REPORT: PASSENGER RAIL AGENCY OF SOUTH AFRICA / DIKIZA RAILWAY AND CIVIL ENGINEERING CC ["DIKIZA"]

1. INTRODUCTION

1.1. This report reflects on an investigation being conducted on behalf of the Board of the Passenger Rail Agency of South Africa (PRASA) into allegations emanating from findings of the Auditor General of South Africa (AGSA), the Public Protector (PP) and subsequent discoveries during these investigations.

1.2. The investigation focuses on the various projects and service providers of PRASA with respect to any instances of fraud, corruption, irregular, fruitless and wasteful expenditure incurred by PRASA employees (past or present) and/or implementing agents, contractors and/or subcontractors and/or associated persons and entities and any irregular and/or unlawful activity relating to the management, implementation and administration of such projects and services rendered.

1.3. An investigation has been commissioned to determine the veracity of these claims, the underlying contracts and any irregularities in the appointment of this supplier.

1.4. This report (in whole or in part) may not, without our prior written consent –

1.4.1. be transmitted or disclosed to or be used or be relied upon by any other person or entity whatsoever for any purposes whatsoever; or

1.4.2. be quoted or referenced to or made public or filed with any third party for any purposes whatsoever, except, in either case to the extent that PRASA is required to disclose this report by reason of any law, regulation or order of court or in seeking to establish its cause of

action/defence in any legal or regulatory proceedings or investigations.

1.5. The investigation is being conducted with the benefit of legal privilege, arising between the Board of PRASA and Werksmans.

2. METHODOLOGY

2.1. The process followed in compiling this report consisted of the collection of raw information from various open source databases and the Internet.

2.2. Where so required, underlying documents and data relied upon can be made available on request.

2.3. This process includes scrutiny of over one billion separate pieces of internally collected data in the form of documents, investigation-results and audit-results.

2.4. The raw information is then collated into a single format which depicts basic information relating to each entity under scrutiny.

2.5. The collated information is then analysed with a view to determine any obvious indicators of potential risk.

2.6. This report reflects the analysed conclusions of potential and actual risk between levels 1 to 5 thus far (out of 5 possible levels).

2.7. Level 1 risk factors reflect clinical indicators of any adverse financial records as registered on the databases. These would include:

2.7.1. Judgments obtained with respect to outstanding debt obligations;

2.7.2. Material default payments to third parties.

2.8. Level 2 risk factors reflect the result of an analysis of the integrated and collated data. This process entails the objective consideration of less obvious factors which may suggest risk. These would include:

2.8.1. Potential risk reflected in registered fixed assets and credit facilities;

2.8.2. Any potential lifestyle or financial risk factors.

2.9. Level 3 risk factors reflect on any additional risk factors concluded through the subjective analysis of the integrated data. These would include:

2.9.1. Potential conflicts of interest and apparent no arms-length relationships;

2.9.2. Any risk factor concerning conflicting registered information;

2.9.3. Possible or existing allegations of criminality;

2.9.4. Any other additional visible potential risk factors.

2.10. Level 4 risk factors are the results of more in-depth audits and investigations which require the integration of risk factors levels 1 to 3 to be combined with material internal documentation, interviews of relevant persons, assessing existing allegations that may emanate from whistle-blowers/complainants/victims or state law enforcement or Chapter 9 institution-related investigations and results of internal/external audits and investigations[1]. Level 4 risk factors consider level 1 to 3 assessments of associated persons, family members and business interests held by primary directors.

[1] This report does not include this level of risk assessment

2.11. Level 5 risk assessments lead to the formulation of specific allegations of misconduct, criminality or unlawful actions. Hypotheses are developed at this level of risk assessment with a view to give direction, guidance and a determinable scope for specific investigations. Such investigations will set out to determine the veracity of such allegations and collect the relevant evidence in support thereof in the lawfully required manner. The results of such investigations may be any or a combination of:

2.11.1. Civil procedural legal action taken to address and remedy issues;

2.11.2. Criminal investigations with a view to seek prosecution;

2.11.3. Internal disciplinary actions.

2.12. In addition to the levels of risk assessments and investigations, legal analysis, opinions and findings (where relevant) insofar certain identified transactions are also set out herein.

3. BACKGROUND:

3.1. Dikiza was appointed by means of a confinement process in and during November 2013, as part of a program to appoint additional suppliers in order to improve after-hours reaction time for infrastructure repairs ("*the Infrastructure 2013 program*"). The implementation of this program was approved in terms of a memorandum styled "Request to augment the capacity within Infrastructure" (the "*November 2013 memorandum*") dated 26 November 2013 and signed by the following signatories:

3.1.1. Requested by: Daniel Mtimkulu (then Executive Manager Engineering Services);

3.1.2. Recommended by: Maishe Bopapi (then Senior SCM Manager);

3.1.3. Recommended by: Mosengwa Mofi (then CEO PRASA Rail);

3.1.4. Approved by: Lucky Montana (then GCEO);

3.1.5. Amount Approved: R68,000,000 per annum; and

3.1.6. Period: 2 years (From 1 April 2014 to 31 March 2016).

3.2. The definition of confinement, according to the PRASA SCM policy signed in 2009 para 11.3.7, a Confinement/Single Source occurs where the needs of the business preclude the use of a competitive bidding process and for practical reasons only one bidder is approached to quote for goods and services.

4. **Level 4 Risk Factors**

4.1. Findings of the mentioned confinement process, identified to date, are as follows:

4.1.1. The manner of selection of suppliers to participate in the Infrastructure 2013 program did not follow proper SCM processes.

4.1.2. Staff members at PRASA Rail SCM and PRASA Engineering Services confirmed that the identification and selection of suppliers to participate in Infrastructure 2013 program was solely undertaken by the end user, D Mtimkulu (then Executive Manager Engineering Services), without the involvement of SCM;

4.1.3. PRASA Rail SCM and Engineering Services have been unable to provide the investigation team with any documentation explaining the identification and selection process;

4.1.4. Only certain of the service providers identified have actually been contracted in the Infrastructure 2013 program. The remainder out of the 27 recommended in the memorandum have never received contracts.

