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ON THE POINT OF TENDERS

*Report on an Investigation into Allegations of Impropriety and Corrupt Practices
Relating to the Awarding of Contracts for Goods and Services by the Limpopo
Department of Roads and Transport*

Report No: 10 of 2012/13

tender mystery deepens

**SGL benefits from tenders which
On-Point says they were awarded**

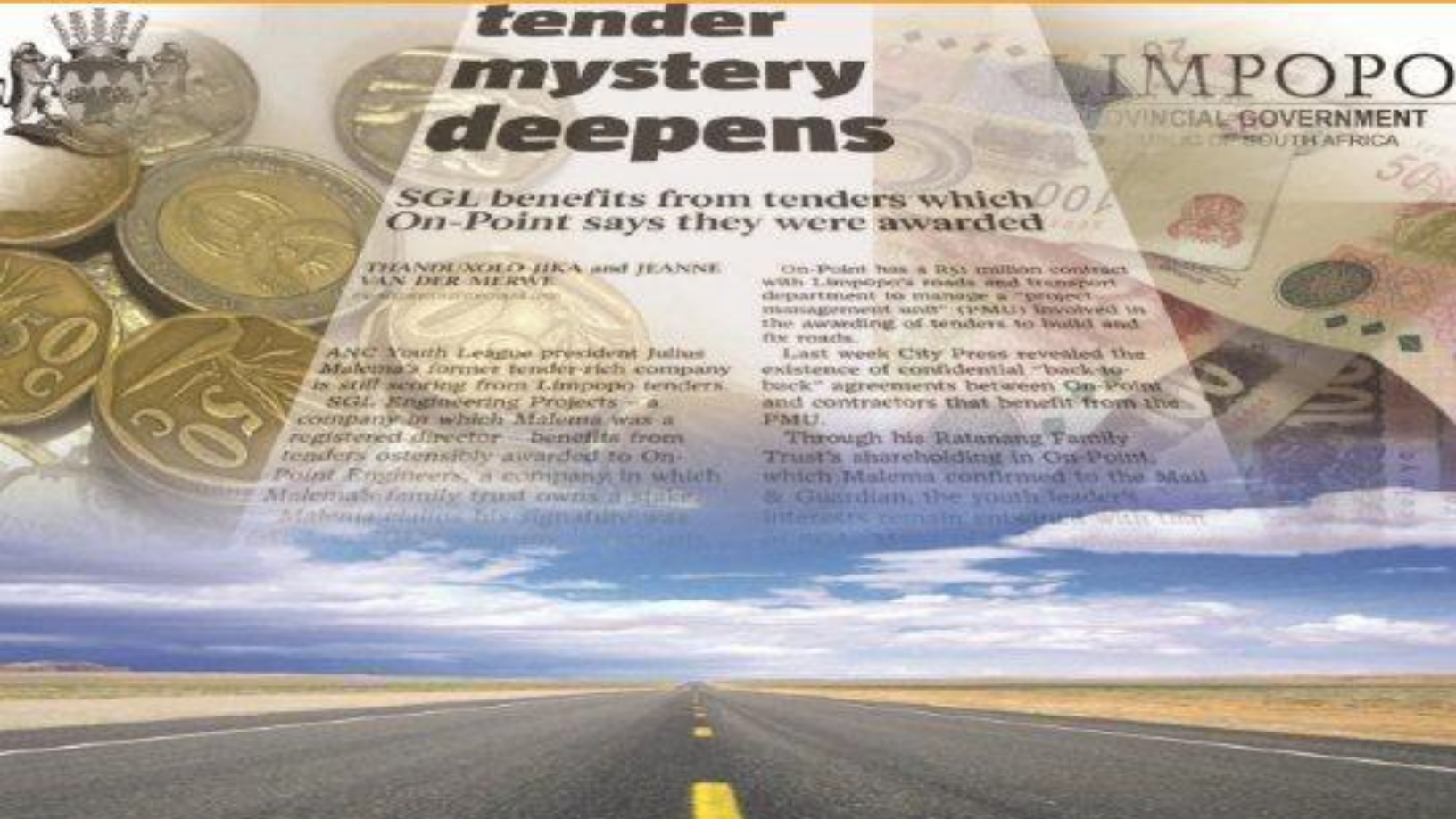
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VAN DER MERWE**

ANC Youth League president Julius Malema's former tender-rich company is still scoring from Limpopo tenders. SGL Engineering Projects – a company in which Malema was a registered director – benefits from tenders ostensibly awarded to On-Point Engineers, a company in which Malema's family trust owns a stake. Malema denies his signature was on the SGL company's contracts.

On-Point has a R51 million contract with Limpopo's roads and transport department to manage a "project management unit" (PMU) involved in the awarding of tenders to build and fix roads.

Last week City Press revealed the existence of confidential "back-to-back" agreements between On-Point and contractors that benefit from the PMU.

Through his Ratanang Family Trust's shareholding in On-Point, which Malema confirmed to the Mail & Guardian, the youth leader's interests remain enmeshed with that of the PMU.



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Executive summary

- (i) *On the Point of Tenders* is a report of the Public Protector on an investigation into allegations of improper conduct, including corrupt practices, relating to the awarding of contracts for goods and services by the Limpopo Department of Roads and Transport to a company called On Point Engineers (Pty) Ltd and others.
- (ii) The investigation followed three complaints lodged with the Public Protector in July 2011 in which it was alleged that Mr Julius Malema, who was the President of the African National Congress Youth League at the time, used his political position to influence the awarding of tenders by the Department of Roads and Transport, and other Departments of the Limpopo Provincial Government, to certain companies where he is involved. It was further alleged that Mr Malema improperly benefitted from corrupt kickbacks paid to him by the companies involved, via the Ratanang Family Trust, set up by him. The one complaint also made similar allegations against Mr S Bosch, said to be Mr Malema's friend, in respect of the Limpopo Department of Human Settlements.
- (iii) The report only deals with allegations that relate to the Department of Roads and Transport (the Department). The allegations relating to other Departments of the Limpopo Provincial Government are the subject of a separate investigation.
- (iv) The allegations in respect of the Department specifically referred to the awarding of tenders to On-Point Engineers (Pty) Ltd (On Point), Arandi Trading Enterprise and Sizani Build It, respectively.
- (v) Based on an analysis of the complaints and the contents of the newspaper articles on which these were based, the following issues were investigated by the Public Protector:
 - **Was the awarding of the tender for a Project Management Unit (PMU) by the Department to On-Point improper and in violation of the provisions of the Prevention and Combatting of Corrupt Activities Act, 2004?**

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- **Was On-Point involved in any corrupt practices in violation of the Prevention and Combatting of Corrupt Activities Act in its dealings with other service providers appointed by the Department, during its management of the PMU of the Department?**
 - **Did the Ratanang Family Trust and/or Mr J Malema benefit improperly from the tender that was awarded to On-Point?**
 - **Was the awarding of tenders for the provision of goods by the Department to the other two companies referred to in the allegations, Sizani Build It and Arandi Trading Enterprise, improper?**
 - **Was the conduct of the Department, particularly its Head of Department, Chief Financial Officer (CFO) and members of the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC), lawful and proper?**
- (vi) The investigation involved mainly the perusal of the relevant documents relating to the procurement of the contracts, interviews with officials of the Department and other role players, perusal of relevant newspaper reports, consultation with the National Treasury and analyses of relevant legislation and jurisprudence. The relevant records of the Companies and Intellectual Property Commission (CIPC) were perused. Documentation relevant to the allegations was also obtained from On-Point and an interview conducted with its sole Director, Mr L Gwangwa. A legal opinion was obtained from independent Senior Counsel and previous relevant decisions of the Public Protector applied, where appropriate.
- (vii) On 16 November 2011, the Public Protector met with the former Limpopo MEC for Roads and transport and the Head of the Department where it was agreed that the Department would not continue to appoint employees of On-Point to BEC's pending the outcome of the investigation.

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- (viii) The total amount paid by the Department to On-Point in terms of the contract at the end of June 2012 amounted to R 43 868 900.
- (ix) The Public Protector issued a Provisional Report on the investigation on 30 July 2012. The complainants and the affected parties were provided with an opportunity to respond to the contents thereof. The responses received were considered and, where applicable, incorporated into this report.
- (x) The **Conclusions and General Findings** of the Public Protector are that:
- (a) On 11 September 2009, 10 days after Mr Letebele took office as the Head of the Department (HOD), the Department advertised a tender for the procurement of a PMU for the construction and maintenance of roads. The advert ran for 20 days from 11 September 2009, the closing date being 01 October 2011. This timeline did not comply with the National Treasury requirement of a minimum of 21 days and the Provincial Treasury requirement of 30 days. The Department's argument for urgency, as envisaged under Regulation 16A6.3 of the Treasury Regulations, on account of thereof that a lot of work still had to be done before the end of the financial year, is not convincing.
 - (b) Out of 16 bids that were received, only On-Point was eventually considered to qualify for consideration, with all of the others having been eliminated on account of various administrative infractions, including failure to indicate acceptance of bid terms in the covering letter, not separating the price and functionality envelopes and failure to score a minimum of 30 points for functionality.
 - (c) The Tax Clearance Certificate submitted by On-Point with its bid document belonged to **Achir Shelf, a five month old shelf company** it had bought one month earlier, whose area of business was registered as ***"all aspects of general trading"***.
 - (d) In the same bid document, On-Point represented its credentials as a **9 year old engineering company** with a solid track record and a sound management structure boasting, among others, an annual turnover of R2 million, an Executive Team, comprising a Chief Executive Officer, Chief Operations Officer, Chief Financial Officer and various departments, including a Corporate Services Department, and a sizeable

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workforce purportedly having many of the skills identified in the call for bids. The bid document also claimed youth empowerment points on account of having subcontracted to Dichabe Engineers to the value of R1.2 million while in fact Mr Dichabe was one of the three equal share holders of the newly established On-Point.

- (e) When the HOD requested a valid Tax Clearance Certificate for On-Point, with the threat of cancelling the deal should such certificate be not submitted within three days, Mr Gwangwa's response was that Achir Shelf was On-Point, having been purchased as a shelf company and the name changed to On-Point.
- (f) It is mind boggling why the stark discrepancies between the bid document and the Tax Clearance Certificate did not disqualify On-Point or present red flags regarding the possibility of tender fraud, to those who dealt with the bid, particularly the HOD.
- (g) The reality is that at the time of the bid, On-Point only existed on paper, with Segwalo Engineering's premises and staff being used. This did not seem to bother the Bid Committees and the HOD when they considered On Point's bid submission. It is worth noting that not even Segwalo Engineering or the combined workforce of the three agencies that were purportedly meant to eventually constitute On-Point, accounted for the structure and staff compliment represented in the bid submitted to the Department and on the basis of which On-Point scored super high functionality points.
- (h) Evidence suggests that Mr Gwangwa and company began preparations for the PMU tender long before it was advertised in September 2009. Such evidence includes the fact that the shelf company, Achir Shelf, which according to Mr Gwangwa was acquired solely for the PMU tender, was purchased in August 2009.
- (i) Members of the BEC that evaluated the bid for the PMU included an external person from Denel who was not an appropriate expert and who participated fully, including in the scoring process. This was against the requirements of National Treasury prescripts and guidelines that only officials of the Department or experts specifically contracted for that purpose may be appointed to the BEC.

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- (j) The powers and responsibilities of On-Point as the PMU, mainly focused on the supervision/overseeing of the work of Professional Service Providers engaged by the Department to plan, design, build, upgrade and maintain roads and bridges in the Limpopo Province.
- (k) Despite denials, there is incontrovertible evidence confirming that On-Point entered into the alleged “*back-to-back*” agreements with some of the Professional Service Providers doing work under its supervision, on the basis of which On-Point had to do some or most of the work and was to be paid for such by them. In one case, the Professional Service Provider was only entitled to 5% of the amount paid by the Department as its input was confined to reviewing work done by On-Point.
- (l) Though not part of the original bid, during the execution phase, On-Point was paid to do similar work to that of the Professional Service Providers it was supervising. At least in one case, it was paid for doing the same work.
- (m) Despite denials, incontrovertible evidence uncovered also shows that On-Point was paid by the Professional Service Providers under its supervision. Verified payments include R1 million paid by Mpotseng Infrastructure on 29 April 2011 into On-Point’s bank account with the relevant bank statement curiously showing the same amount being withdrawn for payment towards the “*Ratanang Farm*”, 5 days later. Another verified payment is an amount of R1,2 million by H L Matlala & Associates on 12 July 2011.
- (n) On-Point has one share holder, Guilder Investments, which in turn has two equal shareholders, the Gwangwa Family Trust and the Ratanang Family Trust. The sole beneficiary of the Ratanang Family Trust is Mr Malema’s son. Originally, Mr Julius Malema was the sole Trustee. His grandmother, who is 83 years old, was later added as a Trustee.
- (o) Bank statements of On-Point show, in addition to the Ratanang Farm payment, the payment of regular amounts of R100 000 to the Ratanang Family Trust totaling R2,17 million over a period of 17 months. Only one payment of R60 000 appears for the

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Gwangwa Family Trust. Undefined loans of R200 000 each are also reflected on the bank statements.

- (p) Regarding contracts, awarded by the Department to Arandi Trading Enterprise and Sizani Build It, the evidence shows that such contracts were awarded following a tender process.
- (q) Regarding the propriety of the conduct of the Department, particularly the HOD, the Chief Financial Officer and Bid Committees, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations, directives and guidelines stipulate the standard to be complied with and the specific findings below address the question whether or not the conduct investigated complied accordingly.

(xi) **SPECIFIC FINDINGS**

The specific findings of the Public Protector are that:

Finding 1: Was the awarding of the tender for a Project Management Unit (PMU) by the Department to On-point Engineering improper and in violation of the provisions of the Prevention and Combatting of Corrupt Activities Act?

- (a) The failure by the Department, specifically the Bid Committees and the HOD, to notice obvious discrepancies in the bid, particularly the Tax Clearance Certificate and company registration documents, showing the company to be not older than 5 months while the bid document claimed 9 years of experience, leaves a lot of questions to be answered regarding the relationship between the HOD and some or all of the departmental players that took part in the bid process and On-Point. That On-Point was given preferential treatment is without doubt. The unanswered questions are further compounded by the fact that evidence suggests that On-Point knew about and started preparing for the bid some time prior to September 2009. The Public Protector does not make a finding on the possibility that such relationship(s) may be in violation of the Prevention and Combating of Corrupt

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Activities Act and leaves this to be concluded under the investigation currently being undertaken by the Directorate: Priority Crime Investigation of the South African Police Service (Hawks). **The Public Protector accordingly reserves her findings on whether or not the awarding of the tender constitutes a corrupt practice as envisaged under the Prevention and Combatting of Corrupt Activities Act.**

- (b) On-Point should never have been awarded the tender for the PMU as it did not qualify by a long stretch. The bid it presented to the Department on 29 September 2009 for the PMU tender consisted of a deliberate and fraudulent misrepresentation in respect of the profile, composition, experience, personnel, assets, annual turnover and contribution to youth business development, and therefore the functionality and track record of the company. It was represented to the Department that On-Point was an established and experienced company with management teams and professional staff that complied with the requirements of the *Request for Proposal*.
- (c) The reality was that at the time of the submission of the bid document, On-Point had existed for approximately one month, had no employees, no assets or annual turnover and several of the purported key management personnel and staff members were not involved with it at all. It also had made no contribution to youth business development.
- (d) As a company, On-Point had no profile, track record and experience and therefore no functionality that could have made it eligible to be considered as a competent bidder.
- (e) The submission of the bid therefore violated the provisions of clause 23.1(a) of the General Conditions of Contract and amounted to an abuse of the supply chain management system, which is prohibited by Treasury Regulation 16A9. The conduct was unlawful and constituted fraud.
- (f) **The Public Protector is accordingly of the view that the crime of fraud has been committed.**

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- (g) The failure by the BEC, BAC and the HOD to properly interrogate the bid presented by On-Point and to perform a due diligence test on and verification of its functionality and compliance with the requirements of the bid, was improper and constituted maladministration. The fact that On-Point had no employees and that it misrepresented its experience, involvement in youth business development and annual turnover is obvious and evident from the bid document itself. None of these obvious discrepancies were noted and considered during the procurement process.
- (h) **The awarding of the tender by the Department to On-Point was unlawful, improper and constitutes maladministration.**

Finding 2: Did On-Point engage in any corrupt practices in violation of the Prevention and Combatting of Corrupt Activities Act, in its dealings with the Departmental Professional Service Providers under its supervision as the Project Management Unit?

- (a) On-Point entered into “*back-to-back*” agreements in terms of which it received or was supposed to have received payment from Professional Service Providers for designs which it had drawn in respect of projects that it was contracted to manage and supervise. This constituted a direct conflict between On-Point’s obligations to objectively manage and supervise projects on behalf of the Department, its own financial interests and that of Mr Gwangwa, its sole Director. These agreements clearly constituted kickbacks, a form of gratification under section 12(1) of the Prevention and Combatting of Corrupt Activities Act.
- (b) The manner in which these agreements were couched further suggests that the existence thereof was to remain a secret.
- (c) The Department made double payments in respect of the designs of certain projects as a result of these agreements. On-Point was paid as well as a Professional Service Provider contracted for the same designs.
- (d) Mr Gwangwa’s involvement in these agreements, in his capacity as the Director of On-Point and a “*Registered Person*” in terms of the Engineering Profession Act,

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2000 may also have constituted a violation of the *Rules of Conduct for Registered Persons: Engineering Profession Act, 2000*.

- (e) As the receiving or requesting of double payments for the designs concerned constituted a fraudulent practice in the executing of the contract between On-Point and the Department, it violated the provisions of Treasury Regulation 16A9 and the General Conditions of Contract that applied.
- (f) In terms of section 12(1) of the Prevention and Combatting of Corrupt Activities Act **any person who accepts or agrees to accept any gratification from any other person or gives or agrees to give to any other person any gratification in order to improperly influence in any way the execution of a contract with a public body, is guilty of an offence.** The evidence and information obtained during the investigation leads to the unavoidable inference that On-Point/Mr Gwangwa acted in contravention of these provisions when it/he entered into the “*back-to-back*” agreements which impacted on the execution of the contract between On-Point and the Department, and accepted payments from the Professional Service Providers and the Department relating thereto.
- (g) **The Public Protector is of the view that the conduct of On-Point as the PMU of the Department in entering into agreements with Mpotseng Infrastructure, Baitseanape Consulting Engineers and H L Matlala & Associates respectively, constitutes corrupt practices, as envisaged under section 12 of the Prevention and Combatting of Corrupt Activities Act. It also amounted to an inappropriate conflict between the obligations and responsibilities of On-Point as the PMU of the Department and its own interests.**
- (h) The Public Protector is accordingly of the view that a crime under the Prevention and Combatting of Corrupt Activities Act has been committed.

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Finding 3: Did the Ratanang Family Trust and/or Mr J Malema benefit improperly from the tender that was awarded to On-Point?

- (a) On-Point paid more than R2 million directly to the Ratanang Family Trust from November 2010 to May 2012 in the form of “dividends” and loans. The amount of R1 million withdrawn 5 days after one of the kickbacks was paid under the back-to-back agreements, is further accounted for in the bank statements as having been paid towards the Ratanang Farm. Further amounts of R160 000 and R100 000 are reflected as having been paid in respect of the “*Sandton Property*” and “*Sandowns Property*”, respectively. Payments were also made to Tshiamo Dichabe, the Makatele Family Trust, Guilder Investments and the Gwangwa Family Trust (former and current shareholders of Guilder Investments, which is the sole shareholder of On-Point).
- (b) The evidence of Mr Gwangwa in respect of how and by whom it was decided that On-Point should pay (monthly) dividends to the Ratanang Family Trust and make payments to the Gwangwa Family Trust (via Guilder Investments) furthermore supported the allegation that the Trusts were probably used as vehicles for the transfer of funds obtained through an unlawful process.
- (c) **As the main source of income of On-Point during this period was the payments made to it by the Department in terms of the agreement and On-Point owed its existence as a profit making establishment that could declare regular dividends thereto, the Ratanang Family Trust as one of two shareholders of Guilder Investments (as the holding company), accordingly benefitted improperly from the unlawful, fraudulent and corrupt conduct of On-Point and maladministration of the Department.**

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Finding 4: Was the awarding of tenders for the provision of goods by the Department to the other two companies referred to in the allegations, Sizani Build It and Arandi Trading Enterprise, improper?

- (a) Apart from the appointment by the HOD of employees of On-Point to the BEC that evaluated the tenders, which was improper, the awarding of the contracts to Arandi Trading Enterprise and Sizani Build It was in accordance with the prescribed tender process.
- (b) In view of the irregular participation of the employees of On-Point in the BEC's of the Department, in violation of National Treasury Guidelines and prescripts, the awarding of these contracts was improper. However, it was not necessarily unlawful.

Finding 5: Was the conduct of the Department, particularly its Head of Department, Chief Financial Officer and members of the BEC and BAC, lawful and proper?

- (a) In terms of the provisions of section 38 of the PFMA, it was expected of the HOD to act in the best interests of the Department and to ensure that the procurement process complied with the provisions of section 217 of the Constitution, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations and directives, and other relevant legislation and policies.
- (b) The HOD conceded during the investigation that as the accounting officer of the Department, he was ultimately responsible for the procurement of the services of On-Point. He also agreed that it was expected of him to consider the minutes of the tender committee meetings and the disqualification and recommendations of bidders.
- (c) No indication could be found during the investigation that the HOD applied his mind to the disqualification of bidders. He made no effort to ensure that the awarding of the bid to On-Point was in accordance with the principles of a system that promotes competition and cost effectiveness in the interest of the Department and the public. The HOD also could not provide any satisfactory explanation for his failure to act in accordance with the resolution of the BAC that the price on certain items had to be

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negotiated with On-Point, which was recorded in the Minutes of the relevant BAC meeting.

