POISONED PROCESSES

Report on an investigation into an allegation of maladministration by the Department of Public Works, Roads and Transport in Mpumalanga in the awarding of tenders for shop leases in Pilgrims Rest

Report No: 20 of 2013/14

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PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

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Executive Summary

(i) "*Poisoned Processes*" is a report I have issued as the Public Protector in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector's Act, 1994.

(ii) The report communicates my findings and directives on remedial action following an investigation into a complaint lodged by Advocate Alberts (the Complainant) on 6 July 2012, alleging maladministration by the Mpumalanga Department of Public Works, Roads and Transport (the Department) in the awarding of tenders for shop leases in Pilgrims Rest. The Complainant alleged illegal awarding of tenders, improper issuing of eviction notices, lack of responsiveness by the department to representations that were made prior to the issuing of eviction notices and threats of forced evictions.

(iii) Pilgrim's Rest is a national heritage site and a tourist attraction. The government, through the Department is its custodian. Businesses rent the buildings from the government from as little as R1 700 a month and the government is responsible for the upkeep of the town, buildings and provision of basic services. There are 21 businesses in the town. The businesses that rent premises are selected through a tender process, which considers the functionality of each bidding business and price, the ideal being to select the most functional in terms of competency and the highest bidder in terms of rental price offered. The allegations investigated concerned the propriety of the selection process and the qualification of some of the bidders that were ultimately selected.

(iv) On analysis of the complaint, the following issues were considered and investigated:

(a) Was the awarding of the leasing tenders to businesses at Pilgrim's Rest, unlawful or improper?

(b) Did the Department's conduct in the awarding of the rent tenders cause prejudice?

(c) Did the Department give inadequate notice to the businesses occupying the premises at Pilgrim's Rest as alleged? If so does this constitute improper conduct and maladministration?

(d) Did the Department fail to properly deal with representations made regarding the extension of the notice period to vacate the premises? If so does this constitute improper conduct and maladministration?

(e) Did the Department's handling of the issuing of notices cause prejudice?

(v) The investigation commenced with an analysis of relevant legislation and related prescripts to ascertain the Department's authority to procure the leasing of the premises in question and the proper exercise of such authority. The rest of the process involved correspondence with the Department as the competent authority, solicitation and analysis of tender documents, collection and analysis of newspaper reports and interviews with departmental officials, traders, business owners involved in Pilgrim's Rest and community members. An inspection *in loco* was also conducted.

(vi) My findings are the following:

(a) Regarding the alleged unlawful or improper awarding of the leasing tenders to businesses at Pilgrims' rest, I find that:

(aa) The allegation of unlawfulness and impropriety with regard to the award of the tender for the leasing of business premises at Pilgrim's Rest is substantiated.

(bb) The process was characterised by gross irregularities and maladministration. The irregularities included:

(1) a Bid Specification Committee without the requisite 60% quorum;
(2) Giving a high score for price to a bidder whose bid was one of the lowest. The bid was adjudicated and scored on the understanding of its rent offer being R19 100, 00 when it was in fact R 10 416,00;
(3) No due diligence exercise was carried out to assess functionality and sustainability of businesses considered for leases;
(4) Suspected fraud in that the letter of appointment for the bid favourably considered with the understanding that its price was R19, 100 correctly stated that the rent amount was R10 416,00;
(5) Evaluation criteria changed from 90:10 to 80:20 for some of the tenders with dubious reasons given for such change and how the change was processed
(6) No proper records were kept resulting in a changing narrative given during the investigation on issues such as why the evaluation criteria changed from the advertised 90:10 to 80:20 for some of the tenders.

(cc) The business that got the leasing contract on account of the price of R19 100, did not qualify for the contract and the conduct involved in awarding such contract was accordingly unlawful, improper and constitutes maladministration

b) Regarding whether or not the Department's actions in the awarding of the tenders caused prejudice, I find that:

(aa) Businesses that legitimately qualified to be awarded the tenders and many of which were running sustainable businesses beneficial to the community were prejudiced by or suffered an injustice due to the Department's maladministration with regard to the ward of the new leasing tenders.

(c) Regarding whether or not the Department failed to give proper notice to businesses occupying the premises at Pilgrim's rest, I find that:

(aa) The allegation regarding insufficiency of notice is substantiated. The thirty (30) day notice did not provide reasonable time for businesses that had been running for years to wind up their operations or make fair arrangements for employees.

(d) Regarding the Department's alleged improper handling of the request by existing businesses to reconsider its decision to grant a 30 day notice period, I find that:

(aa) The allegation that the handling of the request to review the decision to grant a thirty day notice was improper is substantiated. The Department did not apply its mind to the request and the fairness of its previous decision to serve eviction notices.

(e) Regarding whether or not the Department's handling of the issuing of notices caused prejudice, I find that:

(aa) The failure by the Department to give proper notice and to review the notice period when requested to do so did prejudice business owners, the community and sustainability of Pilgrim's Rest as a national heritage site and tourist attraction.

(bb) The conduct of the Department in this regard constitutes improper conduct and maladministration.

(vii) The remedial action to be taken in terms of section 182(1) (c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act is the following-

(a) The HOD must –

(aa) Cancel the awarding of the contracts for the new shop leases in Pilgrims Rest;

(bb) Embark on a new procurement process for the conclusion of lease contracts for buildings on the Pilgrim's Rest Heritage Site that are currently without any valid lease agreements;

(cc) Ensure that the procurement process complies with the relevant laws and related prescripts as well as the standards of fairness, equitability, transparency, competitiveness and cost-effectiveness as required under section 217 of the Constitution; and

(dd) Ensure that the process is "*heritage compliant*" to minimise any adverse effect on the maintenance and conservation of the Pilgrim's Rest Heritage Site and with due regard to the interests of all stakeholders as envisaged in the NHR Act, including –

(i) the affected business owners and their employees,

(ii) individuals or organizations representing the interests of the community; and

(iii) institutions that share responsibilities for the maintenance and conservation of Pilgrim's Rest as a Provincial Heritage Resource, such as the Mpumalanga Provincial Department of Culture, Sport and Recreation, the Mpumalanga Provincial Heritage Authority and provincial sector Departments of Agriculture, Rural Development and Land Administration; Economic Development, Environment and Tourism.

(ee) Ensure that owners of current businesses that are not successful in the new bidding process are given adequate vacation notices which should not be less than three months.

(ff) Review record-keeping systems to identify and remedy the gaps alluded to in this report;

(b) The HOD and the MEC must deal with the incidences of non-compliance with the PFMA, the Department's SCM policy and applicable prescripts, as well as any unauthorised, irregular or wasteful and fruitless expenditure arising from such failures and non-compliance, and must also take effective and appropriate disciplinary steps in terms of Section 38(1)(h) of the PFMA against any official of the Department who made or permitted fruitless and wasteful expenditure.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF MALADMINISTRATION BY THE DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT IN THE AWARDING OF TENDERS FOR SHOP LEASES IN PILGRIMS REST

1 INTRODUCTION

1.1. Overview

1.1.1. *"Poisoned Processes"* is a report I have issued as the Public Protector in terms of section 182(1) of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act), following an investigation into maladministration allegations relating to government's handling of a tender process for the leasing of premises to business owners at Pilgrim's Rest in the Mpumalanga province.

1.1.2. The report is submitted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, 1996 and section 8(1) of the Public Protector Act, 1994 to:

(a) The Member of the Executive Council for Public Works, Roads and Transport in Mpumalanga;

(b) The Head of the Department of Public Works, Roads and Transport (the HOD); and

(c) The Mpumalanga Legislature, through the Speaker of the Legislature.

1.1.3. A copy of the report is provided to Advocate Alberts (the Complainant), in terms of section 8(3) of the Public Protector Act.

1.1.4. The report relates to an investigation into alleged maladministration in the awarding of tenders for shop leases in Pilgrim's Rest by the Department of Public Works, Roads and Transport (the Department).

1.2. Background

1.2.1 Pilgrim's Rest is a national heritage site and tourist attraction, whose custodian is the government represented by the Mpumalanga Department of Public Works, Roads and Transport. Businesses lease premises on site having been procured on the basis of a tender process. The procurement process is like any other procurement process in that functionality and price are taken into account in a process that seeks to be fair as required in section 217 of the Constitution, the Preferential Procurement Policy Framework Act no. 5 of 2000 (PPPFA) and National Treasury Regulations. The difference between the process involved and a normal procurement process is that the price consideration seeks to select the highest bidder and not the lowest bidder.

1.2.2 Pilgrim's Rest was officially proclaimed a gold field on September 22, 1873 and grew into a village with 1,500 inhabitants searching for alluvial gold. Towards the end of the 19th century, claims were bought up and underground mining by the company known as Transvaal Gold Mining Estates (TGME),commenced. The mine was closed down in 1971 and the village was sold to the government as a national museum. The town's original architecture has remained largely unchanged since then as the town was declared a National Monument and a provincial heritage site in 1986. This town was added to the UNESCO World Heritage Tentative List on May 15, 2004 in the Cultural category as a potential world heritage

site.[1]

1.2.3 In October 2010, the government of Mpumalanga visited Pilgrim's Rest for oversight purposes and the visit culminated in recommendations regarding the need for ensuring that leases were in place at Pilgrim's Rest for better management of the heritage site.

