. after the Top Management Meeting where Provincial Treasury was requested to craft a way forward around the transversal implications of the bid award, which were problematic. The Provincial Cabinet resolved to endorse a single brand for the Provincial Government and noted a report by the DG in connection with the procurement of the services of TBWA and that certain measures had to be taken for the contract to operate transversally. She was also involved in the decision to limit the total expenditure of the Provincial Government in respect of communication services to R 70 million per annum. The decision to involve the Premier's special advisors in the BEC was made by the then Acting Deputy Director-General, Mr A Groenewald.
- (n) The SCM Division of the Department lacked capacity to manage the prescribed procurement processes that apply to organs of state effectively and efficiently.
- (o) Certain deficiencies and shortcomings in the procurement process were identified by the Provincial Treasury in its report on a review of the procurement process. However, on its own, it did not render the process or the agreement that was eventually signed unlawful or invalid.
- (p) The involvement of the Head of Strategic Communications of the Department in the BEC was allowed as he is an official of the Department.
- (q) Regarding the alleged previous improper involvement of Mr R Coetzee in the capacity as a Special Adviser to Premier in the awarding of a contract to TBWA in 2001, it was established that he was not a member of the Evaluation Committee. He was requested to assist the Committee at a presentation of bidders together with six other persons in August 2001. By that time he had already resigned from the position of Special Adviser with effect from 1 July

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2001. From the verifiable records of the Department and the Provincial Treasury it could not be determined whether or not Mr Coetzee was involved in any impropriety at the time. The Public Protector never issued a report on this matter.

(xv) The specific findings of the Public Protector are that:

**Finding 1: The failure by the Department to employ proper demand management as required by Treasury Regulation 16A3 in respect of the procurement process constituted maladministration**

(a) The Department failed to apply proper demand management in respect of the procurement of the services referred to in this report due to:

- A lack of proper planning;
- Failure to precisely determine the specific needs and requirements of the Department in terms of what the supplying industry could offer and reasonably comply with; and
- Failure to consider and apply the relevant provisions of the Treasury Regulations, which resulted in an untenable understanding that the procurement process would result in a transversal term agreement.

(b) The failure to apply proper demand management in respect of the bid in question contravened the provisions of regulation 16A.3 of the National Treasury Regulations and amounted to maladministration.

**Finding 2: The failure by the Department to employ proper demand management resulted in fruitless and wasteful expenditure**

(a) It resulted in the expending of public funds in respect of the advertising of the tender on two occasions and the utilisation of human and other resources, that would have been avoided had reasonable care been taken, and therefore constituted fruitless and wasteful expenditure in terms of section 1 of the PFMA, in the amount of R8 696.

- (b) By appointing Yardstick to facilitate the procurement process, the Department prevented further fruitless expenditure
- (c) According to the report of the Provincial Treasury and the response of the Department to the Provisional Report, measures have already been taken to improve the demand management system of the Department.

**Finding 3: The failure by the Department to keep records of the proceedings of the BEC constituted maladministration**

- (a) The failure by the Department to ensure that proper minutes of the meetings of the BEC were taken and filed in its records is in contravention of regulation 16A.3 of the National Treasury Regulations and amounted to maladministration.

**Finding 4: The appointment by the Acting Deputy Director-General, Mr A Groenewald, of two Special Advisers of the Premier to the BEC was improper**

- (a) The legal opinions obtained during the investigation and presented by the Department in its response to the Provisional Report, indicate that although there may be some merit in arguing that the appointment of the Special Advisers of the Premier as members of the BEC was unlawful, such an argument would have to be based on implied illegality in the absence of any explicit prohibition in law, in this regard. The implied illegality would have to include reliance on instructions and guidelines issued by the National Treasury that cannot be regarded with certainty as “*regulations and instructions*” as contemplated by the provisions of sections 1 and 76 of the PFMA. In the light of the uncertainty in respect of the legal status of circulars, practice notes and instruction notes issued by the National Treasury, it cannot be contended with certitude that non-compliance with it constitutes unlawful conduct.
- (b) However, as the Head Official of the Provincial Treasury and hinted in the legal opinion of Adv Budlender SC, the appointment of Special Advisers as members

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of the BEC is considered to be improper. Appointing persons who have been employed specifically to advise the Executive Authority of the Department to be part of a procurement process, which resorts in the domain of the administration, raises the risk profile of the process and can create suspicions and perceptions of political interference or influence, which will be detrimental to its integrity.

- (c) While the appointment of the two special advisers may not have violated the principle of legality it was ill-advised. It resulted in suspicions and perceptions of political involvement and influence in respect of the procurement process that should have been avoided. The appointment was not in line with the spirit and purpose of the National Treasury's Guide for Accounting Officers which seeks to give meaning to the Treasury Regulations, the Public Finance Management Act, 1999 (PFMA) and section 217 of the Constitution.
  - (d) The conduct of the DG, Adv B Gerber, as the accounting officer, ultimately accountable for procurement in terms of section 44 of the PFMA and that of Mr A Groenewald, to whom the authority to appoint the members of the BEC was delegated, was therefore improper and amounted to maladministration. However, his conduct could not be found to have constituted wilful intent or gross negligence.
- (xvi) **Remedial action to be taken** as envisaged by section 182 of the Constitution, is the following:
- (a) The Minister of Finance to amend the Treasury Regulations to regulate the composition of Bid Specification, Bid Evaluation and Bid Adjudication Committees to avoid any uncertainty in regard to the lawfulness and propriety of the appointment of its members.
  - (b) The Director-General of the National Treasury to take urgent steps to ensure that the legal status of circulars, practice notes and other instructions are clearly



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determined and defined in terms of the provisions of section 76 of the PFMA, when it is issued.

(c) The Director-General of the Department to take urgent steps to:

- Improve the Supply Chain Management System of the Department to ensure that Special Advisers are excluded from being appointed as members of Bid Specification, Bid Evaluation and Bid Adjudication Committees;
- Improve the skills and the capacity of the SCM Division of the Department;
- Improve the record keeping of the SCM Division of the Department;
- Ensure that the officials of the SCM Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management;
- Take corrective measures to prevent a recurrence of the failure in demand management process referred to in this report.

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## 1. INTRODUCTION

1.1 *Yes We Made Mistakes* is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to:

1.2.1 The Speaker of the National Assembly;

1.2.2 The Minister of Finance;

1.2.3 The Minister of Co-operative Governance and Traditional Affairs;

1.2.4 The Speaker of the Western Cape Provincial Legislature;

1.2.5 The Premier of the Western Cape Province;

1.2.6 The Director-General of the National Treasury;

1.2.7 The Member responsible for Finance of the Executive Council of the Western Cape Provincial Government;

1.2.7 The Director-General of the Western Cape Provincial Government; and

1.2.8 The Head Official of the Western Cape Provincial Treasury (Provincial Treasury).

1.3 Copies of the report are also distributed to the complainants in this matter:

1.3.1 Mr S Stellenboom;

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1.3.2. The Western Cape Provincial Secretary of the Congress of South African Trade Unions (COSATU);

1.3.3 The Provincial Secretary of the African National Congress (ANC): Western Cape Province;

1.3.4 The Director of Ndifuna Ukwazi, a civil society organisation;

1.3.5 The Managing Director of TBWA/Hunt Lascaris (TBWA); and

1.3.6 The Managing Director of Yardstick .

## **2. THE COMPLAINTS AND ISSUES INVESTIGATED BY THE PUBLIC PROTECTOR**

2.1 During the period 15 August 2011 to 12 October 2011 the Public Protector received complaints from:

2.1.1 Mr S Stellenboom, who complained in his personal capacity;

2.1.2 Mr T Ehrenreich, the Western Cape Provincial Secretary of COSATU;

2.1.3 Mr S Mjongile, the Provincial Secretary of the ANC:Western Cape; and

2.1.4 The Senior Office and Research Coordinator of Ndifuna Ukwazi (a civil society organisation).

2.2 The gist of the complaints was based on and/or the result of an article published by the *Sunday Times* on 14 August 2011, which alleged that:

2.2.1 The Western Cape Premier awarded a “communications tender” (in December 2010) worth R1 billion to an advertising agency, TBWA.

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without following proper procurement procedures and prescripts. The agency would apparently take over all the communication needs of the ten provincial government departments in the Western Cape.

2.2.2 The tender was not publicly advertised, as is required by Treasury Regulations.

2.2.3 A review of the Provincial Treasury found that the process to appoint TBWA “revealed a lack of control measures and good governance principles”. It also raised questions about the appointment of *Yardstick*, a marketing and communications consultant, to run the entire selection process.

2.2.4 The tender committees that considered the bids included Special Advisers to the Premier.

2.2.5 The tender was initially described as a R1.5 million contract for the Premier’s office when the agency was appointed. However, in June 2011, the Director-General of the Department of the Premier (DG) informed all provincial departments to participate in the contract to develop a common brand. This meant that the agency’s mandate would be expanded, effectively increasing the amount agreed upon from R1.5 million to anything up to R500 million a year. To do this, a new tender process should have been initiated.

2.3 In addition to the above:

2.3.1 The Provincial Secretary of COSATU alleged that members of the Bid Adjudication Committee of the Department of the Premier (BAC) were replaced shortly before the bids in respect of the procurement of the communication services referred to above, were considered.

2.3.2 The ANC pointed out that-

2.3.2.1 The tender process was repeated three times resulting in fruitless and wasteful expenditure.

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2.3.2.2 The involvement of the Premier's Special Advisers in operational processes is against the Public Service Act prohibiting interference in the administration and management of departments.

2.3.2.3 Cautionary advice from the Provincial Treasury and Supply Chain Management Unit of the Department of the Premier (the Department) in respect of the procurement, was repeatedly ignored.

2.3.2.4 The scoring system was suspiciously riddled with anomalies and most of the panel members ignored scoring instructions which resulted in unclear determination of acceptability.

2.3.2.5 A number of after-the-fact measures were taken in an attempt to conceal some of the deficiencies in the procurement process

2.3.3 Ndifina Ukwazi referred to the "*Special Dispensation for Advisers*", Treasury Regulation 16 (and other applicable regulations) and the *Guide for Accounting Officers* issued by the National Treasury, and requested the Public Protector to establish whether advisers to Premiers, Ministers and the President are by law entitled to participate in any Supply Chain Management (SCM) committee and/or whether they are entitled to draft the specifications of tenders. The question was also raised whether the involvement of the advisers to the Premier tainted the procurement process in any procedural and/or substantive manner.

2.4 The issues investigated following an analysis of the complaint are the following:

2.4.1 Did the Premier of the Western Cape award the tender to TBWA?

2.4.2 Was the tender worth R1 billion?

2.4.3 Was the tender not publicly advertised?

2.4.4 Was the process on awarding the tender found by the Provincial Treasury to have revealed a lack of control measures and good governance principles?

2.4.5 Was Yardstick's involvement improper?

2.4.6 Were the Premier's advisers improperly included in the tender committee?

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- 2.4.7 Was the tender initially approved for R1.5 million for the Premier's Office, later improperly extended at the instruction of the DG to other departments increasing the amount to R500 million? Was this extension in violation of Treasury Regulations?
- 2.4.8 Were members of the BAC improperly replaced before the tender was awarded?
- 2.4.9 Was the tender process improperly repeated three times leading to fruitless and wasteful expenditure?
- 2.4.10 Was the cautionary advice of the Provincial Treasury on the one hand and the SCM Division on the other hand improperly ignored repeatedly?
- 2.4.11 Was the scoring system suspiciously riddled with inconsistencies?
- 2.4.12 Was there an attempt to conceal some of the deficiencies by taking after-the-fact measures?

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT LODGED AGAINST THE PREMIER OF THE WESTERN CAPE AND THE WESTERN CAPE DEPARTMENT OF THE PREMIER**

#### **3.1 Mandate of the Public Protector**

- 3.1.1 The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. Section 182(1) of the Constitution provides that the Public Protector has the power.
- 3.1.1.1 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;
- 3.1.1.2 To report on that conduct; and
- 3.1.1.3 To take appropriate remedial action.

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- 3.1.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.
- 3.1.3 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged:
- 3.1.3.1 Maladministration in connection with the affairs of government at any level; or
- 3.1.3.2 Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function.
- 3.1.4 The Public Protector may, in terms of section 8(1) of the Public Protector Act, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.
- 3.1.5 In terms of the mandate given to the Public Protector, it is therefore expected of her/him to conduct an enquiry that transcends lawfulness and focuses on good administration and proper conduct. Such enquiry has three components:
- 3.1.5.1 What happened?
- 3.1.5.2 What should have happened; and
- 3.1.5.3 Is there a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, abuse of power, improper enrichment or conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act?
- 3.1.6 In determining whether conduct was improper or constituted maladministration or any of the violations envisaged in the Public Protector Act, the Public Protector compares the conduct of government entities and officials complained of against the relevant legislation and other prescripts, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, and transparency and local and international best practices. The mandate of the Public Protector is not limited to the investigation of complaints, but he/she can also investigate suspicions or allegations of improper conduct on own initiative.

3.1.7 The complaints lodged with the Public Protector and allegations made against the Premier of the Western Cape and the Department, referred to in this report, accordingly fall within the jurisdiction and powers of the Public Protector.

### **3.2 The obligation of the Public Protector to follow due process**

3.2.1 If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall, in terms of section 7(9)(a) of the Public Protector Act, afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

3.2.2 Due process was complied with during the course of the investigation referred to in this report. The Department, the Provincial Treasury and the complainants were also afforded an opportunity to respond to the contents of the Provisional Report of the Public Protector pertaining to the matters investigated to ensure fairness and transparency.

## **4. THE INVESTIGATION**

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

### **4.1 Scope of the investigation**

4.1.1 The investigation referred to in this report was restricted to the period February 2010 to January 2012.



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## 4.2 Method of gathering evidence

The following methods of gathering and analysing information were employed:

### 4.2.1 Documentation studied and its contents considered

4.2.1.1 Report addressed to the DG entitled “*Evaluation of Tender: FMA 0027 Brand Communication Tender Strategy*” from the Acting Head: Asset Management: Western Cape Provincial Treasury, dated 30 April 2011 (Provincial Treasury Report);

4.2.1.2 Western Cape Provincial Treasury Circular No 25/2011, dated 10 June 2011.

4.2.1.3 Correspondence between the Provincial Treasury and other Western Cape provincial departments.

4.2.1.4 Copies of the relevant advertisements and bid documents.

4.2.1.5 Voluminous documentation received from the Department of the Premier, including:

- (a) Correspondence between the Department and the other role players involved in the procurement of communication services, including written communications between the SCM Division and line management;
- (b) Memoranda and other internal documents pertaining to the determination of the need for the relevant services and the associated demand management process that was followed;
- (c) Documents relating to the relevant meetings of the Bid Evaluation and Bid Adjudication Committees in respect of the tender concerned;

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- (d) Memoranda and other internal documents relating to the bid specification, evaluation and adjudication processes;
  - (e) Memoranda relating to the recommendation, approval and appointment of the successful bidder;
  - (f) The contract entered into between the Department of the Premier and the successful bidder, TBWA; and
  - (g) The relevant delegations of authority of the Department.

#### 4.2.2 Correspondence

4.2.2.1 Correspondence and documents received from the complainants, together with the articles published by the *Sunday Times* on 14 and 21 August 2011.

4.2.2.2 Correspondence between the Public Protector and the DG.

#### 4.2.3 Interviews conducted

Interviews were conducted with:

4.2.3.1 The Head Official of the Provincial Treasury;

4.2.3.2 The Acting Head of Asset Management of the Provincial Treasury;

4.2.3.3 The Head of the Provincial Department of Health;

4.2.3.4 Six senior officials of the Department of the Premier;

4.2.3.5 The two Special Advisers of the Premier;

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4.2.3.6 Two representatives from Yardstick CC.

4.2.3.7 Mr S Stellenboom; and

4.2.3.8 Ms Hassan, a Trustee of Ndifuna Ukwazi.

#### 4.2.4 Consultations

Consultations were held with:

4.2.4.1 Senior officials of the Office of the Accountant-General;

4.2.4.2 The Chief Director: Norms and Standards of the National Treasury; and

4.2.4.3 An official of the Office of the State Attorney and Adv B R Tokota SC.

#### 4.2.5 Legal opinion

4.2.5.1 A legal opinion was obtained from Adv B R Tokota SC.

#### 4.2.6 Legislation and other prescripts

The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

4.2.6.1 The Constitution;

4.2.6.2 The Public Protector Act;

4.2.6.3 The Public Finance Management Act, 1999 (PFMA);

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4.2.6.4 The Treasury Regulations and instructions for departments, trading entities, constitutional institutions and public entities, issued by the National Treasury;

4.2.6.5 The Public Service Act, 1994;

4.2.6.6 *Handbook for Members of the Executive and Presiding Officers* that was approved by Cabinet on 7 February 2007;

4.2.6.7 Previous Decisions of the Public Protector; and

4.2.6.8 Applicable case law of the Courts.

## **5. FURTHER INFORMATION PUBLISHED BY THE MEDIA**

5.1 In a statement issued by the Premier of the Western Cape on 14 August 2011 in response to the article published by the *Sunday Times* on the same day, she denied that there was anything improper or unprocedural about the tender referred to in this report. She referred to a formal document released by the Provincial Treasury, which ostensibly, while noting the discrepancies in the award of the tender, found that it could not be regarded as *'critical'*.

