NOTICE 595 OF 2014

competitioncommission
south africa

AUDITOR-GENERAL
SOUTH AFRICA

Memorandum of Understanding

Entered into by and between

The Competition Commission
a juristic person established in terms of Section 19 of the Competition Act, 1998 (Act No.89 of 1998), as amended , herein duly represented by Mr Tembinkosi Bonakele, in his capacity as the Acting Commissioner of the Commission

(Hereinafter referred to as "the Commission")

and

the Auditor-General of South Africa
duly established in terms of Section 181(1)(e) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), read with the Public Audit Act, 2004 (Act No. 25 of 2004)

(Hereinafter referred to as the "AGSA")

1. PURPOSE

1.1 The purpose of this memorandum of understanding (MoU) is to enhance cooperation between the Commission and the AGSA (collectively referred to hereunder as "the parties") and to put in place a formal mechanism for the exchange of information between the parties for the purpose described herein.

1.2 The MoU is further aimed at clarifying the specific mechanisms through which the oversight role of the AGSA can find concrete expression in the fight against fraud and corruption.

1.3 The MoU shall provide a framework for cooperation between the parties in order to lay the basis for seeking ways to complement each other's legal mandates and share technical information and expertise.

1.4 The parties, through their mandates and structures, have a shared interest in improving the lives of South Africans, thereby:

1.4.1 strengthening our country's democracy;

1.4.2 improving good governance and advocacy;

1.4.3 preventing duplication of efforts and resources.

2. BACKGROUND

The functions of the parties are prescribed in the Constitution, 1996 (Act No. 108 of 1996), the Public Audit Act, 2004 (Act No. 25 of 2004)(PAA) and the Competition Act, 1998 (Act No.89 of 1998). The parties agree that their respective functions, in relation to collusive tendering in the public sector's supply chain management processes, complement each other's to some extent. In recognising the synergy between them, the parties deem it necessary to develop a mechanism aimed at enhancing cooperation, efficiency and effectiveness in uncovering and eradicating collusive tendering in the public sector.

3. PRINCIPLES GOVERNING COOPERATION BETWEEN THE PARTIES

The primary principles that shall govern the MoU are as follows:

3.1 Each party recognises and respects the independence, governance structures and internal processes of the other.

3.2 Each party shall be transparent with regard to planned activities that might potentially impact the work of the other party and the parties shall seek ways to complement each other in the performance of their respective functions.

3.3 This MoU is based on an understanding and respecting each party's mandate, processes and responsibilities by the other party.

3.4 The parties shall cooperate in the utmost good faith and with honesty, integrity and professionalism, and each party shall respect the other's intellectual property (whether copyrighted or not), findings and representations.

3.5 Communication from one party to the other party shall be responded to efficiently and timeously and shall take place in the context of seeking ways to cooperate and complement each party's functions.

3.6 Neither party shall have the power to enter into any agreement/s or to otherwise bind itself or incur liability on behalf of the other.

4. COOPERATION BETWEEN THE PARTIES

4.1 Areas of cooperation

The areas of cooperation between the parties shall include the following:

4.1.1 Collaboration, cooperation on, and referrals on, matters encountered by either party that affect the mandate and functions of the other, including investigation requests on suspected improper conduct in state affairs or irregularities detected in audits, reviews, and during investigations;

4.1.2 Strategic collaboration on measures to promote governance, accountability and the maintenance of effective public finance and administration and a high standard of professional ethics in state affairs;

4.1.3 Collaboration on advocacy and outreach initiatives to facilitate better access to the public and become more visibly involved in education and promotional campaigns, particularly in rural areas;

4.1.4 Any other areas of interest as may be identified from time to time.

4.2 Manner of cooperation

The manner of cooperation between the parties shall depend on the specific areas of cooperation indicated in clause 4.1 above and may include but are not limited to the following:

4.2.1 Sharing practical experiences and common areas of interest including but not limited to complaints, support systems and procedures, best practices, trends, training and development, through roundtable discussions, seminars and knowledge sharing sessions with the aim of enhancing the capacity of both parties in an effort to ensure that both parties benefit from existing best practice guidance.