1.2.4 The Mpumalanga government took action to implement this decision in 2011. The specific action taken was the advertisement of a tender for 22 leases for business premises, by the Department of, Public Works, Roads and, Transport, in October 2011.

2 THE COMPLAINT

2.1. The complaint was lodged on 06 July 2012 by Adv Anton Alberts of the Freedom Front Plus alleging maladministration and related irregularities in the handling of tenders for the leasing of business premises at Pilgrim's rest. He alleged that:

1 http://en.wikipedia.org/wiki/Pilgrim's_Rest,_Mpumalanga; http://www.pilgrimsrest.org.za/history.htm; http://whc.unesco.org/en/tentativelists/1075/

2.1.1. According to media reports 17 shop owners in Pilgrim's Rest , who lease their premises from the Mpumalanga Provincial Government, were served with eviction notices by the Mpumalanga Department of Public Works on 29 June 2012 to vacate their premises within 30 days.

2.1.2. These businesses had been operating for years and employed many people from the surrounding area, especially poor communities;

2.1.3. Those businesses whose leases with the Department of Public Works were about to expire did participate in the provincial government tender process and made various other representations, but since making their submissions had not had any communication from the government until they were served with eviction notices;

2.1.4. Reports had also surfaced indicating that some of the business owners, like the golf course operator, were intimidated by government officials and threatened with forced removal; that some tender recipients had already tried to sell their rights back to business owners at exorbitant prices; and that an eviction notice was served on a business that still has lease rights until 2015. It is also reported that one tender recipient, Matletle Construction and Projects received up to five and Mangwanyane was awarded 2 contracts from the department;

2.1.5. This flouting of the rights of successful business owners was taking place whilst at least eight buildings are standing empty and could have been leased to new and worthy businesses; and

2.1.6. He indicated that it is their view that due process had been flouted and that the intimidation taking place is part of a botched transformation process where a few scrupulous individuals are trying to make quick money off the successful businesses.

2.1.7. . He accordingly requested an investigation of the matter and the securing of the rights of the existing business owners.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2. Section 182(1) of the Constitution provides that the Public Protector has the power 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, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in national legislation.

3.3. The Public Protector is further mandated by the Public Protector Act, 23 of 1994, to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve related disputes through conciliation, mediation, negotiation or any other appropriate means.

3.4. The Mpumalanga Department of Public Works, Roads and Transport is an organ of state and its conduct amounts to conduct in state affairs., This matter, accordingly, falls within my office's remit.

3.5. It is further worth noting that the powers and jurisdiction were not disputed by any of the parties.

3.6 However, it is worth noting that the business owners who were being evicted approached the high court for an interdict against the Department in July 2012.

After the interdict was granted no further action was taken. It is my understanding that the parties are awaiting the outcome of the investigation.

4 THE ISSUES CONSIDERED AND INVESTIGATED

4.1. On analysis of the matter, the following issues were considered and investigated:

4.1.1 Was the awarding of the leasing tenders to businesses at Pilgrim's Rest ,unlawful or improper?

4.1.2 Did the Department's conduct in the awarding of the rent tenders cause prejudice?

4.1.3 Did the Department fail to give proper notice to the businesses occupying the premises at Pilgrim's Rest as alleged? If so does this constitute improper conduct and maladministration?

4.1.4 Did the Department fail to properly deal with the representation made regarding the extension of the notice period to vacate the premises? If so does this constitute improper conduct and maladministration?

4.1.5 Did the Department's handling of the issuing of notices cause prejudice?

5 THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and section 6 and 7 of the Public Protector Act and comprised the following:

5.1. Legislation and other prescripts

5.1.1. Section 217 of the Constitution of the Republic of South Africa, 1996;

5.1.2. The Public Management Finance Act 1 of 1999(PFMA);

5.1.3. Preferential Procurement Policy Framework Act 5 of 2000;

5.1.4 The Supply Chain Management Guide for Accounting Officers issued by the National Treasury in February 2004;

5.1.5 National Treasury Circular dated 27 October 2004;

5.1.6 National Treasury Circular dated 30 March 2006: Code of Conduct for Bid Adjudication Committees;

5.1.7 Department of Public Works, Roads and Transport Policy on Procurement of Goods and Services;

5.1.8 Preferential Procurement Regulations, 2001;

5.1.9 National Heritage Resources Act 25 of 1999;

5.1.10 Treasury Regulation 16 of 2003;

5.1.11 Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA);

5.1.12 The Chief Executive Officer of the South African Social Security Agency N.O. v Cash Paymaster Services (Pty) Ltd (90/10) [2011] ZASCA 13 (11 March 2011;and

5.1.13 TEB Properties CC v MEC, Department of Health and Social Development, North West [2012] 1 All SA 479 (SCA).

5.1.14 *Touch Stones: Previous reports released by the Public Protector*

(a) Against the Rules

(b) On the Point of Tenders

5.2 Key sources of information

5.2.12 An assessment of the complaint;

5.2.2 Interviews and meetings conducted

5.2.2.1 Interviews conducted onn 14 August 2012 with the owners or managers of the following businesses-

5.2.2.1.1 Pilgrim's Place

5.2.2.1.2 Highwaymans Garage

5.2.2.1.3 Pilgrims Place

5.2.2.1.4 Pilgrims Pantry

5.2.2.1.5 Golf Course

5.2.2.1.6 Iron Store

5.2.2.1.7 Clewer General Store

5.2.2.1.8 The Vine

5.2.2.1.9 Scotts Café

5.2.2.1.10 Mrs Mac Shop

5.2.2.1.11 Caravan Park

5.2.2.1.12 Beretta's Guest House

5.2.2.2 Meeting held on 20 Septemberwith the following officials of the Department of Public Works, Roads and Transport-

5.2.2.2.1 Ms N Naidoo- General Manager: Property;

5.2.2.2.2 Ms GM Molotsane-Senior Manager: Supply Chain Management;

5.2.2.2.3 Ms D Mbatha: Supply Chain Management;

5.2.2.2.4 Ms KP Dlamini: Legal Services; and

5.2.2.2.5 Ms M Lubisi; Property Management.

5.2.2.3 Meeting held oOn 4 October 2012 with Mr Kgopana Mathew Mohlasedi, the HOD of the Department of Public Works, Roads and Transport.

5.2.3 The following correspondence was exchanged with the officials of the Department –

5.2.3.1 Letter delivered to the office of the HOD on 8 August 2012 addressed to the HOD of the Department of Public Works, Roads and Transport, Mr Mohlasedi.

5.2.3.2 Letter delivered to the HOD on 15 August addressed to the HOD, Mr Mohlasedi

5.2.3.3 Letter from Mr Morolo, Deputy Director General: Public Infrastructure, delivered on 16 August 2012 dated 14 August 2012.

5.2.3.4 Letter to the HOD, Mr Mohlasedi, sent on 10 September, 2010

5.2.3.5 Letter dated 3 October received from the HOD, Mr Mohlasedi on 04 October, 2012.

5.2.3.6 E-mail correspondence to the HOD, Mr Mohlasedi sent by Mpumalanga Public Protector Provincial Representative on 05 October 2012.

5.2.3.7 Letter dated 12 October 2012 received on same day from the HOD, Mr Mohlasedi.

5.2.4 **The following documents were received from the Department-**

5.2.4.1 Summary of Pilgrim's Rest tenders reflecting the names of owners and businesses affected by the eviction;

5.2.4.2 Copies of the bid documents of all bidders for the Pilgrim's Rest shops and appointment letters of the successful bidders;

5.2.4.3 A memorandum on appointment of Bid Specification Committee for Pilgrim's Rest;

5.2.4.4 A memorandum on appointment of Bid Evaluation Committee;

5.2.4.5 A memorandum on the appointment of Bid Adjudication Committee;

5.2.4.6 Bid Evaluation Committee declaration of interest for meetings of 2 March and 18 May 2012;

5.2.4.7 Bid Adjudication Committee minutes, attendance registers and declaration of interest for the meetings dated 6 March and 29 May 2012;

5.2.4.8 A document titled "*Affidavit*" but which is not commissioned by a commissioner of oaths and signed by Ms NX Shirindza regarding her presence in the Bid Adjudication Committee meeting scheduled for 6 March 2012;

5.2.4.9 A memorandum dated 24 February 2012 approving the changing of bid specification for Highwayman's Garage, Caravan Park, Clewer General Store and Berreta's Guest House;

5.2.4.10 Copies of request for renewal of lease for the Vine Restaurant and Pilgrim's Pantry;

5.2.4.11 Copy of the Department's Supply Chain Management policy.

5.3 Approach to investigation

5.3.4 In determining the propriety of the award of the tenders awarded and adjudicating all related complaints the standard enquiry used in Public Protector Investigations was employed. The approach centres around the following questions:

5.3.4.2 What happened?

5.3.4.3 What should have happened?

5.3.4.4 Is there a discrepancy between the two and if so, does it amount to improper conduct or maladministration?

5.3.5 If maladministration is confirmed, what should be the remedy?

5.3.6 The question regarding "*what should have happened*", relates to the standard that should have been met based on the regulatory framework regulating conduct in such circumstances. Such standard is determined on the basis of relevant constitutional provisions, legislation, Codes of Conduct, policies, guidelines and related benchmarks, including international benchmarks and previous Public Protector's decisions.