5.2 The DG was reported in an article published by the *Cape Times* on 15 August 2011 as having stated that the discrepancies related to minor administrative issues which were immaterial to the awarding of the bid, such as:

5.2.1 Communication problems between the Supply Chain Management (SCM) Division of the Department and management resulting in delays;

5.2.2 Minor lapses of record-keeping that were rectified;

5.2.3 Incomplete information from bidders of work done for other customers, which had no effect on the award.

- 5.3 He further explained that the bid process could not have been rigged because senior “officials”, such as the Special Advisers of the Premier did not form part of the Bid Adjudication Committee, which awarded tenders following recommendations from Bid Specification and Bid Evaluation committees.
- 5.4 On 21 August 2011, the *Sunday Times* published an article admitting that it was wrong by reporting its estimate of the value of the contract as R1 billion, as if it was a fact. The newspaper also regretted its error of claiming that the tender had not been advertised.
- 5.5 The *Cape Times* of 16 September 2011, in an article entitled “*Zille acts and bars political appointees from playing role in tender processes*” reported that “*Premier Helen Zille’s office has announced that political advisers will no longer be part of tender processes following the controversial awarding of a multimillion-rand communications contract.*” (emphasis added)

## 6. INFORMATION AND EVIDENCE OBTAINED DURING THE INVESTIGATION

### 6.1 Previous communication tender invitations that were cancelled

- 6.1.1 Bid number FMA 002/10, for “*brand architecture, brand identity, manual and communication strategy development, above the line advertising and other communication executions for the Provincial Government of the Western Cape*” was advertised on 6 and 7 February 2010 in the *Cape Argus* and *Die Burger* respectively. In a memorandum (received by the office of the Chief Financial Officer (CFO) of the Department on 21 April 2010), the then Chairperson of the BEC, Mr Ryan Coetzee, stated that “[h]aving gone through a lengthy process, the *Bid Evaluation Committee does not believe that all of the Provincial Government’s requirements were adequately addressed through that process.*” (emphasis added) He also referred to the vast differences in price between bidding companies and requested the cancellation of the bid.

- 6.1.2 According to a memorandum (File FMA 0002/10) dated 23 April 2010, the Chairperson of the BAC subsequently recommended cancellation of the bid and noted that “the specifications advertised does (sic) not sufficiently cater for the changed requirements and specifications of the service required”. (emphasis added). The Acting DG approved cancellation of the bid on 1 May 2010 (as well as 24 May 2010). The DG conceded during the investigation that the specifications were too broad and therefore open to misinterpretation.
- 6.1.3 According to documentation received from the DG and the Provincial Treasury, on 2 July 2010, Bid Number FMA 0020/10 was advertised in the *Government Tender Bulletin* “to do brand architecture, brand identity, manual and communication strategy development, above the line advertising and other communication executions as may be required from time to time, for the Provincial Government of the Western Cape”. At the subsequent information session, one of the potential bidders raised an objection to the condition of bid, namely the upfront requirement of 10 years’ experience and the bidding company being 10 years in existence. The objection was referred to the Chief Director: Legal Services of the Department who indicated that the bid process was at risk of being successfully challenged. This bid was consequently cancelled on 13 August 2010.
- 6.1.4 When the cancellation of the said two bids was raised with the DG during the investigation, he also conceded that the demand management processes followed by the Department were deficient. However, he did not regard the approximately R8000-00 that was incurred as fruitless and wasteful.
- 6.1.5 The Head Official of the Provincial Treasury, Dr Stegmann, stated the following in this regard when he was interviewed during the investigation on 8 November 2011:

*“I think there are 2 sides to the story, if the department learns and benefits on the process (sic) we would be disinclined to pursue the wasteful and fruitless expenditure, provided obviously it’s low numbers and you end up with a result which puts them in a place where they will not make the same mistakes again, so that is why we described it as a learning exercise. If you are*

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*foolhardy and you keep on knocking your head against the wall, it would be a default back to the wasteful and fruitless expenditure. ”*

## **6.2 Advertisement of Bid Number 0027/10**

- 6.2.1 Perusal of e-mail records revealed that on 16 August 2010, the Association for Communication and Advertising (ACA) contacted the SCM Division of the Department by e-mail to offer its assistance. The ACA apparently became aware of the difficulties experienced by the Department to procure communication services. According to the e-mail, the ACA is the industry body of the advertising and communication sector in the Republic of South Africa. The SCM Division liaised with the ACA to obtain the details of a suitable agency in the Western Cape Province to assist with and facilitate the procurement process. The ACA suggested that the Department approach Yardstick CC, a leading service provider in the industry.
- 6.2.2 The documentary and oral evidence of the SCM Manager, Ms A Stassen, revealed that following the above, she became somewhat uneasy as departmental officials started to engage Yardstick when no formal quotation for their services had been obtained.
- 6.2.3 In an interview during the investigation, held on 10 November 2011, the Head: Strategic Communications of the Department, Mr N Clelland-Stokes, indicated that the nature of the service provided by Yardstick had to be measured prior to a formal quote being forwarded to the SCM Division for consideration. He also wanted to negotiate a better price, which resulted in interactions between him and Yardstick.
- 6.2.4 Subsequently, the DG approved the procurement of the services of Yardstick by means of limited quotation, on 21 September 2010.
- 6.2.5 Mr Clelland-Stokes also confirmed that he and Mr R Coetzee, Special Adviser to the Premier, drafted the specifications of the tender for the bid under discussion, on

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instruction of Mr A Groenewald, who was the Acting Deputy Director-General of the Department at the time.

6.2.6 During the investigation Mr Coetzee confirmed that he assisted in drafting the specifications. He indicated that he has gained relevant experience in putting together brand and communication strategies for the Democratic Alliance. The request for him to be involved in drawing up the specifications came from the DG.

6.2.7 In this regard Dr J Stegmann stated during the investigation that the BEC and Bid Specification Committee can be the same committee, but could also vary from tender to tender.

6.2.8 The CFO of the Department, Mr D Basson, explained that in terms of a delegation issued to the Deputy Director-General of the Department, the latter appointed members of a BEC and the Bid Specification Committee.

6.2.9 Yardstick prepared processes and scenarios suitable for use in the bidding process. A judgment of the Kwazulu-Natal High Court brought the whole bid process to an abrupt stop on 9 September 2011. The High Court declared certain sections of the Preferential Procurement Regulations invalid, which had certain implications on the procurement process concerned. By 14 September 2010, a revised process had been compiled.

6.2.10 Invitation to submit proposals for the selection and appointment of a brand communication agency was advertised in *Die Burger* and the *Cape Argus* on 1 October 2010. The closing date was 22 October 2010. The advertisement read as follows:

“DEPARTMENT OF THE PREMIER

INVITATION FOR PROPOSALS



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The Provincial Government of the Western Cape is planning to develop a **brand and a brand delivery strategy**, and hereby invites interested and suitable agencies to submit proposals to assist Government to drive this process. The successful vendor shall work closely with the Provincial Government of the Western Cape and will be responsible for the development and implementation of the following deliverables and services, over a period of at least two years:

- The Provincial Government’s brand and brand delivery strategy
- A communications strategy
- A corporate identity manual
- Above-the-line and below-the-line communication campaigns in alignment with the strategy
- Media buying.”

6.2.11 The DG indicated during the investigation, that although the Provincial Cabinet had not at the time endorsed a policy for single and professional branding, it was clearly, in his view, the intention of the Provincial Government to establish a single brand and coherent communications across the various provincial departments of the Western Cape Province.

### **6.3 Bid process**

6.3.1 On 15 October 2010, the former CFO approved the following extensive bid evaluation process that had to be followed:

6.3.1.1 Phase 1 – RFI compliance: To issue Request For Information (RFI) documents requested by prospective agencies, facilitate a compulsory information session to brief such agencies on the requirements of the bid and to eventually assess all RFI submissions to determine which of the submissions qualify to go through to shortlisting.

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6.3.1.2 Phase 2 – Shortlisting: This involved the development of a scorecard, and a shortlisting scoring session by a panel facilitated by Yardstick to evaluate the qualifying agency submissions, following which Yardstick would compile a final report and the BEC would select the top scoring five bid submissions.

6.3.1.3 Phase 3 – Pitch Presentation: Yardstick was to coordinate certain preparatory activities and then facilitate a pitch presentation to the BEC. At this stage no price submissions would be opened. The panel members were to be provided with an interpretation guideline to formulate an opinion as to whether or not a presentation met the respective criteria and was deemed acceptable or not. Immediately after each presentation, the BEC were to discuss the merits of the presentation and jointly agree whether or not the presentation was acceptable. Following this, Yardstick would compile a report on the evaluation of functionality and present it to the BEC.

6.3.1.4 Phase 4: Final Price: At this stage the price submissions from agencies whose presentations were deemed acceptable, were to be opened and evaluated. A recommendation on the successful bidder would then be made.

6.3.2 The compulsory information session held on 15 October 2010 was attended by 25 prospective bidders.

6.3.3 Ten companies qualified to go through to shortlisting.

6.3.4 TBWA indicated in its Declaration of Interest that none of its directors / shareholders / members or their spouses conducted business with the state in the past 12 months. However in the shortlisting questionnaire included in the bid document, the company indicated that it had been involved with three contracts with the State in the past 12 months. The DG conceded during the investigation that the Department did not verify the company's contradictory declaration in this regard. He indicated that this information was immaterial to the bid process as it does not relate to a substantive issue. During the said interview held with Dr Stegmann, he explained that the Provincial Treasury regarded these contradictory

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statements as an omission which did not have a material impact on the credibility of the procurement process as such.

## **6.4 Bid evaluation**

6.4.1 On 25 October 2010 the BEC convened to evaluate and shortlist bidders. The BEC comprised of:

6.4.1.1 Mr A Groenewald (Chairperson);

6.4.1.2 Mr R Coetzee (Special Adviser to the Premier);

6.4.1.3 Mr N Clelland-Stokes (Head: Strategic Communications);

6.4.1.4 Mr G Davis (Special Adviser to the Premier);

6.4.1.5 Mr P Boughey (Member); and

6.4.1.6 Ms C du Toit (Acting Head Corporate Communications)

6.4.2 Yardstick facilitated the meetings of the BEC. The SCM Manager attended the meetings of the BEC as an observer.

6.4.3 Mr Clelland-Stokes advised during the investigation that the members of the BEC were appointed by Mr Groenewald, who was the Acting Deputy Director-General at the time. This was confirmed by Messrs Coetzee and Davis.

6.4.4 According to Mr Groenewald, he was appointed by the DG as Chairperson of the BEC and was authorized to appoint the other committee members. He decided to appoint the Premier's Special Advisers in view of their extensive experience in the communications field and understanding of the relevant requirements. The Premier was not informed of their involvement.

6.4.5 Mr Coetzee stated during the investigation that he did not know whether the Premier had been aware that he was involved in the BEC.

6.4.6 When the involvement of the Special Advisers was raised with the DG during the investigation, he highlighted that the BEC held no adjudicative powers. The DG

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further argued that the National Treasury Regulations do not exclude special advisers from participating in a bid evaluation process as Treasury Regulation 16A defines “official” as “any person in the employ of a department”. The DG asserted that while special advisers “may not be employees for purposes of the Public Service Act, they are still in the employ of a department”.

- 6.4.7 The DG concluded that it would have been appropriate for the special advisers to have participated in the bid evaluation process if they had specific knowledge and/or expertise in the subject matter, complied with the ethical standards as set out in Treasury Regulation 16A8 and that the assistance was appropriate in respect of the exercise or performance of the Premier’s powers and functions; there was no interference in the administration or management of the department and the task did not involve taking any decision which the Director-General or another duly authorised employee of the department is empowered by law to take. The DG argued that these criteria were met.
- 6.4.8 However, Dr J Stegmann conceded during the investigation that if the composition of any of the bid committees was improper, it would have a serious impact on the legitimacy of the procurement process. He further indicated that he was of the view that it is not proper for a special adviser to be involved in procurement as it raises the risk profile of the process unnecessarily and can create a perception that there is political involvement in the process.
- 6.4.9 According to a Shortlist Report of the BEC, dated 25 October 2010, four bidders were found to have achieved the hurdle of 75% to go through the next evaluation phase.
- 6.4.10 It is noteworthy that during the shortlisting the majority of BEC members rated TBWA the highest. Only Mr Coetzee rated another agency higher. The DG also drew attention during the investigation to the fact that the grand totals of Mr Davis and Ms C du Toit indicate stricter scoring than other members.

6.4.11 The SCM Manager, Ms A Stassen, confirmed during the investigation that no minutes were recorded of the shortlisting meeting. When asked whether this is not unusual, she remarked-

“ *Yes it is unusual but it’s not an Evaluation Committee where everybody looks at the bid document and evaluates it, it was a special process it wasn’t a normal evaluation process.*

*Where you can write minutes and say this is the finding it’s not like that, it was pictures and scoring and the companies are given an opportunity to present and the members on the, with the assistance of Yardstick they were given the sheets at the meeting what to score and how to score in terms of what scoring methodology and then Yardstick took everything back and then he compiled reports which was (sic) an outcome of these meetings.”*

6.4.12 SCM Division of the Department informed the short listed agencies and six unsuccessful agencies of the outcome of the shortlisting process, on 26 October 2010.

6.4.13 On 15 November 2010, Yardstick raised a possible conflict of interest with the SCM Division. It transpired that a member of the pitch team of one of the bidders knew one of the members of the BEC, Mr Davis, socially. The SCM Manager requested a legal opinion from the Head: Legal Services of the Department on how to deal with the matter.

6.4.14 The legal opinion stated that there “*could not, objectively speaking, be any conflict of interest or reasonable apprehension of bias if Gavin [Davis] were to participate in the panel assessing the bidders*” as neither Mr Davis nor his wife had had any relationship with the relevant person since 2003. It further advised that Mr Davis should declare the possible conflict of interest and the context thereof. The opinion concluded that the possible conflict of interest does raise the possibility that a losing

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bidder may wish to claim reasonable apprehension of bias and pose the question whether it was worth running the risk in such a lucrative contract.

6.4.15 In this connection, Mr Groenewald (Chairperson of the BEC), indicated that, after receiving the legal opinion from Legal Services, he asked Mr Davis during a BEC meeting whether there was anything that would diminish his capacity to be objective in the assessment. He was given the undertaking that there was none. However, Mr Groenewald conceded that this discussion was not specifically minuted and no record of it could be found during the investigation.

6.4.16 The DG explained that Mr Davis remained on the BEC as the matter was considered immaterial to the bid process.

6.4.17 The pitch presentations by the shortlisted bidders were held on 22 November 2010. At the end of each presentation each BEC member completed an evaluation guide. Thereafter, Yardstick facilitated the reaching of consensus on the presentation and completed a single evaluation with key strengths and weaknesses to determine acceptability. Two bidders, namely TBWA and Umlingani (Draft FCB) succeeded to the last phase.

6.4.18 Upon completion of the presentations the price envelopes were opened. Calculations on final price and HDI scoring (90:10 preferential points system) showed that TBWA scored the highest points.

## **6.5 Bid adjudication and award**

6.5.1 On 23 November 2010, the BEC recommended the bidder with the highest points and lowest price, namely TBWA, to the Bid Adjudication Committee (BAC) for consideration. On the same day the BAC recommended that approval be granted to appoint TBWA. On 24 November 2010, the CFO endorsed and supported the BAC's recommendation and the DG approved it. By 25 November 2010 other bidders were informed that they had been unsuccessful. The Department of the Premier and TBWA signed the prescribed contract form on 1 December 2010.

6.5.2 Regarding changes to the membership of the Bid Adjudication Committee, the DG explained during the investigation (letter dated 7 October 2011) that the Department experienced challenges convening that Committee for scheduled meetings, as non-attendance led to an absence of quorums. This had a negative impact on efforts to adjudicate urgent and important bids. The Supply Chain Management Division requested a change in membership of the Committee to ensure operational efficiency. He decided to dissolve the old committee, called for nominations from Branch Heads and appointed a new committee. He argued that this change affected all tenders and not only the TBWA bid. Mr Groenewald confirmed during the investigation the circumstances surrounding inefficiency of the previous Bid Adjudication Committee and its reconstitution, which was “*entirely coincidental*” as far as the bid TBWA bid was concerned.

6.5.3 In December 2010, TBWA and the Director of Strategic Communication of the Department commenced the process of developing a brand strategy, corporate identity and communications strategy.

## **6.6 Concerns regarding the fact that the contract is not transversal**

6.6.1 On 2 March 2011, a workshop on the brand and communication strategy of the Provincial Government was held by the Western Cape Provincial Cabinet (Executive Council), Heads of Departments and TBWA.

6.6.2 By 11 March 2011, some Heads of Department raised concerns regarding the transversal nature and implications of the bid award. In this regard Prof C Househam, the Head of the Western Cape Department of Health, indicated during the investigation, that in March 2011 his Department’s Director of Communications was informed that all future procurement of communication services had to be done in terms of the agreement between the Department of the Premier and TBWA. Prof Househam queried this because he was of the view that the agreement was not transversal and that the instruction would have significant cost implications.

6.6.3 In this regard, the CFO of the Department conceded during the investigation that the original objective of the procurement concerned was for it to be a transversal contract that would have applied to all the provincial government departments.