4.2.2 Sharing information at disposal, including, but not limited to:

- Providing access to data held by each party;
- Exchanging of reports and/or findings.

4.2.3 Referral of complaints and/or requests to the other party must be through a systematic referral process. Either party may refer complaints and/or requests it has received to the other for consideration and follow-up where such referral is deemed appropriate given the respective mandates, powers, and functions of the parties.

4.2.4 Notifying each other of any trends or systemic deficiencies identified in the course of the performance of their functions that have a bearing on effective public finance and administration in state affairs;

4.2.5 Collaboration on outreach and advocacy initiatives and opportunities to extend and communicate the services of the parties through effective engagement with stakeholders and partners to raise awareness and build trust, confidence and faith with stakeholders; and

4.2.6 Undertaking joint projects and/or investigation that are identified by the parties from time to time.

4.3 **Implementation strategies**

4.3.1 The parties may develop and devise implementation strategies and time-bound action plans in order to meet the desired objectives and goals in the form of future project specific memoranda of agreements, to be concluded and reduced to writing on a project-by-project basis. The process of implementation may be assessed and evaluated quarterly by a monitoring and implementation committee to be formed by the parties.

5. INTERACTION AND REPRESENTATIVES

5.1 The parties have agreed that communication will take place through the Business Executive of the Institutional Cooperation Business Unit of the AGSA and the Head of Strategic Relations of the Commission. The provincial Business Executives and Representatives may participate on provincial level based on the demands of a province.

5.2 The Auditor-General and the Commissioner may meet by means of a roundtable discussion at least once per annum for the purpose of agreeing on and reviewing the cooperation in the relevant year and to review, assess and report on the effectiveness of cooperation of the parties.

6. FUNDING

6.1 Each party shall bear its own expenses associated with the implementation of this MoU, unless otherwise reduced to writing in the form of an addendum to this MoU.

6.2 The Commission will not incur liability in respect of matters referred to or collaborated on with the Auditor General, who will recover the costs from the relevant third party in terms of the provisions of the PAA.

7. INTELLECTUAL PROPERTY

7.1 For the duration of this MoU the parties agree, where necessary, to share authorship of any publications arising from.

7.2 The ownership of copyright and other intellectual property rights in all reports and materials pursuant to the collaboration shall be negotiated on a project-specific basis, recognising the collaborative nature and mutual commitment of the parties hereto, and subject to the provisions of the Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (Act No. 51 of 2008) in so far as it may be applicable.

8. CONFIDENTIALITY

8.1 Both parties will observe and maintain the confidentiality requirements of the other in respect of any information specifically notified as being confidential and/or sensitive or could reasonably have been assumed to be confidential and/or sensitive. Information exchanged shall only be used for the purpose for which it has been acquired. The information provided by the AGSA in accordance with section 18 of the PAA shall be used only by the Commission for purposes of conducting lawful investigations.

8.2 For the purposes of this clause, confidential information includes all unpublished reports and any other information which one party (the "disclosing party") may want to disclose to another party (the "receiving party") in connection with any matter which relates to this MoU, and either has been identified in writing as confidential and/or sensitive or is of such a nature (or has been disclosed in such a way) that it should be obvious to the disclosing party that it constitutes confidential and/or sensitive information. This confidentiality clause shall also apply to information of a non-public nature.

8.3 Disclosure of information exchanged from one party to another party to third parties will occur only with express, written prior approval of the party that provided the information.

8.4 In order to give effect to the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) and to prevent the unauthorised disclosure, copying, use or modification of documentation and/or information provided to a party under this MoU, the receiving party is to restrict access to such documentation and/or information on a need to know basis and use recognised security mechanisms such as password, encryption or other reasonable safeguards.

8.5 Neither party shall use the name of the other party to this MoU, either in publicity releases or advertising, or for any promotional purposes, without the prior written approval of the other.

9. DATE OF IMPLEMENTATION AND DURATION

9.3 This MoU shall come into force and effect on the date the last signs it ("the effective date") and shall remain in force for a period of 5 (five) years.

9.4 This MoU may be terminated at any time by either party who shall provide the other party with at least 3 (three) months' written notice.