- (d) The HOD also failed to pick up obvious anomalies in On-Point's bid document, including the discrepancy between the claim that it had 9 years' experience while its registration documents showed that On-Point was converted from a shelf company that had been in existence for about five (5) months.
 - (e) The conduct of the Department, specifically that of Mr Letebele the HOD and the BEC and BAC failed to meet the standard stipulated under the PFMA, particularly section 38, thereof and relevant Treasury Regulations, inclusive of Regulation 16A6, read with National Treasury's *Supply Chain Management Guide for Accounting Officers*. The conduct was accordingly unlawful, improper and constitutes maladministration.**
- (xii) **Remedial action to be taken** as envisaged by section 182 (1)(c) of the Constitution, is the following:
- (a) The Head of the Department to take urgent steps to:
 - (aa) Immediately cancel the agreement between the Department and On-Point in terms of clause 23.1(a) of the General Conditions of Contract and Treasury Regulation 16A9;
 - (bb) Instruct the State Attorney to institute legal proceedings against On-Point and its shareholders that benefitted from the awarding of the tender, in order to recover any amount to which the Department is entitled to, due to On-Point's fraudulent misrepresentation in respect of its bid and the improper financial benefit that it and its shareholders gained as a result thereof;

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- (cc) Commence the process of imposing a restriction penalty on On-Point and Mr Gwangwa in terms of the provisions or clause 23 of the General Conditions of Contract;
- (dd) Ensure that the officials of the Supply Chain Management Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management;
- (ee) Ensure that officials appointed as members of BEC's are properly trained in respect of the proper application of the procurement system as contemplated by the provisions of section 217 of the Constitution, the PFMA, Treasury Regulations and prescripts and the relevant procurement policies;
- (ff) With the assistance of National Treasury, conduct a reconciliation of all the payments made to On-Point in terms of the agreement and to service providers appointed by the Department in respect of the period that On-Point was appointed as the PMU of the Department, in order to determine the total value of double payments made to On-Point and any other payments that should not have been made, taking into account the BAC directive on price negotiation.
- (gg) Recover the total amount of double and other undue payments made to On-Point from it;
- (hh) Institute disciplinary steps against the officials who served as members of the BEC and the BAC in respect of their failure to perform their functions diligently, which resulted in the findings made in connection with the impropriety, unlawfulness and maladministration in paragraph (ix) above pertaining to the awarding of the tender to On-Point;

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- (ii) Bring the Supply Chain Management Policy of the Department in line with the provisions of section 217 of the Constitution, the PFMA and Treasury Regulations and directives; and
 - (jj) Improve the demand management process of the Department in respect of the drafting of specifications for the supply and delivery of goods and services.
- (b) The Director-General of the National Treasury to:
 - (aa) Ensure that the restriction of On-Point and Mr L Gwangwa referred to in paragraph (a) above is captured in the database of the National Treasury, as contemplated by clause 23 of the General Conditions of Contract, should it be imposed; and
 - (bb) Issue instructions in terms of section 76 of the PFMA to compel and guide the accounting officers of organs of state to perform a proper due diligence investigations into the profile, composition, status and financial viability of bidders during the procurement process.
- (c) The Member responsible for the Provincial Treasury of the Executive Council of the Limpopo Provincial Government to:
 - (aa) Ensure, in terms of Treasury Regulation 4.1.3, that the Executive Authority of the Department initiates an investigation into the conduct of the Head of the Department referred to in paragraph (ix) above, with a view of taking disciplinary action against him; and
 - (bb) Take urgent steps to bring the Limpopo Provincial Policy on Bid Committees in line with the procurement system contemplated by the provisions of section 217 of the Constitution, the PFMA and Treasury Regulations and directives.

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- (d) The Chairperson of the Engineering Council of South Africa to take appropriate steps to determine whether the conduct of Mr L Gwangwa referred to in this report complied with the *Rules of Conduct for Registered Persons: Engineering Profession Act, 2000* and if not, to ensure that appropriate action is taken.
- (e) The Master of the North Gauteng High Court to take urgent steps to initiate an investigation into the administration and disposal of the trust property of the Ratanang Family Trust and the Gwangwa Family Trust, with specific reference to the payments made to it by On-Point and any assets it acquired, referred to in this report, as provided for by section 16 of the Trust Property Control Act, and to take appropriate legal action, if required.
- (f) The Acting National Director of Public Prosecutions and the Head of the Asset Forfeiture Unit of the National Prosecuting Authority to:
 - (aa) Take note, in terms of section 6(4)(c)(i) of the Public Protector Act, that the evidence and information obtained during the investigation, as referred to in Findings 1 and 2 of paragraph (ix) above, disclosed the commission of the criminal offences fraud and a contravention of section 12 of the Prevention and Combatting of Corrupt Activities Act, 2004;
 - (bb) Take urgent steps to deal with the evidence of the commission of the criminal offences in the appropriate manner, as envisaged under section 6(4) (c) (i) of the Public Protector Act; and
 - (cc) Ensure that the investigation of the criminal offences referred to in paragraph (aa) above by the Directorate: Priority Crime Investigation of the South African Police Service includes a thorough scrutiny of the relationships between the representatives of the shareholders of On-Point, the top management of the Department, members of the relevant BEC's and the BAC of the Department and all the recipients of contracts awarded with On-Point's participation.

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1. INTRODUCTION

1.1 *On the Point of Tenders*, is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to:

1.2.1 The Member responsible for Roads and Transport of the Executive Council of the Limpopo Provincial Government;

1.2.2 The Member responsible for the Provincial Treasury, of the Executive Council of the Limpopo Provincial Government;

1.2.3 The Head of the Limpopo Department of Roads and Transport;

1.2.4 The Director-General of the National Treasury;

1.2.5 The Chairperson of the Engineering Council of South Africa;

1.2.6 The Master of the North Gauteng High Court;

1.2.7 The Acting National Director of Public Prosecutions; and

1.2.8 The Head of the Asset Forfeiture Unit of the National Prosecuting Authority.

1.3 Copies of the report are distributed to:

1.3.1 Ms M Mthwalo of Potchefstroom who lodged a complaint with the Commissioner of the South African Revenue Service in connection with the matters referred to below, on 25 July 2011 and forwarded a copy thereof to the Public Protector;

1.3.2 Ms D K Barnard MP of the Democratic Alliance, who lodged a complaint with the Public Protector on 26 July 2011;

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- 1.3.3 Mr I Kekana, who at the time of lodging a complaint with the Public Protector on 25 July 2011, was the Limpopo Head of Communications of the *Congress of the People*;
- 1.3.4 Mr L Gwangwa of On Point Engineers (Pty) Ltd (On Point);
- 1.3.5 Mr J Malema, a Trustee of the Ratanang Family Trust;
- 1.3.6 The Commissioner of the South African Revenue Service;
- 1.3.7 The Commissioner of the South African Police Service; and
- 1.3.8 The Head of the Directorate: Priority Crime Investigations of the South African Police Service
- 1.4 The report relates to an investigation by the Public Protector into allegations of improper conduct, including corrupt practices, in connection with to the awarding of contracts for goods and services by the Limpopo Department of Roads and Transport (the Department).

2. THE COMPLAINTS AND ISSUES RAISED WITH THE PUBLIC PROTECTOR

- 2.1 The investigation followed three complaints lodged in July 2011 in which it was alleged that the former President of the African National Congress Youth League, Mr Julius Malema, used his political position to influence the awarding of tenders by the Limpopo Department of Roads and Transport and other departments of the Limpopo Provincial Government to certain companies where he is involved. It was further alleged that Mr Malema benefitted improperly from corrupt kickbacks paid to him by the companies involved via the Ratanang Family Trust, set up by him.
- 2.2 Mr M Mthwalo approached the Commissioner of the South African Revenue Service on 25 July 2011 by e-mail, copying the Public Protector, stating that:

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“Based on City Press article (sic) of the 24th of July 2011, I feel compelled as a South African citizen to raise my concerns with regard to matters raised by City Press:

- *‘Secret Trust Fund’ of Mr Julius Malema*
- *Bribes being paid into this account by business people and politicians for favours.*

My concern as a citizen, based on this media reports, is that Mr Malema could be using the Trust Fund to avoid tax, and the income received by this Fund could be ill-gotten in that, based on media reports, was (sic) some sort of bribes from companies that benefitted from Tenders in Limpopo Province (sic) Government which in itself is illegal.”

- 2.3 On 25 July 2011, Mr I Kekana, the then Head of Communications: Limpopo of the Congress of the People, lodged a complaint with the Public Protector, in which he stated:

“Weekend newspapers reported extensively on Ratanang Family Trust (sic) whose sole trustee and signatory is none other than the ruling party’s youth league leader, Mr Julius Malema. Congress of the People in Limpopo would like to request your office to investigate this Trust Fund and other sources of income relating to Julius Malema.

- 2.4 Ms D K Barnard MP of the Democratic Alliance also lodged a complaint in connection with the matter, on 26 July 2011. With reference to reports published by the media, her complaint was as follows:

“Information regarding the Ratanang Family Trust, of which Julius Malema is the sole trustee was revealed in the City Press Newspaper on Sunday 24th July. I am writing to request that you open an investigation into the Ratanang Family Trust, to investigate whether allegations made in the media are true.

The story reported allegations made that payments were made into this trust in return for his assistance in securing government contracts and tenders for various businesses and for using his political influence to advance various agendas.”

- 2.5 Ms Barnard requested an extension of the investigation by the Public Protector on 15 August 2011. She referred to an article published by the *Sunday Times* in which it was

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alleged that a businessman who had dealings with the Limpopo Provincial Government, Mr S Bosch, had made payments in totaling R1,2 million to the architect involved in the construction of Mr Malema's house in Sandown. She stated in this regard that:

"If allegations prove to be true it could mean that Mr Malema is involved in tender fraud to the tune of hundreds of millions of rand, (sic) this information could have far reaching consequences and it is most certainly in the public interest to know which politicians are involved in corrupt self serving practices that promote the interests of the privileged few while the great majority of South Africans continue to live in poverty."

- 2.6 The *City Press* article of 24 July 2011, referred to by the complainants, in the main alleged that the former President of the African National Congress Youth League (ANCYL), Mr J Malema, improperly benefitted from money deposited into the bank account of the Ratanang Family Trust by business enterprises in return for his facilitation of the awarding of contracts to these entities by departments of the Limpopo Provincial Government.
- 2.7 No reference was made in the article to the specific government departments that were allegedly involved in the improper awarding of the contracts.
- 2.8 Mr Malema reportedly responded to the allegations by conceding that he was involved with the Ratanang Family Trust, but denying that the *"trust was used for receiving bribes."*
- 2.9 The *City Press* published a follow-up article on 7 August 2011. This article contained more detailed allegations relating to the Ratanang Family Trust benefitting from the awarding of contracts by departments of the Limpopo Provincial Government to certain business entities. It stated, *inter alia*, that:

"City Press can reveal that On Point Engineers (Pty) Ltd-a private company headed by Malema's former business partner, Lesiba Gwangwa, in which Malema's Ratanang Family Trust owns a stake-cashes in on Limpopo road tenders it is supposed to manage."

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On Point was awarded a R51-million tender by the Limpopo roads and transport department in 2009 to design, manage and implement road projects in the province through an outfit called the 'project management unit'. This is outsourcing, a form of privatization.

As part of the tender, On Point's duties include supporting the department with the adjudication and awarding of tenders.

A document in the possession of City Press reveals that On Point's involvement in state tenders doesn't stop there. The company also signs confidential 'back-to-back' agreements with successful contractors, giving it a share of between 50% and 90% of the profits of tenders it helped to award.”(emphasis added)

2.10 *The Sunday Times* elaborated on the improper awarding of tenders by departments of the Limpopo Provincial Government on, 14 August 2011. It alleged that Sizani Build It, a company that belongs to Mr S Bosch, who reportedly has strong political ties with Mr Malema and the ANCYL, was also awarded two lucrative contracts by the Limpopo Department of Roads and Transport in July 2011. Sizani Build It allegedly “made at least two payments from its Standard Bank account-and on behalf of Malema- to an Investec bank account belonging to Aurielo Cimato, the architect building Malema’s multimillion-rand house in Sandton.””(emphasis added)

2.11 It was also alleged that “*other Malema cronies who benefitted from roads tenders include Tshepo Malema (a relative of Mr J Malema) –despite the fact that Malema’s On-Point provides the roads department with advice on tenders. Tshepo Malema’s company, Arandi Trading, won a tender on 14 July for supplying the department with ‘painting materials’.*”(emphasis added)

2.12 In response to the allegations stated in the media, referred to above, Messrs Bosch and J Malema and the Limpopo Department of Roads and Transport denied any wrong doing. The *City Press* of 7 August 2011 reported that Mr Malema admitted to owning shares in On-Point Engineers (Pty) Ltd (On-Point) through the Ratanang Family Trust, but denied that he had influenced any of On-Point’s tenders adding: “*I just queue when the dividends are due.*”

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2.13 As indicated above, the said media reports also referred to the alleged improper awarding of contracts by other departments of the Limpopo Provincial Government and pointed fingers at the alleged corrupt involvement of Mr Malema, who it was averred, benefitted financially therefrom. These allegations are the subject of a separate investigation by the Public Protector. This report only deals with allegations that relate to the Limpopo Department of Roads and Transport.

3 COLLABORATION WITH THE DIRECTORATE: PRIORITY CRIME INVESTIGATION OF THE SOUTH AFRICAN POLICE SERVICE

3.1 The allegations published by the media, referred to in paragraph 2 above, were also the subject of charges of criminal conduct lodged with the South African Police Service on 24 July 2011.

3.2 The matter was referred to the Directorate: Priority Crime Investigation (DPCI) of the South African Police Service for investigation. The subject of the investigation by the DPCI relates in the main to allegations of corruption and fraud made against Mr J Malema, the Ratanang Family Trust and business entities that were awarded contracts for goods and services by the Department.

3.3 The Public Protector and the Head of the DPCI agreed to collaborate in their respective investigations by sharing information and resources with a view also not to duplicate investigation efforts.

4 THE ISSUES INVESTIGATED BY THE PUBLIC PROTECTOR

Based on an analysis of the complaints lodged and the contents of the newspaper articles on which these were based, the following matters were investigated by the Public Protector:

4.1 Was the awarding of the tender for a Project Management Unit (PMU) by the Department to On-Point improper and in violation of the provisions of the Prevention and Combatting of Corrupt Activities Act, 2004?

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- 4.2 Was On-Point involved in any corrupt practices in violation of the Prevention and Combatting of Corrupt Activities Act in its dealings with other service providers appointed by the Department, during its management of the PMU of the Department?
- 4.3 Did the Ratanang Family Trust and/or Mr J Malema benefit improperly from the tender that was awarded to On-Point?
- 4.4 Was the awarding of tenders for the provision of goods by the Department to Sizani Build It and Arandi Trading Enterprise improper?
- 4.5 Was the conduct of the Department, particularly its Head of Department, Chief Financial Officer and members of the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC), lawful and proper?

5 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT IN RESPECT OF THE AWARDING OF TENDERS BY THE LIMPOPO DEPARTMENT OF ROADS AND PUBLIC TRANSPORT

5.1 Mandate of the Public Protector

- 5.1.1 The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. Section 182(1) of the Constitution provides that the Public Protector has the power:
- 5.1.1.1 To investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- 5.1.1.2 To report on that conduct; and
- 5.1.1.3 To take appropriate remedial action.
- 5.1.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.

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5.1.3 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged:

5.1.3.1 Maladministration in connection with the affairs of government at any level;

5.1.3.2 Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function; and

5.1.3.3 Improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to aforementioned offences) of Chapter 2 of the Prevention and Combatting of Corrupt Activities Act, 2004, with respect to public money.¹

5.1.4 The Public Protector may, in terms of section 8(1) of the Public Protector Act, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

5.1.5 Section 6(4)(c) of the Public Protector Act provides that the Public Protector shall be competent at a time prior to, during or after an investigation if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions.

5.1.6 Of particular significance for the purposes of this report are the provisions of section 12(1) of the Prevention and Combatting of Corrupt Activities Act, 2004, that refers to offences in respect of corrupt activities relating to contracts. It provides that

“(1) Any person who, directly or indirectly-

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person; or*
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person-*

¹ See paragraph 5.1.6 below

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- (i) *in order to improperly influence, in any way-*
 - (aa) *the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution; or*
 - (bb) *the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract; or*
- (ii) *as a reward for acting as contemplated in paragraph (a), is guilty of the offence of corrupt activities relating to contracts.”*

5.1.7 “*Gratification*” in terms of section 1 includes the following:

- Money, whether in cash or otherwise;
- any service or favour or advantage of any description; or
- any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

5.2 The jurisdiction of the Public Protector in respect of the PMU

5.2.1 The allegations referred to in paragraph 2 above, relate to, *inter alia*, the conduct of On Point, a private company acting as the PMU of the Department. The question that arises is, whether the Public Protector’s powers extend to the actions of the PMU. It was determined that the PMU ultimately exercises public power that involves money in respect of state affairs and therefore its actions are subject to the jurisdiction of the Public Protector.

5.3 Approach to the investigation

5.3.1 In terms of the mandate given to the Public Protector, the Public Protector’s investigations and findings transcend lawfulness. The focus is on good administration and proper conduct. Such enquiry has three components:

5.3.1.1 What happened?

5.3.1.2 What should have happened; and

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5.3.1.3 Is there a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, abuse of power, improper enrichment or conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act, and/or, as in this case, a violation of the Prevention and Combatting of Corrupt Activities Act, 2004?

5.3.2 In determining whether conduct was improper or constituted maladministration or any of the violations referred to above, the Public Protector compares the conduct of government entities and officials complained of against the relevant legislation and other prescripts, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, transparency, ethical standards and local and international best practices.

5.3.3 The mandate of the Public Protector is not limited to the investigation of complaints, but he/she can also investigate suspicions or allegations of improper conduct on own initiative.

5.4 The obligation of the Public Protector to follow due process and the issuing of a Provisional Report

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

5.4.2 The Public Protector issued a Provisional Report on the matters investigated on 30 July 2012. It was presented to the complainants, the Head of the Department, Mr J Malema, a Trustee of the Ratanang Family Trust, and Mr L Gwangwa, the sole Director of On-Point. The said parties were provided with an opportunity to comment of the contents of the Provisional Report, which were considered and, where appropriate incorporated into the final report.

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5.4.3 The deadline to furnish comments on the Provisional Report was extended at the request of the Head of the Department and Mr Gwangwa from 13 to 31 August 2012 and further to 7 September 2012.

6 THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act. The provisions of the Prevention and Combatting of Corrupt Activities Act, 2004 also informed the investigation, in view of the allegations made.

6.1 The scope of the investigation

The scope of the investigation was restricted to the period September 2009 to March 2012.

6.2 Method of gathering evidence

6.2.1 Documentation studied and its contents considered

6.2.1.1 Copies of the relevant advertisements and bid documents.

6.2.1.2 Voluminous documentation received from the Head of the Department, including:

- (a) Memoranda and other internal documents pertaining to the determination of the need for the establishment of a Project Management Unit, the procurement of materials relating to the maintenance of roads services and the associated demand management process that was followed;
- (c) Documents relating to the relevant meetings of the Bid Evaluation and Bid Adjudication Committees in respect of the tenders concerned;

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- (d) Memoranda and other internal documents relating to the bid specification, evaluation and adjudication processes;
- (e) Memoranda relating to the recommendation, approval and appointment of the successful bidders; and
- (f) The contracts entered into between the Department and On-Point, Arandi Trading Enterprise and Raesetja Property Developments (Sizani Build It).

6.2.1.3 Documents provided by Mr Gwangwa of On-Point including:

- (a) On-Point's bank statements;
- (b) The Shareholder Certificates issued by On-Point;
- (c) Correspondence with persons whose CV's were included in On-Point's bid document submitted to the Department; and
- (d) Bank statements of Segwalo Consulting Engineers.

6.2.2 Correspondence

6.2.2.1 Correspondence and documents received from the complainants, together with the articles published by the *City Press* on 24 July 2011 and 7 August 2011 and the *Sunday Times* on 14 August 2011.

6.2.2.2 Correspondence between the Public Protector and the Head of the Department.

6.2.2.3 Correspondence between the Public Protector and persons listed in the bid document presented to the Department by On-Point; and

6.2.2.4 Correspondence between the Public Protector and Mr L Lewaba of Mponyana Ledwaba Inc, the attorney that assisted Mr Gwangwa in the investigation.

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6.2.3 Interviews conducted

Interviews were conducted with:

6.2.3.1 The Head of the Department;

6.2.3.2 The Chief Financial Officer of the Department;

6.2.3.3 Members of the respective BECs and the BAC of the Department;

6.2.3.4 Mr A M Phetla of Mpotseng Infrastructure CC;

6.2.3.5 Mr E Thihe of Baitseanape Consulting Engineers CC;

6.2.3.6 Mr H L Matlala of H L Matlala and Associates;

6.2.3.7 Mr K C Marobela from Denel Aviation;

6.2.3.8 Ms P Maake from On-Point;

6.2.3.9 Mr F Mamabolo from On-Point;

6.2.3.10 Mr L Gwangwa of On-Point;

6.2.3.11 Mr S Ravat, the former Bookkeeper of On-Point (telephonic).

6.2.4 Consultations

Consultations were held with:

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

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

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

6.2.5 Trust Documents

Copies of the relevant documents contained in the file of the Ratanang Family Trust were obtained from the Master of the North Gauteng High Court.