6.6.4 On 13 April 2011, a Provincial Cabinet meeting was held, which endorsed a single brand for the Provincial Government. The Provincial Cabinet also noted a verbal report by the DG, that the Department of the Premier had procured the services of a service provider, but “*for the contract to operate transversally, all HOD’s need to confirm that their departments will utilize the Service Provider appointed by the Department of the Premier.*”

## **6.7 Assessment by the Provincial Treasury**

6.7.1 In a letter to the Public Protector, dated 28 September 2011, the DG advised that, on 14 March 2011 a special “*Provincial Top Management*” meeting was held to discuss concerns raised in respect of the transversal application of the agreement between the Department of the Premier and TBWA. The meeting resolved that the Provincial Treasury craft a way forward around the transversal implications of the bid award, which were problematic.

6.7.2 Ms N Ebrahim, the Acting Head: Asset Management of the Western Cape Provincial Treasury issued a report to the DG on 2 June 2011 on the evaluation of tender. The report concluded *inter alia* that:

6.7.2.1 The motivation for single and professional branding requires clear articulation in a position paper that determines the provincial stance and the Cabinet’s endorsement of such provincial policy. This was a requirement that was not identified prior to the tender process.

6.7.2.2 The bid was cancelled on two occasions before a final decision was made in respect of the procurement method to be employed and the specific requirements of the tender. This reflects among others a lack of adequate demand planning procedures and SCM knowledge and competencies to see the process to fruition.



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It resulted in a process of trial and error, time lost and costs incurred to advertise the bid three times.

- 6.7.2.3 The documentation in the bid file did not allude to a transversal contract and cognisance was not had of the requirements of national Treasury Regulation 16.A6.5 (which among others requires that transversal term contracts be facilitated by the relevant treasury).
- 6.7.2.4 The SCM Division brought to the fore challenges or specific SCM requirements, but there was a level of dissention in the ranks and lack of trust in the credibility of SCM processes within the Department. Senior management caused many delays in the bidding process.
- 6.7.2.5 It is not clear what the terms of reference, for the appointment of Yardstick were. No approval process is on file that supports the procurement of Yardstick.
- 6.7.2.6 The line function/management appeared to have acted as player and referee in the process and there appeared to have been little consideration on issues of good governance.
- 6.7.2.7 It was not clear why the SCM Division and the line function officials were engaging with the service provider in the absence of a contract or a proper procurement process being followed. *“Despite the above findings, it must be noted that the decision to procure the services of Yardstick was a prudent one made by the Department.”*
- 6.7.2.8 TBWA indicated in its Declaration of Interest that none of its directors/ shareholders / members or their spouses conducted business with the state in the past 12 months. *“However, in the shortlisting questionnaire included in the bid document, the company indicates that it had three contracts with the state in the past 12 months.”*

6.7.2.9 The shortlisting score sheets indicated that two evaluation committee members scored the company BBDO low in comparison to the average of the four other members. Similarly, in terms of performance dimension, awards and recognition, five members scored the company Young and Rubicam on average 1.5 whilst one member scored the company 4. It is not clear whether the evaluation committee noted these anomalies and whether there were discussions to establish the reasons.

6.7.2.10 There is no documented record of how the two shortlisted companies, TBWA and Umlingani were found to be acceptable as there are no minutes or deliberations of the BEC on file.

6.7.2.11 It further stated that:

*“[w]hilst it is common cause that the bidder would have ultimately been awarded the contract based on its functionality, compliance to specifications, proven track record and score in terms of the preference points system, the manner in which the SCM process has been followed for all intents and purposes revealed a lack of control measures and good governance principles...”*

6.7.3 The report made the following recommendations and comments:

*“Whilst certain deficiencies / gaps were highlighted in the review process, these must be viewed as a learning experiencing with the Department putting in the required corrective and control measures in place to address these gaps;*

*That the Department concludes a motivation for a provincial common and professional branding and that Cabinet endorses the concept of a single brand and strategy;*

*That the contract between the service provider and the Department be concluded;*

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*That a process in terms of National Treasury regulation 16A6.6 be mapped out in which other provincial departments may participate in the contract concluded by the Department and the service provider. This will include-*

- (a) Availing the bid file to all accounting officers for scrutiny and acquainting themselves with the process followed thus far;*
- (b) Identification of departmental specific documentation and processes that will require common branding;*
- (c) Identification of those documents that are excluded;*
- (d) Aligning of processes that require procurement via specific National contracts or from preferred lists of service provider for e.g. those services that are in the norm procured via Government Printers;*
- (e) Assisting departments with their motivations to their bid adjudication committees for consideration of the process envisaged in terms of regulation 16A6.6; and*
- (f) Ensure that a process is followed to assess the bidders capacity to deliver at each departmental procurement process;*

*That the impact of all departmental contracts running somewhat simultaneously and/ consecutively is reviewed against service delivery needs of each department. Important to note that overall provincial impact was not reviewed / assessed in the tender process.*

*Cognisance must also be had of the impact of any current contract/s that departments are engaged in that will affect departments from participating in the process envisaged.”*

6.7.4 During the investigation, Ms Ebrahim further remarked that the component responsible for procurement within the Department was very small and lacked the necessary SCM expertise, considering the fact that procurement in that Department is of a very strategic nature. Ms A Stassen, the Supply Chain Manager, of the Department indicated during the investigation that the Supply Chain Management

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Division has had a 75% vacancy rate for more than two years. The lack of capacity of the Division was also confirmed by the Head of the Legal Division.

6.7.5 Ms Ebrahim further opined that the first two tenders were cancelled as a result of lack of planning and demand management. She expressed the view that this may have resulted in wasteful expenditure and that it was the responsibility of the DG of the Department to ensure that proper planning and expertise were in place.

6.7.6 She further explained that her assessment found that the SCM Manager on several occasions raised her concerns regarding communications with Yardstick without a formal contract. Her concerns were only taken seriously after a legal opinion on the matter was obtained, which caused delays.

6.7.7 Ms Ebrahim discovered that Yardstick retained the evaluation documents of the BEC relating to the bid concerned. She held the view that this is irregular because the DG has the responsibility to ensure a proper record keeping of the process.

6.7.8 She also emphasised that the Provincial Treasury could not find anything untoward which influenced the process and rendered it fatally flawed. Risks were, however, highlighted to the DG and there had been marked improvement in the procurement processes of the Department since.

## **6.8 The response to and steps taken after the assessment of the Provincial Treasury**

6.8.1 On 10 June 2011, the Provincial Treasury issued Circular No 25 of 2011 regarding the brand communication contract with TBWA. This Circular highlighted the principle of a single communication brand for the Province, but advised that

*“[u]nfortunately the procurement process followed by the Department was not in terms of national Treasury Regulation 16A6.5 as required for a transversal bid process.”* The Circular further indicated that, to roll out the branding initiative and the corporate identity, departments had three options, namely:

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1. *“A limited bidding process to be procured in terms of National Treasury Regulation 16A6.6 whereby TBWA Hunt Lascaris is appointed to render the service for the department for the same terms and conditions as per the contract entered into with the Department of the Premier” (the so-called piggy-backing); or*
  2. *“The procurement of an alternate service provider, but taking into account the single branding and corporate identity requirements provided by the Department of the Premier;” or*
  3. *“Procure via a claim back basis via the Department of the Premier.”*
- 6.8.2 The way forward provided for by the Circular included that a full set of bid documents be disseminated to all departments, each department to evaluate the most cost effective option to proceed and *“[t]hat the impact of all departmental contracts running simultaneously and/or consecutively is reviewed against service delivery needs of each department. It is important to note that the overall provincial impact was not reviewed / assessed in the original tender process.”*
- 6.8.3 The DG conceded during the investigation that due to non-compliance with Treasury Regulation 16.A6.5 the agreement between the Department and TBWA did not constitute a transversal contract.
- 6.8.4 He further explained that subsequent to the issuing of the Circular referred to in paragraph 6.8.1 above, no provincial department had been ordered to use TBWA. By 7 October 2011, four departments had chosen option 1 and two departments option 3. Such contracts are not retrospective.
- 6.8.5 On 13 June 2011, the DG entered into a Service Level Agreement with TBWA. The “Client” party was indicated as the Department of the Premier and the duration of the contract from 1 January 2011 to 31 December 2012. The Client would be entitled to renew the agreement for a further period of one year by giving written notice. Remuneration in terms of the contract consists of two components-

- 6.8.5.1 R1 520 000 total fixed remuneration (excluding VAT) for the once-off deliverables, a brand and brand delivery strategy, a corporate identity manual and a communication strategy;
- 6.8.5.2 Ongoing deliverables relating to above-the-line and below-the-line advertising and communication where TBWA would be entitled to 16% and 20% respectively of such amount spent on work emanating from TBWA.
- 6.8.6 According to the information provided by the Department during the investigation, the amount to be spent by the Provincial Government in respect of communication services will not be allowed to exceed R70 million per annum.

## 6.9 Condonation of discrepancies / irregularities

### 6.9.1 Condonation of non-compliance with the delegation relevant to the appointment of Yardstick

6.9.1.1 The Department requested Yardstick for a proposal to establish appropriate agency remuneration and develop a formal agency agreement with TBWA. On 23 November 2010 the latter quoted a fee of R47 250 (excluding VAT).

6.9.1.2 The SCM Manager advised the Head of Strategic Communications of the Department in this regard that:

*"I don't want to interfere, but you need the AO to approve the acceptance of this quotation. Our first appointment of Yardstick was done in terms of our Department's AO delegation 1.N – and this delegation has a condition that we may not use same service provider more than one (sic) during a one year period. All other powers are with the AO – so you need his approval."*

6.9.1.3 In a memorandum addressed to the DG entitled "CONDONATION FOR THE NON-COMPLIANCE OF DELEGATION 1N WITH RESPECT TO THE APPOINTMENT OF YARDSTICK", it is stated that the Acting Deputy Director-General "...acting on erroneous understanding of the implications for the added service to be rendered by Yardstick, instructed Yardstick to proceed with the drafting of the SLA." The DG

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approved that condonation be granted for the retrospective amendment to the approved contract for Yardstick and that *ex post facto* approval was granted for Yardstick to draft the SLA, the extra amount of which amounted to R53 865 (VAT inclusive).

## **7. EVALUATION OF EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

### **7.1 Did the Premier of the Western Cape award the tender to TBWA?**

7.1.1 No evidence was presented or found during the investigation that the indicated Premier participated in the procurement process. The contract was awarded by the Department of the Premier.

7.1.2 There was also no indication found suggesting that the Premier instructed that her Special Advisers should be or that she was aware that they were involved in the drawing up of the specifications of the tender and appointed as members of the BEC. The evidence shows that the decision to involve the Special Advisers as members of the BEC was that of the Acting Deputy Director-General, Mr Groenewald.

### **7.2 Was the tender worth R1 billion?**

7.2.1 The complaints to the Public Protector were based on an article published by the *Sunday Times* on 14 August 2011 stating that the communications tender awarded was worth R1 billion. On 21 August 2011 the *Sunday Times* admitted that it was wrong by reporting its estimate of the value of the contract as R1 billion, as if it was a fact.

7.2.2 The contract entered into between the Department and TBWA provides for a total fixed remuneration to be paid to TBWA in the amount of R1 520 000 for the once-off deliverables of a brand and brand strategy, a corporate identity manual and a

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communication strategy. Furthermore, the contract provides for on-going deliverables. According to a decision taken by the executing authority of the Department, the amount to be spent by the Provincial Government in respect of communication services will not be allowed to exceed R70 million per annum.

### **7.3 Was the tender not publicly advertised?**

7.3.1 The allegation that the tender was not publicly advertised was not supported by the evidence. It was also noted that the *Sunday Times* retracted this allegation on 21 August 2011.

7.3.2 The investigation revealed that the invitation to submit proposals for the selection and appointment of a brand communication agency was advertised in *Die Burger* and the *Cape Argus* on 1 October 2010.

### **7.4 Was the process on awarding the tender found by the Provincial Treasury to have revealed a lack of control measures and good governance principles?**

7.4.1 Shortcomings and deficiencies in the acquisition process relating to the tender concerned were brought to the attention of the Department by the review report of the Provincial Treasury.

7.4.2 Issues such as the risks of a conflict of interests that could have had an impact on the credibility of the procurement process and contradictory statements made by one of the bidders were highlighted in the review report.

7.4.3 It was noted that the Provincial Treasury concluded that despite the said shortcomings and deficiencies, the decisions to appoint Yardstick as facilitator of the procurement process and to award the tender to TBWA were prudent. Ms Ebrahim of the Provincial Treasury was adamant that the Provincial Treasury could not find anything untoward which could have influenced the procurement process



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and rendered it fatally flawed. She also indicated that there has been a marked improvement in the procurement processes of the Department since.

7.4.4 Information on exactly what happened during meetings of the BEC was difficult to verify due to the fact that no proper minutes of meetings were kept. Records of the procurement process were also retained by Yardstick instead of by the Department, as is required by the PFMA.

7.4.5 The evidence revealed a lack of SCM record management by the Department of the proceedings of the BEC, which included minutes of meetings, failure to keep minutes of an inquiry into possible conflict of interest and to retain evaluation documents.

## **7.5 Was Yardstick's involvement improper?**

7.5.1 The evidence revealed that, following two unsuccessful attempts to procure communication services, the ACA, an industry body in the advertising and communication sector, suggested that the Department approach Yardstick. Yardstick was considered to be a suitable agency to assist with and facilitate a procurement process of this nature.

7.5.2 On 21 September 2010 the DG approved the procurement of Yardstick's services by means of limited quotation.

7.5.3 The assessment report of the Provincial Treasury concluded nevertheless that *"[d]espite the above findings, it must be noted that the decision to procure the services of Yardstick was a prudent one made by the Department."*

7.5.4 Subsequently, Yardstick was requested to quote to establish appropriate agency remuneration and develop a formal agency agreement with TBWA (an added service), which was contrary to a condition of the delegation in terms of which it had been appointed (in that the same service provider may not be used more than once

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in a year). This was however regularized when the DG condoned the retrospective amendment to the approved contract for Yardstick to draft the SLA.

## **7.6 Were the Premier's advisers improperly included in the tender committee?**

7.6.1 No evidence was presented or could be found during the investigation that was materially inconsistent with the findings made by the Provincial Review Report. However, the review of the Provincial Treasury did not consider the consistency of the composition of the BEC that evaluated the bids with the legal and other prescripts regulating the procurement system, as required by section 217 of the Constitution.

7.6.2 There was no suggestion that the Special Advisers of the Premier that were involved in the procurement acted improperly or tried to manipulate or influence the process in any manner. The crisp issue that was raised in this regard was that their involvement was improper and unlawful and created a perception of political influence in the appointment of certain service providers. It was noted that the Premier also took heed of this perception in her response to the media reports in this regard stating that her Special Advisers will in the future not be involved in procurement processes of the Department.

7.6.3 The legal position relating to these matters is discussed in paragraph 8 *infra*.

## **7.7 Was the tender initially approved for R1.5 million for the Premier's Office, later improperly extended at the instruction of the DG to other departments increasing the amount to R500 million? Was this extension in violation of Treasury Regulations?**

7.7.1 The evidence of the DG pertaining to the intention of the Provincial Government to procure services in respect of communication with a transversal application, is inconsistent with the demand management process that was followed by the

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Department. In terms of Treasury Regulation 16.A6.5, transversal term contracts have to be facilitated by the Provincial Treasury. The Head Official of the Provincial Treasury confirmed that this is the case and that the Provincial Treasury was not approached by the Department in respect of the identified need for a common branding and communication strategy in order to facilitate the procurement of a transversal term contract.

- 7.7.2 In its review of the procurement process followed by the Department, the Provincial Treasury also indicated that a uniform branding and communication strategy for the Western Cape Provincial Government as a whole required a provincial policy endorsed by the Cabinet. It was therefore a crucial part of the demand management process to ensure that such an endorsed policy existed, especially as it involved a substantial amount of public money.
- 7.7.3 According to the information provided by the DG, the Provincial Cabinet only endorsed a single brand for the Provincial Government on 13 April 2011, i.e. approximately 5 months after the contract, which was supposed to have transversal application according the Department, was entered into.
- 7.7.4 It was only after Heads of Department raised their concerns about the transversal implications of the agreement between the Department and TBWA that the non-compliance by the Department with the provisions of Treasury Regulation 16A6.5 was exposed (the fact that the agreement was not transversal), resulting in the Provincial Treasury having to issue a Circular to try and make amends by providing different options to the other departments.
- 7.7.5 The reasons for the Department to attempt to procure a transversal term contract in violation of the Treasury Regulations could not be established with certainty during the investigation. It appeared to have been the result of ignorance of the relevant provisions of the Treasury Regulations and a failure on the part of the DG and/or the official(s) to whom the responsibility for the procurement was delegated, to be diligent in respect of compliance with the relevant legislation and other prescripts and to exercise reasonable care in dealing with the expenditure of public funds.

7.7.6 In order to rectify the situation, Provincial Treasury issued Circular No 25 of 2011 highlighting the principle of a single communication brand and, in order to roll this out, the three options available to departments. This resulted in a further waste of resources as alternative measures had to be introduced by the Provincial Treasury to attempt to give effect to the transversal intent of the Department in respect of the agreement.

7.7.7 The impact thereof was that the accounting officers of other provincial departments could opt to participate in the contract between the Department and TBWA. At the time of the conclusion of the investigation, four other provincial departments were already participating in the agreement. Their participation resulted in extending the value of the agreement between the Department and TBWA, which could have been avoided if the Department initially complied with the provisions of Treasury Regulation 16A.6.5.