9.5 Notwithstanding clause 9.1 above, the parties may agree to renew or extend the MoU upon such terms and conditions as may be negotiated between the parties. Such extension or renewal shall only be valid if reduced to writing and signed by the parties..

9.6 The provisions of clause 8 above shall survive any expiry or termination of this MoU.

10. TERMS OF THE MOU

The implementation plan shall be reviewed annually to ensure that it encompasses the needs of the parties and mutual cooperation in prevailing circumstances.

11. GENERAL PROVISIONS

11.1 This MoU, together with the annexure(s) hereto (if any), constitutes the record of the agreement between the parties with regard to the subject matter hereof. In the event of a conflict in the interpretation of this MoU and the annexures attached hereto (if any), the content of this MoU shall prevail.

11.2 The Laws of the Republic of South Africa shall govern this MoU.

11.3 No addition to or variation, waiver, consequential cancellation or novation of this MoU, including this clause, shall be of any force unless reduced to writing and signed by the parties.

11.4 Neither party shall be entitled to cede, assign or delegate any of its rights and/or obligations hereunder without the prior written approval of the other party, which consent shall not be unreasonably withheld.

11.5 No condonation, relaxation or indulgence afforded by any party to the other will prejudice the rights of the former and the former will not be prohibited from exercising such rights due to its actions.

11.6 The Commission is independent and is not an employee or agent of the AGSA and neither party shall have any authority to commit the other party contractually, nor shall any delict which either party may cause, place liability on the other.

11.7 In the implementation of this MoU and in all dealings with each other, the parties undertake to observe the utmost good faith and to give full effect to the intent and purpose of this MoU.

11.8 If any clause or portion of this MoU is held to be invalid or unenforceable, the remainder of this MoU shall remain unaffected and shall retain full force and effect.

11.9 The person signing this MoU in a representative capacity warrants his/her authority to do so and confirms that all the required internal approval(s) authorising him/her to enter into this MoU have been obtained.

12. DOMICILIA CITANDI ET EXECUTANDI AND NOTICES

12.1 All notices or correspondence in terms of this MoU shall be delivered by hand or sent by certified mail or faxed and shall be addressed as below which the parties hereto choose as *domiciliumcitandi et executandi*:

AGSA
Fezeka Baliso
Business Executive: Institutional Cooperation Business Unit
300 Middel Street
New Muckleneuk
Pretoria
0001

Tel no.: [012] 426 8409 Fax no.: [086] 529 2451

The Commission
Mziwodumo Rubushe
Head: Strategic Relations
DTI Campus, 77 Meintjies Street, Sunnyside
Private Bag x23
Lynwood Ridge
Pretoria
0040

Fax no.: [012] 394 0166

12.2 Notice of change of address stated may be given by either party in writing and shall be delivered or sent by prepaid registered post by one party to the other.

12.3 Any notice to a party contained in a correctly addressed envelope and sent by prepaid registered post to it at its chosen address, or delivered by hand by a responsible person during ordinary business hours at its chosen address, shall be deemed to have been received, in cases where it is sent by prepaid registered post, on the 14th (fourteenth) business day after posting (unless the contrary is proved) and, in the case it is delivered by hand, on the day of delivery.

THUS DONE AND SIGNED AT PRETORIA **ON THIS** 23rd **DAY OF** JUNE **2014.**

FOR THE AGSA:

Tsakani Ratoela.
Full name of signatory

Deputy Auditor-General
Designation of signatory

Signature

Witness 1

Witness 2

THUS DONE AND SIGNED AT PRETORIA **ON THIS** 2nd **DAY OF** JULY **2014.**

FOR COMMISSION:

TEMBINKOSI BONAKELE
Full name of signatory

COMMISSIONER
Designation of signatory

Signature

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Witness 1

Witness 2

Annexure A
FUNCTIONS OF THE AGSA

The AGSA is governed by the Constitution of South Africa, 1996 (Act No. 108 of 1996) (Constitution) and the Public Audit Act, 2004 (Act No. 25 of 2004) (PAA) and is established as a chapter 9 institution in terms of section 181 of the Constitution. The functions of the AGSA are stipulated in section 188 of the Constitution and sections 4 and 5 of the PAA.