6.2.6 Legislation and other prescripts

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

6.2.6.1 The Constitution;

6.2.6.2 The Public Protector Act;

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

6.2.6.4 The Treasury Regulations and directives, issued in terms of the PFMA;

6.2.6.5 The Preferential Procurement Policy Framework Act, 2000 and the Regulations issued in terms of the Act;

6.2.6.6 The Companies Act, 1973;

6.2.6.7 The Prevention and Combatting of Corrupt Activities Act, 2004;

6.2.6.8 The Engineering Profession Act, 2000;

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6.2.6.9 The Trust Property Control Act, 1988;

6.2.6.10 The Supply Chain Management Policy of the Department;

6.2.6.11 The Limpopo Preferential Procurement Policy and

6.2.6.12 The Limpopo Provincial Policy on Bid Committees.

6.2.7 Records of the Companies and Intellectual Property Commission (CIPC)

Records of the CIPC pertaining to the companies and close corporations referred to during the investigation were perused.

6.2.8 Records of the Engineering Council of South Africa

Records relating to registered members of the Council were perused.

6.2.9 Previous findings of the Public Protector

The relevant findings of the Public Protector in report no1 of 2012/13, titled: “YES WE MADE MISTAKES: REPORT ON AN INVESTIGATION INTO THE ALLEGED IMPROPER PROCUREMENT OF COMMUNICATION SERVICES BY THE DEPARTMENT OF THE PREMIER OF THE WESTERN CAPE PROVINCIAL GOVERNMENT” were considered and applied, where appropriate.

6.2.10 Intervention by the Public Protector

On 16 November 2011, the Public Protector met with the former Limpopo MEC for Roads and Transport and the Head of the Department where it was agreed that the Department would not continue to appoint employees of On-Point to BEC's, pending the outcome of the investigation.

6.2.11 Responses to the Provisional Report

The responses received from Mr Gwangwa of On-Point, Mr Letebele, the Head of the Department, Mr J Malema and Ms D Kohler-Barnard MP, one of the complainants, were considered and where appropriate incorporated into the report.

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7 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

7.1 The establishment of an infrastructure Project Management Unit for the Department and the appointment of On-Point

7.1.1 The Acting General Manager: Roads of the Department addressed a memorandum titled: *REQUEST FOR APPROVAL FOR TERMS OF REFERENCE AND ADVERTISEMENT TO PROCURE SERVICES OF INFRASTRUCTURE PROJECT MANAGEMENT UNIT FOR THE DEPARTMENT*”, to the Head of the Department, on 3 September 2009.

7.1.2 The contents included the following:

“2. Background

The Department of Roads and Transport is a multi-sectored entity responsible for managing provincial roads, public transport as well as traffic safety. It therefore had (sic) to ensure that roads, intermodal facilities, traffic stations and cost centers are constructed and adequately maintained. The terms of reference were developed with the assistance of the Infrastructure Development Unit at Treasury.

3. Motivation

The Department is currently not having enough capacity to manage this function on its own and therefor (sic) need a Project Management Unit which will assist in capacitating the internal departmental staff. The Department is also training about ten civil engineering students at the university to be roped in the maintenance unit when they qualify. It is on the basis of these facts that an approval (sic) is sought from the Head of the Department for the engagement of a suitably qualified Project Management Unit to assist in managing the maintenance for a period not exceeding three years with an option to renew the contract if it is necessary.

4. Bidding process

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A two envelope system will be used, with one envelope containing a proposal and the second containing a price and details of financial implications. It is further requested that this process be shortened to at least fourteen days or which period (sic) is the shortest due to the amount of work which is still to be done in this financial year. (emphasis added)

- 7.1.3 The memorandum was approved by the Chief Financial Officer on 7 September 2009, who remarked that the bid had to be advertised by 11 September 2009.
- 7.1.4 It was subsequently approved by the Head of the Department, on 8 September 2009.
- 7.1.5 The bid was advertised in the Provincial Tender Bulletin of 11 September 2009. The closing date for the submission of bids was 1 October 2009.
- 7.1.6 The Request for Proposal presented to prospective bidders stated that the Department was in need of the services of a multi-disciplinary team to perform the functions of a PMU. It further indicated that:

“There should be a joint venture with a reputable BEE company in the proposal. Respondents must be multi-disciplinary which may be achieved through the establishment of joint ventures or by appointment of Sub-agents (sic) with local empowerment content clearly specified.

As a minimum requirement the following professionals should be part of the team: Architects, Quantity Surveyors, Civil Engineers, Structural Engineers, Electrical Engineers, Mechanical Engineers, Project Managers, Transport and Traffic Engineers, Economists, Social Facilitators. Respondents are also required to have relevant experience and knowledge in the design and construction of roads, traffic stations, overload control, inter-modal facilities, cost centers and airport infrastructure. (emphases added)

- 7.1.7 It, furthermore, described in detail the functions that the PMU was expected to perform, the expected deliverables and the evaluation requirements that had to be met by bidders. The latter included that:

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7.1.7.1 A two envelope system would be used in terms of which one envelope had to contain price and the other the proposal. It was specifically stated that bidders would be disqualified if they included price in the proposal.

7.1.7.2 The envelopes had to contain an original and two copies of the proposals.

7.1.7.3 An original Tax Clearance Certificate and a covering letter accepting the conditions of the Request for Proposal had to be included.

7.1.8 The Senior Manager: Supply Chain Management submitted a memorandum to the Head of the Department to obtain his approval for the appointment of members of the Bid Evaluation Committee for the bid, on 23 September 2009. The memorandum stated that *“the Head of Department has nominated panel members for appointment”* and concludes:

“It is strongly recommended that the following panel members from within and outside the department be appointed by the Accounting Officer to evaluate and make recommendations to the Bid Adjudication Committee:

Mokgadi Betty Malope: Limpopo Provincial Treasury

Khalatse Colbert Marobela: Denel Aviation

Saracen Mojaelo: Roads Infrastructure

Lesiba Kekana: Finance

Mashila Thomas: Supply Chain Management (Secretariat)”

7.1.9 No motivation was provided in the memorandum as to why the specific individuals were to be appointed as members of the BEC.

7.1.10 The Head of the Department signed the letter of appointment of the members of the BEC on the same day.

7.1.11 A total of 16 bids were received on time.

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7.1.12 The meeting of the BEC took place on 3 and 4 October 2009. According to the Minutes, Ms Malope did not attend. The BEC resolved that the following would be the “disqualifying criteria”:

- *“Submission of both technical and financial proposal in one envelop.*
- *Non submission of 1(one) original and 2(two) copies of technical and non financial proposals.*
- *Scoring of less than 30 points on technical/functionality.*
- *Non submission of covering letter.”*

7.1.13 The Memorandum of the Chairperson of the BEC addressed to the Chairperson of the BAC, dated 4 October 2009 stated that:

7.1.13.1 Six bidders were disqualified for failure to comply with the two envelop and copies of proposal requirements;

7.1.13.2 Proposals for the remaining ten bidders were evaluated in respect of functionality, in terms of the following:

Relevant qualifications: 30 points

Experience 25 points

Skills Transfer 15 points

7.1.13.3 During the evaluation, On-Point scored the highest, i.e 45.67 points. Three of the ten bidders were disqualified during this part of the evaluation process for not achieving the minimum score of 30 points for functionality

7.1.13.4 The financial proposals of the remaining seven bidders were subsequently opened. Three bidders were disqualified for not providing a price breakdown. Another three were disqualified for non-compliance with the requirement in respect of a covering letter accepting the terms and conditions of the Request for Proposal;

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7.1.13.5 The only bidder left, i.e. On-Point, obtained the highest score for functionality and price also complied with the requirement in respect of a valid Tax Clearance Certificate.

7.1.13.6 In terms of the application of the Preferential Procurement Points System, On-Point was awarded 90 points for price and functionality, three points for non-franchise, one point for the promotion of SMME's, two points for being based in the Limpopo Province and 1 point for the promotion of the youth. On-Point's total score was 97 points.

7.1.14 It was accordingly recommended that the bid be awarded to On-Point at an amount of R51 974 057, over a period of three years.

7.1.15 At its meeting held on 5 and 6 October 2009, the BAC resolved:

"That the bid be recommended for HOD's approval and that HOD negotiate the price on certain items with the help of the chairperson." (emphasis added)

7.1.16 On 7 October 2009, the Head of the Department wrote to Mr L C Gwangwa of On-Point stating the following:

"Please take note that you have submitted the tax clearance certificate of Achir Shelf 8 (Pty) Ltd.

You have to submit the tax clearance certificate of On-Point Engineers (Pty) Ltd.

Failure to submit the required document within two days after receipt of this notice will be regarded as non submission of the correct tax clearance certificate, which will disqualify you from further participation in this process."

7.1.17 Mr Gwangwa responded on 8 October 2009 as follows:

"Kindly note that Achir shelf 8 (sic) (Pty) Ltd, Registration number 2009/007402/07 is a shelf company that On-Point Engineers (Pty) Ltd, registration number 2009/007402/07 bought and we had registered a name change from Achir Shelf 8 (Pty) Ltd to On-Point Engineers (Pty) Ltd which was approved by cipro (sic).

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Further note that the Registration number on the tax clearance that we submitted is similar to the one of On-Point's Registration number."

7.1.18 On 9 October 2009, Mr Gwangwa submitted a valid tax clearance certificate for On-Point, as requested by the Head of the Department.

7.1.19 The Chairperson of the BAC submitted a memorandum to the Head of the Department, recommending that the bid be awarded to On-Point at a total bid price of R 51 974 057 over a period of three years. It was noted that the memorandum was dated 5 October 2009, but only signed on 9 October 2009. No reference was made in the memorandum to the resolution of the BAC that the Head of the Department had to negotiate the price of certain items with the assistance of the Chairperson.

7.1.20 The Head of the Department approved the memorandum on 9 October 2009.

7.1.21 On 13 October 2009, the Head of the Department informed On-Point in writing that the bid was awarded to it.

7.1.22 The agreement between the Department and On-Point was signed on 16 October 2009.

7.2 The history of the establishment registration and the Directors of On-Point

7.2.1 According to the records of the Companies and Intellectual Properties Commission (CIPC) (formerly known as the Companies and Intellectual Property Registration Office) (CIPRO) the company currently known as On-Point Engineers (Pty) Ltd was originally a shelf company, going under the name of *Achir Shelf 8 (Pty) Ltd* (Achir Shelf), which was registered for the first time as a company on 9 April 2009, six months before the disputed tender was awarded. Its main business was recorded as: *"All aspects of general trading"*.

7.2.2 The sole Director of Achir Shelf at the time of its registration was Mr A T Rasethaba.

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-
- 7.2.3 Mr Rasethaba resigned as Director and was replaced by Mr K Dichabe, on 7 August 2009.
- 7.2.4 Achir Shelf took a special resolution to change its name to On-Point Engineers (Pty) (Ltd) and its main purpose of business to: *“All aspects of Engineering”*, on 31 August 2009, a little over a month before the tender was awarded to On-Point by the Department.
- 7.2.5 Mr L C Gwangwa joined the company when he was appointed as Director on 16 September 2009, less than a month before the tender was awarded.
- 7.2.6 A Certificate of Change of Name was issued by the Registrar of Companies and of Close Corporations on 25 September 2009.
- 7.2.7 The CIPC records indicate that the resignation of Mr K Dichabe as a Director of On-Point was registered on 12 May 2010.
- 7.2.8 According to the Minutes of a Director’s meeting of On-Point held on 28 October 2010, which was filed with the CIPC, Mr A M Phetla accepted the appointment as a Director of the company. It was recorded in this regard that: *“LG (Mr L C Gwangwa) nominated AP (Mr A M Phetla) as Director to On-Point Engineers (Pty) Ltd with immediate effect. LG stresses the importance of this decision based on AP’s qualifications and experience in taking the company forward. AP has accepted the nomination.”* On-Point registered Mr Phetla as a Director with the CIPC on 9 November 2010.
- 7.2.9 The company records of On-Point filed with the CIPC further indicate that Mr Phetla resigned as Director on 9 December 2010. His resignation was referred to in the Minutes of a Director’s meeting held on 10 December 2010 as follows:
- “LG announced the resignation of AP as Director on (sic) On Point Engineers (Pty) Ltd with immediate effect. AP stated that the decision was to focus on his other business interests and added that he would still provide services and expertise to the Company in a consulting role. LG has accepted the resignation.”*

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7.2.10 Mr Gwangwa informed the CIPC on 1 November 2010 that Mr Phetla was replaced as a Director of the company by Mr D T Maponya. Currently Mr Gwangwa is the sole Director of On-Point. No indication could be found in the records of what happened to Mr Maponya.

7.2.11 It was noted from the CIPC records that the said Mr Phetla is also the sole member of a Close Corporation, *Mpotseng Infrastructure CC*² that was registered with the CIPC on 10 April 2007. The description of its principal business was recorded as: *“Infrastructure, Civil Engineering Consultants and Related Activities.”*

7.3 Analysis of the bid submitted to the Department by On-Point

7.3.1 On-Point’s bid was submitted to the Department under a covering letter accepting the terms and conditions of the Request for Proposal and the General Conditions of Contract, dated 29 September 2009.

7.3.2 The General Conditions of Contract included the following clauses:

“23.1 The purchaser (the Department), without prejudice to any other remedy for breach of contract, by written notice of default sent to the supplier, may terminate this contract in whole or in part:

...

*(a) if the supplier, in the judgment of the purchaser, **has engaged in corrupt or fraudulent practices in competing for or in executing the contract.***

...

23.3 Where the purchaser terminates the contract in whole or in part, the purchaser may decide to impose a restriction penalty on the supplier by prohibiting such supplier from doing business with the public sector for a period not exceeding 10 years.

...

² See paragraph 7.8.6 below

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23.6 *If a restriction is imposed, the purchaser must, within five(5) working days of such imposition, furnish the National Treasury with the following information:*

- (i) The name and address of the supplier/person restricted by the purchaser;*
- (ii) The date of the commencement of the restriction*
- (iii) The period of restriction; and*
- (iv) The reasons for the restriction.*

These details will be loaded in the National Treasury's database of suppliers or persons prohibited from doing business with the public sector."

...

23.7 *If a court of law convicts a person of an offence as contemplated in sections 12 or 13 of the Prevention and Combatting of Corrupt Activities Act, No 12 of 2004, the court may also rule that such person's name be endorsed on the Register of Tender Defaulters. When a person's name has been endorsed on the Register, the person will be prohibited from doing business with the public sector for a period of not less than five years and not more than 10 years. The National Treasury is empowered to determine the period of restriction and each case will be dealt with on its own merits."* (emphasis added)

7.3.3 As noted above, the bid was submitted approximately one month after Achir Shelf agreed to be converted into On-Point and 4 days after the change of the name of Achir Shelf to On Point Engineers and the change of the main purpose of business to: "*all aspects of engineering*" was registered by the CIPC.

7.3.4 The bid documents included a Tax Clearance Certificate issued in the name of Achir Shelf, valid from 18 August 2009 to 18 August 2010.

7.3.5 It also included two "*partnership letters*." The first was from Ernest and Young addressed to On-Point on 1 October 2009, stating its willingness to be involved in its proposed project team and providing the details and credentials of Ernest and Young's key people that would be involved in the project.

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7.3.6 The second letter was addressed to On-Point on 30 September 2009, by Peek Traffic Limited, a company based in the United Kingdom specialising in traffic systems and signal equipment. The letter stated that Peek Limited would welcome the opportunity to support On-Point in the project concerned.

7.3.7 During the investigation, the Peek's Legal Adviser responded as follows to the inclusion of the credentials of members of its staff in On-Point's bid document:

*"In and around September 2009, Peek entered into preliminary discussions with On-Point regarding provision of traffic management implementation support in respect of the Limpopo tender. **No such agreement was reached and at no time was Peek part of On-Point's team.***

As part of preliminary discussions, Peek provided CVs and company data sheets to demonstrate Peek's capability. Peek has no knowledge of the CVs being used in any tender documents." (emphasis added)

7.3.8 There was no indication in the bid document that On-Point was presenting its bid as a joint venture with another or other entities.

7.3.9 The bid document included an organogram, presenting On-Point as a solid company with structures such as the Executive, Management and staff.

7.3.10 The Executive Team

7.3.10.1 On-Point's bid document stated in this regard that:

"The executive team of On-Point consists of engineers that are passionate, qualified, hands-on and experienced. Their local and international experiences range from strategic business architecture; to managing a (sic) multi-million rand civil and transportation engineering projects."

7.3.10.2 The members of the Executive Team of On-Point were listed as follows:

- (a) Lesiba Gwangwa: Chief Executive Officer

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At the time of the submission of the bid document, Mr Gwangwa was one of the Directors of On-Point. During the investigation it transpired that he is registered at the Engineering Council of South Africa as a *“Candidate Engineering Technician”*. His responsibilities were stated in the bid document as: *“implementation of strategies by directing and managing the firm.”*

(b) Kagisho Dichabe: Chief Operations Officer

Mr Dichabe was also a Director of On-Point at the time of the submission of the bid document. He was to be responsible for the business strategy and operational leg of On-Point. The bid document further stated that Mr Dichabe holds a B.Eng (Mechanical) degree. During the investigation it transpired that he is not registered with the Engineering Council of South Africa and that at the time of the submission of the bid, Mr Dichabe was the sole member of Dichabe Engineering Solutions CC and not the Chief Operations Officer of On-Point.

(c) Maleose Leolo: Chief Financial Officer

According to Mr Leolo’s CV that was included in the bid documents, he was at the time of the submission thereof employed by Leolo & Partners Chartered Accountants Inc. It was established during the investigation that he was not the Chief Financial Officer of On-Point.

(d) Mkatoko Holeni: Programme Director

The bid document referred to Ms Holeni as a *“Candidate Quantity Surveyor and a member of the Association of Quantity Surveyors. She holds a Quantity Surveying degree (Honours) specialising in Business Management from the University of Port Elizabeth. She has extensive experience having worked on (sic) construction of schools, clinic, hospitals, and rehabilitation of existing buildings, social facilitation, labour intensive construction projects, contracts documentation and administration.”*

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According to her CV, which was included by On-Point, Ms Holeni was at the time of the submission of the bid employed by Zethu Quantity Surveyors in White River. During the investigation she was still employed by the same firm.

When Ms Holeni was approached during the investigation about her involvement with On-Point, as stated in the bid document, she responded as follows:

“I was called during 2009 by a Mr Kagisho Dichabe of On-Point, he explained that they were working on a proposal for the said project. They were looking for consultants in the construction industry to partner with for this venture.

Mr Dichabe and I never met during this time, all our discussions were telephonic. The understanding was that he would make time to see me as soon as possible, which never transpired. I found out that the contract was awarded to On-Point, I contacted Mr Dichabe and we met to discuss the way forward.

On meeting with Mr Dichabe and Mr Ngwagwa (sic), I was presented with the terms of reference for the first time. The gentlemen explained to me that they required me to assist in setting up the PM unit. It was during our first meeting that I highlighted to them that I had never been involved in pmu’s and requested that they involve me in something that I was more familiar with. Unfortunately they could not accommodate me.” (emphasis added)

(e) Slindile Mthiyane: Company Secretary. Ms Mtiyane could not be contacted during the investigation.

7.3.11 The Senior Management Team

7.3.11.1 The On-Point bid document described its Senior Management Team as follows:

“Our hands-on senior management team support the executive team and ensure (sic) that strategic decisions are implemented within On-Point. The following key individuals consist of this team (sic):”

(a) Johan Jansen van Vuuren

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Mr Jansen van Vuuren is a professional engineer registered with the Engineering Council of South Africa. According to his CV that formed part of the bid document, he was employed by Semono Consulting Engineers at the time of its submission to the Department. It was established during the investigation that Mr Jansen van Vuuren became a member of Semono Consulting Engineers CC on 2 February 2009. Mr L M Ledwaba, an attorney from the firm Mpoyana Lewaba Inc that also represents On-Point and Mr L Gwangwa, responded on behalf of Mr Jansen van Vuuren during the investigation. In an unsigned letter, dated 2 May 2012, Mr Lewaba confirmed that Mr Jansen van Vuuren was part of the *“On-Point project team”*. He also confirmed that Mr Jansen van Vuuren was aware that his name and CV was included in On-Point’s bid document and that he *“performed functions in accordance with the terms of reference of the contract awarded by the Limpopo Department of Roads and Transport to ON Point (sic)”*.

(b) Tsakane Letsholo: Technical Director.

According to the bid document, Ms Letsholo was one of the few black women pursuing a career in structural engineering and worked for a leading civil and construction engineering firm in Africa. She could not be contacted during the investigation.

(c) Lloyd Moti: Senior Technical Manager

Mr Moti was referred to in the bid document as a qualified Civil Engineer as well as a Traffic and Transportation Engineer with more than 7 years’ experience. It was established during the investigation that Mr Moti is not registered with the Engineering Council of South Africa. It was furthermore noted from his CV, which was included in the bid document, that Mr Moti was employed as the Managing Director of Dichabe Engineering Solutions at the time of the submission of the bid³. When he was approached during the investigation, Mr Moti stated that:

³ See paragraph 7.3.10.2(b) above

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"I was never part of the On-Point Senior Management Team. I did have employment negotiations with On-Point to be part of their team, but we could not agree terms.