5. **Level 5 Risk Factors**

5.1.1. The budget for the Infrastructure 2013 program was to be capped at R68 million annually, and the Infrastructure 2013 program was envisaged to run over a 2-year period, which implies an effective value of R136 million;

5.1.2. The investigation team have however noted that only GCEO approval was obtained for the infrastructure program, and in granting such approval the GCEO exceeded his delegation of authority, which is limited to transactions not exceeding R100 million;

5.1.3. More significantly, the total value of contracts, received to date, exceeds R575 000 000, which is in excess of the envisaged program value in the November 2013 memorandum of R136 million;

5.1.4. Individuals at PRASA Rail SCM and PRASA Engineering Services confirmed that the determination of contract values and periods awarded to each supplier was solely undertaken by D Mtimkulu.

5.2. The memorandum regarding the Infrastructure 2013 program was envisaged to run over a 2-year period.

5.3. A detailed assessment of whether work was distributed equitably among the suppliers and in terms of their contracts, as well as whether the suppliers' contracts envisage the scope of work for which they were paid should be investigated further.

6. DIKIZA RAILWAY AND CIVIL ENGINEERING

6.1. Dikiza commenced as a close corporation in 2007 and is a registered supplier at PRASA in terms of a contract (HO/INFRA/254/04/2014) for ad-hoc repair work, call out and technical support, with commencement date 1 April 2014 and completion date 31 March 2016.

6.2. Ad-hoc work was performed by Dikiza for PRASA in terms of this contract.

6.3. The contract is a 2-year contract, signed on 30 June 2014 by L Montana (PRASA) and on 22 April 2014 by L Phetla (Dikiza). The contract price was R50 million.

7. LEGAL OPINION ON CONFINEMENTS

7.1. INTRODUCTION

7.1.1. During the course of our investigations, the investigative team identified various service providers of PRASA, whose engagement with PRASA stemmed from "confinements" purportedly authorised by 4 PRASA internal memoranda dated 2 May 2012, 14 March 2013, 12 December 2014, and 26 November 2013 relating to the PRASA Supplier Development Program ("SDP") and a request to "Augment Capacity" ("the confinements").

7.1.2. We have been requested by the Board of PRASA to provide an opinion on the lawfulness of the process followed by PRASA in respect of the confinements after due consideration of the applicable laws and in terms of the PRASA SCM policy in force at the time.

8. **BACKGROUND:**

8.1. During the course of PRASA's operations there are instances where, due to circumstance, a service provider needs to be appointed by single source/ Confinement which is outside of the normal SCM procurement processes. This process is governed internally by PRASA in terms of its current SCM Policy.

6.1.1. On or about 2 May 2012 a recommendation report ("Memo 1") was authored and recommended by Maishe Bopape, then Senior Manager: Supply Chain Management PRASA Rail ("Bopape"). In terms of Memo 1, its purpose was to *inter alia:*

6.1.2. Seek approval for a confinement appointment of two service providers, Plasser Rail South Africa (Pty) Ltd ("Plasser") and Isongo Rail ("Isongo"), to perform urgent services in the Perway sector of PRASA; and

6.1.3. Seek approval of the SDP concept and the authority to action such a plan.

6.2. The motivation in Memo 1 sets out *inter alia* the following:

6.2.1. The Perway infrastructure of PRASA had dilapidated to such an extent that it required immediate attention and refurbishment. The dilapidation was so severe that services and safety were being imperilled. Therefore, there was no time to proceed with a formal tender process. There were 4 tenders advertised by PRASA during late 2010 and late 2011, however these tenders were not concluded due to the fact that approval to seek confinement was granted;

6.2.2. The emergency appointments were instrumental in correcting the dilapidated infrastructure and therefore, in the opinion of the author, should be sustained; and

6.2.3. Due to the highly specialised skills required in providing the Perway services, there existed a small pool of potential service providers. The skills required acted as a barrier to the entry of other service providers. PRASA intended to introduce black led and owned entities in the Perway discipline and 9 companies were earmarked to participate in the SDP.

6.3. The ultimate recommendations that were approved (by the then GCEO Mr Montana) in Memo 1 were:

6.3.1. The confinement appointments of Plasser and Isongo for contract values of R14 Million and R6 Million respectively for a period of 6 months each; and

6.3.2. The authorisation to initiate the strategy to create the SDP which would include the B-BBEE companies referred to in Memo 1.

6.4. On or about 14 March 2013 a memorandum was authored and recommended by Bopape ("Memo 2"). In terms of Memo 2, its purpose was to *inter alia:*

6.4.1. Request for the confinement of the appointments of the B-BBEE entities identified in Memo 1;

6.4.2. Introduce and implement a training, development and accreditation program for the B-BBEE entities identified in Memo 1 to assist them in executing their mandates; and

6.4.3. To introduce urgent interventions to address the problems in PRASA's rail network.

6.5. The motivation in Memo 2 sets out inter alia the following:

6.5.1. The purpose of the SDP is to increase competition, reduce pricing, and to distribute the contracts to a bigger pool of service providers by developing entities from previously excluded groups in the Perway space;

6.5.2. The entities in the SDP will be entities that are not currently active in the Perway and Infrastructure space and which will be up-skilled and accredited in this regard;

6.5.3. That a further 4 B-BBEE entities be included in the SDP, in addition to the 9 entities approved in Memo 1; and

6.5.4. Detailed the training and accreditation to be implemented in the SDP.

6.6. The ultimate recommendations that were approved (by the then GCEO Mr Montana) in Memo 2 were:

6.6.1. That the 9 entities referred to in Memo 1 and the 4 referred to in Memo 2 be confined appointments to the SDP; and

6.6.2. The implementation of the SDP.

6.7. The recommendations in Memo 2 were approved subject to the following requirements being implemented:

6.7.1. Ratification of the SDP and the B-BBEE entities selected by the Tender Procurement Committee ("TPC") of PRASA, as required by the SCM policy;

6.7.2. Selection by Group SCM of an additional 5 B-BBEE entities for the SDP;

6.7.3. Selection of 7 B-BBEE entities from the Women In Rail Project to participate in the SDP; and

6.7.4. A more transparent and competitive process be developed to ensure allocations of contracts between the 25-preferred list of suppliers [in the SDP] in the Perway and Infrastructure space.