Section 188 of the Constitution states as follows:

(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of -
(a) all national and provincial state departments and administrations;
(b) all municipalities; and
(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of –

(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or
(b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

Sections 4 and 5 of the PAA states as follows:

Constitutional functions

4(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of –

(a) all national and provincial state departments and administrations;
(b) all constitutional institutions;
(c) the administration of Parliament and of each provincial legislature;
(d) all municipalities;
(e) all municipal entities; and
(f) any other institution or accounting entity required by other national or by provincial legislation to be audited by the Auditor-General.

(2) The Auditor-General must audit and report on the consolidated financial statements of–
(a) the national government as required by section 8 of the Public Finance Management Act;

(b) *all provincial governments as required by section 19 of the Public Finance Management Act; and*
(c) *a parent municipality and all municipal entities under its control as required by section 122(2) of the Municipal Finance Management Act.*

(3) The Auditor-General may audit and report on the accounts, financial statements and financial management of –

(a) *any public entity listed in the Public Finance Management Act; and*
(b) *any other institution not mentioned in subsection (1) and which is –*
(i) *funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or*
(ii) *authorised in terms of any legislation to receive money for a public purpose.*

(4) In the event of any conflict between a provision of this section and any other legislation existing when this section takes effect, the provision of this section prevails.

Other functions

5(1) The Auditor-General may, at a fee, and without compromising the role of the Auditor-General as an independent auditor, provide –

(a) *audit related services to an auditee referred to in section 4(1) or (3) or other body, which is commonly performed by a supreme audit institution on condition that –*
(i) *no service may be provided in respect of any matter that may subsequently be audited by the Auditor-General;*
(ii) *such service may not directly result in the formulation of policy; and*
(iii) *there must be full and proper disclosure of such services in terms of section 10(1)(b).*
(b) *advice and support to a legislature or any of its committees outside the scope of the Auditor-General's normal audit and reporting functions;*
(c) *comments in a report on any responses by an auditee to reported audit findings, or responses by an auditee to a report of any legislature arising from its review of an audit report; or*
(d) *carry out an appropriate investigation or special audit of any institution referred to in section 4(1) or (3), if the Auditor-General considers it to be in the public interest or upon receipt of a complaint or request.*

(2) In addition, the Auditor-General may –
(a) *co-operate with persons, institutions and associations, nationally and internationally;*
(b) *appoint advisory and other structures outside of the administration of the Auditor-General to provide specialised advice to the Auditor-General; and*
(c) *do any other thing necessary to fulfil the role of Auditor-General effectively.*

(3) The Auditor-General may, in the public interest, report on any matter within the functions of the Auditor-General and submit such a report to the relevant legislature and to any other organ of state with a direct interest in the matter.

FUNCTIONS OF THE COMMISION

The Competition Commission is a juristic person established in terms of Section 19 of the Competition Act, 1998 (Act No.89 of 1998). The mandate of the commission to prohibit collusive tendering is provided in chapter 2, section 4.

Restrictive horizontal practices prohibited

(1) *An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –*

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.

Subsection (1) was amended to its present form by section 3(a) and (b) of The Competition Second Amendment Act, 2000.

(2) An agreement to engage in a restrictive horizontal practice

referred to in subsection (1)(b) is presumed to exist between two or more firms if –

(a) any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and

(b) any combination of those firms engages in that restrictive horizontal practice.

Subsection (2) was amended to its present form by section 3(c) of The Competition Second Amendment Act, 2000.

(3) A presumption contemplated in subsection (2) may be rebutted if a firm, director or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market.

(4) For purposes of subsections (2) and (3), "director" means –

(a) a director of a company as defined in the

Companies Act, 1973 (Act No. 61 of 1973);

(b) a member of a close corporation, as defined in the

Close Corporations Act, 1984 (Act No. 69 of 1984);

(c) a trustee of a trust; or

(d) a person holding an equivalent position in a firm.

Subsection (4) was amended to its present form by section 3(d) of The Competition Second Amendment Act, 2000.

(5) The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by, –

(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any

combination of them; or 18

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).