He further indicated that he was aware that his credentials were used in On-Point's bid documents, but denied that he ever performed any work for On-Point.

(d) Kabelo Sekete: Strategic Programme Manager

According to the bid document, Mr Sekete has a B. Eng (Mechanical) degree and an Advanced Diploma in Project and Programme Management. *"He has held several Programme Manager roles across a variety of industries and Supply Chain positions both locally and internationally with some of the leading engineering companies."*

It was established during the investigation that Mr Sekete is not registered with the Engineering Council of South Africa. According to his CV, which was included in the bid document, Mr Sekete was employed by Dichabe Engineering Solutions⁴ as its Chief Operations Officer at the time of its submission to the Department.

(e) Dimakatso Matshoga

On-Point's bid document stated the following in respect of Ms Matshoga:

"On-Point is excited to welcome Dimakatso Matshoga to the Senior Management Team. Dimakatso has a Pr. Eng majoring in Electronic Engineering degree from the University of Natal, and she is currently completing her MBA. She has extensive experience with systems engineering, where some of her roles included analyzing, on coordination with engineering (sic), system requirements and client specifications to establish functionality and performance systems on the Gautrain Project."

It was established during the investigation that Ms Matshoga is registered with the Engineering Council of South Africa as a Professional Engineer.

⁴ See paragraph 7.3.10.2(b) above

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Ms Matshoga responded as follows when she was approached during the investigation about her involvement in the Senior Management Team of On-Point:

“I was never part of the Senior Management Team of On-Point, as indicated in the bid documents. (I didn’t even know of On-Point’s existence.) I was totally unaware that my name, professional details and even my picture were included in their bid documents. I have never performed any work for On-Point at any time.

I am quite disappointed to learn about my professional identity being fraudulently used without my knowledge yet again-as you will see in the email extracts below, this is not happening for the first time. What is even sad is that all this is done by a varsity friend; all this for selfish intentions.” (emphasis added)

From the email messages attached to her response, it appeared that Ms Matshoga had raised her concerns on 29 September 2010 with a certain Kagiso about her name being fraudulently used by a company called *Kopania Engineers*, indicating that she was an executive member, without her knowledge and consent.

During the investigation it was established from the records of the CIPC that Kopania Engineers (Pty) Ltd is a registered company involved in all aspects of engineering. Currently, its sole Director is Mr Thomas Rasethaba. Mr Kagiso Dichabe⁵ is/was the Chief Executive Officer of the company.

(f) Calvin Sehlapelo: Procurement Manager

Mr Sehlapelo is described in the bid document as having a B Comm (Hons) degree and a CA (SA) qualification. *“Calvin’s expertise extends to defining, implementing and managing a procurement framework that highlights appropriate sourcing, supplier relationship and contracting approaches and processes. This is one of the key capabilities of within On-Point that ensures that regulatory governance and requirements (sic).*

⁵ See paragraph 7.3.10.2(b) above

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During the investigation, Mr Sehlapelo responded to his inclusion as part of On-Point's Senior Management Team, as follows:

"My role was to be an independent resource on the team and to perform snr. Management functions once the tender was awarded. Yes I was aware that my name and credentials were included in the bid documents for the purposes of providing services on awarding of the contract. I have not performed work for on-point (sic) at any time with regards to the contract in question or any other mandates. My primary reasons for not being involved in the project is that during submission of the tender documents we were still in discussions regarding remuneration which I felt could be resolved, however, in the end I did not accept their offer for full time employment with the company." (sic) (emphasis added)

7.3.12 The Management Team

7.3.12.1 Thomas Mulaudzi

Mr Mulaudzi's CV was not included in the bid document. He is described as having a degree in civil engineering. It was established that he is not registered with the Engineering Council of South Africa. According to the records of the CIPC, Mr Mulaudzi is the sole member of Engcor Engineering Consultants CC, a position that he took on 13 November 2007.

During the investigation Mr Mulaudzi denied that he was a member of the Management Team of On-Point, as indicated in the bid document.

7.3.12.2 Charles Kawanga

According to the bid document, Mr Kawanga is a qualified engineer and registered with the Engineering Council of South Africa. During the investigation it was confirmed that Mr Kawanga is registered with the Council as a Professional Engineer. In his response when his inclusion in the management team of On-Point was raised with him, Mr Kawanga stated:

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"I attended a meeting in Bryanston a while ago, I cannot recall the exact date at which the formation of On Point was discussed. My entity Express Structural Solutions was invited to provide civil and structural design inputs, from the discussion, it came across that On Point was going to be an organisation formed out of companies from various backgrounds to provide solutions to whoever the client might be.

I therefore submitted my company profile and e-mailed same to an individual who was identified as the interim company secretary. That was the last meeting I attended, and my assumptions were that whatever it is that the gentlemen wanted to do did NOT materialise.

...

I was never aware of the presentation of my CV nor my company profile for any bid whatsoever.

I reported the matter to the Engineering Council of South Africa (ECSA) legal (sic) for advice regarding the use of my credentials without my knowledge, whilst awaiting investigations in the matter from the government. I did this to protect myself of any improper conduct on the part of On Point that could eventually be attributed to myself and ESS. I had since written to Mr Gwangwa on numerous occasions to refrain from the use of my name in whatever capacity and circumstance." (emphasis added)

7.3.12.3 Figure 1 below represents On-Point's "Executive Organogram" as it was included in the bid document.

7.3.12.4 The bid document also included a list of names, positions and qualifications of persons, titled: "Summary of Project Team and Support Staff Qualifications. The list is reproduced in Table 1 below. Columns referring to the information obtained in respect of some of the persons mentioned during the course of the investigation, have been added. The names of persons already referred to above have been excluded.

7.3.12.5 Table 2 lists the names and details of additional persons whose CVs were also included in the bid document

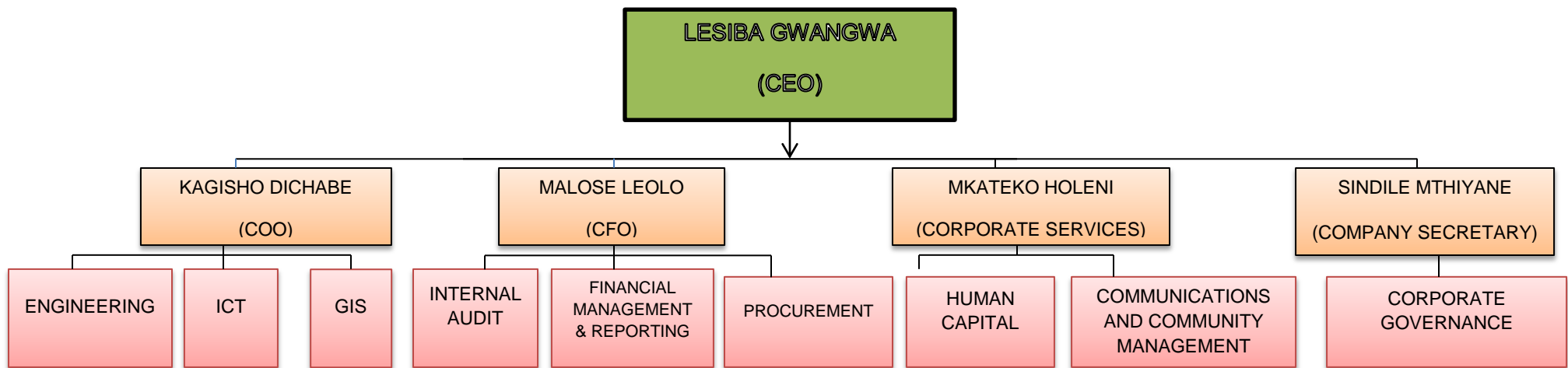


Figure 1

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SUMMARY OF PROJECT TEAM AND SUPPORT STAFF QUALIFICATIONS						
NAME	POSITION/KEY EXPERTISE	REGISTERED WITH PROFESSIONAL BODY	DATE OF REGISTRATION	REGISTERED AS	Employment at the time of the submission of On-Points bid	Response during the investigation to his/her inclusion in On-Point's bid document
D N Maina	Architect	Yes	25 August 2011	Professional Architect	Employed by LTE Consulting/DNA Architects	Does not know anything about it. Was never involved. <i>"I was not aware that my name or CV was presented as part of On-Point's bid documents. I don't even know how they got hold of my CV."</i>
A Zulu	Project Manager/Electrical Engineering	No				No CV submitted. Could not be traced during the investigation
T Maseko	Technician/Electrical Engineering	No			Not clear	Could not be contacted during the investigation
T Bharat	Civil Engineer	No			Employed by Express structural solutions	Could not be traced during the investigation
T Velen	Director/Engineering	Yes	17 February 2003	Professional Engineer	Director of Express structural solutions	Denies involvement. Works for Eskom since 1996 Was not aware that his name and CV were submitted as part of On-Point's bid.
L Nyamuranga	Engineer	Yes	26 August 2010	Candidate Engineering Technologist	Employed by Dichabe Engineering Solutions	Could not be contacted during the investigation.

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L Nyembezi	Civil Engineer	No. Registration cancelled on 14 December 2011 due to Default-Fees		Candidate Engineering Technician	No. Employed by ILISO Consulting	Could not be traced during the investigation
D Padayachee	Structural Engineer	No			Employed by Express structural solutions	Denies any involvement. Was not aware that his name and CV were included in On-Point's bid
D S Govender	Civil Engineer	No			Employed by Express structural solutions	Denies any involvement. . Was not aware that his name and CV were included in On-Point's bid
T Moletsane	Project Engineer	No			Employed by Express structural solutions	Could not be traced during the investigation
T T Khaeane	Economist	N/A			Employed by National Treasury	Was never involved. Denies that he was aware that his name and CV were submitted in On-Point's bid documents
E G Bogopa	Senior Manager/Project Management	N/A			No. Executive Director of Merafong Mining Services	Could not be traced during the investigation
J Segoto	Snr Technical Manager	N/A			Not clear	Could not be traced during the investigation

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C Qina	Contracts Manager	N/A			No Employed by New Environment	Denies any involvement. Managing Director of New Environment confirmed that Mr Qina has been in its full time employment since February 2009. <i>"Furthermore, we have had no dealings or knowledge of the existence of On Point Engineers until this message was received. We are uncertain as to how Mr Qina's CV landed in their hands and we have not given permission to this company to use Mr Qina's CV to secure business. Their claim that Mr Qina is part of their team is fraudulent and we distance ourselves completely from the association. We would appreciate that the legal remedies so such identity theft be followed to the full extent..."</i>
M E Diadla	Company Secretary	N/A			No Employed by Roodepoort City Theater	Could not be traced during the investigation
Kobus Steyn	Associate/Engineer	Yes			No. Employed by Express structural solutions	Could not be traced during the investigation
R T Rasebitse	Managing Member/Project Management	N/A			Not clear	
R Pearce	Project Manager	N/A			No. Employed by Peek Traffic	Not involved-See paragraph 7.3.7 above

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Dave Kelly	Systems Traffic Engineer	N/A			No. Employed by Peek Traffic	Not involved-See paragraph 7.3.7 above
Dave Hall	Project Manager	N/A			No. Employed by Peek Traffic	Not involved-See paragraph 7.3.7 above
M L Motjale	Procurement Manager	N/A			No. Employed by Foskor	Could not traced during the investigation
R Pennings	GIS Specialist	N/A			No. Employed by Imtech	Could not be contacted during the investigation
R Buchmessenger	IMS	N/A			No. Employed by Imtech	Could not be contacted during the investigation
J Smink	GIS Specialist				No. Employed by Imtech	Could not be contacted during the investigation

Table 1

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CVs INCLUDED OF PERSONS NOT ON LIST OF PROJECT TEAM AND SUPPORT STAFF			
NAME	PROFESSION	EMPLOYED BY ON POINT	RESPONSE DURING THE INVESTIGATION
M Moodley	I T Risk and Assurance Manager Ernest and Young	No	Was part of proposed team involvement by Ernest and Young
N Ramlakhan	Assistant Manager: I T Advisory Ernest and Young	No	Was part of proposed team involvement by Ernest and Young
D Stewart	Senior Manager: I T Advisory Ernest and Young	No	Was part of proposed team involvement by Ernest and Young
M L Rathebe	Project Manager	Not clear	Could not be contacted during the investigation
L N E Msimanga	Project Manager	No	Could not be contacted during the investigation
R Mphonyo	Project Manager	Employed by the South African Reserve Bank	<i>"There was a period when I was looking for employment and I sent my CV to my cousin Mr Dachabe⁶, but that was before I joined the Reserve Bank. While I was employed here he asked me for my updated CV and I innocently gave it to him. He told me he was trying to establish something and he will get back to me if it materializes. He was not very clear and he never communicated afterwards. I guess I just assumed that it did not materialize. I was not aware that the CV would be presented in On-Point's bid document."</i>
Charles Gwebu	Project Manager	Not clear	Could not be traced during the investigation
Taka Sande	Projects Consultant	No	Was never part of the On Point Project Team and not aware that his name and CV were included in On-Point's bid document. <i>"Henceforth, I can say that my name and CV were fraudulently used in this contract by On Point Engineers."</i>
C Phelane	Environmental Health and Safety Manager	No-Lives in Ireland J&P Overseas Ltd	Could not be traced during the investigation

Table 2

⁶ See paragraph 7.3.10.2(b) above

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7.3.13 Shareholding and number of years in business

7.3.13.1 In paragraph 9.8 of the “*PREFERENCE POINTS CLAIM FORM*” (Form SBD 6.1) included in On-Point’s bid document, the list of shareholders was stated as follows

Name	Date/Position occupied in enterprise	ID Number	% of business enterprise owned
Guilder Investments	2009/07/01	2009/01125007	33,3%
Tshiamo Dichabe	2009/07/01	8209225662088	33,3%
Maketele (family trust) Trust	2009 (not clear)	IT 8759/2002	33,3%

7.3.13.2 According to the records of the CIPC, Mr L C Gwangwa is the sole Director of Guilder Investments 59 (Pty) Ltd. The company was registered on 10 June 2009.

7.3.13.3 The bid document included a copy of a *Letter of Authority*, signed by the Assistant Master of the High Court, certifying that “*Abathote Thomas 771215261089*” is authorised to act as trustee of the Maketele Family Trust. It was noted during the investigation that the identity number referred to in the said letter of authority is the same as that of Abathote Thomas Rasethaba, who was the sole Director of Achir Shelf 8 before it was taken over by Mr K Dichabe and Mr L C Gwangwa and its name changed to On-Point Engineers. Mr Rasethaba is also the sole Director of Kopania Engineers, referred to in paragraph 7.3.10.1 (e) above.

7.3.13.4 The form also required of On-Point to indicate the total number of years that it had been in business. The answer provided was “*9 years*”. However, as indicated above, On-Point was only established as a company in August 2009, i.e. approximately one month before the bid was submitted. The BEC took the incorrectly stated experience of On-Point into account in the evaluation of its bid. Even if registration date of Achir Shelf was taken into account in this regard, it still amounted to a total of approximately five months of existence at the time when the bid form was completed.

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7.3.14 Promotion of youth owned business enterprises

7.3.14.1 Form SBD 6.14 included in the bid document indicates that On-Point stated that it was actively involved in the promotion of youth owned business enterprises, as defined in the Limpopo Preferential Procurement Policy of 2005, by the outsourcing of its business functions. Dichabe Engineering⁷ was stated as the enterprise to which On-Point outsourced and the amount stated for 2009/10 was R1,2 million.

7.3.15 Permanent employees, annual turnover and assets

7.3.15.1 On-Point was furthermore required to complete Form SBD 6.3, which related to preference points claimed in terms of the Preferential Procurement Regulations for the promotion of small businesses. In this form On-Point stated that it had six full-time employees, has a total annual turnover of R2 million and assets valued at R 400 000.

7.3.15.2 It was noted that these statements were made in the bid document despite the fact that On-Point was only established approximately a month before the bid was submitted. It was also positively scored in this regard by the BEC.

7.3.16 The requirement of a joint venture

7.3.16.1 The Request for Proposal stated in this regard that:

*“There **should be a joint venture** with a reputable BEE company in the proposal. Respondents must be multi-disciplinary which may be achieved through the establishment of joint ventures or by appointment of sub-agents with local empowerment content clearly specified.”*

7.3.16.2 On-Point's bid was not that of a joint venture. The only reference to other entities involved in the proposal was to *“partnership letters”*. In this regard an attached letter from *Ernest and Young* indicated that they accepted an invitation to assist On-Point with delivering on its proposal. The letter however neither indicated whether *Ernest and Young* is a *“reputable BEE company”* nor did it specify the *“local empowerment content”*.

⁷ See paragraph 7.3.10.2(b) above

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7.3.16.3 Also attached to the bid was a letter, as indicated above, from an international company based in the United Kingdom, Peek Traffic Limited, confirming that it was willing to support On-Point in the implementation of its proposal. Again, there was no indication that Peek Traffic Limited is a “*reputable BEE company*” and the local empowerment content was not specified. As indicated in paragraph 7.3.7 above, Peek denied that any agreement was reached with On-Point in respect of its involvement in the bid.

7.4 Analysis of the evaluation and adjudication of the bids by the BEC and the BAC

7.4.1 The 16 bids submitted were evaluated by the BEC on 3 and 4 October 2009.

7.4.2 Six bidders were immediately disqualified for not complying with the “*two envelope requirement*.”

7.4.3 The functionality of the ten remaining bidders was evaluated and On-Point scored an average of 45.67 out of a possible 70 points. Second came Dombo & Du Plessis Consulting Engineers with a score of 36.

7.4.4 From the scoring sheets, it is evident that On-Point was scored as follows by the three members of the BEC:

Evaluation Criteria	Value out of 5	Meaning of value
Relevant Qualifications	Member 1: 4	Very Good
	Member 2: 4	Very Good
	Member 3: 3	Good
Experience	Member 1: 4	Very Good
	Member 2: 4	Very Good
	Member 3: 2	Average
Skills Transfer	Member 1: 2	Average
	Member 2: 3	Good
	Member 3: 2	Average

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- 7.4.5 It was noted from the bid submitted by On-Point that no reference was made to the relevant experience and track record of the company whatsoever. The focus of the bid was on the qualifications and experience of the stated members of the purported project team that was presented to the Department. On-Point was obviously not in a position to refer to experience as it had only been in existence for about a month at the time when the bid was submitted and therefore had no track record of performing as a multi-skilled team, as was required by the Request for Proposal.. There is also no indication that any due diligence process was followed by the BEC to verify the relevant functionality of the bidders.
- 7.4.6 Three bidders were disqualified for not meeting the required 30 minimum points score on functionality.
- 7.4.7 Three bidders were disqualified for not complying with the requirement of submitting a covering letter duly signed by an authorised person accepting the conditions of the Request for Proposal.
- 7.4.8 One of these was a consortium consisting of Aurecon South Africa (Pty) Ltd in association with Prism Architects, K C Maiwashe & Associates, EnvirXcellence and New Work Project Management. The covering letter of this bid stated:
- “This proposal was prepared **according to the invitation to tender** document and is valid for a period of 90 days from the date of submission.”* (emphasis added)
- 7.4.9 It was signed by the Technical Director of Aurecon, Dr D J W Wium.
- 7.4.10 From the wording of the letter it is clear that the proposal was compiled conscious of the terms and conditions of the Request for Proposal and that it was hence prepared in accordance with it. The drafter of the letter could not have had any other meaning in mind than to indicate that the bidder consortium accepted the terms and conditions of the Request for Proposal.

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7.4.11 The BEC did not disqualify On-Point for not submitting a valid Tax Clearance Certificate in the name of the company. The certificate that was submitted was in the name of Achir Shelf 8 and thus did not meet the requirement. No explanation was provided in the bid document as to the reasons why a valid Tax Clearance Certificate in the name of On-Point was not submitted. There is also no indication that the BEC attempted to obtain a valid tax clearance certificate from On-Point, as provided for by paragraph 10.3.1 of the Limpopo Preferential Procurement Policy⁸.

7.4.12 Due to the disqualification of 15 of the 16 bidders, the BEC was ultimately left with only On-Point's proposal to consider for recommendation.

7.4.13 There is no indication from the Minutes of the meeting of the Bid Adjudication Committee that it considered the bid documents, the reasons for disqualifying 15 of the 16 bidders, the non-compliance of On-Point with the requirement of submitting a valid Tax Clearance Certificate and the absence of any due diligence exercise in respect of the credentials of the recommended bidder.

7.5 The approval of the awarding of the contract by the Head of the Department

7.5.1 The Head of the Department requested On-Point to submit a valid Tax Clearance Certificate on 7 October 2009, i.e. two days before the recommendation of the BAC that the contract be awarded to On-Point was signed by the Chairperson of the BAC. It could initially not be established with certainty during the investigation how and why this happened.

7.5.2 No indication could be found in the records of the Department that the Head of the Department negotiated or attempted to negotiate the price quoted by On-Point, as was resolved by the BAC. The Head of the Department approved the awarding of the contract on Friday, 9 October 2009 and the letter of acceptance in the amount of the bid price was signed on Tuesday, 13 October 2009.

⁸ See paragraph 9.6.7 below

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7.5.3 The duration of the agreement signed between the Department and On-Point on 16 October 2009 is from 19 October 2009 to 18 October 2012.

7.6 On-Point's obligations in terms of the agreement

7.6.1 For the purposes of this report, the following are the relevant salient terms of the agreement in respect of the obligations of On-Point as the PMU of the Department:

"6.1 The PMU shall assist the Department in the Infrastructure Programme Management and the implementation of Department Capex and Maintenance Budget relevant to the Transportation Infrastructure in the province. The services shall include the following:

.....