5.4 Provisional Report

5.4.1 At the conclusion of the investigation, a provisional report was sent to respondents, the Complainant and competent authorities identified as potential implementers of remedial action.

5.4.2 An invitation was made to the parties to review the provisional report and forward comments on facts and any other matters. Such comments were assessed,

summarized and, where appropriate, integrated in factual and maladministration findings.

6 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Complainant's case

6.1.1 The Complainant did not submit any supporting evidence except his letter of complaint dated 6 July 2012.

6.1.2 The owners and managers of the 11 businesses interviewed as indicated in paragraph 5.2.2.1 confirmed that they received eviction notices. The Manager of Scott's Café alleged that they received an eviction notice despite having been granted an extension of the lease from 1 December 2008 to 31 October 2013.

6.1.3 A copy of a letter dated 1 January 2008 from the Department was provided as evidence in that regard.

6.2 The responses and evidence obtained from the Department

6.2.1 Regarding the alleged unlawful or improper awarding of leasing tenders at Pilgrim's Rest:

6.2.1.1 Bidding Process

(a) A copy of correspondence addressed to the HOD, Mr K M Mohlasedi by Ms G M Molotsane, Senior Manager: Supply Chain Management dated 25 August 2011, in which a request for the appointment of an ad hoc Bid Specification Committee for the letting of various buildings at Pilgrim's Rest for a period of five (5) years was made, was provided. The correspondence indicated that the request for such appointment was approved by the HOD on 29 August 2011. The proposed members of the committee were:

(i) Mr G Mashego: Chairperson;
(ii) Mr B Sekwane: Member;
(iii) Ms M Lubisi: Member;
(iv) Ms S Shube: Member;
(v) Ms F Netshighefhe: Member; and
(vi) Ms DA Mbatha: SCM advisor.

(b) Copies of tender documents relating to Pilgrim's Rest obtained from the Department revealed that the bid specification documents relating to the 22 buildings that were eventually put on tender were signed by four officials namely Mr Mashego, Mr Sekwane, Ms Lubisi and one TN Ngwenya on 4 October 2011. In its response to the provisional report, the Department contended that Mr TN Ngwenya was not a member of the Bid Specification Committee. The Department further contended that he was only called during the meeting to clarify certain issues since he is the manager at Pilgrim's Rest. Despite evidence to the contrary, which indicates that although Mr Ngwenya signed Bid Specification documents, his signature does not appear on the same page with the signatures of the members of the Bid Specification Committee duly appointed by the HOD. The Department denied that his signature appears with other duly appointed members by the HOD. The Department contended that the Bid Specification Committee comprised of five (5) members of which three (3) attended. The Department contended that Ms DA Mbatha was not a member of the Committee, but just an SCM advisor although the correspondence dated 25 August 2011 referred to at paragraph 6.2.1.1 indicates that she was appointed as a member as approved by the HOD on 29 August 2011. According to the Department this constituted a quorum and that the advisor to the Committee should not be counted. The Department also contended that the decisions taken by the Bid

Specification Committee on 4 October 2011 are valid because the 60% quorum was constituted by the members duly appointed by the HOD.

(c) In October 2011, the Department advertised the leasing of the buildings at Pilgrim's Rest in the Provincial Supply Chain Management Bid Bulletin Volume no. 183 of October 2011, with the closing date indicated as November 2011.

(d) The SBD 1 document (Invitation to tender) provides for the following-

(i) Evaluation criteria- was 80/20 in all of the businesses that were put to tender except four where the evaluation criteria utilised was 90/10;

(ii) The documents that had to be submitted *viz* (SBD 2, SBD4, SBD6.1, SBD 6.9 & SBD8, standard lease agreement, detailed pricing proposal, valid company tax clearance certificate, company registration certificate & proof of residence;

(iii) General requirements *viz* Bid to be in SA Rand on fixed price with escalation per annum, rental must be market related, VAT must be excluded, Department not bound to accept any proposal, Department reserves the right to call interviews with shortlisted bidders, Department reserves the right to negotiate with preferred bidder, only bids submitted with valid tax certificate will be considered, the lowest, highest or any bid will not necessarily be accepted, all price escalations will only effect after the first completed year of contract, bidder must complete the detailed pricing schedule and multiply with the provided square metres, bidder to attach proof of residence to score points for locality;

(iv) Specific requirements - specified the name of the building, its address and size. It stipulated what the building should be used for,

bidder must arrange his/ her own equipment, bidder must arrange his/ her own licences, rental shall exclude amounts paid for domestic services *viz* electricity, refuse removal etc.

(v) Detailed pricing proposal: provided for Name of building, the location, the lease period and size of the leasable area. The bidder was required to fill the rate per square metre and give the total rent per month.

6.2.1.2 Bid Evaluation process

(a) According to the Attendance Register and Declaration of Confidentiality and Impartiality of the Bid Evaluation Committee (BEC) provided by the Department, the BEC met on 2 March 2012 and made recommendations on 14 of the 22 bids received.

(b) In response to the Provisional Report, the Department provided a copy of the Attendance Register and Declaration of Confidentiality and Impartiality of the BEC wherein interest is declared. This document reveals that the BEC met again on 18 May 2012 and made recommendations for the remaining eight bids. The Department initially only provided a copy of the declaration of interest for the meeting of 2 March 2012. Prior to the issuing of the Provisional Report no signed declaration of interest was furnished for the meeting held on 18 May 2012

(c) . The Bid Specification Committee stipulated the evaluation criteria at 80/20 for 18 of the tenders and stipulated the evaluation criteria of 90/10 for the remaining four.

(d) A perusal of the tender documents revealed that the BEC applied an adjudication criteria of 80/20 (80 points for price and 20 points for

preference or B-BBEE Status Level) for the evaluation of the tenders, as stipulated by the Bid Specification Committee. However, the following bids were evaluated in terms of a 80/20 adjudication criteria although advertised as 90/10 tenders:

(i) PWRT/1898/11/MP: Letting of Caravan Park;
(ii) PWRT/1877/11/MP: Letting of Building A74, Highwayman's Garage;
(iii) PWRT/1876/11/MP Letting of Building A49, Clewer General Store; and
(iv) PWRT/1895/11/MP Letting of Building H41, Berreta's Guest House.

(e) On being asked to explain the deviation from the advertised crieteria of 90:10, the Department referred to the comments made by the BEC in its report dated 2 March 2012 and which stated:

"Points were allocated for Price, Functionality and Preference, as follows as per the Specification and Tender document. Price: 80 Preference: 20. However, due to the price offered by the bidders the Preference points and Evaluation method had to change to be evaluated using Price: 90 Preference: 10".

(f) As can be clearly noted the explanation created more confusion as the deviation was from 90:10 to 80:20 and not the other way round. A follow-up enquiry was made with the Department as the explanation proffered did not clarify the reason for changing the evaluation criteria from the 90/10 that was stipulated in the tender document. The Department subsequently submitted a copy of a memorandum that was ostensibly written by the Chairperson of the BEC, dated 24 February 2012,

purporting to seek approval to evaluate the above mentioned tenders using the 80/20 criteria instead of the 90/10 criteria.

(g) The chairperson stated that: "*During the evaluation process the Committee discovered that the bids received were below the 90/10 threshold as stipulated in approved specification and the tender document. Due to the urgency of this matter the Committee therefore requests, that the tenders be evaluated at the 80/20 threshold because of all the bids received were less than R500 000.00.*" The request was ostensibly approved by the HOD on 28 February 2012. In response to the provisional report, the Department reiterated that the evaluation criteria used on the tenders was the 80/20 threshold and not 90/10 as indicated in the approved specifications. The Department further reiterated that approval in that regard was granted by the accounting officer to deviate from the BID specification criteria. No explanation was given for the contradictory note attributed to the report of the BEC which was initially submitted during the investigation.

6.2.1.3 Adjudication and award process

(a) According to the Attendance Register and Declaration of Confidentiality and Impartiality wherein interest is declared, the Bid Adjudication Committee (BAC) sat on 6 March 2012 and considered the 14 bids that the BEC dealt with on 2 March2012. the BAC met again on 29 May 2012 to consider the bids that the BEC dealt with on 18 May 2012. The minutes, attendance register and a signed declaration of interest for the meeting of 6 March 2012, were provided.

(b) The Department was initially unable to provide a signed declaration of interest in respect of the BAC meeting allegedly held on 29 May 2012.

There were also no minutes or an attendance register furnished for this meeting. In response to the provisional report, the Department submitted a copy of the Attendance Register and Declaration of Confidentiality and Impartiality of the BEC wherein interest is declared on 29 May 2012.

(c) The attendance register and minutes of the BAC meeting held on 6 March 2012 indicate that the six attendees in the meeting were:

(i) GM Molotsane;
(ii) SS Shongwe;
(iii) D Nkabinde;
(iv) MA Makgalemane;
(v) GS Ntombela; and
(vi) NR Mahlalela.

(d) On 4 October 2012, when the Department submitted a response on certain outstanding issues, a copy of the same register was included in the supporting annexures.

(e) The copy reflected, in addition to the names listed above, the names of MLB Nemakonde and ML Mamaro, thus putting the total number of officials who attended the meeting at eight.