6.8. On or about 12 December 2014 a memorandum ("Memo 3") was authored and recommended by Josephat Phungula, the then Group Chief Procurement Officer. In terms of Memo 3, its purpose mirrored that of Memo 2 which was to *inter alia:*

6.8.1. Request for the confinement of the appointments of the B-BBEE companies identified in Memo 1;

6.8.2. Introduce and implement a training, development and accreditation program for the B-BBEE entities identified in Memo 1 to assist them in executing their mandates; and

6.8.3. To introduce urgent interventions to address the problems in PRASA's rail network.

6.8.4. The motivation in Memo 3 sets out *inter alia* the following:

6.8.5. The purpose of the SDP is to increase competition, reduce pricing, and to distribute the contracts to a bigger pool of service providers by developing entities from previously excluded groups in the Perway space;

6.8.6. The entities in the SDP will be entities that are not currently active in the Perway and Infrastructure space and which will be up-skilled and accredited in this regard;

6.8.7. That a further 26 B-BBEE entities be included in the SDP, in addition to the entities approved in Memo 1; and

6.8.8. The training and accreditation to be implemented in the SDP was detailed.

6.9. The ultimate recommendations that were approved (by the AGCEO Ms Ngoye) in Memo 3 were:

6.9.1. The revised list of the B-BBEE entities (contained in Memo 3) was to be incorporated into the SDP;

6.9.2. Suppliers on the list will be allocated assignments in line with areas of speciality following the SCM process. All areas of supply covered, in terms of the submission, have more than 2 suppliers competing.

6.10. On or about 26 November 2013 a memorandum ("Memo 4") was authored and recommended by Daniel Mtimkhulu, the then Executive Manager: Engineering Services. In terms of Memo 4, its purpose was to *inter alia:*

6.10.1. Request approval to augment the capacity and improve reaction time for the infrastructure repairs on an ad-hoc basis and plant hire for work performance after hours; and

6.10.2. Approve the confined appointment of a list of service providers to assist with the purpose mentioned in 13.1 above.

6.11. Memo 4 was not related to the SDP. This memorandum is relevant to Dikiza and all the infrastructure entities.

6.12. The motivation in Memo 4 sets out *inter alia* the following:

6.12.1. Due to the fact that PRASA internal personnel are over extended on the more cumbersome internal projects, PRASA required the urgent assistance of external service providers to provide ad-hoc technical support on other projects;

6.12.2. The list of providers that have been selected for the confined appointment have been selected based on them having the requisite capacity, plant hire capability, particular knowledge of infrastructure, skills, accessibility, minimum reaction time and the ability to assist PRASA in restoring its network.

6.12.3. The envisaged technical support agreements that would be entered into with these providers would endure for only two years.

6.13. The ultimate recommendation that was approved (by the then GCEO Mr Montana) in Memo 4 was:

6.13.1. The list of entities contained in Memo 4 was approved in line with the Infrastructure Technical Support Procedure and that the value of such work was to be capped at R68 million annually for 2 years.

7. **Analysis of The Memoranda: Some points to note and areas of concern:**

8. **Memo 1:**

8.1. The confinement approved was only for Plasser and Isongo (for a cumulative contract value of R20 million);

8.2. The approval of the SDP and the entities identified therefor was only to the extent that the requestors may commence constructing the SDP with those entities in mind.

9. **Memo 2:**

9.1. The entity that would be responsible for the training of the B-BBEE entities would be DB Mobility Networks Logistics and "their local representative" Siyaya db Engineers in terms of a Memorandum of Understanding between PRASA and these two entities;

9.2. It was intended that the SDP entities only commence their work, after undergoing proper training and accreditation, in February 2013 for a period of 24 months, or the depletion of the contract value, whichever came first;

9.3. In order to assist the entities in commencing their work, the parties would be paid a mobilization fee ranging from between 5% and 15% of the actual contract value. This fee would be made available to an entity after the successful completion of the training and accreditation of that entity;

9.4. The available budget that was identified in the memo was R427 million however the memo states that the overall value of each contract will be in line with the GCEO's delegated authority;

9.5. The memo relies on section 11.3.7 of the PRASA SCM policy to support the motivation for the confinement but it does not go so far as to state what the actual section states; and

9.6. It states that the Network is again in a deteriorated state that requires urgent attention. This is 3 months after the expiry of the contracts

extended under Memo 1, which extensions were purportedly required to improve and maintain that very network. No explanation is proffered as to why the R20 million previously spent in this regard was not sufficient.