7.7.8 The allegation that the initial tender amount was in the region of R1.5 million, which expanded to R500 million per year over the period of the contract due to the transversal application of the contract is also not consistent with the evidence and information obtained from the Department. The contract entered into between the Department and TBWA provides for a total fixed remuneration to be paid to TBWA in the amount of R1 520 000 for the once-off deliverables of a brand and brand strategy, a corporate identity manual and a communication strategy. As indicated above, it was decided that the total cost in respect of communication services for the Provincial Government would not exceed R70 million per annum.

## **7.8 Were members of the BAC improperly replaced before the tender was awarded?**

7.8.1 The composition of the Bid Adjudication Committee of the Department did in fact change, as was alleged, before the bid in question was considered. However, no evidence was presented or found that it related specifically to this bid. The change affected all bids and was not specific to the consideration of the tender referred to

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in this report. No indication was found that the explanation of the DG that the changes made related to improving operational efficiency in the Department was inaccurate.

## **7.9 Was the tender process improperly repeated three times leading to fruitless and wasteful expenditure?**

- 7.9.1 Demand management is a key element of the procurement process of an organ of state to ensure that it complies with the constitutional imperatives of competitiveness and cost effectiveness. In terms of the SCM Guide issued by National Treasury, the objective of demand management is to ensure that the resources required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and that the quantity and quality will satisfy those needs.
- 7.9.2 It was noted that the relevant Strategic Plans of the Department provided for the uniform branding and application of coordinated strategic communication of all departments with its stakeholders.
- 7.9.3 The DG of the Department, who is ultimately responsible and accountable for the entire procurement process, was therefore obliged to ensure that the demand management process followed to procure the communication services concerned consisted of proper planning, that relevant and sound techniques were used in conducting the needs analysis of the Department and that the specifications were precisely determined in terms of what the supplying industry could offer.
- 7.9.4 The results of the demand management process that was followed in respect of the first two bids that were advertised for the said communication services show that it was inconsistent with the prescribed standard.
- 7.9.5 It was conceded by the DG that the initial demand management processes followed in respect of the first two bids were deficient.

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**7.10 Was the cautionary advice of the Provincial Treasury on the one hand and the SCM Division on the other hand, improperly ignored repeatedly?**

7.10.1 The allegation that cautionary advice from the Provincial Treasury and the SCM Division of the Department was ignored is not supported by the evidence.

7.10.2 Concerns raised by the SCM Division regarding engagement of Yardstick when no formal quotation was received, were clarified during the investigation – it was explained that the nature of the service provided by Yardstick had to be measured prior to a formal quote being forwarded to the SCM Division for consideration and also discussion regarding pricing.

7.10.3 The intervention of the Provincial Treasury was only requested after the tender had already been awarded to TBWA. However, it was noted in the Provincial Review Report that issues of distrust and “*dissentation in the ranks*” amongst the officials involved delayed the conclusion of the procurement process. This might have created a perception of indifference to issues that were raised.

**7.11 Was the scoring system suspiciously riddled with inconsistencies?**

7.11.1 Allegations that the scoring system applied during the evaluation process was riddled with anomalies and that most of the panel members ignored scoring instructions are also not supported by the records of the Department and the evidence and information provided by witnesses during the investigation. The Provincial Review Report identified that there were some anomalies in the score sheets. Treasury indicated that it was not clear whether there were discussions by the BEC to establish the reasons why that was the case. These anomalies had no impact on the ultimate finding of the Report in respect of the regularity of the process.

7.11.2 During shortlisting the majority of BEC members rated TBWA as the highest, with the exception of Mr Coetzee. The grand totals of two BEC members also revealed stricter scoring, which explained low scores of certain BEC members.

## **7.12 Was there an attempt to conceal some of the deficiencies by taking after-the-fact measures?**

7.12.1 The allegation that certain after-the-fact steps were taken in an attempt to deal with some of the deficiencies of the procurement process is supported by the evidence and information obtained during the investigation, indicating that the Provincial Treasury had to intervene to address the non-compliance by the Department with Treasury Regulation 16A6.5 in respect of transversal term agreements. However, no evidence was found that such measures were taken to conceal the deficiencies.

7.12.2 The DG conceded the said non-compliance and the fact that other provincial Departments had to be provided with certain options to consider in an attempt to give the agreement between the Department and TBWA some transversal application, as was the original objective.

## **8. LEGAL FRAMEWORK AND ANALYSIS**

### **8.1 Introduction**

8.1.1 Supply chain management is one of the key challenges at all levels of government. Matters concerning government tenders are frequently reported and debated in the media. Some state entities have even been dubbed “*department of irregular expenditure*” or given other names due to irregular and improper procurements.

8.1.2 In *Moseme Road Construction CC and others v King Civil Engineering Contractors (Pty) Ltd and another [2010] 3 All SA 549 (SCA)* the Deputy President of the Supreme Court of Appeal remarked as follows:

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*“These [government tender] awards often give rise to public concern – and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. **Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders.**”*  
(emphasis added).

8.1.3 The management of procurement involves two fundamental stages, namely Demand Management and Acquisition Management. Things often go wrong in the initial cycle of demand assessment, research and planning to acquire goods and services with dire consequences on further processes that are followed. Equally important is the acquisition cycle of processing specifications, invitations to tender, bid document management, evaluation, adjudication, contracting and management of contracts. Issues relating to the several different stages in these processes as it was applied in the procurement in question, were considered in terms of the legal framework referred to below.

8.1.4 The financial management and responsibilities of provincial government departments are governed by the PFMA Treasury Regulations, and instructions and directives issued by the National Treasury, in terms of section 76 of the PFMA.

8.1.5 In terms of section 18(2)(a) of the PFMA, a provincial treasury must issue provincial treasury instructions not inconsistent with that Act. A provincial treasury has the following additional responsibilities:

*“(b) must enforce this Act and any prescribed national and provincial norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in provincial departments;*



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- (c) *must comply with the annual Division of Revenue Act, and monitor and assess the implementation of that Act in provincial public entities;*
  - (d) *must monitor and assess the implementation in provincial public entities of national and provincial norms and standards;*
  - (e) *may assist provincial departments and provincial public entities in building their capacity for efficient, effective and transparent financial management;*
  - (f) ***may investigate any system of financial management and internal control applied by a provincial department or a provincial public entity;***
  - (g) ***must intervene by taking appropriate steps, which may include the withholding of funds, to address a serious or persistent material breach of this Act by a provincial department or a provincial public entity;***
  - (h) *must promptly provide any information required by the National Treasury in terms of this Act; and*
  - (i) *may do anything further that is necessary to fulfil its responsibilities effectively.* (emphasis added).

8.1.6 Ultimately, in terms of section 38 of the PFMA, it is the general responsibility of the accounting officer of a department to:

8.1.6.1 Ensure that that department has and maintains *inter alia* effective, efficient and transparent systems of financial and risk management and internal control; and

8.1.6.2 Take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure.

8.1.6.3 Section 1 of the PFMA defines “*fruitless and wasteful expenditure*” as expenditure which was made in vain and would have been avoided had reasonable care been exercised.

8.1.7 On discovery of any fruitless and wasteful expenditure, the accounting officer must, in terms of section 38(1)(g) report the particulars thereof to the relevant treasury.

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He/she must also take effective and appropriate disciplinary steps against any official of the department who made or permitted fruitless and wasteful expenditure (Section 38 (1)(h)).

- 8.1.8 Fruitless and wasteful expenditure must be recovered in terms of Treasury Regulations 9 and 12.
- 8.1.9 Section 64 of the PFMA makes a clear distinction between the executive authority and the administration of a department. It provides, *inter alia*, that any directive by an executive authority of a department to the accounting officer having financial implications must be in writing. If the implementation thereof is likely to result in unauthorized expenditure, the accounting officer would only escape liability if he/she has informed the executive authority accordingly. Any decision of the executive authority to proceed with the implementation of the directive and the reasons therefore has to be put in writing and forwarded to the National Treasury, the Provincial Treasury, if applicable and the Auditor-General.

## 8.2 Procurement legislation

- 8.2.1 The constitutional imperatives relating to procurement are encapsulated in section 217 of the Constitution, which stipulates that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a **system which is fair, equitable, transparent, competitive and cost-effective**.
- 8.2.2 In terms of section 38 of the PFMA, it is the general responsibility of the accounting officer to ensure that the department has and maintains an appropriate procurement and provisioning **system which is fair, equitable, transparent, competitive and cost-effective**.
- 8.2.3 Section 76(4)(c) of the PFMA provides that the National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning, among others, the determination of a framework for an

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

8.2.4 Treasury Regulations and instructions issued in terms of section 76, are, in terms of section 1 of the PFMA, regarded as part of that Act. It therefore has the same legal application and compliance requirements as if it were part of the PFMA.

8.2.5 Regulation 16A of the (National) Treasury Regulations sets out the framework for Supply Chain Management and provides *inter alia* that:

***“16A.3 Supply chain management system***

*16A3.1 The accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for—*

*(a) the acquisition of goods and services; and*

*(b)...*

*16A3.2 A supply chain management system referred to in paragraph 16A3.1 must—*

*(a) be fair, equitable, transparent, competitive and cost effective;*

*(b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*

*(c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*

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(d) provide for at least the following:

- (i) demand management;
- (ii) acquisition management;
- (iii) logistics management;
- (iv) disposal management;
- (v) risk management; and
- (vi) regular assessment of supply chain performance.

**16A.4 Establishment of supply chain management units**

16A4.1 *The accounting officer or accounting authority must establish a separate supply chain management unit within the office of that institution's chief financial officer, to implement the institution's supply chain management system.*

...

**16A.6 Procurement of goods and services**

16A6.1 ...

16A6.2 *A supply chain management system must, in the case of procurement through a bidding process, provide for—*

- (a) the adjudication of bids through a bid adjudication committee;*
- (b) the establishment, composition and functioning of bid specification, evaluation and adjudication committees;*
- (c) the selection of bid adjudication committee members;*
- (d) bidding procedures; and*
- (e) the approval of bid evaluation and/or adjudication committee recommendations.*

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16A6.5 *The accounting officer or accounting authority may opt to participate in **transversal term contracts** facilitated by the relevant treasury.*

*Should the accounting officer or accounting authority opt to participate in a **transversal contract facilitated by the relevant treasury**, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.*

16A6.6 *The accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of State, subject to the written approval of such organ of State and the relevant contractors.” (emphasis added)*

### **8.3 The composition of the Bid Evaluation Committee (BEC)**

#### **8.3.1 The provisions of the Constitution and the PFMA**

8.3.1.1 Legislation and prescripts applicable to national, provincial and local government regulate the composition of bid committees. A regulatory framework and good governance principles are of vital importance in this regard, especially in the light of the renowned risks of improper influence, irregular or illegal practices.

8.3.1.2 In terms of section 217 of the Constitution, government departments have to procure goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Section 2 of the Constitution provides that conduct that is inconsistent with it is invalid. Any procurement by a government department that is therefore not in accordance with the said system, would be invalid.

8.3.1.3 The PFMA gave effect to, *inter alia*, the provisions of section 217 of the Constitution. In terms of section 38(1), it is the responsibility of the accounting officer to ensure that his/her department has and maintains an appropriate procurement and provisioning system. **The ultimate responsibility for all procurement by the department rests with the accounting officer.**

8.3.1.4 The accounting officer may, in terms of section 44(1) of the PFMA, in writing delegate any of the powers entrusted to him or her to an official of the department and may instruct any official of that department to perform any of the duties assigned to him or her in terms of that Act. Delegation of powers and the assigning responsibilities enable the accounting officer to establish and maintain a “system” that is under his or her authority and control and for which he or she can be held accountable.

8.3.1.5 It is important to note that section 44(2)(d) of the PFMA provides that a delegation or instruction as referred to in paragraph 5.3.1.4 above, does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

8.3.1.6 The accounting officer can accordingly only be held accountable for his/her own conduct or failures and that of persons to whom his/her powers and duties were assigned.

8.3.1.7 In terms of section 38(1)(n) of the PFMA, the accounting officer must comply, and ensure compliance by the department, with the provisions of this Act. He/she is compelled by the provisions of section 38(1)(h) to take effective and appropriate disciplinary steps against any official of the department who:

- (i) contravenes or fails to comply with a provision of this Act;
- (ii) commits an act which undermines the financial management and internal control system of the department; or

- 
- (iii) makes or permits an unauthorized, irregular or fruitless and wasteful expenditure.

### 8.3.2 The Treasury Regulations

8.3.2.1 As alluded to above, the National Treasury may, in terms of section 76(4) of the PFMA, make regulations or issue instructions applicable to departments concerning any matter that may be prescribed for in terms of this Act. This includes regulations and instructions concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

8.3.2.2 Of note in this regard are the provisions of section 1, which provides that a reference to *“this Act”* includes any regulations and instructions in terms of section 76 of the PFMA.

8.3.2.3 Regulation 16A of the Treasury Regulations, issued in terms of section 76 of the PFMA regulates supply chain management in respect of government departments.

8.3.2.4 It is also important to note that that Regulation 16A.1 adds a definition that is not contained in section 1 of the PFMA, i.e. to the word *“official”*, which means *“a person **in the employ of a department.**”* (emphasis added)

8.3.2.5 In terms of Regulation 16A.3, the accounting officer must develop and implement an effective and efficient supply chain management system in his/her department for the acquisition of goods and services. The supply chain management system must provide for, *inter alia*, demand and acquisition management.

8.3.2.6 Regulation 16A.6 provides that a supply chain management system must, in the case of procurement through a bidding process, provide for the establishment, composition and functioning of bid specification, evaluation and adjudication committees.

8.3.2.7 Consequently, the BEC of a department forms part of the “system”, which, in order for it to be efficient and effective, should not be or perceived to be susceptible to influence which may impact on the requirements of section 217 of the Constitution.

### **8.3.3 The *Supply Chain Management Guide for Accounting Officers* issued by the National Treasury in February 2004**

8.3.3.1 According to the *Preface* to this *Guide* was intended to facilitate a general understanding of changes to Supply Chain Management practices.

8.3.3.2 There is no indication in the *Guide* that it was issued as an instruction in terms of section 76 of the PFMA. It is specifically stated in the *Preface* that :

*“The Guide is not a suitable substitute for legislation and should not be used for legal interpretations.”*

8.3.3.3 The contents of the *Guide* confirm that it was meant to assist accounting officers to comply with the requirements of section 217 of the Constitution, the PFMA, Treasury Regulations and the Preferential Procurement Policy Framework Act, 2000.

8.3.3.4 The promotion of uniformity in supply chain management practices is provided for in paragraph 1.6 of this *Guide*. It provides, *inter alia*, that:

*“Uniformity in SCM practices will be promoted in the following manner:*

*1.6.1.1 Efficiency and effectiveness in SCM will be improved by applying a uniform system in all institutions. Bidding procedures should become easy to interpret, cost effective, inexpensive, quick, transparent and free of corruption.*

*1.6.1.2 Accounting officers/authorities should ensure that a formal **set of delegations** is issued to bid evaluation/adjudication committees, which*



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***should be constituted of at least three members, of whom at least one should be a SCM practitioner. When it is deemed necessary, independent experts may also be co-opted to a bid evaluation/adjudication committee in an advisory capacity.***”(emphasis added)

### 8.3.4 National Treasury Circular dated 27 October 2004

8.3.4.1 This *Circular* was issued by the National Treasury under the heading ‘IMPLEMENTATION OF SUPPLY CHAIN MANAGEMENT.’ It aimed to provide further guidance and clarity to accounting officers and supply chain management practitioners. There is no indication that it was issued as an instruction in terms of section 76 of the PFMA.

8.3.4.2 Paragraph 1.1 of this *Circular* states that:

*“Sections 36 and 49 of the Public Finance Management Act, No 1 of 1999, (as amended by Act 29 of 1999) **vest accountability with the accounting officer/authority.** This includes the management of all finances. Only the accounting officer/authority may award bids where any finances are involved. This is for the procurement of goods and/or services by means of a competitive bidding process, including the procurement of fixed assets, as well as bids related to the sale of moveable and/or immovable assets by means of a competitive bidding process.....*

*The accounting officer/authority is empowered to delegate decision-making to subordinates who are officials, **but accountability cannot be delegated.**”(Emphasis added).*

8.3.4.3 Paragraph 4.1 deals with the appointment of bid committees. It provides that the accounting officer of a department should appoint bid committees as indicated in this *Circular*. As far as BECs are concerned, it states, *inter alia*, that:

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*“The evaluation committee should be cross-functional and should be composed of **supply chain practitioners and officials from the user departments requiring the goods and/or services.**” (emphasis added)*

8.3.4.4 As far as the participation of advisers is concerned, paragraph 8.1 of this *Circular* states that:

*“The accounting officer/authority may procure the services of advisers to **assist** in the execution of the supply chain management function. **These services should be obtained through a competitive bidding process.** No advisor may, however, form part of the final decision-making process regarding the award of bids, as this will counter the principle of vesting accountability with the accounting officer/authority. The accounting officer/authority cannot delegate decision-making authority to a person other than an official.” (Emphasis added)*

8.3.4.5 It can therefore be concluded from what is stated above that the National Treasury has advised accounting officers of government departments to establish BEC's as part of the acquisition management components of the supply chain management system envisaged by section 217 of the Constitution. The appointment of the members of a BEC by the accounting officer is made by means of a delegation or instruction to officials of the department to perform the functions associated with the BEC. The services of advisers to assist in the procurement process may be obtained, but they may not form part of the final decision making process regarding the award of bids.