(f) The minutes on the other hand indicate that there were seven people in attendance and do not reflect the name of NR Mahlalela, which also does not appear in the BAC's memorandum submitted to the HOD.

(g) A document purporting to be an affidavit but not properly commissioned, dated 27 September 2012, signed by Ms NX Shirindza, whose name did not appear on the register or minutes as a member of the BAC was also

furnished. She stated that she was an advisor to the BAC and that her failure to sign the attendance register and declaration of interest was an oversight. In response to the provisional report the Department also pointed out that the Bid Adjudication Committee (BAC) met on 6 March 2012 The Department further submitted that there were no discrepancies and that it maintains its previous response in that regard. The discrepancies related to the number of people who attended the BAC meeting of 6 March 2012. The Department submitted two conflicting attendance registers for the meeting of 6 March 2012. One register reflected 6 attendees and the other 8. The Department further contended that the officials reflected under Item 02 of the minutes of 6 March 2012 reconciles with the attendance register thereof.

6.2.1.4 Sampling of tender documents of the winning bidders

The awarding of bid number PWRT/1877/11/MP: letting of Building A74, Highwayman's Garage

(a) The tender documents reflected that the following bids and the quoted unit prices were received:

(i) Spano Investment CC R9, 300.00 per month;
(ii) Yourtrade 62 R10 050.00 per month;
(iii) Matletle Construction & Projects R14 880.00 per month;
(iv) Highwayman's Garage R9 300.00 per month;
(v) Muhawini Trading R13 020.00 per month;
(vi) Isibanisethu Investment R11 904.00 per month;
(vii) Mangwanyane Trading R10 416.00 per month;
(viii) Mpumalanga Petrolium R8 928.00 per month; and
(ix) Sphelele Trading R12 276.00 per month.

(b) The BEC recommended the letting of the building to Mangwanyane Trading for R19 100.00 per month over a period of five years with a 10% rental escalation per annum.

(c) The minutes reflect that when the bids were evaluated Mangwanyane Trading's bid was assessed using a unit price of R19 100.00 per month instead of the R10 416.00 per month as reflected in the tender document. As a result of this, the company scored the highest and received 80 points for price.

(d)When the points scored for price were added to the preference points of 10, the company obtained the highest number of points (90) and was thus selected.

(e) The BAC made a similar recommendation that was approved by the HOD on 20 May 2012. However, on analysis of the bid documents it was established that the appointment letter signed by the HOD on 18 June 2012 stipulated that the rental amount per month for Mangwanyane would be R10 416.00.

(f) In its response on the discrepancy between the price reflected on the tender document and the one used in adjudicating the bid, and the one subsequently stated in the appointment letter, the Department stated that "*this was a genuine typographical error and that the tender amount in the bid document was the amount written in the appointment letter.*" In its response to the provisional report, the Department reiterated that it was a genuine typographical error. However, while the Department could not explain which prize was considered when this bid was evaluated and the impact of such prize on the success of the bid in question, the fact that the bid came on top of the others points towards the price of R19 100, 00 having been used as the basis to award the tender.

6.2.1.5 Bids awarded to Matletle Construction

(a) Matletle Construction was awarded five tenders for letting of buildings in Pilgrims Rest. In all its winning bids, this company did not respond to paragraph 2 of the SBD4 document, which is a declaration of interest form that requires the personal details of the declarant.

(b) Paragraph 2 states *"In order to give effect to the above, the following questionnaire must be completed and submitted with the bid*

Full Name of bidder and his or her representative;
Identity number;
Position occupied in the Company (director, trustee, shareholder);
Company Registration Number;
Tax Reference number; and
VAT Registration Number."

(c) In completing the above mentioned paragraphs, the declarant wrote "*N/A*". She then went on and responded to all other questions and provided the name and signature required in paragraph 4 of the document.

(d) The Department responded to the query on the failure of the declarant to reveal the full particulars required in subparagraph 2.1 to 2.6 by stating that these paragraphs were "*indicated as not applicable because the bidder is not connected to anybody employed by the state and was understood to be responding to the bold lettered statement.*" However, such explanation did not deal with the bidder's omission of:

(i) Name of bidder or her representative;

(ii) ID number;
(iii) Position occupied in the company;
(iv) CIPRO Registration number;
(v) Tax Reference number; and
(vi) Vat Registration number.

(e) In response to the provisional report, the Department contended that the Bidder attached the CIPRO certificate for verification and ID copies that the Bidder is not connected with any person employed by the State and that it was understood to be responding to Clause 1 of the SBD4. This still did not deal with the other omissions and failure to complete the bid documents appropriately. More importantly, the Department still did not explain why the bid in question was not disqualified upfront.

6.2.1.6 Other trends

(a) The award of tender PWRT/1895/11/MP reflects that only two of the four members of the BAC signed the recommendation on the bid document. Significantly, the HOD's signature does not appear on the document. The only indication that the recommendation was approved, is the letter of appointment that was signed by the HOD on 27 March 2012.

(b) In the following eight bids, it is not possible to determine when the BAC's recommendations in respect of these bids were approved as the HOD signed the approval of the BAC's recommendation but did not insert the date of signature –

(i) PWRT/1879/11/MP Caravan Park;
(ii) PWRT/1899/11/MP Chaitows;
(iii) PWRT/1878/11/MP Mrs Mac Shop;

(iv) PWRT/1888/11/MP Golf course;

(v) PWRT/1880/11/MP Pilgrims Pantry;

(vi) PWRT/1892/11/MP The Vine;

(vii) PWRT/1886/11/MP Mona Cottage; and

(viii) PWRT/1889/11/MP The Daisy.

(c) In response to the provisional report, the Department contended that in the event that the HOD did not date a document such should be regarded as an oversight.

6.2.2 Regarding whether or not the Department gave insufficient notice to businesses occupyingthe premises at Pilgrim's Rest:

6.2.2.1 The Department contended that the 30 (thirty) days' notice was in terms of the original agreements. However, the Department did not provide evidence of such original agreements. Regarding the allegation that eviction notices were served on businesses that still had valid leases, the Department stated that *"The leases of the businesses that were put on tender have expired"* (sic). The Department reiterated that the lease agreements had expired and contended that from thereon the leases were dealt with on a month to month basis, in its response to the provisional report.

6.2.2.2 One of the buildings that were put on tender was the Scotts Café. The manager of the business in question provided a copy of a letter, dated 1 January 2008, from the Department. The letter purportedly responded to a request for the extension of the lease agreement by the business in question.

6.2.2.3 The letter states, among other things, that *"Kindly be informed that approval for the extension of the Scott's Café lease from 01st December 2008 to 31st*

October 2013 has been granted with the same terms and condition of the existing lease."

6.2.2.4 The Department responded to the allegation that there were at least eight buildings that were vacant and which could have been offered to new businesses by stating that two of the buildings, namely Jubilee Porters and the Bakery were burnt down.

6.2.2.5 The Department further stated that three buildings were allegedly vacant, namely the Chaitos Restaurant, Moloutse Trout and the Bank house. It stated that Chaitos Restaurant was put out to tender but could not be occupied due to a court interdict. It stated further that *"... the Moloutse Trout building was intended for trout fishing and the Department could not advertise it since it had not been configured what it could be used for besides it intended purpose"* (sic).

6.2.2.6 The Department finally stated that the Bank house was intended for commercial banking, and that the prerequisite to conduct a banking business in terms of banking law was that the institution must be a public company and be registered as a bank in terms of section 11(1) of the Bank Act 94 of 1990.

6.2.3 Regarding potential prejudice ensuing from the Department's handling of notices to existing businesses:

6.2.3.1 The Department's response to the allegation that affected businesses had been operating for years and employed many people from surrounding poor communities was that the leases that were put on tender had expired and that the thirty day notice period was reasonable. It went on to state that it was agreed at a meeting with the Business Chamber on 6 March 2012 that the Department would give notice of at least 1 month for the transition. A copy of

the said minutes was furnished. The Department further stated that the successful bidders were prepared to absorb the current staff, although the minutes do not include this aspect.

6.2.3.2 In interviews, the chairperson and other members of the Business Chamber, denied that there was ever agreement on the notice period that current owners would be given to vacate the buildings. According to them, the Department promised to afford affected business owners a reasonable time which would allow them to dispose of their stock and to negotiate a possible sale of licences and goodwill with the new owners.

6.2.3.3 In the copy of the minutes of a meeting held with the Business Chamber on 6 March 2012 provided by the Department, the General Manager for Property Management - Ms BP Mojapelo, was recorded under the heading "*Lease Agreements*", as stating that "*...those who are currently occupying businesses and not the preferred lessees in terms of the procurement process, will be notified timeously and given notice of at least a month.*"

6.2.3.4 The chairperson and other members of the Chamber disputed the accuracy of the minutes in this regard and pointed out that the Department had not provided the Chamber with the minutes of their meetings, despite having been asked to do so on numerous occasions. The veracity of the minutes could therefore not be determined.

6.2.3.5 With regard to the fate of employees of the affected businesses, the Business owners disputed the Department's assertion that an undertaking had been made that new business owners would bsorb the current staff. The Department changed itw story in its response to the Provisional Report, where it now contended that it dealt with the matter on a strictly contractual basis,

namely, the lease agreements between the parties which did not make provision for future lessees to take over the business as a 'going concern'.