6.1.4 Preparation and administration of the Terms of Reference (TOR) for the appointment of PSP's (Professional Service Providers on the database of the Department), this includes the following:

6.1.4.1 Selection based on the adopted procedure

...

6.1.4.5 Support in planning, design management and administration of projects undertaken by the Department;

6.1.4.6 Support in regular progress review on planning and design and documentation process of the projects undertaken by the Department;

6.1.4.7 Ensuring adherence to planning and design standards in terms of engineering requisites....

...

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6.1.4.9 Support in the management of PSP's in its totality through technical and administrative support of the regular progress review meetings with PSP's and reporting to the department on the outcomes of those meetings, and follow up in making sure that they are implemented;

...

6.1.4.11 Support on project implementation, quality assurance, physical and financial status overview and reporting. This among others includes the following:

...

b. Quality and quantity control of the works performed by the contractors in conjunction with PSP's

...

i. Monitoring of the performance of the PSP's and contractors on a systematic and substantive manner and advising the Department accordingly;

...

o. Support in trouble-shooting and clearing of the bottle-necks relating to quality assurance at planning, design, and documentation and bid stages of the projects to be managed by the appointed service provider/s;

p. Overall support to the monitoring of the performance of the appointed service provider/s and making recommendations to improve where and when needed." (emphasis added)

7.6.2 It was noted that the agreement does not provide for On-Point to be involved in the evaluation of bids of prospective of service providers for the Department.

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7.7 The appointment of Mr A M Phetla as a Director of On-Point

- 7.7.1 As indicated in paragraph 7.2 above, the On-Point's official records filed with the CIPC indicated that Mr A M Phetla, the sole member of Mpotseng Infrastructure CC, was appointed as a Director of On-Point on 28 October 2010 and that he resigned from the position on 9 December 2010.
- 7.7.2 Mr Phetla was interviewed during the investigation, as referred to below, and denied that he was a Director of On-Point at any stage. He expressed the firm view that the documentation filed with the CIPC in this regard was fraudulent.
- 7.7.3 He further indicated that when he became aware of media reports published in August 2011 linking him with On-Point, he had the matter investigated by his attorney and was surprised to discover that he was indeed registered with the CIPC as a Director of On-Point.
- 7.7.4 On 16 August 2011, Mr Phetla informed the Engineering Council of South Africa of his discovery and that he *"was never a director of On Point (sic) at any given point, then and now, and if there was any work/design or even documentation which was done during that period I'm accepting no responsibility of such (sic) hence it was done without my written consent and/or my approval."*
- 7.7.5 Mr Phetla was advised by the Engineering Council of South Africa to lodge a complaint with the South African Police Service, which he failed to do.
- 7.7.6 On 8 February 2012, Mr Phetla's attorney addressed a letter to On-Point stating that:
- "Our client has instructed us that he was made aware of the fact that he was a director of On-Point Engineers (Pty) Ltd during the periods referred to above (28 October 2010 and 19 January 2011); an occurrence which he was not aware, nor a part of at the time and that a meeting between yourselves was subsequently held to clarify the issue.*

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Despite the foregoing, our client is concerned that there may have been transactions, for instance the purchase of property or other assets which may have occurred during this period, and this aspect was not clarified in the meeting referred to above. As a result, our client has instructed us to request from you, as we hereby do, to clarify (sic) as to any such transactions if any that may have occurred during this period which he may not be aware of.”

7.7.7 According to Mr Phetla, he never received any response to this letter from On-Point.

7.8 THE “BACK TO BACK” AGREEMENTS

7.8.1 As indicated in paragraph 2.9 above, it was alleged that On-Point entered into agreements with Professional Service Providers appointed by the Department in respect of projects managed by On-Point in its capacity as the Project Management Unit, in terms of which On-Point would do the planning and design of the project and the Professional Service Provider would be responsible for the construction stage. On Point would then be paid by the Professional Service Provider for the planning and design, which would be submitted to the Department under the name of the Professional Service Provider, who would then be paid by the Department.

7.8.2 It was suggested that this alleged practice resulted in a conflict of interests as On-Point would be supervising its own work and be paid from the funds of the Department for planning and design whilst it was also paid by the Department to supervise such stages of projects. Furthermore, that it amounted to misrepresentation and fraud.

7.8.3 During the investigation, copies of the so-called: “back-to-back” agreements were obtained (only one of which was signed), all of which have essentially the same wording. The heading of the document is “MEMORANDUM OF UNDERSTANDING”. It states on the cover page that it is an agreement between On-Point and the Professional Service Provider mentioned.

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7.8.4 Clause 3 states that the parties agree that they will be working on a stipulated project for the Limpopo Department of Roads and Transport and that the proceeds of the project would be shared between them in accordance with an annexure to the agreement as follows:

“3.1 as to On Point all fees for the planning and design stages

3.2 as to (the Professional Service Provider) all fees for the construction stages.

7.8.5 Confidentiality of the agreement is referred to in clause 10, which provides, inter alia, that:

“10.1 Neither party may, without the written approval of the other party disclose any confidential information relating to the other party and/or any entities in which the other party has an interest (collectively referred to as “the companies”) to anyone other than those persons who are connected to the companies and who are required or authorised to have access to such information.

10.2 Any information shared by the service provider with National Treasury will be shared on a statistical basis and no names will be made known unless the express written consent has been obtained from the person whose name is to be made known.” (emphasis added)

7.8.6 The agreement between Mpotseng Infrastructure CC and Qualis Health and Safety Consultants Services (Pty) Ltd

7.8.6.1 From an interview conducted with Mr Mpotseng Phetla, the sole member of Mpotseng Infrastructure CC, on 2 February 2012, the documentation provided by his attorney and the records of the Department, it was established that:

7.8.6.2 Mr Phetla has known Mr Lesiba Gwangwa of On-Point since High School.

7.8.6.3 Mr Gwangwa is, according to Mr Phetla, involved in a number of other entities including SGL Engineers and Qualis Consulting.

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7.8.6.4 Qualis Consulting and Mpotseng Infrastructure were involved in the design and planning of construction projects.

7.8.6.5 The Department appointed Mpotseng Infrastructure on 29 November 2010 for “*THE CONSULTING ENGINEERING SERVICES FOR THE PROJECT: EPWP ROUTINE MAINTENANCE-CONSTRUCTION OF PEDESTRIAN SIDEWALKS IN SIX MUNICIPALITIES AROUND THE PROVINCE.*”

7.8.6.6 The six parts of the project were referenced by the Department as: PUDP 387/B2, PUDP 388/D3, PUDP 388/D4, PUDP 389/E3, PUDP 391/C3, and PUDP 391/C1. The value of the contract was R42 000 000, which included professional fees and construction costs.

7.8.6.7 The appointment included the following stages of the project:

- Design and design reviews;
- Construction supervision; and
- Contract administration.

7.8.6.8 Mr Phetla realised, soon after the appointment, that Mpotseng Infrastructure lacked sufficient capacity to complete the designs for the project. He approached Mr Lesiba Gwangwa for assistance. Mr Gwangwa agreed that the designs would be prepared by Qualis Consulting, where he was involved.

7.8.6.9 Qualis Consulting invoiced Mpotseng Infrastructure on 22 March 2011 for the designs in the amount of R1 668 000. The invoice stated that the amount was payable to the account of On-Point Engineers at First National Bank, account no: 622 549 180 67.

7.8.6.10 However, as Mr Phetla was not satisfied with the designs prepared by Qualis Consulting, he paid only R1 million into On-Point’s account. He was not sure why the money had to be paid to On-Point, but assumed that Qualis Consulting was part of a group to which On-Point also belonged and in which Mr Lesiba Gwangwa was involved.

7.8.6.11 Mpotseng Infrastructure finalised the designs which were submitted to the Department under its name.

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7.8.6.12 On-Point managed the project on behalf of the Department.

7.8.6.13 During the investigation, a copy of an unsigned Memorandum of Understanding, similar to the one described in paragraphs 8.1 to 8.5 above, was discovered. It purported to be an agreement between On-Point and Mpotseng Infrastructure in terms of which the proceeds of a project referred to in an annexure, would be shared between them as follows:

- (a) To On-Point all fees for the planning and design stages; and
- (b) To Mpotseng Infrastructure all fees for the construction stages.

7.8.6.14 The annexure referred to the project as: *EPWP SIDEWALKS: GROUP 2* and described it as “391/C3, 391/C1, 388/D3, 388/D4, 389/E3, 387/B2”. It also stated that the fees due to On Point for the planning and design stages would amount to R1 598 020.90.

7.8.6.15 Mr Phetla denied that he was aware of any such Memorandum of Understanding before he noticed media reports in this regard. He never signed such a document and was not aware of its origin.

7.8.6.16 It was noted that the description of the project in the annexure to the Memorandum of Understanding was identical to its description in the letter of the Department appointing Mpotseng Infrastructure and in the records of the Department, referred to in paragraphs 7.8.4 and 7.8.5 above.

7.8.6.17 According to the records of the CIPC, Qualis Consulting was registered as *Qualis Health and Safety Consultants Services (Pty) Ltd* on 1 November 2006. The description of its principal business is: “*Health and Safety Consultants Services*” and its sole director, appointed on 19 October 2009, is M S Mphahlele.

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7.8.7 The agreement between On-Point and Baitseanape Consulting Engineers CC

From an interview conducted with Mr E Thipe, the sole member of Baitseanape Consulting Engineers CC (Baitseanape) on 17 February 2012, and the records of the Department, it was established that:

7.8.7.1 Baitseanape was listed as a service provider on the database of the Department in January 2011.

7.8.7.2 On 22 February 2011, the Head of the Department appointed Baitseanape to provide civil engineering consulting works for the project titled: *“VHEMBE AND CAPRICORN ACCESS ROADS UPGRADE FROM GRAVEL TO SEAL: 3,5 KM MAKONDE TO LUVHIMBI, 3.5 KM FROM D3709 TO MALAVUWE HEALTH CENTRE, AND 4 KM FROM D4021 TO MOSHATE MAMABOLO TO KGOLE.”*

7.8.7.3 The Department’s reference number for the upgrade of the road no D4016, Moshate to Kgole was PUDP 387 B1.

7.8.7.4 The appointment included the following stages:

- (a) Planning review and design; and
- (b) Construction supervision of the project.

7.8.7.5 After the appointment, Baitseanape was briefed by On-Point, who indicated that it had already done some work on the planning and design part of the project. Baitseanape was to review the designs of On-Point, add what was still outstanding and submit the final product to the Department under its own name. Some of the designs had already been approximately 80% completed when it was taken over from On-Point by Baitseanape.

7.8.7.6 At the time of the appointment of Baitseanape, Mr Lesiba Gwangwa of On-Point presented Mr Thipe with a Memorandum of Understanding (similar to the one referred to in paragraphs 7.8.1 to 7.8.5 above.). According to this document, On-Point and Baitseanape agreed that they would be working together on the project in respect of which Baitseanape was appointed. It was further agreed that On-Point would be paid an

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amount of R1,826 602.12 for “all fees for the planning, design including reimbursable expenditure for planning stages” pertaining to “Road D 4016.”

7.8.7.7 Mr Thipe stated that at the time of the signing of the Memorandum of Understanding on 2 June 2011, he was not fully aware of its implications. However, after considering the matter he realised that the conduct of On-Point was unethical as it expected of Baitseanape to pay for designs and planning that On-Point did, whilst it was employed by the Department to manage and supervise the project and in respect of which it had probably already been paid for by the Department. Baitseanape consequently informed On-Point that it would not implement the Memorandum of Understanding and received no response in this regard from On-Point.

7.8.7.8 On-Point submitted an invoice (which was paid) to the Department on 7 May 2010 in respect of several access roads in the amount of R 8 432 114.93. The invoice included an amount of R 806 766.80 in respect of reference no PUDP387B1 made up as follows:

Description	Amount claimed
Preliminary design	R 322 706.72
Detail design	R 322 706.72
Working drawings	R 161 353.36
Total	R 806 766.80

7.8.8 The agreement between On Point and H L Matlala & Associates CC

7.8.8.1 Mr H L Matlala, the sole member of H L Matlala & Associates CC, was interviewed on 17 February 2012. He stated that he has been a very close friend of Mr Lesiba Gwangwa since their school days and has been involved in business ventures with him before. Mr Gwangwa was involved in a number of companies and close corporations, including On-Point and Segwalo Consulting Engineers. It was his understanding that Mr Gwangwa was running all these entities and that they were actually one business with different names.

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7.8.8.2 H L Matlala & Associates was established as a Close Corporation in October 2002. It was registered as Consulting Engineers on the database of the Department and appointed in January 2011 by the Head of the Department in respect of the project titled: “*Praktiseer to Bogwasa, D4344 to Good Hope & R35 TO Sethupulane Access Roads* (sic).” According to the contract signed between H L Matlala and Associates and the Department, the Departmental reference numbers of the project were: PUDP 389 E1, PUDP 389 E2, and PUDP 390 A1. The total contract amount was R4 997 538.66 for the planning and design of the project.

7.8.8.3 Mr Matlala indicated that the contractors procured for the relevant construction works were already on site at the time of the appointment of H L Matlala and Associates. He found that to be an abnormal situation as contractors, in his experience, were only appointed after the design and planning of a project had been completed.

7.8.8.4 It also appeared that On-Point had almost completed the designs for the project and that what was expected of H L Matlala and Associates was to perform a review thereof.

7.8.8.5 Mr Matlala expressed his astonishment during the investigation at the situation in terms of which On-Point was doing designs and performing the functions of a PMU at the same time. He was of the view that On-Point was supposed to be the “*referee*” and therefore could not be a “*player*” in the project. This has never before happened in the projects that he had been involved in 11 years in the construction business and he regarded On-Point’s conduct as improper.

7.8.8.6 He further explained that H L Matlala and Associates had to take over the designs from On-Point and finalise them. Small changes had to be made before the designs could be presented to the Department, especially in terms of the quantities of materials that were underestimated.

7.8.8.7 On-Point expected from H L Matlala and Associates to be paid for the designs that they had already done at the time it was taken over. There was talk of an agreement that had to be signed, but because of the long standing friendship between Mr Matlala and Mr Gwangwa, he regarded that as not necessary.

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7.8.8.8 H L Matlala and Associates received an invoice from Segwalo Consulting Engineers for the designs, dated 3 July 2011. Mr Matlala explained that he did not regard it as strange that the invoice did not come from On-Point. He was doing business with Mr Gwangwa, whom he knew as the owner of Segwalo Consulting Engineers.

7.8.8.9 The invoice in the amount of: R 1 558 420.31, which was broken up as follows:

Professional fees for design stage:	R 1 388 965.59
Secondary services	R 25 161.40
Head Office transport	R 12 857.60
Documentation	<u>R 12 000.00</u>
Subtotal	R 1 438 984. 59
Less 5% design review process	<u>R 71 949.23</u>
Subtotal	R 1 367 035.36
14% VAT	<u>R 191 384.95</u>
Total	<u>R 1 558 420 31</u>

7.8.8.10 The invoice was signed by L C Gwangwa “for SGL Engineers”.

7.8.8.11 Mr Matlala confirmed during his interview that H L Matlala paid an amount of R 1,2 million to Segwalo Consulting Engineers in response to the said invoice, on 12 July 2011. He indicated that the balance of the amount is still due to On-Point. The money was transferred to Segwalo’s bank account, as indicated on the invoice. To him this presented no problem because On-Point and Segwalo “were the same people.”

7.8.8.12 According to the CIPC’s records, Segwalo Consulting Engineers was established as a Close Corporation in 2002. Mr Lesiba Gwangwa is its sole member. SGL Engineering Projects (Pty) Ltd was registered on 12 May 2009 and Mr Lesiba Gwangwa is its sole Director.

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7.8.8.13 An unsigned Memorandum of Understanding between On-Point and H L Matlala and Associates was obtained during the investigation. It is similar in nature to the Memorandum of Understanding referred to in paragraphs 8.1 and 8.5 above. Clause 3 of this document states that the parties agree that they will be working on the following access roads projects for the Department: *“Praktiseer to Bogwasa, Setupulane Access Road, Good Hope to Masakaneng.”*

7.8.8.14 In terms of the said Memorandum of Understanding, the parties further agreed that proceeds from the projects would be shared, but that On-Point would be paid R 2 031 762.58 by H L Matlala and Associates, in respect of *“all fees for the planning, design stage including reimbursable expenditure for planning stage.”* The agreement further states that:

“In the event that H L Matlala has been involved in the review of designs produced by On-Point, they will be entitled to 5% of the design fees for their services.”

7.8.8.15 According to the paid invoice records of the Department in respect of the project concerned, On-Point was paid, *inter alia*, as follows:

Reference No	Project Name	Description of Service	Amount paid (excluding VAT)
PUDP 389	Access Road- Praktiseer to Bogwasa	Preliminary design	R 322 215.60
		Detail design	R 322 215.60
		Working drawings	R 161 107.80
PUDP 389	Access Road and sidewalks D 4344 to Good Hope	Preliminary design	R 258 843.56
		Detail design	R 258 843.56
		Working drawings	R 129 421.78
PUDP 390	Access Road-R35 to Setupulane	Preliminary design	R 342 217.06
		Detail design	R 342 217.06
		Working drawings	R 171 108.53
Total (excl VAT)			R 2 308 190.55

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7.8.8.16 The evidence and information obtained during the investigation show that On-Point was paid a total amount of R 2 308 109.55 (excl VAT) by the Department for the designs and drawings in respect of the project. In addition, according to the records of the Department H L Matlala and Associates was paid as follows by the Department for designs in respect of the project:

Ref No	Project Name	Date of payment	Amount (incl VAT)
PUDP 389 E1	Access road Praktiseer to Bogwasa	21 June 2011	R 701 576.51
PUDP 389 E2	D4344 to Good Hope	21 June 2011	R 557 980.72
PUDP 390 A1	Upgrading of Access Road from R35 to Setupplane	21 June 2011	R 381 996 39
Total			R 1 641 553.62

7.8.8.17 It was noted that H L Matlala and Associates only received an invoice from and made payment to Segwalo Consulting Engineers **after** it was paid by the Department for designs. On Point/Segwalo therefore received payment from the Department and from H L Matlala and Associates for designs. Put differently, the Department paid twice for the same designs. The total amount paid by the Department for the designs is: R 4 272 890.847 (VAT inclusive).

7.9 THE EVIDENCE OF THE HEAD OF THE DEPARTMENT

7.9.1 The Head of the Department, Mr N Letebele, was interviewed on 1 November 2011. The salient aspects of his evidence are the following:

7.9.2 He was appointed as the Head of the Department with effect from 1 September 2009, that is 10 days before the bid for the PMU was advertised. Less than a month later, he appointed On-Point to the role of the PMU.

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- 7.9.3 Tender Committees operate in terms of authority delegated to them by the accounting officer.
- 7.9.4 During the interview, Mr Letebele explained that it is his duty as the Accounting Officer of the Department, when presented with the recommendations of the BAC, to ensure that a proper evaluation was done, that the recommended bidder complied with all the requirements relevant to the tender and that the adjudication was performed accordingly. He has to consider the contents of the documentation and the proceedings relevant to the procurement process.
- 7.9.5 He stated that the Supply Chain Management Policy of the Department, signed by the former Head of the Department on 18 February 2009, was applied during the procurement of the contract with On-Point.
- 7.9.6 Mr Letebele agreed that said Policy is not in accordance with the Supply Chain Management framework, as prescribed by Regulation 16A of the Treasury Regulations as it does not provide for the establishment of Bid Specification, Evaluation and Adjudication Committees.
- 7.9.7 The Policy of the Department was used in conjunction with the Provincial Procurement Policies in respect of procurement.
- 7.9.8 It was necessary to establish a PMU for the Department in 2009, due to the capacity constraints experienced at the time and the need for expertise to assist the Department in achieving its objectives, especially with regard to infrastructure management, development and maintenance.
- 7.9.9 During his interview, he could not explain why the bid for the PMU was advertised for only 20 days (11 September to 1 October) and not 21 days as prescribed by Treasury Regulations and specifically not 30 days as prescribed by the Department's Supply Chain Management Policy and the Limpopo Provincial Procurement Policy.
- 7.9.10 He nominated Mr Marobela from Denel and appointed him as a member of the BEC that had to evaluate the bids for the PMU, as he knew him *"as legal person who has done*

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contracts.” According to the Limpopo Provincial Policy on Bid Committees, he was entitled to do so.

7.9.11 The inclusion of an original valid Tax Clearance Certificate is a critical requirement of a bid submission. This compliance issue should be attended to during the period from the receipt of the bids to the adjudication thereof by the BAC. It must be done before the recommendation of the BAC is presented to the Head of the Department for consideration.

7.9.12 He could not explain why he wrote to On-Point requesting a valid Tax Clearance Certificate on 7 October 2009, even before the memorandum of the Chairperson of the BAC was presented to him on 9 October 2009. The only assumption that he could make was that the BAC realised the absence of a valid Tax Clearance Certificate and that the letter was written in his name.

7.9.13 The resolution of the BAC that he and the Chairperson had to negotiate the price on certain items with On-Point was never brought to his attention, and no such negotiations took place.

7.10 THE EVIDENCE OF THE CHIEF FINANCIAL OFFICER

The Chief Financial Officer of the Department, Ms M Thindisa, was interviewed on 1 November 2011. According to her evidence:

7.10.1 She was appointed as the Chief Financial Officer on 1 June 2006.

7.10.2 In the application of procurement processes, the Department relied on Provincial Procurement Policies in addition to the Supply Chain Management Policy of the Department. The latter is currently in the process of being improved.