### **8.3.5 Should special advisers be appointed as members of a BEC?**

#### 8.3.5.1 The provisions of the Public Service Act, 1994-

- (a) The appointment of special advisers is regulated by section 12A, which provides as follows:

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*“(1) Subject to this section, such executive authorities as the Cabinet may determine may appoint one or more persons under a contract, whether in a full-time or part-time capacity-*

- (a) to advise the executive authority on the exercise or performance of the executive authority’s powers and duties;*
- (b) to advise the executive authority on the development of policy that will promote the relevant department’s objectives;*  
*or*
- (c) to perform such other tasks as may be appropriate in respect of the exercise or performance of the executive authority’s powers and duties.”*

(b) Section 8 of this Act deals with the composition of the public service. It provides that the public service shall consist of persons who are employed in posts on and additional to the establishment of departments.

(c) It should be noted that the definition of “employee” in terms of section 1 of this Act specifically excludes Special Advisers, appointed in terms of section 12A. Special advisers are therefore not regarded as employees of the Department linked to the Executive Authority where they are assigned.

#### 8.3.5.2 The provisions of the Ministerial Handbook

(a) Annexure F to the *Handbook for Members of the Executive and Presiding Officers* that was approved by Cabinet on 7 February 2007, refers to the special dispensation for the appointment and remuneration of Special Advisers.

(b) Of particular significance to the purpose of this report are the contents of paragraph 7, which state the following:

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*“Since a Special Adviser would act in an advisory capacity to advise an Executing Authority on, or perform other tasks in respect of, the exercise or performance of the Executing Authority’s powers and duties, or to advise the Executing Authority on the development of policy that will promote the objectives of the relevant department, **there shall be no relationship of authority between the Special Adviser and the Head of the Department concerned. The Special Adviser shall direct his/her inputs to the Executing Authority and refrain from interfering in the administration and management of the department, which in law is the function and responsibility of the Director-General.**”* (emphasis added)

- (c) Annexure C to the *Handbook: Benefits and Privileges for Members of the Western Cape Provincial Cabinet* contain an identical provision to what is stated in paragraph (b) above.

#### 8.3.5.3 The advice received from the Office of the Accountant-General

- (a) During the course of the investigation, the appointment to a BEC of persons who are not officials of the department concerned, was raised with the Office of the Accountant-General.
- (b) Ms Z Mxunyelwa of Specialised Audit Service advised as follows on 3 November 2011:

*“External professional parties can be engaged at an agreed fee to provide special expert advice in the evaluation, but without the (sic) voting rights. There are also external parties who participate in the bid evaluation **with voting rights**, if they are under a **fixed contract term**, though not permanent employees of the department, if the terms of the contract include the participation in the bid evaluation, e.g. built environment project management consultants with a fixed contract term.”* (Second emphasis added)

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#### 8.3.5.4 Opinion of Mr J Breytenbach of National Treasury

- (a) The Chief Director: Norms and Standards of the National Treasury, Mr J Breytenbach, was also approached for advice on 26 November 2011 in connection with the composition of a BEC by the accounting officer of a Department. Mr Breytenbach has more than 30 years' experience in respect of the interpretation and application of legislation and other prescripts relating to procurement by government departments. He was also the drafter of, amongst many others, the *Circular* referred to in paragraph 5.3.4 above.
- (b) Mr Breytenbach expressed the notion that a BEC should consist of officials of the department involved and that the accounting officer may co-opt an independent professional expert to the BEC in exceptional cases. The person co-opted to the BEC would be involved in an advisory capacity only and would not be a member of the BEC and participate in the actual evaluation and scoring process.
- (c) He also agreed with the opinion of the Office of the Accountant-General referred to in paragraph 8.3.5.3 above that experts who are not officials of the department can only form part of a particular BEC as a member in terms of a contractual arrangement with the department following a proper procurement process. The contract would regulate the involvement of the expert in the BEC and his/her responsibilities in this regard. It would obviously also provide for remedies in the event of improper conduct by the expert concerned that can impact on the validity of the procurement process and therefore on the ultimate accountability of the accounting officer.

#### 8.3.5.5 The involvement of external advisors or experts as members of a BEC

- (a) From what is stated above, it appears that special circumstances may require the composition of the BEC to include in addition to officials of the department, external advisors or experts as scoring members of the committee. However, such persons cannot be appointed by the accounting officer as they are not officials. Their membership of a BEC will have to be regulated by means of a

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contractual arrangement following a proper procurement process for the specific service.

- (b) In order to address the issue of the accountability of the accounting officer for maintaining an appropriate procurement system, such a contract will have to clearly stipulate the conditions under which a particular person(s) would form part of a specific BEC and regulate remedies for non-compliance with the standard expected of such members.

#### 8.3.5.6 The involvement of Special Advisers in a BEC

- (a) In the light of the considered view expressed above that only officials of the end user department or specifically contracted external advisers can be members of a BEC, the question arises as to the position of special advisers to the executive authority of a department, appointed in terms of section 12A of the Public Service Act.
- (b) The Treasury Regulations define “*official*” as a person in the employ of a department.
- (c) Departments employ persons in terms of the Public Service Act. However, in terms of section 1 of this Act, Special Advisers are not regarded as employees of the department. They are therefore not “*in the employ*” of the department and cannot be regarded as officials, as contemplated by the relevant Treasury Regulations.
- (d) It is furthermore clear from the provisions of the *Ministerial Handbook* that Special Advisers are appointed in terms of a special dispensation by virtue of which they do not form part of the administration and management of the department. Procurement is an administrative function and therefore cannot involve Special Advisers.
- (e) The *Ministerial Handbook* also makes it clear that there is no relationship of authority between the accounting officer and a Special Adviser. The accounting

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officer accordingly does not have the authority to assign any of his/her powers or duties to a Special Adviser and cannot be held accountable for their conduct or failures.

- (f) In his response to enquiries made during the investigation, the DG expressed the following contrary view:

*“The National Treasury Regulations do not exclude special advisors from participating in a bid evaluation process as NTR16A defines ‘official’ as ‘any person in the employ of a department’. While special advisors may not be employees for the purposes of the Public Service Act, they are still in the employ of a department. In our view, and with reference to the provisions of the Public Service Act and the Dispensation for Special*

*Advisors, which forms part of the Provincial Ministerial Handbook, it would have been appropriate for the two officials to have participated in the bid evaluation process if the following criteria were met:*

- (i) *The special advisor has specific knowledge and/or expertise in the subject matter of the bid. We believe this criterion was met.*
- (ii) *The special advisor complied in all respects with the ethical standards as set out in NTR16A8. We believe this criterion was met.*
- (iii) *The assistance was appropriate in respect of the exercise or performance of the Premier’s power and functions; there was no interference in the administration or management of the department and the task did not involve taking any decision which the Director-General or any other duly authorized employee of the department is empowered by law to take. We believe this criterion was met.”*  
(emphasis added)

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(g) The views of the Director-General are respectfully not consistent with the legal framework discussed in this paragraph, for the following reasons, some of which have already been alluded to above:

- (i) Special advisers are, in terms of section 12A of the Public Service Act appointed by means of a special contract between a specific executive authority (and not the department) and the person concerned;
- (ii) The terms of the special contract is linked specifically to the term of office of the executive authority and is not determined by the department;
- (iii) Special advisers may only be appointed **to advise** the executive authority specifically (and not the department) or to perform such other tasks ***“as may be appropriate in respect of the exercise or performance of the executive authority’s powers and duties”*** and not that of the department.
- (iv) A Special adviser is therefore clearly in the *“employ of a specific executive authority”*, and not in the employ of the department, as contemplated by Treasury Regulation 16A1.
- (v) It is for these reasons that special advisers are excluded by section 1 of the Public Service Act from the definition of *“employee”*.
- (vi) Paragraph 7 of Annexure F to the *Ministerial Handbook* (and the *Western Cape Provincial Ministerial Handbook*) makes it abundantly clear that there is no relationship of authority between the head of a department and a special adviser and that a special adviser *“shall direct his/her inputs to the Executing Authority”* and not to the head of the department.



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(vii) Procurement of goods and services is the sole responsibility of the accounting officer and not of the executive authority. The Premier therefore had no power or function that could be exercised in this regard, as referred to by the DG.

(viii) Special advisers accordingly should not participate in the administration of the department and form part of the supply chain management system that falls under the authority of the accounting officer, in respect of whom they have no role to play. Any inputs that they may wish to make in this regard can only be directed to the executive authority.

#### 8.3.5.7 Legal opinion of Adv B R Tokota SC

- (a) The Public Protector obtained a legal opinion from Adv B R Tokota SC in respect of the analysis and interpretation of the legal provisions relating to composition of a BEC. Salient aspects of the opinion obtained in this regard are as follows:

*'...accounting officers are not entitled to appoint persons other than employees of the department to participate in the BEC. However, in terms of the National Treasury's instructions consultants may be appointed on an advisory capacity in the BEC. These consultants however may only be engaged when necessary skills and/or resources to perform a project are not available and the accounting officer cannot be reasonably expected to either train or recruit people in the time available. The relationship between the accounting officer and the consultant **concerned should be one of a purchaser/provider and not employer/employee.** The work undertaken by a consultant should be **regulated by a contract.** The National Treasury prescribes the manner in which such consultants may be appointed.*

*The question is whether Special Advisers to the Premier ... can be classified as consultants. I think not. I am generally in agreement ...that such Special Advisers though appointed in terms of section 12A of the*

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*Public Service Act are not employees of the State as envisaged in the Public Service Act.*

*I however deem it expedient to deal with the response by the Director-General of the Western Cape in this regard. The Director-General argues that the Special Advisers, though not employees in terms of the Public Service Act, are employees of a department and therefore it was appropriate to appoint them as members of the Bid Evaluation Committee. This argument does not seem to take into account the definition of an employee in terms of the Public Service Act which excludes persons appointed in terms of section 12A (Special Advisers).*

*Section 8 of the Public Service Act describes the composition of the public service and states that the public service shall consist of persons who are employed in the posts on the establishment of departments or additional to the establishment of departments. It is these employees that are defined to be employees in the public service in terms of the PSA. Special Advisers employed in terms of section 12A are excluded from the definition of public servants and therefore from the establishment of a department and cannot therefore be persons in the employ of a department.*

*...The Director-General further argues that Special Advisers had specific knowledge and expertise in the subject matter of the bid. This also loses sight of the provisions of chapter 5 of the guidelines referred to above. As pointed out by Advocate Fourie in his opinion the ministerial handbook makes it abundantly clear that the employment of Special Advisers to the executive authority is based on policy consideration and that there shall be no relationship of authority between Special Advisers and the head of the department concerned. Such Special Advisers shall refrain from interfering in the administration and management of the department.*

*...I am therefore of the view that the view of the Director-General is untenable. If the Special Advisers were appointed by virtue of their specialised knowledge or expertise in the subject matter they should have been engaged on a consultancy basis and therefore the guidelines set out*

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in chapter 5 of the National Treasury's instructions should have been adhered to.

...In the absence of compliance with those instructions then their appointment had no legal basis. The regulations quoted above set out the circumstances under which deviation from the prescripts is permitted. If the Special Advisers participate in the bidding process an impression **could be created that there is an indirect political influence** in the appointment of a successful bidder. Thus the process was not transparent.

I am in agreement with the conclusion that the accounting officer of a department is not entitled to appoint people who are not employees of the department save in those cases stipulated in chapter 5 of the National Treasury guidelines.

...it is expedient to refer to the decisions in the Supreme Court of Appeal. In the case of **MUNICIPAL MANAGER: QAUKENI LOCAL MUNICIPALITY AND ANOTHER v FV GENERAL TRADING CC 2010 (1) SA 356 (SCA)** it was stated as follows:

*“As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.*

*As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the*

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*legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. **Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.***

*Therefore a procurement contract for department/premier concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost- effective and competitive tendering process in the public interest, is invalid and not enforceable.*

*With regard to the impact of the invalidity this aspect has also been decided by the Supreme Court of Appeal where it stated.*

*“This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act: ....*

*Finally, in Premier, Free State and Others v Firechem Free State (Pty) Ltd, Schutz JA concluded in giving the unanimous judgment of the court that 'the province [the appellant] was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist [the respondent's] attempts at enforcement'.*

## **9. THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR**

- 9.1 The Public Protector issued a Provisional Report on the matter investigated on 16 April 2012. The Provisional Report was presented to the complainants, the Premier of the Western Cape, the DG of the Western Cape Provincial Government, the Head Official of the Western Cape Provincial Treasury and Mr A Groenewald, formerly employed by the Department of the Premier of the Western Cape Provincial Government and the Chairperson of the BEC at the material times referred to in this report.

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- 9.2 The complainants and the other interested and affected parties were provided with an opportunity to respond to the contents of the Provisional Report by 10 May 2012.
- 9.3 In a letter addressed to the Public Protector on 16 May 2012, the Premier of the Western Cape, Ms H Zille, raised the following concerns regarding the submission of the Provisional Report to certain parties and the subsequent leaking thereof to the media:
- 9.3.1 As a result of the leaking of the Provisional Report, the investigation has been compromised and the Western Cape Provincial Government prejudiced;
- 9.3.2 Whether and when, as well as to whom, copies of the Provisional Report were furnished;
- 9.3.3 The reasons that informed such disclosure by the Public Protector;
- 9.3.4 Whether the Public Protector's investigative procedure provides for copies of provisional reports to be submitted to complainants for comment or for any other purpose (if not, why copies were so furnished); and
- 9.3.5 The measures that were and are taken to prevent the disclosure of provisional reports to unauthorised parties and the media.
- 9.4 The Provisional Report was made available to the Premier, the Department, the Provincial Treasury and the complainants in this matter on 24 April 2012, for comments.
- 9.5 Mr D Basson, the Chief Financial Officer, received copies of the Provisional Report on 24 April 2012 on behalf of the Premier, DG, Head Official of the Provincial Treasury and Mr Groenewald. The Provincial Secretary of the ANC: Western Cape Province collected a copy of the Provisional Report on 25 April 2012. After several requests to collect copies at the Western Cape Office of the Public Protector South Africa in Cape Town, it was eventually delivered on 11 May 2012 to the Provincial

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Secretary of COSATU in the Western Cape and Mr S Stellenboom and on 14 May 2012 to Mr G Solik of Ndifuna Ukwazi.

- 9.6 Letters accompanying the report, addressed to the DG and Mr Groenewald, directed attention to the provisions of section 7(9) of the Public Protector Act and that the Public Protector might have to make an adverse finding against them for actions performed and/or decisions taken in their respective capacities. They were afforded an opportunity to respond in writing to the contents of the Provisional Report and specifically in respect of where they are implicated, as is required by law.
- 9.7 The deadline to furnish comments on the Provisional Report was extended on request from 10 to 18 May 2012.
- 9.8 The Public Protector met with the Premier on 17 May 2012 during which the leaking of the Provisional Report to the media, the issues referred to in paragraph 9.3 above and the response of the Department to the report were discussed.
- 9.9 The Public Protector had a similar meeting with the complainants on 17 May 2012 where they were afforded an opportunity to discuss their comments on the Provisional Report.
- 9.10 The leaking of the Provisional Report was unfortunate and an unethical act by all the parties involved. However, the Public Protector did not allow this to compromise the investigation. Responding to enquiries by the media, the Public Protector clearly stated that she does not comment on the contents of Provisional Reports, which are regarded as confidential documents. She explained that the status and purpose of Provisional Reports are to furnish all parties with the provisional views of the Public Protector in order to provide them with an opportunity to make final submissions on the facts, law or otherwise, to be considered by her for the purposes of the final report.
- 9.11 As far as the availing of Provisional Reports to the respective parties involved, including the complainants, is concerned, it should be noted that section 7(1)(b)(i) of the Public Protector Act provides that the format and procedure to be followed in

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conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case. The Public Protector Act only prescribes that a notice of intention to make an adverse finding against a person implicated by the matter investigated must be provided to him/her in order to respond in connection therewith.. (Section 7(9)) Following the *Mail and Guardian* case the Public Protector decided to issue provisional reports in order to clear any factual, legal or other complications before articulating her findings in a final report. In fact, the issuing of provisional reports is not uncommon in Ombudsman institutions globally and is regarded by the UN Ombudsman Guidelines as good practice. The Public Protector applies this procedure to all reports and provisional findings have no status.

9.12 The following steps are taken to prevent the disclosure of provisional reports to unauthorised parties and the media:

- Only the investigation team and authorized staff handle such documents;
- Electronic documents are not transmitted by means of conventional e-mail servers;
- Production of hard copies are limited to the number of recipients;
- Complainants are required to sign a Notice of Confidentiality wherein the individual concerned acknowledges that a copy is provided on condition that s/he agrees to keep the contents of the said Provisional Report confidential, as all the parties implicated by the investigation have not responded thereto, as is required by law. The recipient also has to take notice that the Public Protector has not determined that the contents of the said Provisional Report may be disclosed to persons other than those identified by her and has to confirm that s/he is aware that section 7(2) of the Public Protector Act, 1994, which provides that:

*“Notwithstanding anything to the contrary contained in any law no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, the Deputy Public Protector or a person contemplated in subsection (3) (b) during an investigation, unless the Public Protector determines otherwise.”*

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- Further section 11 of the Public Protector Act, 1994 provides that a contravention of section 7(2), is a criminal offence.
- 9.13 The key contentious issues raised in the Provisional Report were the failure by the Department to employ a proper demand management process and the lawfulness of the involvement of the Special Advisers of the Premier in the BEC.
- 9.14 As indicated in paragraph 10 below, the Department submitted a comprehensive response, which included legal opinions obtained from two independent senior counsel, to the contents of the Provisional Report. The Head Official of the Western Cape Provincial Treasury and the Secretary General of the ANC: Western Cape also submitted detailed comments. These responses, including the legal opinions, were extremely helpful and thoroughly considered in the drafting of this report. The views expressed at the two meetings, one with the Premier, the other with the complainants, were also considered.
- 9.15 Mr Groenewald submitted no comment on the contents of the Provisional Report.