10. **Memo 3:**

10.1. This Memo is a duplication of Memo 2, save for a few amendments and additions;

10.2. The memo purports to regurgitate the list contained in Memo 1, however one entity was added to the list, namely Vossloh South Africa (Pty) Ltd. This entity has been implicated in other alleged irregularities and is subject to a separate investigation;

10.3. The 26 entities named in Memo 3 purport to be a revised list of entities which comprise both the old (already approved SDP companies) and the new ones. This is not the case as the new entities mentioned in Memo 2 do not appear on this revised list;

10.4. The memo repeats Memo 2 in that it states that the entity that would be responsible for the training of the B-BBEE entities would be DB Mobility Networks Logistics and "their local representative" Siyaya db Engineers in terms of a Memorandum of Understanding between PRASA and these two entities;

10.5. The memo repeats Memo 2 in that it states that they intend the SDP entities to commence their work, after having received proper training and accreditation, in February 2013 for a period of 24 months, or the depletion of the contract value, whichever came first. We emphasise that the memo is dated 12 December 2014 (already a year into the period). This would appear to be a simple cut and paste from Memo 2

without even having due regard to the inapplicability of this statement by virtue of the passage of time;

10.6. The memo repeats Memo 2 in that it states that in order to assist the entities in commencing their work, the parties would be paid a mobilization fee ranging from between 5% and 15% of the actual contract value. This fee would be made available to an entity after the successful completion of the training and accreditation of that entity;

10.7. The available budget that was identified in the memo was an additional R500 million however the memo states that the overall value of each contract will be in line with the GCEO's delegated authority;

10.8. Memo 3 also relies on section 11.3.7 of the PRASA SCM policy to support the motivation for the confinement but it does not go so far as to state what the actual section states; and

10.9. The memo again repeats Memo 2 in that it states that the Network is in a deteriorated state that requires urgent attention.

11. **Memo 4:**

11.1. The entities identified to assist with the technical support are purported to have been selected based on the assertion that they possess the requisite skills, qualifications, and capacity. However, a number of the entities contained on this list are also entities identified as part of the SDP (in Memo 3, which is dated after this Memo). It was recorded that the SDP entities were identified as entities that were unskilled and/or new entrants into the Perway and the Infrastructure space thus constituting a direct contradiction to the statement made in Memo 3 regarding these particular entities;

11.2. The Memo states that the value of the technical support agreements is outlined in the "technical call out rates" which were purported to be attached to the Memo. The copy on PRASA's file does not have such an attachment; and

11.3. Bopape records (in manuscript) alongside his recommendation, that the request under the Memo involves a confinement to speedily address huge capacity challenges faced by PRASA whilst the organisation prepares for an expression of interest to broaden coverage in line with the SCM policy.

12. General points to notes as provided by the investigative team after their consultations with Bopape and Letsane Rathaba (Acting Chief Engineer):

12.1. Plasser have been linked as the subcontractor to several of the SDP entities, thus circumventing the very purpose of the SDP.

12.2. The SDP (according to Memo 2 and Memo 3) required a training and accreditation process to be completed by each entity before they could commence work and get paid. None of the entities completed the requisite training course, and only 1 entity was accredited. The SDP entities were paid regardless of this fact. A "learn on the job" approach was adopted.

12.3. In terms of the conditional approval in Memo 2, the requisite involvement by the TPC did not occur, and the subsequent envisaged tender process involving the 25 further SDP entities was not followed.

12.4. In terms of the second recommendation in Memo 2, the requisite SCM procedure between the competing entities did not occur.

12.5. Memo 4 states that the R68 million annual budget would be taken from the Capital expenditure budget, however we have been advised that this ought to have been taken from the Operational expenditure budget.

12.6. The investigation team identified that the list of SDP entities on PRASA's internal database includes entities not even referred to in Memos 1, 2 or 3.

12.7. Internal audit in fact flagged the confinements as irregular in November 2015.

13. LEGAL FRAMEWORK APPLICABLE TO CONFINEMENT AND EMERGENCY PROCUREMENT

13.1. Section 217 of the Constitution of the Republic of South Africa, 1996 places an obligation on organs of State in the national, provincial or local sphere of government, or any other institution referred to in national legislation to, when contracting for goods or services, do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. The Constitution further makes provision for legislation, which provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination, to be enacted.

13.2. It is therefore a constitutional imperative that procurement must take place in terms of a system which is fair, equitable, transparent, competitive and cost effective.

13.3. To give effect to these constitutional requirements, the legislator has enacted framework legislation which regulates public procurement. This legislation is *inter alia*:

13.4. the Public Finance Management Act 1 of 1999 ("the PFMA"), which prescribes the general system for public procurement which must be followed by national and provincial governments, the public entities listed in the PFMA, constitutional institutions, Parliament and provincial legislatures; and

13.5. the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA") which is applicable to public procurement by organs of state in all spheres of government, as defined in the Act. The PPPFA prescribes the framework for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination in public procurement.

14. **THE PFMA**

14.1. Section 49(1) of the PFMA provides that every public entity must have an authority which must be accountable for the purpose of the PFMA. Subsection (2) provides that if the public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity. Therefore, the Board of PRASA is the accounting authority, unless the provincial treasury has approved or instructed that another functionary of PRASA must be the accounting authority.[2]

14.2. Section 50 of the PFMA provides for the fiduciary duties of the accounting authority of a public entity and provides that the accounting authority for a public entity must:

14.2.1. exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

[2] Such approval or instruction would only be given in exceptional circumstances and in accordance with section 49(3) of the PFMA.

14.2.2. act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

14.2.3. on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

14.2.4. seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

14.3. Subsection (2) provides that a member of an accounting authority may not:

14.3.1. act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

14.3.2. use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

15. Subsection (3) provides that a member of an accounting authority must:

15.1. disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

15.2. withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.

15.3. Section 51(1)(a) of the PFMA provides that an accounting authority for a public entity must ensure that that public entity has and maintains *inter alia*:

15.4. effective, efficient and transparent systems of financial and risk management and internal control;

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

15.6. a system for properly evaluating all major capital projects prior to a final decision on the project;

16. Section 51(1)(b) provides that the accounting authority must take effective and appropriate steps to:

16.1. prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

16.2. manage available working capital efficiently and economically.

17. Section 59 of the PFMA provides that an official in a public entity:

17.1. must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

17.2. is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

17.3. must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

17.4. must comply with the provisions of the PFMA to the extent applicable to that official, including any delegations and instructions in terms of section 56; and

17.5. is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.