7.10.3 She could not explain why the bid was advertised for a period less than the 21 and 30 days prescribed by the Treasury Regulations and the Limpopo Preferential Procurement Policy, respectively.

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- 7.10.4 As the Chairperson of the BAC, she expected that all the compliance requirements of the bid relating to the PMU had been considered during the evaluation process. It is possible that a letter was drafted for the Head of the Department to sign in respect of the non-compliance of On-Point with the requirement of the inclusion of an original valid Tax Clearance Certificate during the evaluation process, but she was unsure.
- 7.10.5 She also could not explain why the resolution of the BAC that certain items of On-Point's price had to be negotiated, was not complied with.
- 7.10.6 On the appointment by the Head of the Department of Mr Marobela of Denel to the BEC that evaluated the bids for the PMU, she stated that persons who are not officials of the Department can be appointed as members of the BEC, in terms of the Limpopo Provincial Procurement Policy. It was her understanding that Mr Marobela was appointed because of his legal background.
- 7.10.7 She was not sure whether the National Treasury's prescripts in respect of the appointment of consultants applied and were complied with in respect of the appointment of On-Point as the PMU of the Department.
- 7.10.8 Any back-to-back agreement involving On-Point, as was alleged by the media, would have been unethical and in violation of compliance with the relevant procurement prescripts. If she was aware of any such agreements, which she was not, the Department would have terminated the contract with On-Point.

7.11 THE EVIDENCE OF MR L GWANGWA OF ON-POINT

7.11.1 The subpoena and appearance before the Public Protector

- 7.11.1.1 Mr Gwangwa of On Point was subpoenaed to appear before the Public Protector in terms of section 7(4)(a) of the Public Protector Act, 1994. The subpoena was served on him on 24 May 2012 and he appeared before the Public Protector on 11 June 2012. The purpose of the subpoena was for the Public Protector to interview Mr Gwangwa in

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connection with the matters investigated and to provide him with an opportunity to respond to the evidence and information obtained during the investigation.

7.11.1.2 The subpoena also required of Mr Gwangwa to submit the following documents at his appearance:

- (a) All the bank statements of On-Point from date that it was established to 8 June 2012.
- (b) The official company register or list of shareholders of On-Point from the date that it was established to 11 June 2012.
- (c) All the Minutes of meetings of the Directors of On-Point from the date that it was established; and
- (d) All the Minutes of the Shareholders' meetings of On-Point from the date that it was established.

7.11.1.3 At his appearance to be interviewed on 11 June 2012, Mr Gwangwa was assisted by his attorney, Mr L Ledwaba of Mpoyana Lewaba Incorporated.

7.11.1.4 However, Mr Gwangwa did not submit the documents required, as his attorney first wanted to clarify the jurisdiction of the Public Protector in respect of the affairs of On-Point, as a private entity. After the matter was clarified (as indicated in paragraph 5.2 above), Messrs Gwangwa and Ledwaba undertook to provide the documents, after the interview. Some of the requested documents were provided to the Public Protector on 26 June 2012.

7.11.2 The establishment of On-Point

7.11.2.1 According to Mr Gwangwa, On-Point was established "*somewhere in 2008/9*". Its original name was *Kopano Engineers*. During the process of reserving a name for the company, his business partners suggested "*On-Point*".

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7.11.2.2 The objective with the establishment of On-Point was to create an engineering company that could handle all sectors of engineering. The idea was to merge all the experience of Mr Gwangwa and his business partners into one structure.

7.11.2.3 At the time when it was registered, the Directors were Mr Gwangwa, Mr K Dichabe and Mr T Rasethaba.

7.11.2.4 On-Point was originally managed by Mr Dichabe. Mr Gwangwa later became its Chief Executive Officer.

7.11.3 The Directors and Shareholders of On-Point at the time when the tender was awarded

7.11.3.1 Mr Gwangwa explained that Mr Rasethaba resigned shortly after the establishment of On-Point as he was not really interested in its business. At the time of the awarding of the tender to On-Point (October 2009) he and Mr K Dichabe were the Directors of the company.

7.11.3.2 The Shareholders of On-Point in equal parts were Guilder Investments (Pty)Ltd (Guilder Investments) , Mr K Dichabe, although for some reason his shares were held in the name of his brother (Mr Tsiamo Ditchabe) and Mr T Rasethaba, whose shares were held in the name of the Makatele Family Trust.

7.11.4 Subsequent changes of the Directors and shareholders of On-Point

7.11.4.1 During the interview, Mr Gwangwa indicated that Mr K Dichabe had resigned as Director as a result of which he became the sole Director of the company.

7.11.4.2 In “2010 or 2011” Mr Gwangwa’s business partners (Messrs K Dichabe and T Rasethaba) sold their shares to Guilder Investments, of which Mr Gwangwa is also the sole Director. Guilder Investments therefore became the sole shareholder of On-Point.

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7.11.5 Guilder Investments, the sole shareholder of On-Point

7.11.5.1 Mr Gwangwa explained that Guilder Investments is a “*holding company*” and as such its only objective is to hold shares in other companies.

7.11.5.2 He registered Guilder Investments on the advice of Mr Rasethaba, as he did not want to hold shares in On-Point in his own name.

7.11.5.3 The Ratanang Family Trust and the Gwangwa Family Trust are the equal shareholders of Guilder Investments.

7.11.5.4 The Ratanang Family Trust only became a shareholder of Guilder Investments after the original shareholders of On-Point sold their shares to Guilder Investments.

7.11.5.5 Mr Julius Malema represented the Ratanang Family Trust and the Gwangwa Family Trust was represented by Mr Gwangwa and one of the other trustees during shareholders’ meetings.

7.11.6 Payments made by On-Point to the shareholders of Guilder Investments

7.11.6.1 According to Mr Gwangwa, he appointed “*strategic and financial people*” to advise him as the Chief Executive Officer of On-Point on the “*expected performance*” and “*expected profit*” of the company. On the basis of this advice, he decided to pay loans and dividends to the shareholder of On-Point.

7.11.6.2 On-Point did originally have shareholders’ meetings. These meetings were very informal and no minutes were kept. After the other shareholders sold their shares to Guilder Investments, no such meetings were recorded as there was only one shareholder. As the sole director of On Point and Guilder Investments, Mr Gwangwa decided when dividends were to be paid and what the amount should be.

7.11.6.3 Guilder Investments does not have a bank account and any payments of loans or dividends to its shareholders were made from On-Point directly. The Ratanang Family

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Trust therefore received payments directly from On Point. Some payments had also been made to the Gwangwa Family Trust.

7.11.6.4 As far as when and how much would be paid in dividends to the shareholders, it was decided by Mr Malema, Mr Gwangwa and the other Trustee of the Gwangwa Family Trust, on the basis of the “*particular requirements of the shareholders*”. Meetings and discussions in this regard took place on a day-to-day basis. No records of the meetings and discussions were kept, as it was informal.

7.11.6.5 No payments had been made directly to Mr Malema.

7.11.6.6 Mr Gwangwa could not provide any details of the amounts paid to the Gwangwa Family Trust and the Ratanang Family Trust during his interview.

7.11.6.7 However, according to documentation submitted by Mr Gwangwa’s attorney, on his behalf, on 26 June 2012, On-Point made the following payments to the Ratanang Family Trust:

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DATE	DESCRIPTION OF PAYMENT	AMOUNT
2010/11/01	Dividends	R 100 000
2010/11/01	Dividends	R 100 000
2010/10/15	Dividends	R 100 000
2010/11/30	Dividends	R 100 000
2010/11/30	Dividends	R 100 000
2011/01/04	Loan	R 160 000
2011/01/18	Dividends	R 100 000
2011/01/18	Dividends	R 100 000
2011/02/04	Dividends	R 100 000
2011/02/28	Dividends	R 100 000
2011/03/28	Loan	R 100 000
2011/04/29	Dividends	R 100 000
2011/08/01	Dividends	R 100 000
2011/03/30	Dividends	R 100 000
2011/11/28	Dividends	R100 000
2011/12/28	Dividends	R150 000
2012/01/12	Dividends	R60 000
2012/01/31	Dividends	R100 000
2012/02/29	Dividends	R100 000
2012/03/30	Dividends	R100 000
2012/05/02	Dividends	R100 000
Total		R 2 170 000

7.11.7 The involvement of Mr A M Phetla in On-Point

7.11.7.1 Mr Gwangwa confirmed during his interview that he knows Mr Phetla as they went to school together and had been involved in a number of business ventures.

7.11.7.2 He denied that Mr Phetla had ever been appointed as a Director of On-Point.

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7.11.7.3 The only explanation that he could provide for the fact that Mr Phetla was registered as a Director of On-Point in the records of the CIPC, was that: *“It could have been an oversight or mistake”*.

7.11.7.4 When it was discovered that Mr Phetla was erroneously registered as a Director of On-Point, the mistake was already rectified.

7.11.7.5 Mr Gwangwa denied the contents of the minutes of Directors’ meetings of On-Point that were included in the CIPC documents of On-Point as, according to him, no minutes of any meetings were kept.

7.11.7.6 He further could not recall any of the other documents that were filed with the CIPC in respect of the appointment of Mr Phetla as a Director or that Mr Phetla ever resigned as a Director. However, he did concede that the signature on the documents filed with the CIPC could be his.

7.11.7.7 Mr Gwangwa also could not explain how, by whom and when the mistake or oversight was rectified. All he stated in this regard was that he did from time to time instruct his office to register different companies.

7.11.7.8 He conceded that Mr Phetla did approach him about his erroneous appointment as a Director of On-Point. However, he could not remember when this was and what was discussed. He also could not recall ever receiving a letter from Mr Phetla’s attorney in this regard.

7.11.8 The bid presented to the Department by On-Point

7.11.8.1 Mr Gwangwa confirmed that On-Point presented a bid to the Department on 29 September 2009.

7.11.8.2 At the time when the bid was advertised, Mr Gwangwa and his *“business partners”* were considering merging three companies into one, under the name of On-Point, i.e. On-Point, Dichabe Engineering and Segwalo Engineering. However, the merger never materialised.

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7.11.8.3 At the time of the submission of the bid, On-Point had no employees.

7.11.8.4 According to Mr Gwangwa, the bid document included a profile that indicated how On-Point was comprised and *“all the elements of the other companies that came together.”* However, the bid was not submitted as a joint venture of the companies concerned, but presented as a single solid entity.

7.11.8.5 When the bid was presented to the Department, On-Point was using the office address of Segwalo Engineering.

7.11.8.6 Initially during his interview, Mr Gwangwa indicated that the statement made in the bid document that On-Point had been in business for *“9 years”* was based on a misunderstanding, as they sought to refer to the cumulative experience of the team. Later he stated that the mistake was made because English is not his first language. When he again was asked whether the statement was correct or incorrect, he stated that: *“It is possible that it was an oversight”*.

7.11.8.7 Mr Gwangwa was referred to the statement made in On-Point’s bid document that it was actively involved in the promotion of youth owned business enterprises, as defined in the Limpopo Preferential Procurement Policy of 2005, by the outsourcing of work to Dichabe Engineering in 2009/10 in the amount of R 1,2 million. He conceded that On-Point did not outsource work to Dichabe Engineering, as was stated in the bid document.

7.11.8.8 He further explained that a number of associates of the businesses that he was involved in at the time when the bid was advertised, were approached in connection with the tender. It included Peek International and Ernest and Young.

7.11.8.9 According to Mr Gwangwa, he and his business partners entered into contracts *“with a lot of people that were not forming part of our immediate companies in that we were coming together as a team. There had to have been an exchange of documents and we had to have obtained their consent (to have involved them in the bid document). Meetings were arranged. They went through the documents. Most of them sent letters to confirm their commitment.”*

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7.11.8.10 Mr Gwangwa further confirmed the composition of On-Point's Executive Team (despite the fact that none of them were employed by On-Point at the time) as presented to the Department in its bid document. As far as Ms Holeni is concerned, he indicated that it is possible that she might say that she was never involved as the focus of the Department's requirements changed after the tender was awarded, which resulted in the services of some of the persons indicated in the bid document as members of the On-Point team, not being required.

7.11.8.11 When he was referred to the fact that Ms Holeni was indicated in the bid document as the person that was supposed to have been responsible for the corporate services of On-Point and that in terms of the submitted organogram of the company she was supposed to have reported to him as the Chief Executive Officer, Mr Gwangwa's response was that as a lot of people worked on the bid document, there could have been typing errors.

7.11.8.12 In response to further questioning about the constitution of On-Point's team as it appears from the bid document, Mr Gwangwa responded that the tender document was a reflection of On-Point's *"intentions"*.

7.11.8.13 As far as the constitution of the Senior Management team is concerned, Mr Gwangwa explained that: *"you call people, sell the idea to them and they agree."*

7.11.8.14 He emphasised that the Senior Management Team, as presented in the bid document, was the intended team, *"should we get the tender"*. He conceded that the bid document presented On-Point as structured according to the organogram and that he never indicated that this was an intended structure.

7.11.8.15 According to Mr Gwangwa, Mr Moti was involved in the process and became a Senior Manager of On-Point despite the fact that he never worked at its offices. Mr Moti was employed in terms of a contract, which he could not fulfil, *"for one reason or the other"*.

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7.11.8.16 Mr Gwangwa further explained that the constitution of the Senior Management team consisted of persons that fell under his “*banner*” and persons that fell under the “*banner*” of Mr Dichabe.

7.11.8.17 Messrs Dichabe, Moti, Sekete, Ms Letsholo were involved in the businesses of Mr Dichabe.

7.11.8.18 Mr Van Vuuren was a freelance associate of Mr Gwangwa.

7.11.8.19 Ms Mthiyane and Messrs Mr Rasethaba and Sehlapelo were involved in businesses of Mr Gwangwa.

7.11.8.20 It was also put to Mr Gwangwa during the interview that Mr Moti and Ms Matshoga denied involvement with On-Point as far as the bid was concerned. He responded: “*I don’t know. They could have been intimidated to say so.*”

7.11.8.21 The Public Protector also put it to Mr Gwangwa that the Department required of bidders to indicate who they were and not who they intended to be. He responded: “*There is no space in the bid document to tell stories. We had plans to structure ourselves in a particular way in the manner we indicated in the document.*”

7.11.8.22 In regard to the Management Team as indicated in On-Point’s bid document, Mr Gwangwa explained that Mr Mulaudzi was employed by Segwalo Consulting Engineers at the time. After the awarding of the contract, he performed as a manager of On-Point “*to some extent*”, but as he was a key manager at Segwalo he was moved back to it.

7.11.8.23 Mr Gwangwa stated that Mr Kawanga is a previous shareholder of Segwalo Consulting Engineers. Initially Mr Gwangwa explained that when he approached Mr Kawanga, the latter wanted to be involved in the bid on a full time basis as he was not busy at the time. However, later during his interview, Mr Gwangwa stated that Mr Kawanga was not involved in management of On-Point as he was engaged “*in other things*”. He conceded that Mr Kawanga was never part of the Management Team of On-Point.

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7.11.8.24 When asked as to who became On-Point's management team after the awarding of the contract, Mr Gwangwa stated that:

"It is difficult to respond to that. When you have an idea saying this is how I want to function and that reality comes that you are unable to resume that form, it becomes very difficult to operate in that line of structure given the circumstances. We did not concern ourselves with who was the management team. The pressures were too overwhelming."

7.11.8.25 Mr Gwangwa was also referred to the fact that several of the persons that were not indicated as part of the management teams, but whose CV's were included in On-Point's bid document, denied during the investigations that they were part of On-Point's plans or that they were even aware that their CV's were included. His response was that *"On-Point was in the media and a lot of people have been trying to get as far away from it as possible for reasons known to them."*

7.11.9 On-Point's role as the appointed PMU of the Department

7.11.9.1 Mr Gwangwa explained in this regard that at the time of the awarding of the contract, the Department had no technical capacity. On-Point's main focus was that of assisting the Department with the technical aspects of planning.

7.11.9.2 He conceded that the drafting of designs for projects was not part of the contract between On-Point and the Department. However, the Department insisted that On-Point designs certain projects, because it was under pressure to deliver. Discussions on how On-Point would bill the Department for the designs never resolved the issue.

7.11.9.3 Mr Gwangwa denied that On-Point ever drafted designs in respect of projects that were later awarded to other service providers.

7.11.9.4 He also denied that On-Point was involved in the selection of service providers by the Department, although he conceded that employees of On-Point were appointed as members of the Bid Evaluation Committees, due to their technical expertise.

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7.11.10 The allegations of corrupt practices by On-Point in the execution of its functions as the PMU

7.11.10.1 Mr Gwangwa conceded that he signed the Memorandum of Understanding with Baitseanape referred to in paragraph 7.8.7 above.

7.11.10.2 According to him, Baitseanape was appointed by the Department as a consultant. Following its appointment, Baitseanape approached On-Point to assist them with the rendering of its service, as On-Point already had the background.

7.11.10.3 The intention of the agreement was just to indicate that On-Point would provide a professional service to Baitseanape.

7.11.10.4 He stated that the agreement was later retracted on the basis of legal advice obtained by On-Point, which indicated that it constituted a conflict of interests. Mr Gwangwa could not indicate how long after the agreement was signed, was it retracted. He also could not provide any evidence of the retraction.

7.11.10.5 He could not recall why it was necessary to include the confidentiality clause in the agreement, that was referred to in paragraph 7.8.5 above.

7.11.10.6 According to Mr Gwangwa, the Department was not informed of this agreement.

7.11.10.7 He also stated that no payment was made to On-Point on the basis of this agreement.

7.11.10.8 Mr Gwangwa further denied that On-Point ever billed the Department for the designs referred to in its agreement with Baitseanape.

7.11.10.9 No cancellation agreement was entered into between On-Point and Baitseanape to retract the Memorandum of Understanding. It was simply requested from Baitseanape in order to cancel it.

7.11.10.10 As far as the Memorandum of Understanding between On Point and Mpotseng Infrastructure (referred to in paragraph 7.8.6 above) is concerned, Mr Gwangwa

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indicated that there was an intention to enter into such agreement that never materialised.

7.11.10.11 He was also referred to the invoice issued by Qualis Consulting that had his name on it (referred to in paragraph 7.8.6.9 above), but he denied any knowledge of it.

7.11.10.12 Mr Gwangwa explained that Qualis Consulting is a company that is managed by Mr Van Vuuren. It does designs for different companies, but does not have a particular relationship with On-Point.

7.11.10.13 He denied that Mpotseng Infrastructure made any payments to On-Point.

7.11.10.14 Mr Gwangwa also denied that there was a Memorandum of Understanding between H L Matlala and On-Point. (See paragraph 7.8.8 above)

7.11.10.15 He was referred to the invoice issued by Segwalo Consulting discussed in paragraph 7.8.8.8 above and conceded that he signed it and that it related to work that was done for the Department.

7.11.10.16 In response to a question as to why he signed it when it reflected a conflict of interest. Mr Gwangwa stated:

“It does occur that when I have been out of the office for a long time, a pile of documents need to be signed. I do not necessarily check each and everyone of them because I rely on my staff.”

7.11.10.17 He further denied that On-Point received any payment from H L Matlala in respect of this invoice.

7.11.11 Mr Gwangwa’s relationship with other role players in the matters investigated

7.11.11.1 According to Mr Gwangwa he is a friend of Mr Julius Malema.

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7.11.11.2 He stated that he did not know the Head of the Department, Mr Letebele, before the contract was awarded to On-Point and only knew the former Limpopo MEC for Roads and Transport from meeting her at political events.

7.12 DOCUMENTS SUBMITTED BY MR GWANGWA SUBSEQUENT TO THE INTERVIEW CONDUCTED WITH HIM

7.12.1 Confirmation of involvement with *On-Point* in respect of the bid submitted to the Department

7.12.1.1 During the interview referred to in paragraph 11 above, Mr Gwangwa was requested to provide documentary confirmation of his evidence that the majority of the persons whose particulars appeared in the bid document as having been involved with On-Point in some or other capacity, agreed to it in writing. His attorney, Mr Ledwaba, submitted e-mail communication from two persons in this regard, on 26 June 2012.

7.12.1.2 From the e-mail messages, it appears that Mr Gwangwa approached Mr C Sehlapelo on 21 June 2012 as follows:

“As discussed with Thomas, please confirm that we have used your cv in the proposal for LDRT proposal document (sic) with your consent.”

7.12.1.3 Mr Sehlapelo responded on 26 June 2012, confirming that his CV was used with his consent.

7.12.1.4 The other e-mail message was a copy of a response obtained from Mr Moti during the investigation, referred to in paragraph 7.3.10.1(c) above.

7.12.1.5 As far as the other persons referred to in the bid document are concerned, Mr Lewaba stated that attempts were made to contact them telephonically, but without success. It was not explained why copies of the written consent referred to during Mr Gwangwa's interview could not be provided.

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7.12.1.6 On 28 June 2012, Mr Lewaba presented a copy of a confirmation obtained from Ms M C Holeni. It was addressed to Mr Gwangwa, dated 26 June 2012, stating that she was recruited by Mr K Dichabe of On-Point in about June 2009 to form part of a consortium for “*bidding purposes*”. Ms Holeni also stated: *Though I was not informed fully of the bid in question, I did consent to the utilization of my cv. However, upon receiving a full brief on the bid requirements, which was by then awarded, I relinquished all responsibilities associated with the said bid as they fell outside my personal professional expertise.*”

7.12.2 On-Point’s bank statements

7.12.2.1 Mr Gwangwa provided the Public Protector with the statements of five bank accounts in the name of On-Point Engineers. It was established that transactions reflected in the records of two of the bank accounts were of significance to the investigation. The relevant payments made from the respective bank accounts are listed in the tables below.