6.2.3.6 During an interview with Mr Brummer, the current owner of the Highwayman's Garage and the then chairperson of the Business Chamber, he stated that a new owner of the business would have to apply for a site and operator's permit (site and/ or retail license in terms of Petroleum Products Act, 1977) from the Department of Energy before he/she could commence doing business as a service station and fuel retailer. According to him, the process would take at least three months and he expressed a concern about the fate of the current employees during the intervening period.

6.2.3.7 Similar sentiments were expressed by Mr Mashego, the chairperson of the Concerned Employees Committee, who stated during an interview, that the employees were concerned that the new owners may not want to take over the businesses as going concerns, and that this placed the job security of the employees in jeopardy.

6.2.3.8 He stated that the Department informed them that it was up to the new owners to negotiate employment conditions with staff. He stated further that they were concerned that the winning bidders were not screened to determine whether they had the required capacity to operate businesses that would ensure that Pilgrims Rest would maintain its status as a heritage site, while also remaining an important tourist destination.

6.2.4 Regarding the propriety of the Department's handling of representations received from businesses occupying premises at Pilgrim's Rest regarding extension of the notice period:

6.2.4.1 The Department responded to the allegation that representations were ignored by stating that it received three requests for renewal of the leases from two business owners, Mr Reinders of The Vine and Ms Paterson of Pilgrim's Pantry, and provided documents in this regard.

6.2.4.2 In respect of Mr Reinders' request for the renewal of the contract for The Vine restaurant, the documents show that on 9 May 2011, the General Manager: Property Management recommended the renewal of the lease agreement with Mr Reinders for a period of 4 years 11 months. The HOD, however on 16 May 2011, approved the renewal for a period of 12 months. A copy of a letter dated 20 May addressed to Mr Reinders was not acknowledged as received by the latter. Mr Reinders himself stated that he did not receive the letter.

6.2.4.3 There is no indication how the request by Ms Paterson was handled, as no documents were furnished by the Department in this regard.

6.2.4.4 During the interview of Ms Maboi, the occupier of Clewer General Store, she stated that since 2010 when she took over the business from the previous lease holder, the late Mr Van Jaarsveld, she had been negotiating the signing of a lease agreement with the property manager, Mr Ngwenya.

6.2.4.5 Ms Maboi indicated that Mr Ngwenya had promised to issue her a month-by-month lease agreement which would regularise her occupation of the premises. She alleged that she was not issued with the promised lease agreement until the time she was served with the eviction notice. In response to the provisional report, the Department contended that the copies of letters were attached. The Department further contended that to the allegation that the eviction notices were served on Scotts Café whose lease was only due to expire in October 2013, it has not been afforded an opportunity to respond.to the letter allegedly received by Scott's Café dated 1 January 2008 from it.

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 Regarding the alleged unlawful or improper awarding of tenders:

7.1.1 Bidding Process

7.1.1.1 There is a dispute regarding the number of members appointed by the HOD to the Bid Specification Committee. . Whereas the Department contended that the HOD had appointed **five (5)** members of this committee, the correspondence dated 25 August 2011 adressed to the HOD by Ms GM Molotsane indicates that the HOD approved the appointment of six (6) members on 29 August 2011. The six (6) members appointed are Mr G Mashego, Mr B Sekwane Ms M Lubisi, Ms S Shube, Ms F Netshingefhe and Ms DA Mbatha. I am accordingly not persuaded by the Department's argument. A reasonable conclusion can only be that there were six(6) persons appointed to the Bid Specification Committee..

7.1.1.2 It is in dispute whether the bid specification documents relating to the 22 buildings that were eventually put on tender were only signed by **three (3)** members of the Bid Specification Committee, namely Mr G Mashego, Mr B Sekwane Ms M Lubisi as contended by the Department. A perusal of the tender documents relating to The Vine, Golf Course and Mrs Mac Shop at Pilgrim's Rest indicated that in addition to the three members referred to above, Mr TN Ngwenya also signed as a member of the Bid Specification Committee on 4 October 2011. The contention of the Department in this regard is not supported by evidence.

7.1.1.3 The Department's contention that the three members, who attended the Bid Specification Committee meeting where the specifications were approved,

constituted a quorum appears to be based on incorrect information that said Committee comprised of 5 members. On the basis of the of the correspondence referred to at paragraph 7.2.1.1 above, the Bid Specifications Committee consisted of 6 members. Therefore in terms of the applicable legal prescript which will be dicussed under the Legal and Regulatory Framework heading, three (3) members of the Committee do not constitute the prescribed quorum of 60% out of the total membership of six (6).

7.1.1.4 It is not clear in which capacity Mr TN Ngwenya attended the meeting, ostensibly participated in the specification processes and signing the bid documents as he was not among the officials appointed to the Bid Specification Committee. The Department's contention that he was called to clarify certain issues since he is the manager in Pilgrim's Rest, is not consistent with him having signed the tender documents as alluded to above.

7.1.1.5 Consequently Mr TN Ngwenya's signing of the tender documents when he is not a member of the Bid Specifications Committee is irregular

7.1.1.6 It is not disputed that the Department advertised the leasing of buildings at the Pilgrim's Rest in the Provincial Supply Chain Management Bid Bulletin Volume no. 183 of October 2011, in October 2011 with the closing date indicated as November 2011 in.

7.1.2 Bid evaluation and adjudication processes

7.1.2.1 It is not disputed that the Public Protector was provided with two different copies of the attendance register of the BAC meeting held on 6 March 2012, one reflecting 6 names and the other reflecting 8 names of people who attended the meeting. If it is taken into account that Ms Shirindza's confirmed her attendance of the meeting as an advisor, but did not sign the attendance

register, it means that a possible 9 people were present during the meeting, while the minutes of the meeting reflected that 7 people attended the meeting.

7.1.2.2 The evidence and information alluded to above therefore reveal serious discrepancies in the availability and the accuracy of the records of the meetings of the BEC and the BAC during the bid evaluation and adjudication processes.

7.1.2.3 It is not disputed that the criteria utilised in the evaluation of the bids for Caravan Park, Highwaymans Garage, Clewer General Dealer and Barettas Guesthouse was 80/20. It is also common cause that the HOD approved deviation from the evaluation criteria of 90/10 with regard to these particular bids. The BEC report of 2 March 2012 mistakenly reported the situation as if the evaluation criteria was changed from 80/20 to 90/10 instead of 90/10 to 80/20.

7.1.2.4 In dispute, is whether bids received for Caravan Park, Highwaymans Garage, Clewer General Dealer and Barettas Guesthouse were below the 90/10 threshold. The Department's explanation that the adjudication criterion of 90/10 that was stipulated by the Bid Specification Committee was changed to 80/20 in respect of the four buildings, because the bids received were below the 90/10 threshold, is not supported by the available evidence since all bids were above R500 000.00.

7.1.2.5 An examination of the bids in relation to the four buildings reveal that only the Golf Course received tenders that were below the R500 000 threshold over the contract period.

7.1.2.6 The approval by the HOD of the memorandum, that purported to authorise the changing of the adjudication criteria, is problematic as the memorandum requesting approval for changing the adjudication criteria was written on 24

February 2012, which was before the first meeting of the Bid Evaluation Committee held on 2 March 2012. This contradicts the Department's response, to the Public Protector's question regarding the Bid Committee's access to the tender documents, wherein the Department stated that "*The Bid committees only have access of tender documents during the sittings for security measures.*"(sic)

7.1.2.7 The fact that the memorandum was written on 24 February 2012 while the Bid Evaluation Committee met on 2 March 2012 clearly contradicts the above assertion. There is also no indication that the memorandum was submitted to the Bid Specification Committee for consideration. However, a perusal of the said memorandum indicates that it was approved by the HOD on 28 February 2012.

7.1.2.8 It is not disputed that the contract to lease Building A74, Highwayman's Garage, was awarded to Mangwanyane Trading whose actual bid price did not justify it having been awarded the highest points.

7.1.2.9 The explanation by the Department that the discrepancy between the price reflected on the tender document and the one used in adjudicating the bid, and the one subsequently quoted in the appointment letter, was a genuine typographical error is disingenuous. It does not address the factual situation that there were 4 bidders who submitted higher prices than Mangwanyane Trading, who would not have scored the highest number of points and would thus not have been awarded the tender, had the correct tender price been used in adjudicating the bid. We do not need rocket science to conclude that this bid was inferior to its competitors. The question that remains an answered is why everyone in the room having a copy of this bid, indicating R10,416.00, considered it a superior bid of R19, 100.00. It is difficult not to consider the possibility that the minutes may have been doctored after the

meeting. If the Department is being honest in saying there was a genuine typographical error surely the letter of award should never have been written and the process should have been referred back to the BEC.

7.1.2.10 It is also curious that this obvious error by the BEC was not picked up by the BAC in its scrutiny and adjudication of the awards and resulted in the HOD wittingly or unwittingly giving Mangwanyane Trading undue advantage over other bidders. Equally curious is why the obvious "error" was also not picked up by the HOD, who proceeded to award the contract to one of the lowest bidders as the award letter reflected the correct bid amount being R10 416,00 and not the R19 100,00 that allegedly confused the BEC.