18. Section 83 of the PFMA deals with financial misconduct of accounting authorities and officials of public entities and provides in subsection (1) that the accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently[3]:

18.1. fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or

18.2. makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

19. Subsection (3) provides that an official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.[4]

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[3] Subsection (2) provides that if the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.

[4] Section 56 allows the accounting authority to delegate any of the powers entrusted or delegated to it in terms of the PFMA, to an official in that public entity or instruct an official in that public entity to perform any of the duties assigned to the accounting authority. However, a delegation or instruction to an official is subject to any limitations and conditions the accounting authority may impose and does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty. The accounting authority may confirm, vary or revoke any decision taken

20. Lastly, an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of sections 50, 51 or 55.

21. The PFMA therefore provides the framework, in accordance with the constitutional requirements, within which the relevant accounting authority must have and maintain the applicable procurement system. The PFMA provides in Section 76(4)(c) that the National Treasury may issue National Treasury Regulations for the determination of a framework for an appropriate procurement and provisioning system.

22. The National Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities:

22.1. The National Treasury promulgated regulations dealing with supply chain management, with specific reference to public procurement, on 15 March 2005 ("the Treasury Regulations").[5]

22.2. Regulation 16A of the Treasury Regulations deals specifically with the procurement of goods and services by the State and in effect echoes the obligations set out in section 217 of the Constitution.

22.3. Regulation 16A6.4 provides that if in a specific case it is impractical to invite competitive bids, the accounting officer or authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting bids must be recorded and approved by the accounting officer or authority.

by an official as a result of a delegation or instruction, subject to any rights that may have become vested as a consequence of the decision.

5 GN R255, Government Gazette 27388, 15 March 2005.

22.4. It is important to note that Regulation 16A is only applicable to:

22.4.1. departments;

22.4.2. constitutional institutions; and

22.4.3. public entities listed in Schedules 3A and 3C to the PFMA.

22.5. PRASA is a public entity listed in Schedule 3B of the PFMA. Thus, Regulation 16A is not applicable to it, unless it has been adopted:

22.6. In PRASA's Supply Chain Management Policy; or

22.7. In any specific tender, in the RFP or bid documents related thereto.

23. **TREASURY PRACTICE NOTE 8 OF 2007/2008**

23.1. Treasury Practice Note 8 of 2007/2008 ("the Practice Note") sets the threshold values for the procurement of goods, works and services by means of petty cash, verbal/written price quotations and competitive bids and is applicable to *inter alia* all accounting authorities, regardless of in which schedule of the PFMA a public entity is listed.

23.2. Paragraph 3.3 of the Practice Note provides that when dealing with transactions above R10 000.00, but below R500 000.00, accounting officers/authorities should invite and accept written price quotations from as many suppliers as possible that are registered on the list of prospective suppliers. Where no suitable suppliers are available from the list of prospective suppliers, written price quotations may be obtained from other possible suppliers. If it is not possible to obtain at least three (3) written price quotations, the reasons should be recorded and approved by the accounting officer/authority or his/her delegate.

23.3. Paragraph 3.4.1 provides that for transactions above R500 000.00, accounting officers/authorities should invite competitive bids. Paragraph 3.4.3 further provides that in urgent or emergency cases or in the case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) are procured in accordance with Regulation 16A6.4.

23.4. Paragraph 11.3.7 of the PRASA SCM Policy falls within the ambit of paragraph 3.4.3 of the Practice Note in that it prescribes the process to be followed by PRASA in instances where emergency procurement is required, or where goods or services can only be procured from a sole supplier.

23.5. It is our view that because paragraph 3.4.3 of the Practice Notes makes specific reference to Regulation 16A6.4, PRASA is bound to follow the prescripts of this Regulation when utilising the provisions of paragraph 11.3.7 of the SCM Policy. Even if Regulation 16A6.4 is not applicable to PRASA, it is instructive in that it provides guidance on the proper process to be followed in confinement situations in order to ensure that procurement in those circumstances complies with the constitutional imperatives.

24. DEVIATIONS: EMERGENCY PROVISIONS

24.1. The rule of law embraces the principle of legality which requires the government, the legislature and the courts to act in accordance with the legal principles and rules applicable to them. In *Fedsure Life Assurance*

Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1998(12) BCLR 1458 which dealt with the principle of legality, the Court said the following:

"*it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate when lawful. The rule of law to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.*"

24.2. Administrators have no inherent powers. Every incident of public power must be inferred from a lawful empowering source, usually legislation. The logical concomitant of this is that an action performed without lawful authority is illegal or *ultra vires* (beyond the powers of the administrator).[6]

24.3. Provision is made in the Treasury Regulations and Practice Note 8 for a deviation from normal supply chain management procedures, where following a competitive bidding process is impractical due to, *inter alia*, emergency situations. Unfortunately, neither the legislature, national treasury nor the Courts have provided clear guidance on determining which situations may amount to emergencies. The Green Paper on Procurement Reform[7] may be used as a guideline when interpreting provisions of procurement legislation regulating emergencies. Clause 4.15 of the Green Paper provides that emergency situations may include:

24.3.1. the possibility of human injury or death;

24.3.2. the prevalence of human suffering or deprivation of rights;

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[6] Cora Hoexter "Administrative Law in South Africa" (2007, Juta reprint), pages 226 -223.

[7] 'Green Paper on Public Sector Procurement Reform in South Africa: An initiative' GN 691 in *GG* 17928 of 14 April 1997.

24.3.3. the possibility of damage to property, or suffering and death of livestock and animals;

24.3.4. the interruption of essential services, including transportation and communications facilities;

24.3.5. the possibility that the security of the State could be compromised;

24.3.6. the possibility of serious damage occurring to the natural environment;

24.3.7. the possibility that failure to take necessary action may result in the State not being able to render an essential community service;

24.3.8. the prevailing situation, or imminent danger, should be of such a scale and nature that it could not readily be alleviated by interim measures, in order to allow time for normal procurement systems to be used; and

24.3.9. available details of the nature and extent of the work and services required should be insufficient to permit an accelerated, or normal procurement system to be used.