## **10. THE RESPONSE OF THE DEPARTMENT OF THE PREMIER OF THE WESTERN CAPE PROVINCIAL GOVERNMENT TO THE PROVISIONAL REPORT**

### **10.1 Salient issues raised by the response**

- 10.1.1 The response made issue with the title of the Provisional Report, i.e. “*Yes we made mistakes*”. It was contended that “*it appears as if these words were those of the WCG (Western Cape Government) when, in fact, it was the heading of an article dated 21 August 2011, where the Sunday Times admitted incorrect reporting.*”
- 10.1.2 It is further stated that the Department does not agree that the “*entire*” demand management process in respect of the procurement was deficient. In this regard reference was made to the appointment of Yardstick “*to ensure proper demand planning and management.*”



10.1.3 The Department further disagreed that there was any contravention of the provisions of Treasury Regulation 16A.3 on the basis that a supply chain management system was developed and implemented. In this regard it was stated that:

*“We therefore disagree with the unqualified and unbalanced finding that there was a failure to apply proper demand management which constituted maladministration, or that any such failure, were it to exist, constituted a contravention of the regulation, as it had no relevance to the development and implementation of, or prescribed requirements for, the system itself.”*

10.1.4 As far as the intended finding contained in the Provisional Report relating to fruitless and wasteful expenditure is concerned, the Department agreed in the response that it could have been avoided. However, it was contended that as the amount is “small” and was required to “rectify a bona fide error”, it does not warrant the label of ‘fruitless and wasteful expenditure.’”

10.1.5 It is furthermore disputed that the cancellation of the second bid related to a failure to take reasonable care. The explanation provided is that the officials involved in the drafting of the specifications, none of whom were legally trained, considered it prudent to include a bid condition relating to the number of years’ experience a bidder had to have, to be considered. When this condition was challenged, legal opinion advised that it would not pass muster and the bid had to be cancelled.

10.1.6 The Department denied that it failed to keep proper minutes of the meetings of the BEC. It in any event denied that a failure to keep proper minutes would constitute a contravention of Treasury Regulation 16A.3 as it has no relevance to the development and implementation of the supply chain management system.

10.1.7 According to the response, the “shortlist report constituted the record/minutes of the bid evaluation committee’s proceedings.” The response also stated in this regard that:

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*“In any event, whilst a failure to keep minutes of a bid evaluation committee meeting’s proceedings may be indicative of poor governance, it does not constitute a contravention of National Treasury Regulation 16A.3 or any other legally binding prescript.”*

10.1.8 The intended findings of the Public Protector that the appointment of the Special Advisors of the Premier to the BEC was unlawful, that the contract concerned is accordingly unlawful and its further execution should be terminated, are also contested in the response. In this regard, reference was made to a legal opinion that was obtained, which is discussed in more detail in paragraph 13 below.

10.1.9 It is further stated that:

*“Even if the appointment of the special advisors were unlawful (which the Department contests) the finding that the conduct of the Director-General was unlawful, is without any foundation. The Deputy Director-General had acted in terms of a delegation when he appointed the members of the bid evaluation committee. In our view the Director-General cannot be held to act unlawfully every time a delegated official acts beyond the scope of a delegation (or not in accordance with a prescript) when such conduct is only drawn to the attention of the Director-General after the fact. This would create an unreasonable and untenable level of responsibility that is not supported by any authority.”*

10.1.10 Referring to the capacity of the Supply Chain Management Unit of the Department, the report stated that it is currently adequately staffed that and one-on-one training sessions are held with staff members who have recently joined the unit. Various awareness sessions have been held with SCM staff and line managers to ensure that they are conversant with the relevant supply chain management legislation and other prescripts. It further stated in this regard that:

*“The SCM unit ensures that proper records are kept of all SCM transactions. **Record keeping is taken seriously due to the potential for litigation in relation to procurement-related processes and decisions.**”* (emphasis added)

10.1.11 Finally, the response advised that Mr Groenewald had left the employ of the Department.

## 10.2 Evaluation of the response

10.2.1 The title of a report of the Public Protector is solely his/her prerogative. It is not correct to accept that the title relates only to the article published by the *Sunday Times* on 21 August 2010. It also relates to the acknowledgement by the Department and the Premier that mistakes were made during the procurement process. In a letter of the Premier published in the *Cape Argus* of 12 September 2011, she, *inter alia*, stated that:

*“However, I have conceded that there were administrative problems, in particular around the transversal applicability of the contract. In other words, at the start we did not follow the right administrative process to make it applicable to all provincial departments. While the advertised bid requirement covered all provincial departments and potential bidders understood the brief to cover all provincial departments, it was only at the contracting stage that the point was raised that each department’s bid adjudication committee would have to consider their options individually.”*

10.2.2 As indicated in paragraph 6.2 above, the information obtained during the investigation shows that the involvement of Yardstick was the result of the ACA offering its assistance when it became aware that the Department was experiencing difficulties in procuring communication services. By that time, the bid had already been advertised twice. The appointment of a consultant to assist in the procurement process was therefore not the initiative of the Department, but based on advice offered by the ACA.

10.2.3 The fact that the demand management process initially failed and resulted in two cancelled bids, to the extent that the ACA decided to offer its assistance, is also indicative of the failure in the effective and efficient implementation of the supply chain management system, as required by Treasury Regulation 16A3. It would be

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of no use to have developed a proper system, but then to fail to implement it appropriately.

- 10.2.4 The PFMA does not quantify expenditure for it to be regarded as fruitless and wasteful. It is the incurring of such expenditure that is prohibited, irrespective of the amount. The response also does not indicate when an amount should not be regarded as “*small*”. Would R100 000 in respect of a contract of R100 million, for example, also be regarded as “*small*”? It still remains public money that has to be expended in a manner that benefits the public and in terms of which the Department has to account. If the expense would have been avoided had reasonable care been taken, it has to be regarded as fruitless and wasteful.
- 10.2.5 It would not be sensible to expect that the officials involved in the drafting of the specifications of a bid for communication services should include persons with legal qualifications. However, in the case of a bid of the financial magnitude as the one in question, reasonable care should include obtaining the inputs from the legal section of the Department before the bid is advertised, to avoid legal challenges such as the one that was presented when the bid concerned was advertised for the second time.
- 10.2.6 A supply chain management system can only be effective and efficient in its implementation if it is seen to be so. The only way for any person not involved in the process to determine whether the system complies with the constitutional imperatives and the relevant provisions of the PFMA, the Treasury Regulations and other prescripts, is to access the records of the process. If the record keeping of the process was deficient, it impacts on the effectiveness and efficiency thereof as it cannot be shown. The fact that it is not explicitly provided for in Treasury Regulation 16A3 does not mean that it is not inherent in the meaning of an “*effective and efficient supply chain management system*” that proper records should be kept. To argue to the contrary would lead to an absurd result that could not have been the intention of the drafters of the PFMA and the Treasury Regulations.
- 10.2.7 As also stated in the response, as referred to in paragraph 10.1.10 above, record keeping is vital to the potential for litigation in relation to the procurement process.

10.2.8 The intended findings of the Public Protector relating to the conduct of the DG as stated in the Provisional Report, clearly indicated that it was based on his ultimate accountability in respect of the procurement process. Section 44(2) of the PFMA provides that a delegation to an official does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty. The Director-General therefore has to be held responsible for the manner in which the delegated authority to appoint the members of the BEC was exercised by Mr Groenewald.

10.2.9 The references in the response to application of Treasury Instructions and the appointment of the Special Advisers of the Premier as members of the BEC, are discussed in paragraphs 12 and 13 below.

## **11. THE RESPONSE OF THE HEAD OFFICIAL OF THE WESTERN CAPE PROVINCIAL TREASURY TO THE PROVISIONAL REPORT**

### **11.1 Salient issues raised by the response**

11.1.1 The response contends that the primary responsibility for a fair, equitable, transparent, competitive and cost-effective supply chain management system is, according to section 38(1)(a)(iii) of the PFMA, in the hands of accounting officers and not that of treasuries.

11.1.2 The Provincial Treasury has, over the last couple of years, embarked on periodic structured assessments of SCM policies and practices within departments and municipalities. When necessary, specific assessments would be performed as requested by a department or other interested party in instances of problematic or challenging SCM matters or issues:

*“The assessment alluded to in your (provisional) report relevant to the Communications Services tender, was one of these. It has to be added, that the main reason that this assessment was done, was to determine whether the*

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*outcome and underlying processes were sound enough to warrant extension into a transversal type tender and to give other departments the assurance that they could piggy-back on the awarded tender without any material disquiet.”*

11.1.3 The response contended that the Public Protector should not rely on “*administrative glitches, which by their very nature, either taken independently or collectively, do not constitute sufficient materiality to render the awarded bid in default of the key legislative requirements.*”

11.1.4 The Provincial Treasury further expressed its disagreement with the notion contained in the Provisional Report that failure by a department to comply with guides and instructions issued by the National Treasury have to be based on cogent reasons. The disagreement is based on the argument that the Guide is not an instruction as envisaged by section 76 of the PFMA. In this regard it was further stated that:

*“Provinces are experiencing tremendous challenges in respect of the manner in which the National Treasury issues guidelines, circulars, practice notes and now recently ‘instruction notes’ with all of these terminologies being utilised interchangeably or purportedly (hence incorrectly) issued in terms of section 76 of the PFMA, the content of which is at times at variance with specifically sections 18 and 38 of the PFMA and National Treasury’s own implementation strategy for SCM, which has not been repealed or amended.*

*The issue of the legal status, implementability as well as the hierarchy of guidelines, practice notes, circulars and instructions have previously been addressed with the National Treasury by this Provincial Treasury at various fora of the National Treasury, but to no avail, and only to have subsequent documentation entitled ‘Circulars’ or ‘Practice Notes’ issued in terms of section 76 of the PFMA, with the more recent being issued under the banner of ‘instruction notes’.*”

.....

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*In conclusion instructions, practice notes, guides, circulars and the like are at best advisory in nature and in determining whether there has been compliance (and hence lawful action), one is limited to the provisions of the PFMA and the NTR's (National Treasury Regulations)."*

11.1.5 It is further argued in the response that the expenditure referred to in the Provisional Report as fruitless and wasteful cannot be regarded as such as it was not made in vain.

*"If humans were perfect beings, which they are not, we could have expected perfection, but, obviously, we cannot. The tender in question was a highly complicated one and the first of its kind within the Provincial Government, a fact which seems also not to have been taken into account. So success on a third attempt in producing an award with has withstood tremendous scrutiny in practice, cannot be judged as fruitless and wasteful."*

11.1.6 The Provincial Treasury did not find that the composition or conduct of the BEC was improper. The Head Official of the Provincial Treasury agreed in the response that in his evidence he stated that:

*"..the appointment of special advisors on the BEC would raise the risk profile unnecessary and, if asked, we would have advised against it."*

11.1.7 However, it was emphasised that in the view of the Provincial Treasury, the appointment of the Special Advisors to the BEC was not unlawful. In any event, the composition of a BEC is regarded by the Provincial Treasury as a mere administrative matter and *"not of sufficient materiality to render the award of the bid unlawful."*

## **11.2 Evaluation of the response**

11.2.1 The issue of the fruitless and wasteful expenditure that was also raised in this response, has already been referred to in paragraph 10.2.4 above.

- 11.2.2 During the interview that was conducted with the Head Official of the Provincial Treasury during the investigation, he was asked whether in his view it was lawful and proper for the Department to have appointed Special Advisers of the Premier as members of the BEC. His answer was: *“Well, if I had to give the advice, I would’ve said no.”*
- 11.2.3 He agreed that the involvement of the Special Advisers would create a perception of improper political influence.
- 11.2.4 The response also referred to the legal opinions obtained by the Department in respect of the application of National Treasury Regulations and instructions of Provincial Departments and the lawfulness of the appointment of the Special Advisors to the Premier as members of the BEC, which are discussed in paragraphs 12 and 13 below.

## **12. THE LEGAL OPINION OF ADV O RODGERS, SC**

### **12.1 The gist of the opinion**

- 12.1.1 The Department included a legal opinion obtained from Adv O Rodgers SC in its response to the Provisional Report.
- 12.1.2 It was obtained by the Department in July 2011, when the Auditor General intended to issue a qualified audit report because of the Department’s apparent failure to comply with instructions issued by the National Treasury in terms of section 76(4)(c) of the PFMA.
- 12.1.3 The said instructions were contained in Treasury Practice Notes.
- 12.1.4 For the purposes of his opinion, Adv Rodgers assumed that the Practice Notes concerned were indeed instructions issued in terms of section 76 of the PFMA.



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12.1.5 The opinion concluded that provincial departments are not obliged to comply with instructions issued by the National Treasury in terms of section 76 of the PFMA. The essence of Adv Rodgers' arguments are the following:

12.1.5.1 In terms of section 125 of the Constitution, the executive authority of a province is vested in the Premier who exercises it together with the other members of the Executive Council of the Provincial Government. The procurement of goods and services for the provincial government is part of a provincial government's executive authority.

12.1.5.2 A provincial government is therefore entitled to determine its own mechanisms for complying with its duties under section 217 of the Constitution.

12.1.5.3 Section 216 of the Constitution provides that national legislation must establish a National Treasury and prescribe measures to ensure transparency and expenditure control in each sphere of government by introducing, *inter alia*, uniform treasury norms and standards.

12.1.5.4 Section 76 makes a clear distinction between regulations and instructions. National Treasury Regulations constitute subordinate legislation and are therefore part of national legislation. It was made by the Minister of Finance by virtue of the provisions of section 76 of the PFMA and promulgated in the *Government Gazette*.

12.1.5.5 By contrast, instructions issued by the National Treasury are not "*national legislation*" made in terms of the PFMA. It is not made by the Minister of Finance, but issued by an official of the National Treasury and not promulgated in the *Government Gazette*.

12.1.6 Adv Rodgers also pointed out that if indeed Practice Notes constitute instructions that are binding on provincial governments, there might be other grounds on which it could be "*impeached and set aside*", such as the absence of consultation or gross unreasonableness.

12.1.7 He also argued that if an instruction is to have the force of law, the document should make it clear that it is issued in terms of section 76 of the PFMA. By not

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doing so, the instruction does not sufficiently convey that a failure to comply with the guidance offered by it will result in a negative finding against an institution involved.

## **12.2 Evaluation of the legal opinion**

12.2.1 In terms of section 3 of the PFMA, “this Act” applies to, *inter alia*, “departments”.

12.2.2 “This Act” is defined in section 1 as including “any regulations and instructions in terms of section 69, 76, 85 or 91.”

12.2.3 Section 1 also provides that “department” means “a national or provincial department”.

12.2.4 Instructions issued in terms of section 76 of the PFMA therefore form part of the Act and apply to all provincial departments, simply by virtue of its provisions.

12.2.5 Instructions issued by the National Treasury have to be based on the provisions of the PFMA and the Treasury Regulations, as it cannot have legal application on its own.

12.2.6 Adv Rodger’s view that in order for instructions to have the force of law, it has to be clear that it is issued in terms of section 76 of the PFMA, has to be supported. If that is not the case, it raises uncertainty as to the status of the document, which could be also regarded as a mere guideline or advice in respect of the subject that is addressed by it and that the institutions that it is addressed to are not compelled to comply with it.

## **13. THE LEGAL OPINION OF ADV G BUDLENDER, SC**

### **13.1 Salient points of the opinion**

13.1.1 The Department also submitted a legal opinion obtained from Adv G Budlender SC on the intended finding of the Public Protector, as stated in the Provisional Report,

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that the appointment of the Special Advisers of the Premier as members of the BEC was unlawful.

13.1.2 Adv Budlender distinguished in his opinion between improper and unlawful conduct. In his view:

*“Conduct which is unlawful is in breach of a prescription of the law. The unlawfulness may affect the legal validity of the conduct in question.”*

...

and

*“Improper conduct is conduct which is inappropriate in some way. The fact that conduct has been improper does not affect its legal validity.”*

13.1.3 According to the opinion, propriety is a matter of proper governance, whilst unlawfulness is a matter of law.

13.1.4 Adv Budlender opined that the Guideline referred to in the Provisional Report does not prescribe law and that it was not meant to be an instruction issued by the National Treasury. He is also of the view that due to its nature, the Circular referred to is not a regulation or instruction issued in terms of section 76 of the PFMA.