7.1.2.11 It is not disputed that Matletle Construction, one of the winning bidders' declarant, failed to reveal the full particulars required in subparagraph 2.1 to 2.6 of the SBD4 tender documents The Department's response in this regard does not explain why it was deemed not important to have the full particulars of the declarant as is required by the bid document. It is a requirement that bidders make a declaration and complete the required information in this regard. No explanation was provided by the Department regarding why thus particular bidder was treated favourably, against the rules.

7.1.2.12 The declarant, as indicated above, went on to complete the other paragraphs relating to whether or not he/she is employed by the state. The information required in subparagraphs 2.1 to 2.6 is not only mandatory, but is also necessary to understanding and to give proper context to the responses given to other questions in the document.

7.1.2.13 It is not disputed that Matletle Construction failed to declare interest in terms of paragraph 2 of the SBD4 document. The Department's contention that the Bidder attached the CIPRO certificate and ID copies that it is not connected

with any person employed by the State is not consistent with the mandatory nature of paragraph 2 as indicated above.

7.1.2.14 It is not disputed that the HOD and the members of the BAC did not sign recommendations relating to a number of bids as indicated at paragraph 6.2.1.6 above. The Department's contention that the failure by the HOD to sign the documents be regarded as an oversight is not convincing given that in total the HOD failed to do so on nine (9) of the bids.

7.2 Regarding the potential of prejudice caused by the Department's actions:

Having decided how the procurement process unfolded, I had to determine if the Department's actions caused prejudice. I decided to defer my decision on this until the application of the law and the relevant prescripts to the factual findings with a view to determining if there was maladministration

7.3 Regarding whether or not the Department gave proper notice to the occupiers of the premises:

7.3.1 Although the Department denied that some of the businesses that were put on tender had expired, its own responses, including its response to the provisional report, confirm that some of the advertised leases were still running at the time the tender was advertised. For example, a copy of a letter dated 1 January 2008 indicates that the Department granted Scott's café an extension of the lease from 1 December 2008 to 31 October 2013.

7.3.2 The Department's contention that the 30 day notice period was reasonable and was agreed upon in the meeting with the Business Chamber on 6 March 2012 is disputed by the affected businesses is only backed by its own minutes while disputed by all other parties. The accuracy of the minutes is doubtful

given that there is no evidence of such minutes ever being distributed to parties and some of the documents recording the tender processes have been changed during the investigation. The Department's further submission in response to the provisional report that the thirty (30) day's notice was in terms of the original agreements is not substantiated by the available evidence, including the disputed minutes submitted by the Department itself.

7.3.2 In the absence of any verifiable agreement on a reasonable and acceptable notice period, I had to rely on general standards of reasonableness regarding would constitute a reasonable notice period to allow businesses to wind up operations and relocate elsewhere. I was unable to accept the argument from the department that 30 days was reasonable. I also took account the reality that renting of new premises would require licensing processes and that employee retrenchment or related packages had to be dealt with within such time line.

7.4 Regarding whether or not the Department's handling of the issuing of notices caused prejudice:

7.4.1 The issue of prejudice shall be determined once the law and the relevant prescripts have been applied to the factual findings with a view to determine if there was maladministration.

7.5 Regarding whether the Department properly dealt with the representations received from occupiers:

7.5.1 It is common cause that the Department received three requests for renewal of the leases from two business owners, Mr Reinders of The Vine Restaurant and Ms Paterson of Pilgrim's Pantry.

7.5.2 It is in dispute whether Mr Reinders received the letter dated 20 May 2012 allegedly addressed to him by the Department informing him about the outcome of his request to have his lease for the The Vine Restaurant extended. The said letter made provision for a signature of acknowledgement of receipt however it was not signed to indicate that it was received.

7.5.3 Since Mr Reinders did not sign an acknowledgement of receipt, which the letter made provision for, and the letter could not have been sent to him by post, as his postal box number was not written on it; it is most probable that Mr Reinders indeed did not receive the letter.

7.5.4 There is no indication how the request by Ms Paterson was handled, as no documents were furnished by the Department in this regard. Therefore no factual finding can be made in this regard.

7.5.5 It is not disputed that the Department allowed Ms Maboi, the occupier of Clewer General Store, to trade from 2010 without a lease agreement. It is also not disputed that Mr Ngwenya had promised to issue her a month-by-month lease agreement which would regularise her occupation of the premises. It is further not disputed that she was not issued with the promised lease agreement until the time she was served with the eviction notice. It is therefore clear that Ms Maboi's representations were not handled properly.

8. LEGAL AND REGULATORY FRAMEWORK

8.1 Regarding the alleged unlawful or improper awarding of tenders:

8.1.1 Principles of public procurement

8.1.1.1 A lawful and accordingly proper procurement process is one that complies with section 217(1) 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***." In *Eastern Cape Provincial Government and others v Contractprops 25 (Pty) Ltd*[2], the Supreme Court of Appeal said that the statutory prescripts in terms of which organs of State are obliged, in concluding agreements for the supply of goods or services, to act openly and in accordance with a system that is fair, equitable, competitive and cost-effective are aimed at "*ensuring good governance in the field of procurement policies and procedures and the priority accorded to fair dealing and equitable relationships among parties to provincial contracts.*" (Emphasis added).

8.1.1.2 Such process must also comply with applicable laws. Key of any of those laws are the Preferential Procurement Policy Framework Act No.5 of 2000 (PPPFA), the Public Finance Management Act No. 1 of 1999 (PFMA), Treasury Regulations and related Prescripts and Internal Institutional policies and related prescripts.

8.1.1.3 Section 2(1)(b) of the PPPFA specifically provides that an organ of state must determine its preferential procurement policy and implement it within the following framework:

(i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in

2 Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA).

paragraph (d)[3] provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d)[4] provided that the lowest acceptable tender scores 80 points for price.

8.1.1.4 Section 2(f) of the PPPFA specifically provides that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e)[5] justify the award to another tenderer.

8.1.1.5 According to the PPPFA Regulations 6 and 5 respectively the procurement of leases for traders to rent premises at Pilgrim's Rest required a tender process based on 90/10 if the Rand value of the bids were above R1 million and based on 80/10 if the Rand value of the bids were equal to, or above R30 000 and up to a Rand value of R1 million.

8.1.1.6 In terms of PPPFA Regulation 8(1)(a) in the event that, in the application of the 80/20 preference point system as stipulated in the tender documents, **all** tenders received exceed the estimated Rand value of R1 000 000, the tender invitation must be cancelled. On the other hand PPPFA Regulation 8(2)(a) states that in the event that, in the application of the 90/10 preference point system as stipulated in the tender documents, **all** tenders received are equal

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3 In terms of paragraph (d) specific goals may include:
(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
(j) implementing the programmes of the Reconstruction and development Programme as published in the Government Gazette No. 16085 dated 23 November 1994.

4 *Supra.*

5 Paragraph (e) provides that any specific goal for which a point may be awarded, must be clearly Specified in the invitation to submit a tender.

to, or below R1 000 000, the tender must be cancelled. In terms of PPPFA Regulation 8(3) an organ of state which has cancelled a tender invitation as contemplated in sub-regulations (1) (*a*) and (2) (*a*) must re-invite tenders and must, in the tender documents, stipulate the correct preference point system to be applied.

8.1.1.7 Section 38(1)(a)(iii) of the PFMA, reinforces the requirement of a **fair, equitable, transparent, competitive and cost-effective** process while section 76(4)(c) mandates Treasury to make regulations or issue instructions to all institutions to ensure compliance with these principles. "(Emphasis added)

8.1.1.7 The important Treasury Regulations and instructions applicable to the Pilgrim's Rest procurement process are the following:

A. Treasury Regulation 16A3.2 a supply chain management system 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);…"

B. Treasury Regulation 16A.3 states that 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*,

"(a) demand management;

(b) acquisition management;

(c) logistics management;

(d) disposal management;

(e) risk management; and

(f) regular assessment of supply chain performance."

C. Treasury 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. It more specifically states that:

"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."

8.1.1.8 In terms of paragraph 4 of the National Treasury Circular dated 27 October 2004, the accounting officer should appoint Bid Specification Committee responsible for compiling bids, Bid Evaluation Committee responsible for evaluating bids received and Bid Evaluation Committee responsible for making the final award or recommending to the accounting officer to make the final award. In terms of paragraph 1 of the aforesaid Circular, accountability is vested with the accounting officer in accordance with sections 36 and 49 of the PFMA.

8.1.1.9 The National Treasury Circular referred to above also states that the bid specification, evaluation and adjudication process must be within the ambit of section 217 of the Constitution as well as the prescripts contained in the PPPFA and the Broad-Based Black Economic Empowerment Act No. 53 of 2003 (BBBEEA) and their associated regulations.

8.1.1.10 Department's Policy on Procurement of Goods and Services provisions applicable to the Pilgrim's Rest procurement process are the following:

(a) Paragraph 5.7.5 of the Department's Policy on Procurement of Goods and Services (SCM policy) provides that *"each member as well as the secretaries of the Bid Specification and the Bid Evaluation Committees shall sign a declaration of interest for each bid adjudication meeting."*

(b) Paragraph 5.8.5 of the SCM policy provides that *"each member as well as the secretaries of the Bid Adjudication Committee shall sign a declaration of interest at each bid adjudication meeting."*

(c) Paragraph 5.7.6 of the SCM policy provides that *"the bid evaluation committee shall ensure that:*

a) All necessary bid documents including mandatory documents have been submitted, completed and duly signed;

b) Bids are evaluated in accordance with the evaluation criteria with the evaluation criteria stipulated in the bid documentation; and

c) Scoring is fair consistent and correctly calculated and applied."