24.3.10. Where emergency provisions are utilised, the procurement process must still comply with the constitutional imperatives and must therefore be transparent, equitable, fair, cost effective, and competitive. In other words, organs of state are not empowered to do away with these principles simply because an emergency exists. It is further important that the circumstances giving rise to an emergency must not have been foreseeable by the organ of state concerned and should not have been the result of negligent conduct on its part.

25. In *CEO, SA Social Security Agency NO and others v Cash Paymaster Services (Pty) Ltd [2011] 3 All SA 233 (SCA)* the SCA said:

"Section 217(1) of the Constitution prescribes the manner in which organs of State should procure goods and services. In particular, organs of State must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. This implies that a "system" with these attributes has to be put in place by means of legislation or other regulation. Once such a system is in place and the system complies with the constitutional demands of section 217(1), the question whether any procurement is "valid" must be answered with reference to the mentioned legislation or regulation."

26. In relation to Treasury Regulation 16A6.4, the SCA said:

"The regulation permits an accounting officer or the chief executive officer to deviate from a competitive process subject to conditions. As mentioned it is not contended that a "system" may not provide for such deviations. First, there must be rational reasons for the decision. That is a material requirement. Second, the reasons have to be recorded. That is a formal requirement. The basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of regulation."[8]

[8] See also Allpay consolidated Investments Holdings (Pty) Ltd and Others vs CEO of SASSA and Others 2014 (1) BCLR 1 (CC) at paragraph 40 *"Deviations from the procedure will be assessed in terms of the principles of procedural fairness. That does not mean that administrators may never depart from the system put into place or deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair".*

27. In applying the above *dictum* to deviations in the procurement process occasioned by emergencies, the first enquiry is whether rational reasons are provided for the decision to deviate from normal competitive procedures.

28. In the determination of the rationality of the reasons provided for a deviation, it is important to bear in mind that the prescripts of administrative justice still require procedural fairness and competitiveness in public procurement processes, regardless of whether or not emergency provisions are utilised.

29. Where, for example, PRASA requires service providers to carry out emergency repairs to damaged tracks, PRASA cannot simply choose service providers off a database and do nothing more. It is required to follow a process which is competitive, fair and transparent. Such a process may involve inviting quotations from all service providers on the database. The Request for Quotations would have to be clear and unambiguous so as to ensure that all service providers responding to the Request know what they are required to respond to. PRASA may perhaps be required to go further and undertake an exercise to ensure that those B-BBEE entities who were included in the SDP have the capacity to provide the services sought.

30. The second stage of the process requires organs of state to record the reasons for the deviation. The Treasury Regulations require the accounting officer to, within 10 working days of deviating from procedure as set out in Regulation 16A6.4, to report to the relevant treasury and the Auditor General all cases where goods and services above the value of R1 million are procured.

31. From the above it is clear that PRASA cannot initiate and follow procurement processes that flout the constitutional imperatives codified

in section 217 of the Constitution, on the basis of a confinement, whether the confinement is necessitated by emergency or the limited availability of competent suppliers.

32. We must also point out that PRASA is empowered, and indeed obliged, to put in place its own control measures to deal with foreseeable cases of emergency that occur within its area of functionality. These measures may include the arrangement of strategic or specific term contracts with suitable service providers with a view to ensuring that the required goods or services are available immediately when cases of emergency occur.

33. **THE RELEVANT SECTIONS IN THE PRASA SCM POLICY**

33.1. *"11.3.5 Emergency Purchases*

Purchases made for "emergency situations" where competitive bidding would be inappropriate is limited to the following types of situations:-

Disasters (e.g. damage from cyclone, flood, fine, etc.);

System failures (including supporting items which could affect the system);

Security risk.

During emergencies the required goods, works or services may be obtained by means of quotations by preferably making use of the departmental supply database.

A motivation of the emergency purchase should be submitted to the GCEO for ratification."

34. *"11.3.7 Single Source/Confinement*

This occurs where the needs of the business preclude the use of the competitive bidding process and for practical reasons only one bidder is approached to quote for goods and/or services.

This method can only be used for:

Appointment of professional services such as legal, financial, technical contracts and security where unique expertise and/or security are required; or

If it's an emergency as defined in clause 11.3.6 above.

The decision to make use of a single source shall be motivated for approval and ratification by the GCEO".

35. **INVALID ADMINISTRATIVE ACTION AND THE PRACTICALITY OF SETTING IT ASIDE**

35.1. It is trite that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process. The Court in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)* expressed this principle as follows:

"*Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity*

of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

35.2. However, even where a court finds that administrative decision has been taken unlawfully, it has the discretion to decline to set the decision aside where doing so will achieve no practical purpose. This may be the case where the effluxion of time and the extent of the work performed prior to review proceedings being launched render an order setting aside the decision incapable of practical implementation. The effect of refusing to set aside the decision will be that the invalid administrative action will remain effectual, and any contracts concluded pursuant thereto will remain valid.

36. In *Chairperson, Standing Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA)* the Court said, *"as a matter of public interest in the finality of administrative decisions and the exercise of administrative functions, considerations of pragmatism and practicality might in an appropriate case compel the court to exercise its discretion to decline to set aside an invalid administrative act."*

37. **APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS**

37.1. The reasoning set out in the motivation of the confinements sought and ultimately approved under all the Memoranda (Memo 1 to Memo 4) do not appear to adequately comply with the legal and SCM requirements for urgency and the ultimate confinement approved in terms thereof.