13.1.5 However, he agreed that the view of the National Treasury should be taken very seriously in the composition of a BEC. He further stated in this regard that:

*“It may be that in a particular instance, inconsistency with the Guide or the Circular will give rise to an inference or conclusion that the conduct was improper. But as I have pointed out, that does not make it unlawful.”*

13.1.6 As far as the question as to whether there is an implied prohibition on Special Advisors being members of a BEC is concerned, Adv Budlender expressed the view that they could be regarded as “*role players*” as contemplated by Treasury Regulation 16 A. He concluded that:

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*“Under the circumstances, I do not think one can draw the inference that the law implicitly prohibits the participation of a Special Adviser in a BEC. As I have pointed out, there is no legal prescript which explicitly prohibits the participation of a Special Adviser in a BEC. **It may be that the participation of a Special Adviser in a BEC will not be proper or prudent. However, I do not think that it be said to be unlawful.**” (third emphasis added)*

## 13.2 Evaluation of the opinion

- 13.2.1 Adv Budlender is correct in his observation that there is no explicit prohibition in law against the appointment of a Special Adviser to a BEC.
- 13.2.2 Due to the fact that Special Advisers are specifically appointed to advise and assist the Premier and that they are therefore not officials and part of the administration of the Department, the argument that the drafters of Treasury Regulation 16A contemplated them to be “*role players*” in the procurement process, does not appear to be supported by the relevant legislation.
- 13.2.3 The involvement of Special Advisers of the Premier in a procurement process of the Department unavoidably raises suspicion and, as happened in this case, the perception of political involvement and influence in the process. It therefore impacts on the application and violates the spirit of the provisions of section 217 of the Constitution, as far as the requirements of fairness, transparency and competition are concerned.
- 13.2.4 Adv Budlender is therefore, with respect, conservative in his view that it might be improper to appoint Special Advisers to a BEC of the Department. It simply cannot be proper or prudent to do so.

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## 14. THE RESPONSE OF THE SECRETARY GENERAL OF THE AFRICAN NATIONAL CONGRESS: WESTERN CAPE

### 14.1 Salient issues raised by the response

14.1.1 The response contended that a supply chain management practitioner has an inherent “*responsibility of care*.” This responsibility extends to officials, as defined by Public Service Act only.

14.1.2 *“The question that needs answering is whether or not the special advisor is clouted (sic) with the same responsibility of care as required from officials, the answer is no. The Special Advisors (sic) duty of care extends only insofar as his responsibilities set out in the agreement he signs with the Executive Authority.”*

14.1.3 The Special Adviser receives instructions from the Executive Authority in accordance with his/her contract of employment, implying that the Executive Authority is “*aware of what the Special Advisor does.*”

14.1.4 The notion that a Special Adviser can be regarded as a “*role player*” in the supply chain management process is not correct as it would ignore the constitutional imperative of separation of powers. “*Role players would be supply chain practitioners, bidders, i.e. parties directly involved in the supply chain management process.*”

14.1.5 With reference to sections 10, 18 and 20 of the PFMA, the response stated that Provincial Treasury was required to participate in the procurement process to ensure compliance with the relevant legislation. It is stated that:

*“The argument that the PT [Provincial Treasury] only became aware of the problems after the contract was award (sic) is indicative of an abdication of the functions of the PT and the officials at the steering wheel. The lack of active compliance with the PFMA by the PT is more indicative of the callous attempt to cover its failure in the report and divert blame to the DG.”*

14.1.6 There is a concern that the Public Protector relied substantially on the report of Ms Ebrahim of the Provincial Treasury, yet its conclusion differs materially from the findings of the Public Protector on the validity of the contract.

14.1.7 According to the response, it is doubtful whether a ‘Provincial Top Management’ meeting was held on 14 March 2011 to discuss the concerns raised in respect of the transversal application of the agreement. *“Firstly, this meeting is never mentioned by the PT in its report and it would appear that no minutes are available.”*

14.1.8 The MEC of Finance was present in the Provincial Cabinet Meeting that endorsed *“the appointment of a single service provider”* which was held on 13 April 2011 and was already aware of the concerns raised by the Heads of Departments. Yet it is not clear what the Provincial Treasury did to craft a plan to address the transversal application problems from the 14<sup>th</sup> of March 2011 to the date of the issuing of its report on 2 June 2011.

14.1.9 In addition in this regard, the following questions are posed in the response:  
*“Why is the responsibility of the MEC as head of the PT not brought into play in the same manner as the DG?*

*Why is the PT not held to account for the failure to act proactively as required by the PFMA?*

*Why the provincial cabinet endorse (sic) the appointment of the service provider considering the concerns of the HOD’s prior to the cabinet’s decision on the 13<sup>th</sup> of April 2011, which concerns was (sic) never addressed?*

*Why did the internal auditing system of the department of the premier not pick up non compliance with the Accounting Officers System and the awarding of the contract in 2010?”*

14.1.10 As far as the composition of a Bid Specification and Evaluation Committees is concerned, it is contended that a department may require the services of an outside

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expert to assist, but that such expert would be appointed for specific period following a proper procurement process. *“The process used to appoint the special advisors in this instance will surely not be used.”*

14.1.11 Reference was also made in the response to the awarding of a contract by the Western Cape Provincial Government to TBWA in 2001. It was suggested that Mr R Coetzee was involved in proposing a project to improve the *“communications performance”* of members of the Provincial Government. Furthermore, that Mr Coetzee was a member of the BEC that considered the bids, including that of TBWA and that his role was terminated following *“bad publicity”*.

14.1.12 The response referred to documents submitted during the investigation that included an unsigned memorandum from the Chairperson of the Procurement Committee purportedly addressed to the Director-General on 24 August 2001, under the heading: *Open Door Project: Procurement Committee’s Recommendations*. Paragraph 3.9 of this document states that:

*“The Committee understands, and considers it essential, that Mr Ryan Coetzee play no role in the implementation, management or future direction of this contract. Furthermore, the Committee records that this project is already contentious because of the risk that the separation of power between party and state could be compromised. The matter was fully discussed by the procurement committee and, given the reassurances received thus far, the credentials of this project, has proceeded to this point in good faith. Notwithstanding this, the safeguards referred to in paragraph 3.5 above will have to be strictly implemented and implementation continually carefully monitored.”*

14.1.13 The paragraph 3.5 of the memorandum referred to stated that:

*“The contract must describe safeguards to ensure that there is always clear separation between the interest of the Provincial Government and those of any political party and that only the interests of the Provincial Government are promoted. The contract will, therefore, have to be carefully worded and it is*

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*recommended that prior to its approval an outside legal opinion be obtained to ensure that the contract meets these requirements.”*

14.1.14 From a copy of a signed letter that was also provided, it appears that the Director-General of the Western Cape Provincial Government on 27 August 2001 addressed a letter to the Chairperson of the Western Cape Tender Board, recommending that approval be granted to negotiate with TBWA in respect of entering into an agreement for the rendering of services pertaining to the Strategic Communication Project of the Provincial Government. The total value of the project was R 10 million.

14.1.15 This letter also states that the Evaluation Committee in respect of this tender consisted of :

- Dr D J Sutcliffe , Chairperson
- Adv G A Oliver, Deputy Director-General; and
- Adv R Berg, Director: Legal Services.

14.1.16 In addition, the said letter of the Director-General indicated that the shortlisted bidders made presentations to the Evaluation Committee on 15 August 20001. The Committee invited seven persons to assist it during the presentations, including Mr R Coetzee, who was referred to as a communication specialist.

14.1.17 With reference to the above mentioned memorandum and letter, the response contended that:

*“In the light of the previous findings during 2002 (sic) and further of the fact (sic) that the very same people are involved in a similar process and your preliminary report has a similar finding on their involvement in the process, does not (sic) even remotely justify the concept of a learning curve to the department as claimed. The object of Ryan Coetzee was to use the taxpayers (sic) funds to run a party political agenda.”*



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14.1.18 It is further submitted that the Provincial Treasury's view that the amount involved in the fruitless and wasteful expenditure relating to the demand management process, was small and insignificant and that the experience should be regarded as a learning curve, is irrelevant. *"You cannot learn with tax payer's money."* The Provincial Treasury's report is also regarded as not fully addressing the notion of accountability. However, its outcome is considered as significant for the following reasons:

*"The contract itself was not a transversal contract;*

*Attempts were then made to have the contract 'complied' with the requirements of a transversal contract."*

14.1.19 The following questions were also raised:

*"If the Special advisor is not an official as defined by the PFMA or the Public Service Act how should the fruitless and wasteful expenditure be recovered from them?"*

*Should the special advisors have been aware that they did not take instructions from the DG?*

*How did the DG know prior to the provincial cabinet endorsement that it intended to appoint a single brand service provider?*

*Were there recommendations for the appointment of a single service provider?*

*What is the involvement of the special advisors on (sic) the recommendations made?"*

14.1.20 It is contended that the Department entered into an agreement that was not transversal in nature and subsequently attempted to convert it into such, which is not possible. *"They wanted to rectify something that did not exist."*

14.1.21 With reference to the transversal nature of the agreement, the following questions were raised:

*“Can a non transversal contract be converted into a transversal contract and the process that should be followed?”*

*If the DG was correct that all HOD’s must agree to the service provider, did the contract become transversal if not all of the HOD’s used the service provider (sic)?*

*If all the HOD’s did not use the service provider was contract (sic) successfully converted to a transversal contract and correctly so applied?”*

14.1.22 It is asserted that the Premier ought to have known that her Special Advisers were involved in the BEC and that she should be held accountable as their involvement was unlawful.

14.1.23 Furthermore, that the CFO and not the Deputy Director-General of the Department should have appointed the members of the Bid Specification and Evaluation Committees.

14.1.24 The following statement is also made:

*“Terms of the contract further prohibit TBWA from sourcing work or delivering services to existing departments serviced by existing service providers. This clearly indicates that the department of the Premier wanted to appointment (sic) someone to assist that apartment (sic).”*

14.1.25 It is submitted that the Special Advisers of the Premier were appointed to serve on the Bid Specification and Bid Evaluation Committees for political reasons.

14.1.26 The following pertinent questions were raised in regard to the value of the contract:

*“What was the initial budget of the tender?”*

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*What was the value of the expansion of the contract?*

*Was the SLA entered into in accordance with what the initial budget of the contract was?*

*Was a process followed to compile a recommendation this (sic) type of contract?*

*If there was a process what was the involvement of the Special Advisors in that process.”*

14.1.27 Finally, it was contended that the final report should address the lodging of criminal charges and the relationships between the parties and role players involved in the procurement process and the awarding of the contract.

## **14.2 Evaluation of the response**

14.2.1 The responsibilities of officials involved in supply chain management are provided for in section 45 of the PFMA. The functions of such officials of the Western Cape Provincial Government were described in detail in Chapter 6 of the former Accounting Officer’s System (Supply Chain Management). These provisions clearly constitute a “*responsibility of care*” as contended in the response.

14.2.2 Section 64 of the PFMA makes a clear distinction between the authority, powers and functions of the executive Authority and the accounting Officer of a Department. As is prescribed by the provisions of section 12A(1) of the Public Service Act, 1994, the function of a Special Advisors is limited to:

- (a) Advising the Executive Authority on the exercise/performance of its powers and duties; or
- (b) Advising the Executive Authority on the development of policy; or
- (c) Performing such other tasks as may be appropriate in respect of the exercise or performance of the Executive Authority’s powers and duties.

- 14.2.3 Accordingly, the view expressed in the response that a special adviser has a “*duty of care*” in respect of the executive authority is based on the relevant legal framework and therefore supported.
- 14.2.4 As indicated in paragraph 13.2.2 above, the notion that a Special Adviser can be regarded as a “*role player in the supply chain management process*” is inconsistent with the applicable legal framework and the distinction that is drawn between the executive authority and the administration by the PFMA.
- 14.2.5 The establishment, powers and functions of provincial treasuries are provided for in Chapter 3 of the PFMA. In terms of section 18, a provincial treasury must intervene by taking appropriate steps to address a serious or persistent material breach of the PFMA by a provincial department. However, provincial treasuries are not required by the PFMA to participate pro-actively in the general procurement processes of provincial departments and can therefore not be held accountable for deficiencies or failures in the process. The accountability for the procurement process is, in terms of section 38 of the PFMA, that of the accounting officer.
- 14.2.6 As provided by Regulation 16A6.5, transversal terms contracts have to be facilitated by the relevant treasury. In this case, the Provincial Treasury was not approached by the Department when it was decided to procure the service of a service provider by means of an agreement with transversal implications. It was not disputed during the investigation that this requirement was not complied with by the Department.
- 14.2.7 The conclusions and findings of the Public Protector as contained in the Provisional Report did not “*rely substantially*” on the contents of the report of the Provincial Treasury. This report was part of the evidence and information obtained and evaluated during the investigation as it was the basis of the complaints that were lodged with the Public Protector.
- 14.2.8 The records of the Department perused during the investigation included the Minutes of a Special Meeting of the Provincial Top Management held on 14 March 2011. At this meeting it was resolved that:

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- *“The meeting noted and supported the principle of a single brand.*
  - *All departments would need to conclude their own agreements after having fully applied their minds.*
  - *The process to be facilitated by the Provincial Treasury and with Mr A Groenewald, Mr D Basson, Mr N Clleland-Stokes, Mr L Buter and Ms N Ebrahim to work through any potential risks.*
  - *Full tender documentation as obtained by the Department of the Premier to be forwarded to all Heads of Department to assist with an informed decision.”*

14.2.9 The Provincial Cabinet meeting held on 13 April 2011 did not endorse the appointment of a single service provider, as contended in the response. At this meeting it was resolved that *“Cabinet reiterates its support for the establishment of a single brand for the Provincial Government.”* The meeting further noted a verbal report by the DG that the Department had procured the services of a service provider, but that for the contract to operate transversally, all HOD’s needed to confirm that their departments would utilise the service provider.

14.2.10 The report of the assessment of the Provincial Treasury was dated 30 April 2011, but only officially issued on 2 June 2011. According to the information provided during the investigation, the assessment was performed during the period 14 March 2011 to 30 April 2011.

14.2.11 It is not clear from the response which non-compliance the respondent would have expected to have been addressed by the internal auditing system of the Department.

14.2.12 The authenticity of the unsigned document referred to in paragraph 14.1.12 could not be established during the investigation as it was not found amongst the records of the Department that relate to the awarding of the contract to TBWA in 2001, that was provided during the investigation.

14.2.13 During the meeting in connection with the Provisional Report referred to in paragraph 9.9 above, the ANC referred to a complaint that was lodged with the

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Public Protector in connection with the appointment of Mr R Coetzee as a Special Adviser to the Premier in 2001. It was established that the complaint was lodged by a Member of Parliament on 23 August 2001 and that the enquiries made by the Public Protector at the time focused on allegations relating to the salary level at which Mr Coetzee was appointed and his alleged employment at the City of Cape Town and the Democratic Alliance at the same time. Mr Coetzee's involvement in the procurement of the services of TBWA by the Western Cape Provincial Government in 2001 was not investigated.

14.2.14 It was also established that Mr Coetzee was indeed appointed as the Special Adviser of the Premier with effect from 1 January 2001. He resigned on 1 July 2001. At the time when he was invited by the Evaluation Committee to attend the presentation of bidders on 15 August 2001, the invitation was ostensibly based on him being a communication specialist and not on his position as the Special Adviser to the Premier.

14.2.15 The PFMA does not quantify the level of expenditure before it can qualify to be regarded as fruitless and wasteful, as contemplated by section 1. It is the defined conduct that is prohibited, irrespective of the amount. As already alluded to above, suggestion that the expending of public funds in vain and in circumstances where it would have been avoided had reasonable care been exercised, should not be regarded as fruitless and wasteful because of the relatively small amount and the proposition that the Department learned from the experience, is not consistent with the meaning and spirit of the relevant provisions of the PFMA.

14.2.16 The fruitless and wasteful expenditure referred to in the Provisional Report, and in this report, does not relate to the specific conduct of a Special Adviser that was involved in the demand management process. It relates to the failure by the official in charge of determining the specifications of the goods and services required and ultimately of the Accounting Officer who was responsible and accountable for the demand management process.

14.2.17 Due to the specific provisions of section 12A of the Public Service Act, 1994 and the Ministerial Handbook, which determined the fundamental conditions of service of the Special Advisers, they ought to have been aware that there is no relationship

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of authority between them and the DG and that they have been appointed solely to assist the Executive Authority. However, the information and evidence obtained during the investigation indicate that the Special Advisers and the Acting Deputy DG were of the impression that the participation of the Special Advisers in the procurement process was not inappropriate.

14.2.18 As indicated in paragraph 6.8 above, the Provincial Treasury advised the Heads of Departments of the opportunity to participate in the contract between the Department and TBWA, should they choose to do so, in terms of the provisions of Regulation 16A6.6 of the Treasury Regulations. Although the effect of such participation would have been similar to participating in a transversal term agreement, it is allowed in terms of the Treasury Regulations and did not *“convert a non transversal contract into a transversal contract.”*

14.2.19 As stated in the Provisional Report, no evidence or information was found or presented during the investigation that the Premier participated in the procurement process. The response of the Department to the Provisional Report, as supported by legal opinion, in any event indicates that the involvement of the Special Advisers was not regarded as inappropriate.

14.2.20 The responsibility and the accountability for the procurement process of the Department is, in terms of the PFMA, that of the Accounting Officer. It is the prerogative of the Accounting Officer or his/her delegatee to appoint the members of Bid Specification and Bid Evaluation Committees. The relevant legislation and other SCM prescripts do not prescribe that the members of the said committees have to be appointed by the CFO.

14.2.21 Clause 3.3 of the Service Level Agreement between the Department and TBWA signed on 15 June 2011, provides that:

*“The Parties acknowledge that the Heads of other provincial departments in their capacities as Accounting Officers may opt to participate in this agreement, as arranged by the Department of the Premier, and the Agency has no objection to such participation.”*

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This clause is indicative of the fact that it was not the intention of the parties to limit the execution of the contract in respect of the rendering of goods and services to the Department of the Premier only.