(d) Paragraph 5.8.6 of the SCM policy provides that *"the bid adjudication committee shall ensure that:*

a) All necessary bid documents have been submitted; and

b) Scoring has been fair, consistent and correctly calculated and applied."

(e) Paragraph 5.33.4 of the SCM policy provides that *"a bid evaluation committee is responsible for evaluating bid received in accordance with the evaluation criteria and includes verification of the following:*

a) if the bid complies in all respect with the specification and condition of the bid;

b) *if the bidder completed and signed all the prescribed bid forms to enable the department to evaluate the submitted bid;*

c) *if the bid complies with the quality requirements and conditions; and*

d) *if the bidder has the necessary capacity and ability to execute the contract."*

8.1.1.11 The provisions of the Department's SCM policy referred to above are also reiterated in the Code of Conduct for Bid Adjudication Committees published in terms of the National Treasury Circular dated 24 March 2006.

8.1.1.12 Paragraphs 3.4 and 3.5 of the Code provide that the Bid Adjudication Committee should only consider recommendations/ reports **if at least sixty percent (60%) of its members are present** (in other words to form a *quorum*). For the purpose of continuity and not to delay meetings, the accounting officer/ authority "*may also appoint **secundi** to temporarily replace members that are absent from meetings due to illness, leave, etc. The accounting officer/ authority will also decide whether or not such **secundi** will have the same powers as members.*" (Emphasis added).

8.1.1.13 In terms of paragraph 5.4 of the Code, members shall sign a register at each meeting, serving as attendance register as well as an undertaking to confidentiality of that meeting. This register will also provide for the declaration of interest.

8.2 Principles and concepts underpinning heritage resource management

8.2.1 The term "heritage resource" is defined in the National Heritage Resources Act No. 25 of 1999 (NHR Act) as places and objects of "*cultural significance*", which is defined as "*aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance*". For the purposes of the NHR Act, those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities. "*Cultural significance*" encompasses the natural and built environment, as well as the intangible components of heritage such as indigenous knowledge systems or rituals.

8.2.2 Types of heritage resources as defined in the relevant legislation may include the following:

a) Places, buildings, structures and equipment of cultural significance;

b) Places to which oral traditions are attached or are associated with living heritage;

c) Historical settlements or townscapes;

d) Landscapes and natural features of cultural significance;

e) Geological sites of scientific or cultural importance;

f) Archaeological and paleontological sites;

g) Graves and burial grounds; and

h) Sites related to the history of slavery.

8.2.3 The heritage legislation also makes provision for three grades of heritage resources of national (Grade I), provincial (Grade II) and local (Grade III) significance respectively. A provincial heritage resources authority is responsible for the identification and management of Grade II heritage resources.

8.2.4 Section 5 of the NHR Act provides for the following General principles for heritage resources management, and may therefore have a bearing on the administrative practices of the Department and its management of Pilgrims Rest as a provincial heritage resource:

"5(1) *All authorities, bodies and persons performing functions and exercising powers in terms of this Act for the management of heritage resources must recognise the following principles:*

(a) Heritage resources have lasting value in their own right and provide evidence of the origins of South African society and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival;

(b) every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans;

(c) heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity; and

(d) *heritage resources management must guard against the use of heritage for sectarian purposes or political gain.*

(2) *To ensure that heritage resources are effectively managed —*

(a) *the skills and capacities of persons and communities involved in heritage resources management must be developed; and*

(b) *provision must be made for the ongoing education and training of existing and new heritage resources management workers.*

(3) *Laws, procedures and administrative practices must—*

(a) *be clear and generally available to those affected thereby;*

(b) *in addition to serving as regulatory measures, also provide guidance and information to those affected thereby; and*

(c) *give further content to the fundamental rights set out in the Constitution.*

(4) *Heritage resources form an important part of the history and beliefs of communities and* ***must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management.***

(5) ...

(6) *Policy, **administrative practice** and legislation must promote the integration of heritage resources conservation in urban and rural planning and social and economic development.*

(7) *The identification, assessment and **management of the heritage resources of South Africa must—***

(a) *take account of all relevant cultural values and indigenous knowledge systems;*

(b) *take account of material or cultural heritage value and involve the least possible alteration or loss of it;*

(c) *promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs;*

(d) *contribute to social and economic development;*

(e) *safeguard the options of present and future generations; and*

(f) *be fully researched, documented and recorded."* (Emphasis added)

8.2.5 Section 9 of the NHR Act provides for the rights, duties and exemptions of the State and supported bodies -

"9(1) *All branches of the State and supported bodies must give heritage resources authorities such assistance in the performance of their functions as is reasonably practicable.*

(2) ...

(3) Each State department and supported body must—

(a) maintain and conserve the heritage resources under its control in accordance with standards and procedures set out in regulations by SAHRA in consultation with the Department of Public Works;

(e) Not take any action that adversely affects such a resource unless the authority concerned is satisfied that there is no feasible and prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse effect will be taken;

(f) at the initiation of the planning process of the project, or at least 90 days before taking any action that could adversely affect such heritage resource, whichever is the greater, inform SAHRA of the proposed action and give them a reasonable opportunity to consider and comment on it."

9. ANALYSIS AND CONCLUSION

9.1 Regarding the alleged unlawful or improper awarding of tenders:

9.1.1 The HOD duly established a Bid Specification Committee for the determination of the bid requirements and specifications in terms of the Supply Chain Management Policy of the Department, and Treasury Regulation 16A.

9.1.2 However, the process relating to the determination of the specifications fell short of the standard required for the composition of the Bid Specification Committee,

which is a quorum of 60% was not met. The 60% quorum is stipulated by Paragraph 3.4 of the Code of Conduct for Bid Adjudication Committees issued in terms National Treasury Circular dated 24 March 2006.

9.1.3 As indicated earlier, the Bid Specific Committee members that sat on 04 October, 2012, were only three out of the 6 appointed by the HOD, which amounts to 50%.t attend the meeting of 4 October 2011, where the bid specifications were approved and therefore did not constitute a quorum as per

9.1.4 The attendance and participation (as illustrated by his/ her signature on the Bid Specification Documents) of the fourth attendee, T Ngwenya, was contrary to Paragraph 3.5 of the Code referred to above as –

(a) He was not duly appointed by the HOD as a *secundus* in the place of members temporarily not available; or

(b) he/ was not co-opted to the Committee in an advisory capacity,

(c) he/ not was duly authorized to take part of the decision making process as per delegation by the HOD; and

(d) he did not submit the required declaration of interest.

9.1.5 The decisions taken by the Bid Specification Committee in its meeting, of 4 October 2011, are therefore invalid.

9.2 Bid evaluation and adjudication process

9.2.1 The failure to sign a declaration of interest by the Bid Evaluation and the Bid Adjudication Committees, for the meetings of 18 and 29 May 2012 respectively, was in violation of the Department's SCM policy which provides that each

member of the Bid Specification Committee, the BEC and the BAC is required to sign a declaration of interest for each bid adjudication meeting. Furthermore, one of the officials who attended the BAC meeting, of 6 March 2012, did not sign the declaration of interest.

9.2.2 The discrepancies between the information in the attendance register and the minutes of the meetings of the BAC of 6 March 2013 mean that there is no accurate written record and proof "*reflecting in a brief, clear and impartial manner the decisions of the Committee*", as required by the *Code of Conduct for Bid Adjudication Committees* and other Treasury guidelines.

9.2.3 The failure by the BEC to ensure that Matletle Construction completed paragraph 2 of the SBD4 tender documents in full, is contrary to the provision of paragraph 5.7.6.1 of the SCM policy which states that the committee must ensure that "*all necessary bid documents including mandatory documents have been submitted, completed and duly signed.*" It is also contrary to paragraph 5.33.4.2 of the SCM policy which places the responsibility on the BAC to verify "*if the bidder completed and signed all the prescribed bid forms to enable the department to evaluate the submitted bid.*"

9.2.4 The changing of the adjudication criteria of 90/10 that was stipulated by the Bid Specification Committee in respect of four buildings (without the involvement of the Bid Specification Committee and with or without the approval of the HOD) was in violation of section 10(2) of the Preferential Procurement Regulations, 2001 which states that "*In the event that, in the application of the 90/10 preference point system as stipulated in the tender documents, all the tenders received are equal to, or below R500 000, the tender must be cancelled.*" It was also in contravention of the SCM policy which provides that the BEC should ensure that tenders are evaluated in accordance with the evaluation criteria stipulated in the bid documentation.

9.2.5 The contract to lease Building A74, Highwayman's Garage awarded to Mangwanyane Trading, whose bid did not score the highest points on price or the highest points overall, was in violation of section 2(1)(f) of the Preferential Procurement Framework Act which provides that the contract must be awarded to the tenderer who scores the highest points. It was also in breach of the SCM policy which states that the Bid Evaluation and Bid Adjudication Committees should ensure that scoring has been fair, consistent and correctly calculated and applied.