37.2. The urgency as set out in Memo 1 may be suitable to justify the R20 million Plasser and Isongo confined appointment. However, it appears this same justification for urgency was conveniently applied in Memos

2, 3 and 4 without a suitable explanation being provided for the alleged non-fulfilment of the very purpose of the prior confinements.

37.3. Notwithstanding our view that the confined appointments were invalid due to improper process being followed, it was an inherent requirement of the SDP that a training program be completed by the unskilled entities before any work could commence. These entities were furthermore required to undergo an accreditation process prior to commencing work. These requirements were not adhered to by PRASA or the service providers. Work was allegedly performed and paid for without the necessary training or accreditation.

37.4. Furthermore, from the manner in which the SDP is set out in Memo 1, 2 and 3 and the entities approved therein, it appears that the approver's intention was to create a database of these service providers. The process followed in the compilation of the database should have complied with the constitutional imperatives. PRASA cannot simply choose entities to include on a database without following a process which satisfies the requirements of *inter alia*, Section 217of the Constitution.

38. We are advised that once the SDP list had been created, no formal tender processes were undertaken for the appointment of a supplier from this database. Whilst such appointments could have deviated from normal tender processes, PRASA would have been required and indeed empowered, in emergency situations, to request price quotations from a number of suppliers on the database, on a rotational basis, instead of going out on a competitive tender for each contract. Thus, simply choosing suppliers off the database, which would appear to have been precisely what happened, was irregular.

39. In the circumstances, we are of the opinion that the confinements were irregular in that the process followed in appointing the entities was

flawed and insufficient to justify a confinement in terms of the legal requirements and those of the SCM policy as set out above.

40. Although the confinement appointment process was flawed, in most instances a valid legal and binding contract was entered into with the respective entities. As we have pointed out previously these contracts remain valid until set aside by a competent court or tribunal with the jurisdiction to do so. Furthermore, the fact that work has been performed and paid for would severely prejudice the justification of any application brought to set aside these contracts. In instances such as these and in order to satisfy the common law position as set out above, one would need to prove an underlying fraud and/or that no value was received commensurate with the payments that were made.

40.1. **Level 4 risk factors:**

40.1.1. The registered address for the company is recorded as 407 Kirkness Street, Sunnyside, Pretoria, which is also reflected on invoices. No website seems to exist for Dikiza.

40.1.2. Members of the investigation team visited the address to establish the authenticity of the addresses supplied and further to interview the owner(s) of the business (if possible).

40.1.3. The address identified offices of Nkambule and Associates. An employee at the premises informed the investigation team that they are aware of Dikiza Railway and Civils, but stated that Dikiza operates from a different premise.[9]

[9] Documents and files lying around inside the office visited indicate that Nkambule and Associates are involved in several Government related tenders, mostly Department of Water and Sanitation related work and tenders.

40.1.4. The employee interviewed informed the investigation team that Dikiza Railway and Civils operates from Lombardy Business Park, Block 5, Unit 85, c/o Graham and Cole Roads, Lombardy East, Pretoria, and that Andrew Nkambule operates more than one business there.

40.1.5. The investigation team visited this address as well. Andrew Nkambule was not at the office and has not responded to requests for an interview.

40.1.6. Dikiza's premises are not situated at the address stipulated in the invoices submitted to PRASA. In fact more than one business appears to operate from the premises together with Andrew Nkambule's supply of services to more than one government department is a risk indicator that requires further investigation.

41. RECOMMENDATIONS WITH RESPECT TO CONTINUED CRIMINAL INVESTIGATIONS GOING FORWARD

41.1. Having regard to the content of this report, read in conjunction with the other investigative reports holistically, it is recommended that the offences of racketeering in terms of the *Prevention of Organised Crime Act* 121 of 1998 (POCA) as amended be considered. The reasons underpinning this recommendation are set out herewith:

41.1.1. It must be noted that the recommendations require a collective perusal and consideration of all relevant investigative reports and link analysis charts in this regard.

41.1.2. By way of background: The intentions of the legislature in introducing POCA (and relevant to this recommendation) were; to introduce measures including combating organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to

racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to provide for the recovery of the proceeds of unlawful activity; to provide for the establishment of a Criminal Assets Recovery Account; to amend the International Co-operation in Criminal Matters Act, 1996; to repeal the Proceeds of Crime Act, 1996; to incorporate the provisions contained in the Proceeds of Crime Act, 1996; and to provide for matters connected therewith.

41.1.3. The sections of POCA relevant to this recommendation are Sections 2 (1), 4 and 6:

"2. Offences - (1) Any person who:

(a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity,

(c) *(i)* *uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and*

(ii) *knows or ought reasonably to have known that such a property derived or is derived from or through a pattern of racketeering activity;*

(d) *acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;*

(e) *whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;*

(f) *manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity; or*

(g) *conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f), within the Republic or elsewhere, shall be guilty of an offence.*

4. Money Laundering:

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and –

1. enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

2. performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect –

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence".

6. *Acquisition, possession or use of proceeds of unlawful activities. – Any person who –*

(a) acquires;

(b) uses; or

(c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence".

41.2. In reading the three sections of POCA above, the following definitions as contained in Section 1 thereof are also relevant:

41.2.1. ***"Enterprise"*** includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity;

41.2.2. ***"Pattern of racketeering activity"*** means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act (POCA) and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1;

41.2.3. ***"Proceeds of unlawful activities"*** means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection

with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived;

41.2.4. ***"Unlawful activity"*** means any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.

41.3. In light of the above, it is clear that POCA intends to deal with organised racketeering of entities irrespective of the various parts played by persons associated with such enterprise in achieving the object of their collective conspiracy to commit a particular crime or a series of crimes.

41.4. The starting point in considering the recommendation to institute charges of racketeering as defined and provided for in POCA would be the fact that the requirements described in Section 2 (1) of POCA (as set out above) would have to be met in evidence.