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BANK ACCOUNT 1:

Only one deposit was made into this account by the Department. The account was reasonably active from January 2010 to May 2010, where after it was only used on occasion. The following payments that relate to the allegations made in respect of *On Point* were noted:

DATE	PAYMENT TO	AMOUNT
28/01/2010	Tshiamo Dichabe (Shareholder of On Point)	R20010
29/01/2010	Maketele Family Trust (Shareholder of On Point)	R3844
05/02/2010	Gwangwa Family Trust (Shareholder of Guilder Investments)	R 60 000
11/02/2010	Guilder Investments (Shareholder of On Point)	R 200 000
11/02/2010	Maketele Family Trust (Shareholder of On Point)	R 50 000
25/02/2010	Maketele Family Trust (Shareholder of On Point)	R 35 000
25/02/2010	Tshiamo Dichabe (Shareholder of On Point)	R 19 634
30/03/2010	Tshiamo Dichabe (Shareholder of On Point)	R 20 325
28/03/2011	Aurelio Cimato	R400 000
14/11/2011	Cimato	R 500 000
16/11/2011	Aurelio Cimato	R 82 080

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BANK ACCOUNT 2:

This appears to be the day-to-day account of On-Point. The following payments that relate to the allegations made in respect of On-Point were noted:

DATE	PAYMENT TO	AMOUNT
10/05/2010	"Shareholders Loan"	R 200 000
10/05/2010	"Shareholders Loan"	R 200 000
15/10/2010	Dividends	R 100 000
1/10/2010	Dividends	R 100 000
1/10/2010	Dividends	R 100 000
30/10/2010	Dividends	R 100 000
30/10/2010	Dividends	R 100 000
4/01/2011	"Sandton Property"	R 160 000
18/01/2011	Dividends	R 100 000
18/01/2011	Dividends	R 100 000
04/02/2011	Dividends	R 100 000
28/02/2011	Dividends	R100 000
28/03/2011	"Sundowns Property"	R 100 000
29/04/2011	Dividends	R 100 000
04/05/2011	"Ratanang Farm"	R 1 000 0000
01/08/2011	Dividends	R 100 000
30/08/2011	Dividends	R 100 000
28/11/2011	Dividends	R 100 000
28/12/2011	Dividends	R 150 000
12/01/2012	Dividends	R 60 000
31/01/2012	Dividends	R 100 000
29/02/2012	Dividends	R 100 000
29/05/2012	Dividends	R 100 000

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7.12.2.2 It was also noted that an amount of R 1 million was paid into Bank Account 2 by Mpotseng Infrastructure on 29 April 2011. (see paragraph 7.8.6.10 above) Significantly, the amount of R 1 million was withdrawn five days later to pay for the “Ratanang Farm.”

7.12.3 On-Point’s share certificates

7.12.3.1 On-Point issued share certificates to the Makatele Family Trust, Tsiamo Ditchabe and Guilder Investments in terms of which each shareholder owned 33.3 ordinary shares in the company, on 23 September 2009.

7.12.3.2 In terms of the share certificates issued on 30 August 2010, Guilder Investments became the sole shareholder of On-Point, owning 1000 shares.

7.12.4 The bank statements of Segwalo Consulting Engineers

7.12.4.1 From the perusal of the banks statements provided by Mr Gwangwa, it was established that an amount of R 1 200 000 was paid into Segwalo’s account on 12 July 2011. This is consistent with Mr Matlala’s evidence that he paid R1 200 000 on 12 July 2011.

7.13 THE RATANANG FAMILY TRUST

The Trust Deed and other documents filed with the Master of the North Gauteng High Court in respect of the Ratanang Family Trust were perused during the investigation. It was established that:

7.13.1 The Trust was created by means of a Deed of Trust signed by Mr Julius Malema as the only Trustee on 25 October 2005.

7.13.2 Ratanang Ramohlale (Id no: 0610145066086) is identified as the only beneficiary of the Trust.

7.13.3 The Trust was created by means of a donation by Mr Malema of R100.

7.13.4 Paragraph 9.1 of the Deed of Trust states that:

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“The powers of the trustees as outlined in this trust document, are the authority ex officio in order to manage the trust fund on behalf of the Beneficiaries and not to the personal advantage of the trustees.”(emphasis added)

7.13.5 According to the paragraph 1 the assets and income of the Trust represents the Trust Fund.

7.13.6 Paragraph 11.4 of the Deed of Trust provides that the Trustees may refund themselves from the trust property for expenditure they incurred personally in the execution of their duties as trustees.

7.13.7 In terms of paragraph 12.7, Trustees are subject to all the duties of a trustee as stipulated in the Trust Property Control Act, 1988, which includes to refrain from managing trust property to their own advantage or that of their estates and to act continually with care and diligence as may be fairly expected from someone who takes care of another's affairs.

7.13.8 The Deed of Trust was amended on 17 May 2010. It is still stated in the Deed of Trust that it was created for the benefit of Ratanang Ramohlale (currently five years old). However, in terms of the amendments, the Trustees can nominate any other beneficiary of the Trust from time to time.

7.13.9 The documents in the Trust file also include an Acceptance of Trusteeship, dated 17 May 2010. In terms of this document, Julius Sello Malema and Sarah Mathebu Malema (Id No: 2910180162081) are appointed as Trustees of the Ratanang Family Trust. Paragraph 4 states very clearly that the beneficiaries are not parties to the Trust Agreement.

7.13.10 The Trust file does not contain any document indicating that the Master of the North Gauteng High Court was informed that the Trustees have nominated any other beneficiary for the Trust.

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7.14 THE CURRENT STATUS OF THE CONTRACT

7.14.1 The Head of the Department advised on 21 June 2012 that the contract between *On Point* and the Department is still running and that it only expires on 18 October 2012.

7.14.2 The total amount paid by the Department to *On Point* in terms of the contract at the time, is R 43 868 900.

7.15 THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION IN CONNECTION WITH THE AWARDING OF A CONTRACT BY THE DEPARTMENT TO ARANDI TRADING ENTERPRISE

7.15.1 According to the procurement records of the Department, its Bid Specification Committee considered the procurement of a number of items in respect of the supply and delivery of road materials (as and when required) on 25 February 2011. Included was bid PUDP 514, which related to the supply and delivery of painting materials.

7.15.2 On 3 March 2011, the Senior Manager: Supply Chain Management submitted a memorandum to the Head of the Department, recommending that approval be granted for the advertisement of a number of bids, including PUDP 514. The Head of the Department approved the memorandum on the same day.

7.15.3 Bid no PUDP 514 was advertised in the Limpopo Provincial Tender Bulletin on 18 March 2011. The closing date was 20 April 2011.

7.15.4 The Head of the Department appointed the following persons as the members of the BEC, to evaluate the bid, on 4 July 2011:

Ms M Kgosana of the Department: Chairperson

Ms P Mathale of the Department; and

Ms P Maake of On-Point.

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7.15.5 The BEC met during the period 5 to 10 July 2011 to evaluate bid submissions in respect of several bids, including PUDP 514.

7.15.6 The Bid Evaluation Report pertaining to PUDP 514 was presented by the Chairperson of the BEC to the Chairperson of the BAC, on 14 July 2011. It stated, inter alia, the following:

7.15.6.1 A total of 250 bids were received;

7.15.6.2 The BEC resolved that 243 bids had to be disqualified due to non-compliance with the administrative requirements.

7.15.6.3 Seven bidders qualified to be evaluated in terms of “*price and preferential procurement*”.

7.15.6.4 The prices submitted ranged between R46 804 and R 32 365. The lowest price was presented by Arandi Trading Enterprise. The calculations made in respect of price and the prescribed preferential goals resulted in the recommendation by the Chairperson of the BEC that the bid be awarded to Arandi Trading Enterprise.

7.15.7 A memorandum of the BAC addressed to the Head of the Department on 14 July 2011 stated that it is recommended that bid no PUDP 514 be awarded to Arandi Trading Enterprise.

7.15.8 The Head of the Department informed Arandi Trading Enterprise on 15 July 2011 that the bid was awarded to it.

7.15.9 According to the CIPC records, Arandi Trading Enterprises was registered as a Close Corporation on 14 December 2007. Its principal business is described as: “*Project management, trading and other related businesses.*” and its sole member is Mr A T Malema.

7.15.10 Ms Maake of On-Point, one of the members of the BEC, was interviewed on 29 November 2011. She stated that she has a Diploma in Quantity Surveying, and that

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most of her experience to date related to documentation pertaining to construction projects, including tender documents.

7.15.11 During the interview that was conducted with the Head of the Department, referred to in paragraph 9 above, he stated that Ms Maake was appointed as a member of the BEC in this case, due to her particular expertise and skills.

7.15.12 The Chief Financial Officer indicated during the interview that was conducted with her, referred to in paragraph 10 above, that the Department was experiencing a serious challenge in respect of procuring the supply and delivery of products. According to her “every Tom, Dick and Harry” tendered for such bids, which results in a huge administrative burden for the Department. It often takes the BEC several days to evaluate the hundreds of bids received in such cases, most of which do not even comply with the administrative requirements.

7.15.13 The Head of the Department also indicated during the investigation that no invoices could be provided in respect of Arandi Trading Enterprises as no orders had been placed.

7.16 THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION IN CONNECTION WITH THE AWARDING OF TWO CONTRACTS BY THE DEPARTMENT TO RAESETJA PROPERTY DEVELOPMENTS, TRADING AS SIZANI BUILD IT

7.16.1 The Minutes of the meeting of the Bid Specification Committee of the Department referred to in paragraphs 7.15.1 above and the memorandum referred to in paragraph 7.15.2 also included references to PUDP 509 (supply and deliver of steel reinforcement bars) and PUDP 513 (supply and delivery of crushed stone, dust and sand), respectively.

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7.16.2 PUDP 509 and PUDP 513 were also advertised in the Limpopo Provincial Tender Bulletin of 18 March 2011. The closing date for PUDP 509 was 20 April 2011 and that of PUDP 513, 21 April 2011.

7.16.3 The Head of the Department appointed the following persons as members of the BEC's in respect of PUDP 509 and PUDP 513:

BID NO 509	
Name	From
Ms P Maake	On-Point
Mr P Mathale	Department
Ms M Kgosana (Chairperson)	Department

BID NO 513	
Name	From
Mr F Mamabolo	On-Point
Ms A Moloisi	Department
Mr L Maluleke (Chairperson)	Department

7.16.4 PUDP 509 was evaluated by the BEC as part of a large number of tenders, during the week of 5 to 11 July 2011. 114 bids were received, 107 of which had to be disqualified due to non-compliance with administrative requirements and other criteria, such as not stating a firm price. Seven bidders qualified to be evaluated on price and preferential points. Raasetja Property Developers' price was the lowest and its overall score was the highest.

7.16.5 The BEC appointed in respect of PUDP 513 met on 8 July 2011 to evaluate the 125 bids received. 118 bids had to be disqualified due to non-compliance with administrative requirements and other criteria, such as not stating a firm price. Seven bidders qualified

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to be evaluated in terms of price and preferential procurement principles. Ivanmalate Engineering Project Management scored the highest, followed by Raesetja Property Developers. However, Ivanamalete was disqualified after tax verification with the South African Revenue Services (no records could be found on the system), and Raesetja was recommended as the successful bidder.

7.16.6 After having considered the respective reports of the BEC's, the BAC resolved on 14 and 15 July 2011, respectively that PUDP 509 and PUDP 513 be awarded to Raesetja Property Developers. The Head of the Department approved the recommendations of the BAC on 15 July 2011.

7.16.7 According to the records of the CIPC, Raesetja Property Developers (Pty) Ltd was registered as a private company on 30 October 2006. Its standard industrial classification is: *"Retail sales of building materials."* Mr S B Bosch is the sole director of the company and its trading name is: *Sizani Building Suppliers."*

7.16.8 The evidence of the Chief Financial Officer and the Head of the Department referred to in paragraphs 7.15.12 and 7.15.13 above applied *mutatis mutandis* in respect of PUDP 509 and PUDP 513.

8 EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

8.1 Common cause

8.1.1 It is common cause that the Head of the Department awarded a tender for the performance of the functions of a PMU to On-Point on 13 October 2009 and that the contract will expire on 18 October 2012.

8.1.2 The evidence and information obtained during the investigation also indicate that it is not in dispute that the bid was not advertised for the prescribed 30 days. It was only advertised for 20 days and neither the Head of the Department nor the Chief Financial

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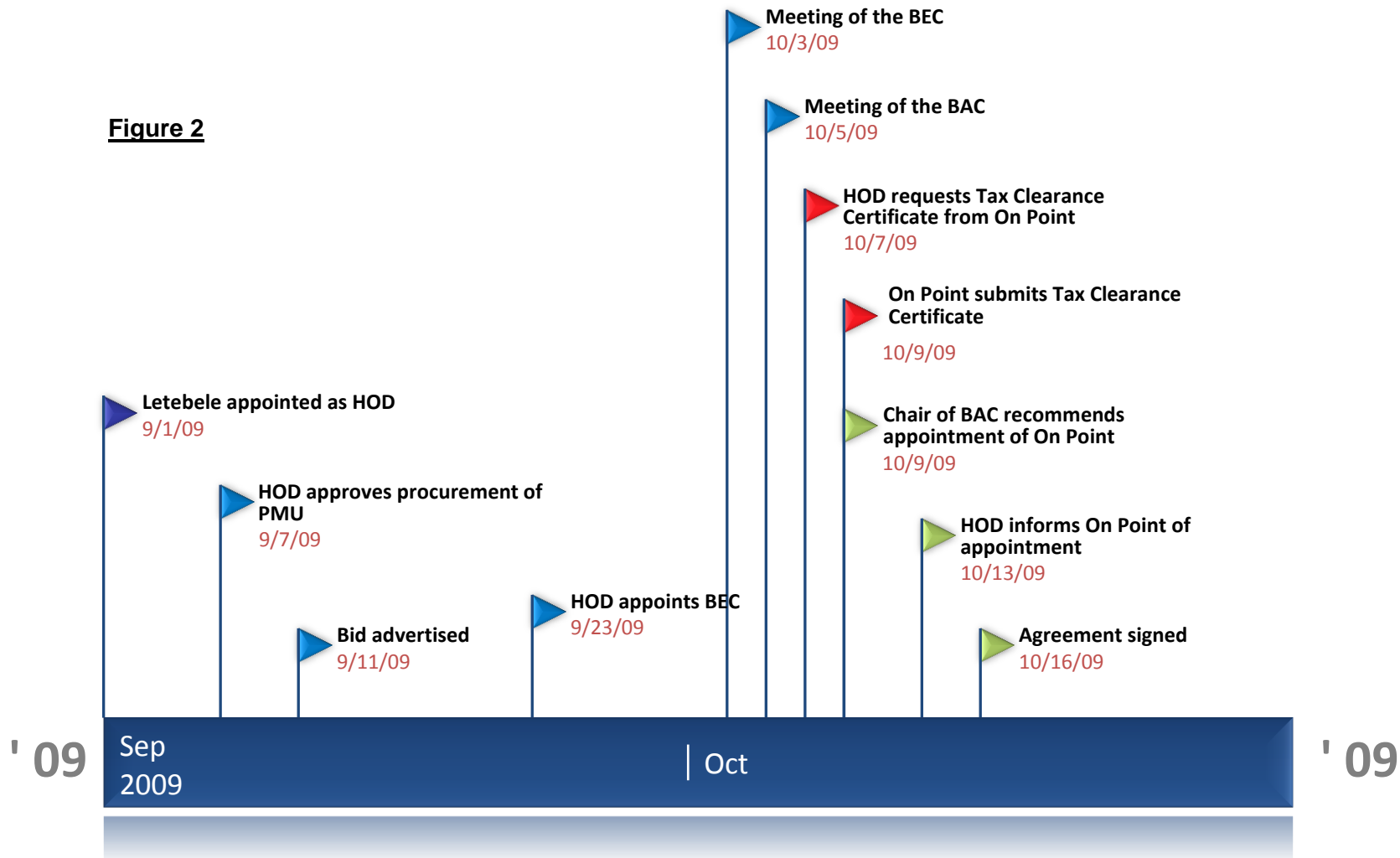
Officer could provide acceptable reasons for this variation. Reference was made to the Memorandum requesting the advertisement, which only stated that a shortened procurement process should be used *“due to the amount of work that is still to be done in this financial year.”*

- 8.1.3 The Head of the Department appointed an official of another department and a staff member of Denel (a parastatal) as members of the BEC. The official of the other department did not attend the meeting of the BEC, but the person from Denel participated as a full member. This person was appointed at the initiative of the Head of the Department. His only explanation during his interview was that he was aware of the legal background and experience of this person and therefore regarded it as necessary for him to be a member of the BEC. It could not be established from the investigation why, for example, the Director: Legal Services of the Department could not have been appointed as a member of the BEC, especially as neither the bids, nor the requirements that had to be considered and evaluated required any significant legal expertise.
- 8.1.4 The fact that employees of On-Point participated in the BEC's that selected contractors that On-Point had to manage on behalf of the Department, is also not disputed.
- 8.1.5 It is also common cause that the Head of the Department awarded tenders to Arandi Trading Enterprise and Sizani Build It, and that these contracts have not been implemented to date.
- 8.1.6 The sequence of events in respect of the procurement process in respect of the services of On-Point, as indicated in the timeline below (Figure 2), is also not in dispute.

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TIMELINE OF PROCUREMENT

Figure 2



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8.2 Was the awarding of the tender for a PMU by the Department to On-Point improper and in violation of the provisions of the Prevention and Combatting of Corrupt Activities Act, 2004?

- 8.2.1 On-Point was only registered as a company on 25 September 2009, i.e. 6 days before the closing date for bids set by the Department.
- 8.2.2 Mr Gwangwa's explanation that On-Point was originally known as *Kopano Engineers*, is inconsistent with the information and evidence obtained during the investigation. The original name of On-Point was Achir Shelf 8 (Pty) Ltd, which was registered approximately 5 months before On-Point submitted its bid.
- 8.2.3 Mr Gwangwa conceded that at the time when On-Point's bid was presented to the Department, it had no employees. His explanation that On-Point's bid clearly indicated in its company profile that it consisted of a merger of companies, is not supported by the bid document, which does not contain any such reference or profile.
- 8.2.4 His explanation that the composition of the management teams of On-Point as presented in the bid document, was an indication of how the company intended to structure itself, should it be awarded the tender, is also not to be found anywhere in the bid documentation. The bid document gives the impression of an established company with experienced and qualified staff and management teams employed by it.
- 8.2.5 The Executive Team, according to the bid document, consisted of five members, none of whom were registered with the Engineering Council of South Africa at the time. The person referred to as the Chief Financial Officer was, according to the CV that was included in the bid, not employed by On-Point.
- 8.2.6 Ms Holeni who was referred to as the Programme Director and a person with the qualifications, skills and experience as a Quantity Surveyor, denied that she was ever a member of On-Point's Executive Team. To the contrary, she indicated that she had no experience in managing a PMU.

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- 8.2.7 Three of the six persons referred to as the Senior Management Team denied that they were involved with On-Point. One of them, a highly qualified and experienced engineer, was not even aware that her credentials formed part of the bid document. According to the information contained in the bid document, five of the six members of the purported Senior Management Team were not employed by On-Point at the time when the bid was presented to the Department. The credentials of the remaining person could not be determined during the investigation.
- 8.2.8 The two members of the purported Management Team denied that they were involved. One of them was not even aware that his credentials were used in On-Point's bid document.
- 8.2.9 In addition, On-Point's bid document included the credentials of 32 persons referred to as members of the project team and support staff. According to the bid documentation, the majority of these persons were not employed by On-Point.
- 8.2.10 Eleven of the said persons contacted during the investigation denied that they were ever involved with On-Point or that they were aware that their credentials were included in the bid document. 18 of the listed persons could not be contacted during the investigation. Four of those are employed by international companies and are based abroad.
- 8.2.11 Mr Gwangwa conceded during the investigation that On-Point had no employees at the time when its bid was presented to the Department.
- 8.2.12 During his interview, Mr Gwangwa stated that all the persons whose credentials were used in the bid document consented thereto in writing. He was requested to provide the written consent, but could only do so in respect of three persons, Ms M C Holeni, Mr C Sehlapelo and Mr L Moti, who were approached by him after he was interviewed. All three provided the same response as when they were approached during the investigation, as referred to in paragraph 7.3 above.
- 8.2.13 The only explanation provided as to why the written consent of the other persons concerned could not be provided, was that they could not be reached. It appeared that

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Mr Gwangwa and his attorney only started to request the written consent from them after the interview with the Public Protector on 11 June 2012.