14.2.22 No evidence or information could be found or was presented during the investigation that the Special Advisers were appointed to serve on the Bid Specification and Evaluation Committees for political reasons.

14.2.23 According to the evidence of Mr A Groenewald, who was the Acting Director-General of the Department at the time of the procurement concerned, the initial idea was to ring-fence as a benchmark the budget expenditure of all the Departments of the Provincial Government in order to determine the reasonable projected costs of procuring communication services by means of a contract with transversal application for the Provincial Government as a whole over a period of three years. The total budget to be spent on communications was capped at R70 million per annum, as stated in the Provisional Report.

14.2.24 On the advice of the Provincial Treasury the botched attempt by the Department to conclude a transversal term agreement was managed by applying the provisions of Treasury Regulation 16A.6.6 to the agreement with TBWA. The impact thereof was that the accounting officers of other provincial departments could opt to participate in the contract between the Department and TBWA. At the time of the conclusion of the investigation, four other provincial departments were already participating in the agreement. Their participation resulted in extending the value of the agreement between the Department and TBWA, which could have been avoided if the Department initially complied with the provisions of Treasury Regulation 16A.6.5.

14.2.25 The evidence and information obtained during the investigation did not reveal any indication of wilful non-compliance or gross negligence on the part of the DG, as contemplated by section 86 of the PFMA, and therefore, no reference was made to criminal proceedings in the Provisional Report. There was also no suggestion of any relationship between any of the parties involved in the procurement process that was not disclosed or that was improper, which would have warranted an investigation thereof.



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## 15. CONCLUSIONS

- 15.1 Shortcomings and deficiencies in the acquisition process relating to the tender concerned were brought to the attention of the Department by the review report of the Provincial Treasury. It was noted that the Provincial Treasury concluded that despite the said shortcomings and deficiencies, the decisions to appoint Yardstick as facilitator of the procurement process and to award the tender to TBWA were prudent. Ms Ebrahim of the Provincial Treasury was adamant that the Provincial Treasury could not find anything untoward which could have influenced the procurement process and rendered it fatally flawed. The evidence revealed a lack of SCM record management by the Department of the proceedings of the BEC, which included minutes of meetings, failure to keep minutes of an inquiry into possible conflict of interest and to retain evaluation documents.
- 15.2 On 21 September 2010 the DG approved the procurement of Yardstick's services by means of limited quotation. The DG condoned the retrospective amendment to the approved contract for Yardstick to draft the SLA. The assessment report of the Provincial Treasury concluded that the decision to procure the services of Yardstick was a prudent one. The investigation therefore could not find impropriety in relation to the involvement of Yardstick.
- 15.3 In terms of Treasury Regulation 16.A6.5, transversal term contracts have to be facilitated by the Provincial Treasury. It was only after Heads of Department raised their concerns about the transversal implications of the agreement between the Department and TBWA that the non-compliance by the Department with the provisions of Treasury Regulation 16A6.5 was exposed, resulting in the Provincial Treasury having to issue a Circular to try and make amends by providing different options to the other departments. The agreement between the Department and TBWA therefore indeed did not constitute a transversal agreement.
- 15.4 The reasons for the Department to attempt to procure a transversal term contract in violation of the Treasury Regulations could not be established with certainty during

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the investigation. It appeared to have been the result of ignorance of the relevant provisions of the Treasury Regulations and a failure on the part of the DG and/or the official(s) to whom the responsibility for the procurement was delegated, to be diligent in respect of compliance with the relevant legislation and other prescripts and to exercise reasonable care in dealing with the expenditure of public funds. In this connection the investigation revealed that the component responsible for procurement within the Department was very small, had had a high vacancy rate for two years and lacked the necessary SCM expertise, considering the fact that procurement in that Department is of a very strategic nature.

- 15.5 The allegation that the initial tender amount was in the region of R1.5 million, which expanded to R500 million per year over the period of the contract due to the transversal application of the contract is also not consistent with the evidence and information obtained from the Department. The contract entered into between the Department and TBWA provides for a total fixed remuneration to be paid to TBWA in the amount of R1 520 000 for the once-off deliverables of a brand and brand strategy, a corporate identity manual and a communication strategy. Furthermore, the contract provides for on-going deliverables. The total cost of communication services for the Provincial Government as a whole (including the costs associated with the execution of the contact) was limited, according to a decision taken by the executing authority of the Department, to R70 million per annum.
- 15.6 The composition of the Bid Adjudication Committee of the Department did in fact change, as was alleged, before the bid in question was considered. However, no evidence was presented or found that it related specifically to the bid in question. Nor was there any indication that the explanation that the changes made related to improving operational efficiency in the Department, was inaccurate.
- 15.7 The results of the demand management process that was followed in respect of the first two bids that were advertised for the said communication services show that it was inconsistent with the prescribed standard. It was conceded by the DG that the initial demand management processes followed in respect of the first two bids were deficient. The evidence of the DG and the Head of the Provincial Treasury that due

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to the fact that the wasted costs amounted to only about R 8 000-00 and that the Department was supposed to have learned from the botched demand management process, it should not be regarded as fruitless and wasteful expenditure, is inconsistent with the provisions of section 1 of the PFMA. All that is required in this provision for expenditure to have been fruitless and wasteful is that it would have been avoided had reasonable care been taken, irrespective of the amount. No evidence was presented during the investigation indicating that the DG and/or the persons to whom he delegated the demand management function took reasonable care to avoid such expenditure. The view of the Provincial Treasury is concurred with that the cancellation of the bid on two occasions reflects a lack of adequate demand planning procedures, SCM knowledge and competencies, which resulted in a process of trial and error, time lost and costs incurred.

- 15.8 The allegation that certain after-the-fact steps were taken in an attempt to deal with some of the deficiencies of the procurement process is supported by the evidence and information obtained during the investigation, indicating that the Provincial Treasury had to intervene to address the non-compliance by the Department with Treasury Regulation 16A6.5 in respect of transversal term agreements. However, no evidence was found that such measures were taken to conceal the deficiencies.

## **16. FINDINGS**

### **16.1 General findings**

The **general findings** of the Public Protector are that:

- 16.1.1 The Department identified the need for a single brand identity and communication strategy for the Western Cape Provincial Government prior to 2010. The objective of this initiative was to procure a transversal term contract that would have been applicable to all provincial departments. A single brand for the Provincial Government was, however, only endorsed by the Provincial Cabinet on 13 April 2011, some months after the tender had been awarded.

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- 16.1.2 The procurement process embarked on by the Department was not facilitated by the Provincial Treasury, as required by Treasury Regulation 16.A6.5. The Provincial Treasury only became aware of the procurement of the services of TBWA after concerns were raised by the Heads of Departments regarding their Departments' participation in the transversal agreement, and the associated costs.
- 16.1.3 The bid for the development of a brand and brand delivery strategy for the Provincial Government was advertised by the Department on three occasions. The first two advertisements had to be cancelled due to a failure on the part of the Department to implement a proper demand management process.
- 16.1.4 The allegation that the tender for the procurement referred to in this report was not properly advertised is inconsistent with the evidence and information obtained during the investigation. The tender for the Department of the Premier was found to have been duly advertised. The *Sunday Times* also retracted this allegation on 21 August 2011.
- 16.1.5 The Department employed the services of Yardstick to facilitate the procurement process on the advice of the ACA. No evidence of any impropriety in respect of the appointment of Yardstick could be found during the investigation. The Provincial Treasury found the appointment of Yardstick as a facilitator of the procurement process to have been prudent under the circumstances where two previous attempts to procure the intended service failed.
- 16.1.6 The Provincial Review Report identified that there were some anomalies in the score sheets. The Provincial Treasury indicated that it was not clear whether there were discussions by the BEC to establish the reasons why that was the case. These anomalies had no impact on the ultimate finding of the Report in respect of the regularity of the process. The grand totals of two BEC members during shortlisting revealed stricter scoring, which explained low scores of certain BEC members. The comments of the Provincial Treasury and the evidence and information obtained during the investigation do not support the allegation that the scoring was "*riddled with anomalies*".

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- 16.1.7 The investigation revealed that the Department failed to keep proper records of the proceedings of the BEC.
- 16.1.8 The composition of the BAC changed before the bid was adjudicated. The explanation that it related to improving the operational efficiency of the Committee and that it was applicable to all subsequent bids, was acceptable.
- 16.1.9 The allegation that the communications tender awarded to TBWA was worth R1 billion is not supported by the evidence and information obtained during the investigation. The contract provides for a total fixed remuneration in the amount of R1 520 000 for the once-off deliverables. The total cost of communication services for the Provincial Government as a whole (including the costs associated with the execution of the contract) was limited, according to a decision taken by the Executive Authority of the Department, to R70 million per annum.
- 16.1.10 Certain after-the-fact steps were taken in an attempt to deal with some of the deficiencies of the procurement process, in that the Provincial Treasury had to intervene to address the non-compliance by the Department with Treasury Regulation 16A6.5 in respect of transversal term agreements.
- 16.1.11 On the advice of the Provincial Treasury the botched attempt by the Department to conclude a transversal term agreement was managed by applying the provisions of Treasury Regulation 16A.6.6 to the agreement with TBWA. The impact thereof was that the accounting officers of other provincial departments could opt to participate in the contract between the Department and TBWA. At the time of the conclusion of the investigation, four other provincial departments were already participating in the agreement. Their participation resulted in extending the value of the agreement between the Department and TBWA.
- 16.1.12 The allegation that cautionary advice from the Provincial Treasury and the SCM Division of the Department was ignored is not supported by the evidence. The Department explained that it engaged Yardstick prior to receiving a formal quotation in order to measure the nature of the service provided by Yardstick as well as an indication regarding pricing. The intervention of the Provincial Treasury was only requested after the tender had already been awarded to TBWA. However, it was

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noted in the Provincial Treasury Review Report that issues of distrust and “*dissent in the ranks*” amongst the officials involved delayed the conclusion of the procurement process. This might have created a perception of indifference to issues that were raised.

- 16.1.13 No evidence or information was presented or found during the investigation indicating that the Premier participated in the procurement process. Her involvement did not impact on the tender, was after the fact and was limited to the Provincial Cabinet meeting held on 13 April 2011, i.e. after the Top Management Meeting where Provincial Treasury was requested to craft a way forward around the transversal implications of the bid award, which were problematic. The Provincial Cabinet resolved to endorse a single brand for the Provincial Government and noted a report by the DG in connection with the procurement of the services of TBWA and that certain measures had to be taken for the contract to operate transversally. She was also involved in the decision to limit the total expenditure of the Provincial Government in respect of communication services to R 70 million per annum. The decision to involve the Premier’s special advisors in the BEC was made by the then Acting Deputy Director-General, Mr A Groenewald.
- 16.1.14 The SCM Division of the Department lacked capacity to manage the prescribed procurement processes that apply to organs of state effectively and efficiently.
- 16.1.15 Certain deficiencies and shortcomings in the procurement process were identified by the Provincial Treasury in its report on a review of the procurement process. However, on its own, it did not render the process or the agreement that was eventually signed unlawful or invalid.
- 16.1.16 The involvement of the Head of Strategic Communications of the Department in the BEC was allowed as he is an official of the Department.
- 16.1.17 Regarding the alleged previous improper involvement of Mr R Coetzee in the capacity as a Special Adviser to Premier in the awarding of a contract to TBWA in 2001, it was established that he was not a member of the Evaluation Committee. He was requested to assist the Committee at a presentation of bidders together with six other persons in August 2001. By that time he had already resigned from

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the position of Special Adviser with effect from 1 July 2001. From the verifiable records of the Department and the Provincial Treasury it could not be determined whether or not Mr Coetzee was involved in any impropriety at the time. The Public Protector never issued a report on this matter.

## 16.2 Specific findings

The specific findings of the Public Protector are that:

**Finding 1: The failure by the Department to employ proper demand management as required by Treasury Regulation 16A3 in respect of the procurement process constituted maladministration**

16.2.1 The Department failed to apply proper demand management in respect of the procurement of the services referred to in this report due to:

16.2.1.1 A lack of proper planning;

16.2.1.2 Failure to precisely determine the specific needs and requirements of the Department in terms of what the supplying industry could offer and reasonably comply with; and

16.2.1.3 Failure to consider and apply the relevant provisions of the Treasury Regulations, which resulted in an untenable understanding that the procurement process would result in a transversal term agreement.

16.2.2 The failure to apply proper demand management in respect of the bid in question contravened the provisions of regulation 16A.3 of the National Treasury Regulations and amounted to maladministration.

**Finding 2: The failure by the Department to employ proper demand management resulted in fruitless and wasteful expenditure**

16.2.3 It resulted in the expending of public funds in respect of the advertising of the tender on two occasions and the utilisation of human and other resources, that

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would have been avoided had reasonable care been taken, and therefore constituted fruitless and wasteful expenditure in terms of section 1 of the PFMA, in the amount of R8 696.

16.2.4 By appointing Yardstick to facilitate the procurement process, the Department prevented further fruitless expenditure

16.2.5 According to the report of the Provincial Treasury and the response of the Department to the Provisional Report, measures have already been taken to improve the demand management system of the Department.

**Finding 3: The failure by the Department to keep records of the proceedings of the BEC constituted maladministration**

16.2.6 The failure by the Department to ensure that proper minutes of the meetings of the BEC were taken and filed in its records is in contravention of regulation 16A.3 of the National Treasury Regulations and amounted to maladministration.

**Finding 4: The appointment by the Acting Deputy Director-General, Mr A Groenewald, of two Special Advisers of the Premier to the BEC was improper**

16.2.7 The legal opinions obtained during the investigation and presented by the Department in its response to the Provisional Report, indicate that although there may be some merit in arguing that the appointment of the Special Advisers of the Premier as members of the BEC was unlawful, such an argument would have to be based on implied illegality in the absence of any explicit prohibition in law, in this regard. The implied illegality would have to include reliance on instructions and guidelines issued by the National Treasury that cannot be regarded with certainty as “*regulations and instructions*” as contemplated by the provisions of sections 1 and 76 of the PFMA. In the light of the uncertainty in respect of the legal status of circulars, practice notes and instruction notes issued by the National Treasury, it cannot be contended with certitude that non-compliance with it constitutes unlawful conduct.



- 16.2.8 However, a the Head Official of the Provincial Treasury and hinted in the legal opinion of Adv Budlender SC, the appointment of Special Advisers as members of the BEC is considered to be improper. Appointing persons who have been employed specifically to advise the Executive Authority of the Department to be part of a procurement process, which resorts in the domain of the administration, raises the risk profile of the process and can create suspicions and perceptions of political interference or influence, which will be detrimental to its integrity.
- 16.2.9 While the appointment of the two special advisers may not have violated the principle of legality it was ill-advised. It resulted in suspicions and perceptions of political involvement and influence in respect of the procurement process that should have been avoided. The appointment was not in line with the spirit and purpose of the National Treasury's Guide for Accounting Officers which seeks to give meaning to the Treasury Regulations, the Public Finance Management Act, 1999 (PFMA) and section 217 of the Constitution.
- 16.2.10 The conduct of the DG, Adv B Gerber, as the accounting officer, ultimately accountable for procurement in terms of section 44 of the PFMA and that of Mr A Groenewald, to whom the authority to appoint the members of the BEC was delegated, was therefore improper and amounted to maladministration. However, his conduct could not be found to have constituted wilful intent or gross negligence.

## 17 REMEDIAL ACTION

Remedial action to be taken as envisaged by section 182 of the Constitution, is the following:

- 17.1 The Minister of Finance to amend the Treasury Regulations to regulate the composition of Bid Specification, Bid Evaluation and Bid Adjudication Committees to

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avoid any uncertainty in regard to the lawfulness and propriety of the appointment of its members.

17.2 The Director-General of the National Treasury to take urgent steps to ensure that the legal status of circulars, practice notes and other instructions are clearly determined and defined in terms of the provisions of section 76 of the PFMA, when it is issued.

17.3 The Director-General of the Department to take urgent steps to:

17.3.1 Improve the Supply Chain Management System of the Department to ensure that Special Advisers are excluded from being appointed as members of Bid Specification, Bid Evaluation and Bid Adjudication Committees;

17.3.2 Improve the skills and the capacity of the SCM Division of the Department;

17.3.3 Improve the record keeping of the SCM Division of the Department;

17.3.4 Ensure that the officials of the SCM Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management; and

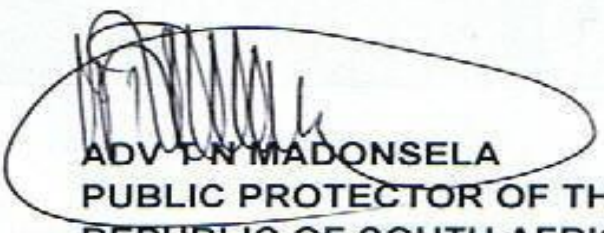
17.3.5 Take corrective measures to prevent a recurrence of the failure in demand management process referred to in this report.

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## 18 MONITORING

The Directors-General of the National Treasury and the Department is to:

- 18.1 Submit to the Public Protector an implementation plan in respect of the remedial action taken in paragraph 17 above within 30 days of the date of the issuing of this report; and
- 18.2 Submit a report to the Public Protector on the implementation of the remedial action referred to in paragraph 17 above within 90 days of the date of the issuing of this report.



ADV. N. MADONSELA  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

1 June 2012