41.5. These require the ability to demonstrate that the various suspect individuals and entities were all active in different capacities, in one manner or another, and involved in an illegal enterprise.

41.6. The respective reports have to be read in conjunction in order to comprehend the scale and range of criminal activities that are alleged to have been committed. In addition, the relevant link analysis charts need to be taken into account simultaneously.

41.7. Read collectively as recommended, the reports and link analysis make a *prima facie* case which identifies the persons and entities, underlying criminal offences and show all to have had the intended purpose to facilitate the multiple instances of fraud, corruption, money laundering and other unlawful activities or a combination thereof and as described in schedule 1 of POCA, for the benefit of the criminal enterprise.

41.8. The reports which display the progress made on the multiple cases depict the various stages of investigation and collection of evidence (even when having regard for the limitations ensued as a result of the lack of the Directorate of Priority Crimes Investigations and/or the National Prosecuting Authority in exercising their persuasive powers, such as subpoenaing and analysing bank account statements of the relevant periods and other third parties, obtaining witness statements and warning statements from suspects and/or conducting search and seizure warrants) collectively comprise *prima facie* evidence which the state can rely upon to institute several charges of racketeering against the identified entities and individuals. Common categories of activities which are demonstrated throughout all the reports and which must be read in conjunction with each other in order to consider such charges include:

41.8.1. Instances where invoices for payment were submitted for the same delivery of services and/or goods on more than one occasion – alleged fraud and corruption;

41.8.2. Instances where suppliers of services and/or goods were registered as suppliers on multiple occasions and within multiple parts of PRASA – alleged fraud and corruption;

41.8.3. Instances where payments were given effect to for services not rendered – alleged fraud and corruption;

41.8.4. Instances where contracts were entered into *contra* the legal requirements of PRASA – alleged fraud and corruption;

41.8.5. Instances where suppliers to PRASA were registered as suppliers under one name or legal status interchangeably e.g as CC or Pty(Ltd) – alleged fraud and corruption;

41.8.6. Instances where payments from PRASA to suppliers were diverted from one entity or person to another in a concealed fashion – alleged money laundering;

41.8.7. Instances where suppliers to PRASA presented themselves to be based at particular addresses as functioning entities, when in fact they could not be traced to those addresses – alleged fraud;

41.8.8. Instances where individuals and entities received the benefits of proceeds of organised crime;

41.8.9. Instances where the financial proceeds of unlawful activities were utilised by persons to acquire moveable and immovable property;

41.8.10. Instances where the proceeds of organised crime or unlawful activities were diverted from one entity or person to another;

41.8.11. Instances where persons with conflicts of interests or potential conflicts of interest participated in activities and/or decisions and/or giving effect to payments, which resulted in unlawful direct or indirect benefits to third parties associated to them – alleged fraud, corruption and money laundering.

41.9. Insofar the recommendations as set out above, PRASA has written to both the Head: Directorate of Priority Crimes Investigations and the National Director of Public Prosecutions of the National Prosecuting Authority, requesting for the declaration of the investigations as priority crimes and to consider the issuance of a certificate for an investigation of racketeering.

41.10. Unfortunately, any further attempts to see this process through to its logical conclusion have not borne any fruit from the side of PRASA and its legal representatives.

41.11. Having said this, there is no reason why the National Director of Public Prosecutions of the National Prosecuting Authority may not still consider these requests at any given point in time going forward.

41.12. It is strongly recommended that the requests referred to be pursued until the National Director of Public Prosecutions of the National Prosecuting Authority takes a stance either way. Such a decision would dramatically impact on the continued paths for the investigations, as it would result in each instance having to be treated as separate and unconnected offences, and presented by way of criminal complaints and prosecutions accordingly. Should such a scenario occur, various legal ramifications may ensue which would hamper successful prosecutions significantly, simply because of the overlapping nature of the reported activities, alleged crimes, and common suspects and methodologies as set out in the respective investigative reports.

42. CONCLUSION

42.1. We are of the view that the confined appointments of the entities listed in Memos 1, 2, 3 and 4 and the additional entities that were simply added to PRASA's internal SDP list did not constitute a lawful process as dictated by the relevant legislative framework and the prevailing SCM policy.

42.2. The subsequent contracts concluded with the various entities are valid and binding until set aside by the courts on the demonstration that no value was received alternatively, proof of fraud in the conclusion of the contracts.

42.3. The entities listed on PRASA's internal SDP database ought never to have been so listed as it appears from the information presently at our disposal, that no formal procurement process was undertaken in respect of these entities.

42.4. The next phase of the investigation in this regard will comprise, *inter alia*:

42.4.1. Unpacking the agreements entered into with these various entities to determine whether the work contracted and paid for was in fact completed by each such entity and to the satisfaction of PRASA;

42.4.2. The PRASA employees involved in the compilation, motivation, recommendation and approval of the Memos and their relationships, if any, with the entities be investigated;

42.4.3. Investigate the PRASA employees involved in the initial selection of the list of entities as well as the employees involved in the implementation of the SDP and their relationships, if any, with the entities;

42.4.4. An in depth investigation would be recommended into the additional entities listed in PRASA's internal SDP database and the circumstances surrounding their inclusion thereon in light of the irregularities around their appointment;

42.4.5. Should the investigation reveal any impropriety on the part of any employee, the appropriate disciplinary action needs to be considered;

42.4.6. Should the investigation show that no value was in fact received the appropriate steps need to be taken to set aside the contracts, possibly recover any payments made and proffer the appropriate criminal charges against all wrongdoers.

43. It must be noted that the levels of complexity and sheer volumes of evidence that is required to be considered, reviewed and concluded to bring these matters to conclusion, will prove a challenge to even the state's law enforcement agencies today. Notwithstanding this challenge, it is incumbent upon PRASA to properly and fully investigate these matters so that from an operational perspective, all identified irregularities are addressed and appropriate legal procedures are followed to both protect and enforce PRASA's rights.