9.2.6 The instances of unsigned recommendations by all the members of the BAC, as well as final awards not properly signed and dated by the HOD may not only be further illustrations of incomplete record keeping by the Department, but may also be impediments to vesting proper accountability for the procurement processes and decisions with the Accounting Officer (HOD) in terms of sections 36 and 49 of the PFMA.

9.3 Engagement with current leaseholders and consultation with affected persons and communities

9.3.1 In terms of the NHR Act, the Department is the custodian of Pilgrim's Rest as a provincial heritage resource and obliged to protect, maintain and preserve it as a heritage resource under its control. Furthermore, the Department is obliged to refrain from taking any action that might adversely affect such a resource unless the there is no feasible and prudent alternative to the taking of that action and the Department ensured that all measures that can reasonably be taken to minimise the adverse effect, will be taken.

9.3.2 A heritage resource such as Pilgrim's Rest must, in terms of the NHR Act, *"be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management."* In the case of Pilgrim's Rest,

the leaseholders of the buildings in the town, their employees, and the community play a crucial role in partnership with the Department in the management and the conservation of the tangible features of the town in the form of maintenance, preservation and sustainable use of buildings, places and objects of historical significance, while also safeguarding the intangible aspects of the town as a living heritage by providing access to the public and preserving its popular memory.

9.3.3 The project by the Department to ensure that lease agreements in place for the business owners and residents came about as a result of concerns and resolutions of the Mpumalanga Provincial Legislature regarding the decline in economic development and tourism, infrastructure maintenance and development at Pilgrim's Rest Heritage Site, as well as delays in its registration as a National and potential World Heritage Site.

9.3.4 These concerns, as well as my following observations of the manner in which the procurement process is being handled, does not inspire a great deal of confidence that the Department has taken all measures that can reasonably be taken to minimise the adverse effect or potential adverse effect that such a large scale transition of the businesses to new leaseholders might have on both the tangible and intangible heritage aspects of the town:

a) The Department's assertion that the 30 day notice period to vacate the buildings was agreed upon with the business chamber could not be substantiated.

b) The assertion that the successful bidders were prepared to absorb the current staff could also not be substantiated. The fact is that there is no formal arrangement or provisions in place to facilitate the protection of the security of employment of the employees.

c) The Department's response to the allegation that representations for renewal of the leases were ignored is not convincing. There was no indication how the letter addressed to Mr Reinders was delivered to him. The Department failed to indicate how it had dealt with representations made by Ms Paton and Ms Maboi.

d) The Department's response to the allegation that eviction notices were served on businesses whose leases had expired was untrue in so far as it related to the Scotts Café whose lease was only due to expire in October 2013.

e) There is no indication that the Department consulted with any stakeholders that may be involved in the maintenance or preservation of the Pilgrim's Rest Heritage Site as a heritage resource as envisaged by the NHR Act, including the Mpumalanga Provincial Department of Culture, Sport and Recreation, the Mpumalanga Provincial Heritage Authority or the provincial "sector" Departments of Agriculture, Rural Development and Land Administration; Economic Development, Environment and Tourism.

9.4 Validity of the new lease contracts

9.4.1. In this matter, there were irregularities in the initial demand management process, and the decisions of the Bid Specifications Committee were unauthorized and therefore unlawful. It should follow that declaration of invalidity of the administrative action that is the *fons et origo* (source) of the rest of the procurement process, must have an impact on the validity of the whole process.

9.4.2. In addition, there were a number of incidents of non-compliance with the requirements contained in peremptory prescripts of the PFMA, the Treasury

Regulations, the Preferential Procurement Preferential Framework Act, 2000 and Preferential Procurement Regulations. The breaches of these statutory prescripts relate to material aspects of the procurement process because incidents such as the changing of the adjudication criteria, the absence of declarations of interests, incorrect calculation of points and incomplete tender documents all have a direct and significant impact on the integrity of the processes that the Constitution and the rest of the legislative framework seek to preserve.

10. FINDINGS

I make the following findings:

10.1 Regarding the alleged unlawful or improper awarding of the leasing tenders to businesses at Pilgrims' rest, I find that:

10.1.1 The allegation of unlawfulness and impropriety with regard to the award of the tender for the leasing of business premises at Pilgrim's Rest is substantiated.

10.1.2 The process was characterised by gross irregularities and maladministration. The irregularities included:

(1) a Bid Specification Committee without the requisite 60% quorum;
(2) Giving a high score for price to a bidder whose bid was one of the lowest. The bid was adjudicated and scored on the understanding of its rent offer being R19 100, 00 when it was in fact R 10 416,00;
(3) No due diligence exercise was carried out to assess functionality and sustainability of businesses considered for leases;
(4) Suspected fraud in that the letter of appointment for the bid favourably considered with the understanding that its price was R19, 100 correctly stated that the rent amount was R10 416,00;

(5) Evaluation criteria changed from 90:10 to 80:20 for some of the tenders with dubious reasons given for such change and how the change was processed

(6) No proper records were kept resulting in a changing narrative given during the investigation on issues such as why the evaluation criteria changed from the advertised 90:10 to 80:20 for some of the tenders.

10.1.3 The business that got the leasing contract on account of the price of R19 100, did not qualify for the contract and the conduct involved in awarding such contract was accordingly unlawful, improper and constitutes maladministration

10.2 Regarding whether or not the Department's actions in the awarding of the tenders caused prejudice, I find that:

10.2.1 Businesses that legitimately qualified to be awarded the tenders and many of which were running sustainable businesses beneficial to the community were prejudiced by or suffered an injustice due to the Department's maladministration with regard to the ward of the new leasing tenders.

10.3 Regarding whether or not the Department failed to give proper notice to businesses occupying the premises at Pilgrim's rest, I find that:

10.3.1 The allegation regarding insufficiency of notice is substantiated. The thirty (30) day notice did not provide reasonable time for businesses that had been running for years to wind up their operations or make fair arrangements for employees.

10.4 Regarding the Department's alleged improper handling of the request by existing businesses to reconsider its decision to grant a 30 day notice period, I find that:

10.4.1 The allegation that the handling of the request to review the decision to grant a thirty day notice was improper is substantiated. The Department did not apply its mind to the request and the fairness of its previous decision to serve eviction notices.

10.5 Regarding whether or not the Department's handling of the issuing of notices caused prejudice, I find that:

10.5.1 The failure by the Department to give proper notice and to review the notice period when requested to do so did prejudice business owners, the community and sustainability of Pilgrim's Rest as a national heritage site and tourist attraction.

10.5.2 The conduct of the Department in this regard constitutes improper conduct and maladministration.

11. REMEDIAL ACTION

The remedial action to be taken in terms of section 182(1) (c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act is the following-

11.1 The HOD must –

11.1.1 Cancel the awarding of the contracts for the new shop leases in Pilgrims Rest;

11.1.2 Embark on a new procurement process for the conclusion of lease contracts for buildings on the Pilgrim's Rest Heritage Site that are currently without any valid lease agreements;

11.1.3 Ensure that the procurement process complies with the relevant laws and related prescripts as well as the standards of fairness, equitability, transparency,

competitiveness and cost-effectiveness as required under section 217 of the Constitution; and

11.1.4 Ensure that the process is "*heritage compliant*" to minimise any adverse effect on the maintenance and conservation of the Pilgrim's Rest Heritage Site and with due regard to the interests of all stakeholders as envisaged in the NHR Act, including –

a) the affected business owners and their employees,

b) individuals or organizations representing the interests of the community; and

c) institutions that share responsibilities for the maintenance and conservation of Pilgrim's Rest as a Provincial Heritage Resource, such as the Mpumalanga Provincial Department of Culture, Sport and Recreation, the Mpumalanga Provincial Heritage Authority and provincial sector Departments of Agriculture, Rural Development and Land Administration; Economic Development, Environment and Tourism.

11.1.5 Ensure that owners of current businesses that are not successful in the new bidding process are given adequate vacation notices which should not be less than three months.

11.1.6 Review record-keeping systems to identify and remedy the gaps alluded to in this report;

11.2 The HOD and the MEC must deal with the incidences of non-compliance with the PFMA, the Department's SCM policy and applicable prescripts, as well as any

unauthorised, irregular or wasteful and fruitless expenditure arising from such failures and non-compliance, and must also take effective and appropriate disciplinary steps in terms of Section 38(1)(h) of the PFMA against any official of the Department who made or permitted fruitless and wasteful expenditure.

12 MONITORING

12.1 The MEC of the Department of Public Works, Roads and Transport in Mpumalanga must within 30 days from the date of this report submit an implementation plan to me indicating the manner in which the remedial action taken in paragraph 10 will be implemented; and

12.2 The MEC of the Department of Public Works, Roads and Transport in Mpumalanga must within 21 days of submission of the implementation plan to me provide a progress report regarding the implementation of the remedial action taken in paragraph 10.

12.3 I will monitor the implementation of the remedial action taken in paragraph 12 over regular intervals.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19 / 12 / 2013

Assisted by: Mr. S Dube, Provincial Representative: Mpumalanga
Adv. N van der Merwe, Acting Manager: Knowledge Management