- 8.2.14 Mr Gwangwa's statement that some of the persons concerned denied their involvement because they were intimidated or due to the negative publicity in respect of O- Point, was not substantiated during the investigation. He did not provide any information or evidence to that effect and also could not provide any proof that any of the persons who denied their involvement lied to the Public Protector.
- 8.2.15 Given the persons who denied any involvement with On-Point, its bid (at least) did not include Architects, Quantity Surveyors, Structural Engineers, Transport and Traffic Engineers, Mechanical Engineers, Economists and Social Facilitators, which were part of the **minimum requirements** set out in the Request for Proposal.
- 8.2.16 On-Point indicated in the bid document that it had been in business as a service provider for a period of 9 years. This could not have been the case as On-Point was only registered as a company on 25 September 2009. Achir Shelf, the company whose name was changed to On-Point, was a shelf company that was registered on 9 April 2009. Mr Gwangwa's explanation that the 9 years referred to in the bid document was either a misunderstanding, a language problem, an oversight, or a reflection of the experience of the companies involved in the purported merger, cannot be accepted. The question in the bid document was put in simple language and was easy to respond to. Its purpose was to inform the Department of the experience and track record of the company to enable it to evaluate the bid in terms of functionality and preference points.
- 8.2.17 Similarly, the statement made in the bid document that On-Point had outsourced some of its business functions in the interest of the empowerment of the youth to the value of R1,2 million in 2009/10 to Dichabe Engineering cannot be accepted. Mr Gwangwa also conceded during his interview that this statement was not true.
- 8.2.18 The bid document furthermore incorrectly stated that On-Point had six permanent employees, an annual turnover of R2 million and assets to the value of R 400 000.

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- 8.2.19 There was furthermore no indication in the bid document that On-Point was in a joint venture or that it would have appointed sub-agents with a local empowerment content to assist it, as was required by the Request for Proposal. The only reference was to “partners”, which related to two companies, one of which is not based in South Africa (Peek) and indicated during the investigation that it was never involved with On-Point.
- 8.2.20 On-Point’s bid did not include an original valid Tax Clearance Certificate as required. The certificate that was submitted was in the name of Achir Shelf with no explanation provided.
- 8.2.21 The bid submitted by On-Point therefore, in terms of the available information and evidence, failed to comply with the requirements of the Request for Proposal. It was also riddled with deliberate fraudulent misrepresentations in terms of On-Point’s composition, experience, value and functionality.
- 8.2.22 There was no indication in the evidence and information obtained during the investigation that the BEC at any stage considered the possibility of requesting the three bidders who were disqualified for not including the required covering letter, to submit same to enable the Committee to evaluate their proposals in the interest of fair competition and cost effectiveness. At least one of the bidders in any event complied in this regard, although the wording of the letter was clearly not considered by the BEC, simply because wording exactly similar to the requirement was not used.
- 8.2.23 The BEC also did not request a valid Tax Clearance Certificate from On-Point prior to evaluating its bid, as it was expected to have done in terms of the relevant policy⁹
- 8.2.24 No indication could be found that the BEC, the BAC or the Head of the Department considered the fact that On-Point only came into existence shortly before the bid was advertised and that its experience, track record and functionality, which was paramount to the evaluation, were therefore suspect. No due diligence investigation or verification was conducted, as one would have expected under the circumstances. The criteria applied by the BEC focussed mainly on functionality, which could only have been

⁹ See paragraph 9.6.7 below

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determined from the composition of On-Point in terms of its management and relevant staff, as it was presented in the bid document.

- 8.2.25 The result of eventually disqualifying all the bidders, except On-Point, was that there was no competition for the latter in the second phase of the evaluation process.
- 8.2.26 According to the Head of the Department, the resolution of the BAC that On-Point's price should be negotiated was never brought to his attention. The Chief Financial Officer also could not explain why this resolution was not implemented.
- 8.2.27 The Head of the Department furthermore could not explain why he wrote to On-Point requesting a valid Tax Clearance Certificate before the recommendation of the BAC was presented to him.
- 8.2.28 The evidence and information obtained during the investigation therefore indicated that the bid presented by On-Point was not a true reflection of the composition, experience, track record and profile of the company and that the Department was therefore deliberately mislead in respect of its relevant functionality and experience.
- 8.2.29 It also shows that the procurement process in certain critical respects failed to comply with the constitutional standard of fairness and competitiveness.
- 8.2.30 The awarding of the tender by the Department to On-Point was therefore improper.
- 8.2.31 Whether the awarding of the tender also constituted a violation of the Prevention and Combatting of Corrupt Activities Act, 2004 is a matter that should be further explored by the Directorate: Priority Crime Investigation of the South African Police Service and the National Prosecuting Authority.

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8.3 Was On-Point involved in any corrupt practices in violation of the Prevention and Combatting of Corrupt Activities Act in its dealings with other service providers appointed by the Department, during its management of the PMU of the Department?

- 8.3.1 Mr Gwangwa conceded during his interview that On-Point entered into the Memorandum of Understanding with Baitseanape referred to in paragraph 7.8.7 above. He also stated that he obtained legal advice that the agreement constituted a conflict of interests.
- 8.3.2 However, his evidence that the agreement was retracted is inconsistent with that of Mr Thihe of Baitseanape, who stated that when he realised that it was unethical for On-Point to be part of such an agreement, he decided not to implement it and informed On-Point accordingly.
- 8.3.3 Mr Gwangwa's denial that On-Point was paid by the Department for the designs referred to in the agreement with Baitseanape is also inconsistent with the payment invoices of the Department, which indicate a payment of R 806 766.80 to On-Point in this regard.
- 8.3.4 Mr Gwangwa further denied that there was a similar agreement between On Point and H L Matlala & Associates. Although he conceded that he signed a related invoice that was issued by Segwalo Consulting and that it pertained to work that was done for the Department, he denied that On-Point received any payment in respect of this invoice.
- 8.3.5 His evidence is inconsistent with that of Mr Matlala who confirmed that although the agreement was not signed On-Point expected from H L Matlala and Associates to be paid for the designs it had done in terms of the project concerned. Bank statements of Segwalo submitted by Mr Gwangwa confirmed that payment of R1,2 million was made to Segwalo which belongs to and is controlled by Mr Gwangwa.
- 8.3.6 As far as the Memorandum of Understanding between On-Point and Mpotseng Infrastructure is concerned, Mr Gwangwa confirmed that: *"there was an intention to enter*

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into such agreement”, but he denied that it ever materialised. He further denied any knowledge of an invoice issued by Qualis Consulting to Mpotseng Infrastructure and that any payment was made by the latter to On-Point.

8.3.7 Mr Gwangwa’s evidence in this regard is inconsistent with that of Mr Phetla, who indicated that Qualis was used by him as a vehicle in respect of the designs that were done by On-Point and in terms of which payment was due to it. His evidence is also inconsistent with the bank statements of On-Point which recoded a payment of R 1 mil made to it by Mpotseng Infrastructure on 29 April 2011.

8.3.8 The evidence and information obtained during the investigation therefore show that On-Point was involved in improper *“back-to-back agreements”* as alleged. In one such case, it resulted in double payments made by the Department in respect of designs in the amount of R4 272 890.

8.3.9 The question regarding whether On-Point’s conduct in this regard constituted a corrupt practice is referred to in paragraph 13 below.

8.4 Did the Ratanang Family Trust and/or Mr J Malema benefit improperly from the tender that was awarded to On Point?

8.4.1 According to the evidence and information provided by Mr Gwangwa, On-Point made payments to the Ratanang Family Trust directly from 15 October 2010 to 2 May 2012 in the amount of R2 170 000. The bank statements provided by Mr Gwangwa further indicate that payments were also made by On-Point to Guilder Investments and its other two original shareholders, Tshiamo Dichabe and the Makatele Family Trust.

8.4.2 Comparing the information obtained from On-Point’s Bank statements with that provided by Mr Gwangwa, it was noted that the amount indicated by him as a loan paid to the

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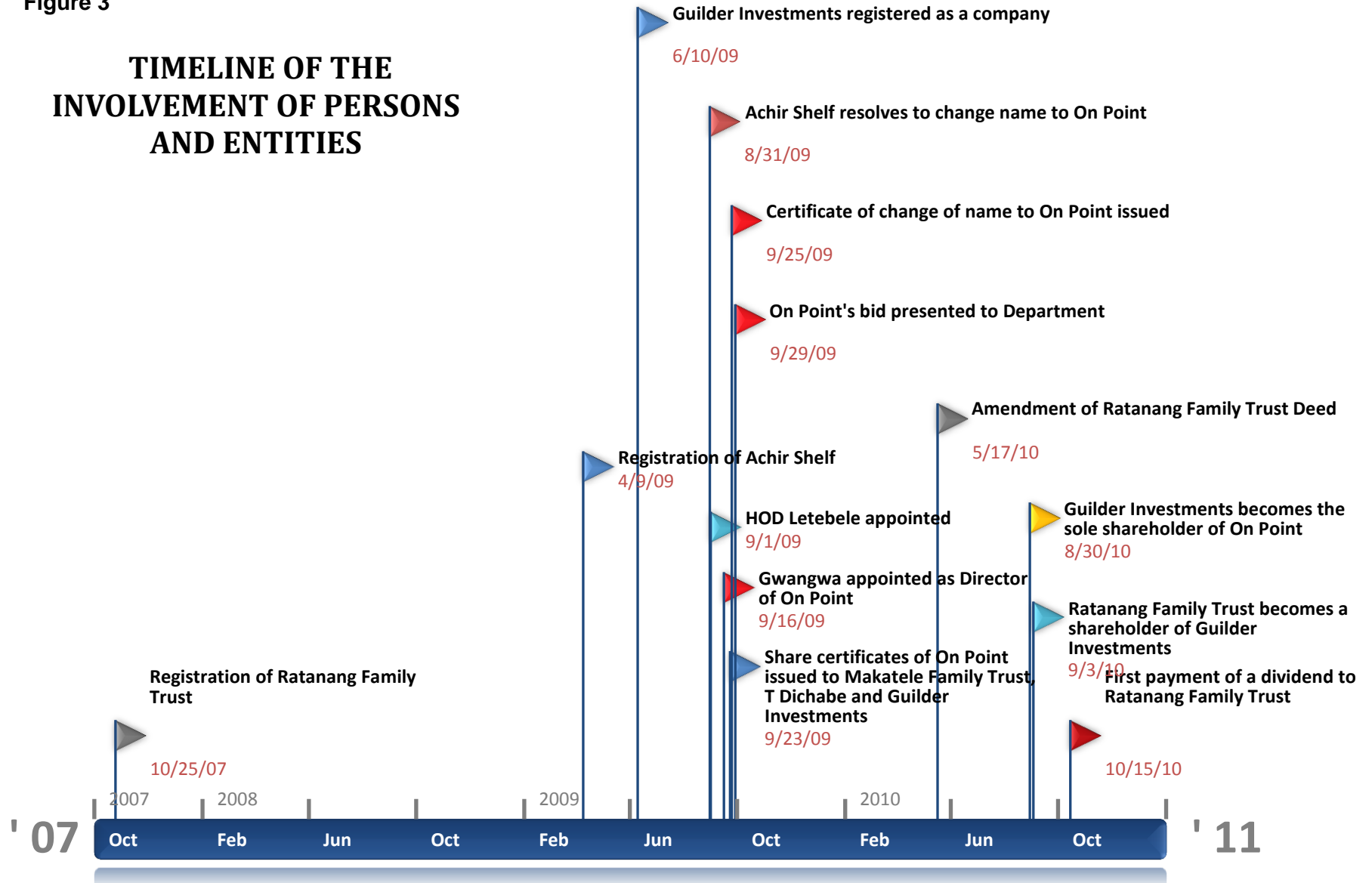
Ratanang Family Trust on 4 January 2011, was referenced on the bank statement as “Sandton Property”. Similarly, an amount stated by Mr Gwangwa as a loan of R100 000 paid on 28 March 2011 is indicated on the bank statement as “Sundowns Property”. The bank statements also contain an payment of R1 000 000 made on 4 May 2011 under the reference “Ratanang Farm” which was not referred to by Mr Gwangwa in the information that he provided.

- 8.4.3 On-Point’s main source of income from its establishment to at least the end of May 2012 was the regular payments made to it by the Department. The evidence and information obtained during the investigation showed that On-Point owed its existence as a profit making establishment that could declare dividends on a monthly basis, solely to the awarding of the contract by the Department to it in October 2009.
- 8.4.4 Due to the fact that the awarding of the contract to On-Point was based on deliberate misrepresentation and non-compliance with procurement prescripts, its shareholders, including the Ratanang Family Trust and the Gwangwa Family Trust that eventually became the shareholders of Guilder Investments (the sole shareholder of On-Point), benefitted improperly by means of the payments of “dividends” and other payments made to it by On-Point. As a Trustee of the Ratanang Family Trust, Mr J Malema was therefore also put in an advantageous position as his family was supposed to benefitted from it.
- 8.4.5 The timeline below (Figure 3) provides an indication of the relevant persons and entities involved in the contract in respect of which the shareholders of On-Point benefitted improperly:

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Figure 3

TIMELINE OF THE INVOLVEMENT OF PERSONS AND ENTITIES



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8.5 Was the awarding of tenders for the provision of goods by the Department to Sizani Build It and Arandi Trading Enterprise improper?

- 8.5.1 The Department awarded one contract to Arandi Trading Enterprise and two to Raesetja Property Development, trading as Sizani Build It.
- 8.5.2 The Chief Financial Officer conceded during the investigation that failures in the bid specification process of the Department resulted in the ridiculously high number of bids that were presented. She also indicated that the Department was in the process of improving the system.
- 8.5.3 Of particular significance in respect of the procurement processes followed in all three cases was that the Head of the Department appointed staff members of On-Point to be members of the BECs. He holds the view that he was entitled to do so in terms of the Limpopo Procurement Policy and that it was necessary to make the expertise of the On-Point employees available to the BEC's under the circumstances. However, it appeared from the nature of the goods procured that very little, if any, specific expertise was required. The bids related to quantities and price more than quality and content.
- 8.5.4 The goods in respect of which the contracts were awarded had not been ordered at the time of the investigation and no payments had been made in respect thereof to the successful bidders concerned.
- 8.5.5 No indication of impropriety other than the involvement of employees of On-Point in the BEC's, which is discussed in more detail below in terms of the applicable legal framework, could be found.

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9 LEGAL FRAMEWORK

9.1 Introduction

9.1.1 Supply chain management is one of the key challenges at all levels of government. Matters concerning the procurement of goods and services by government departments are frequently the subject of allegations and suspicions of impropriety published by the media. Some state entities have even been dubbed “*department of irregular expenditure*” or given other names due to irregular and improper procurements.

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

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

9.1.3 The management of procurement by government departments involves two fundamental stages, namely Demand Management and Acquisition Management. A failure in the initial cycle of demand (needs) assessment, research and planning to acquire goods and services results in dire consequences for the subsequent processes that have to be followed. Equally(if not more) important is the acquisition cycle of processing specifications, invitations to tender, bid document management, evaluation, adjudication, contracting and management of contracts.

9.1.4 The financial management and responsibilities of provincial government departments are governed by the Constitution, the PFMA, Treasury Regulations, instructions and

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directives issued by the National Treasury in terms of section 76 of the PFMA and the relevant provincial and departmental procurement policies.

- 9.1.5 Ultimately, in terms of section 38 of the PFMA, the accounting officer (Head) of a provincial government department is responsible and accountable for the procurement of goods and services with public money.

9.2 General provisions relating to procurement

- 9.2.1 The constitutional imperatives relating to procurement are encapsulated in section 217 of the Constitution, which stipulates that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a **system which is fair, equitable, transparent, competitive and cost-effective**.
- 9.2.2 In terms of section 38 of the PFMA, it is the general responsibility of the accounting officer to ensure that the department has and maintains an appropriate procurement and provisioning **system which is fair, equitable, transparent, competitive and cost-effective**.
- 9.2.3 Section 76(4)(c) of the PFMA provides that the National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning, among others, the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- 9.2.4 Regulation 16A of the Treasury Regulations sets out the framework for Supply Chain Management and provides *inter alia* that:

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“16A.3 Supply chain management system

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

- (a) the acquisition of goods and services; and*
- (b)...*

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

- (a) be fair, equitable, transparent, competitive and cost effective;*
- (b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
- (c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*
- (d) provide for at least the following:*
 - (i) demand management;*
 - (ii) acquisition management;*
 - (iii) logistics management;*
 - (iv) disposal management;*
 - (v) risk management; and*
 - (vi) regular assessment of supply chain performance.*

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16A.4 Establishment of supply chain management units

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

...

16A.6 Procurement of goods and services

16A6.1 ...

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

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

....

16A6.3 *The accounting officer or accounting authority must ensure that-*

- 1 *bid documentation and the general conditions of a contract are in accordance with-*
 - (i) the instructions of National Treasury; or*
 - (ii) the prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry;*

...

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- 2 bids are advertised in at least the Government Tender Bulletin for a minimum period of at least 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine.

...

- (g) instructions issued by the National Treasury in respect of the appointment of consultants are complied with.

...

16A9 Avoiding abuse of supply chain management system

16A9.1 The accounting officer or accounting authority must-

...

- (d) reject any bid from a supplier who fails to provide written proof from the South African Revenue Service that that supplier either has no outstanding tax obligations or has made arrangements to meet outstanding tax obligations;

.....

- (f) cancel a contract awarded to a supplier of goods or services-
- (i) if the supplier committed any corrupt or fraudulent act during the bidding process or the execution of that contract; or
- (ii) if any official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of that contract that benefitted that supplier."

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9.3 The composition of the Bid Evaluation Committee (BEC)

9.3.1 The provisions of the Constitution and the PFMA

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

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

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

9.3.1.4 It is important to note that section 44(2)(d) of the PFMA provides that a delegation or instruction as referred to in paragraph 18.3.1.3 above, does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

9.3.1.5 The accounting officer can accordingly, only be held accountable for his/her own conduct or failures and that of persons to whom his/her powers and duties were assigned. Put differently, the accounting officer can only assign his/her powers and duties to persons that fall under his/or her authority, i.e. officials of the department.

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He/she does not have the power to delegate his/her powers or assign any of his/her responsibilities to external persons.

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

- (i) contravenes or fails to comply with a provision of this Act;
- (ii) commits an act which undermines the financial management and internal control system of the department; or
- (iii) makes or permits an unauthorized, irregular or fruitless and wasteful expenditure.

9.3.2 The Treasury Regulations

9.3.2.1 As alluded to above, the National Treasury may, in terms of section 76(4) of the PFMA, make regulations or issue instructions applicable to departments concerning any matter that may be prescribed for in terms of this Act.

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

9.3.2.3 Regulation 16A of the Treasury Regulations (referred to above) issued in terms of section 76 of the PFMA regulates supply chain management in respect of government departments.

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

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9.3.2.5 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.

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

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

9.3.3.1 As indicated above, regulations and instructions made or issued in terms of section 76 of the PFMA are regarded as part of the Act, and therefore carry the same authority.

9.3.3.2 Despite the absence of any indication that it was issued in terms of section 76, this *Guide* of the National Treasury is widely applied in the supply chain management systems of government departments.

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

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

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

*1.6.1.2 Accounting officers/authorities should ensure that a formal **set of delegations** is issued to bid evaluation/adjudication committees, which should be constituted of at least three members, of whom at least one should be a SCM practitioner. When it is deemed necessary, independent experts may also be co-opted to a bid evaluation/adjudication committee in an advisory capacity.”*(emphasis added)

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9.3.4 National Treasury Circular dated 27 October 2004

9.3.4.1 This *Circular* was issued by the National Treasury under the heading ‘IMPLEMENTATION OF SUPPLY CHAIN MANAGEMENT.’ It aimed to provide further guidance and clarity to accounting officers and supply chain management practitioners. As is the case of the *Guide*, the National Treasury did not indicate that it made and issued this Circular in terms of section 76 of the PFMA.

9.3.4.2 Paragraph 1.1 of this *Circular* states that:

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

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

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

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

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

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

9.3.4.5 It can therefore be concluded from what is stated above that the National Treasury has advised accounting officers of government departments on how to establish BEC's as part of the acquisition management components of the supply chain management system, envisaged by section 217 of the Constitution. The appointment of the members of a BEC by the accounting officer is generally made by means of a delegation or instruction to officials of the department to perform the functions associated with the BEC.

9.3.5 The Limpopo Provincial Policy on Bid Committees

9.3.5.1 The Supply Chain Management Office of the Limpopo Provincial Treasury issued this policy on 1 November 2005. Its aim was to promote uniformity in the establishment and operation of various procurement committees in the Limpopo Province.

9.3.5.2 This Policy provides for the establishment of a Bid Specification Committee, Bid Evaluation Committee and Bid Adjudication Committee for every department.

9.3.5.3 As far as the Bid Evaluation Committee is concerned, paragraph 7.2 provides that the members were to be appointed by the Head of the Supply Chain Management Unit of the department. It had to comprise of at least three officials of the department. Paragraph 7.2.2 (c) provides that:

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“The Accounting Officer/Authority may appoint an external technical expert to serve in the committee for that specific bid.” (emphasis added)

9.3.6 The Limpopo Preferential Procurement Policy

9.3.6.1 The Executive Council of the Limpopo Provincial Government approved this Policy on 14 December 2005. Its major objectives include *“to promote a uniform procurement approach in the Provincial Administration and public entities in Limpopo.”*

9.3.6.2 Paragraph 9.3 provides that the accounting officer of a department is responsible for the establishment, composition, appointment and functioning of bid specification, evaluation and adjudication committees. No requirements for the composition of these committees are included in the Policy.

9.3.7 The Supply Chain Management Policy of the Limpopo Department of Roads and Transport

9.3.7.1 The (former) Head of the Department approved this Policy on 18 February 2009.

9.3.7.2 Paragraph 2 of the Policy describes its purpose as to promote uniformity in the procurement of goods and services by the Department, to comply with the procurement requirements of the Constitution and the PFMA and to *“provide guidance in handling (sic) the procurement of the department.”*

9.3.7.3 This Policy notably provides for a Departmental Tender Committee (DTC) and a Departmental Sub-Tender Committee (DSTC)

9.3.7.4 According to paragraph 7, the DTC *“will approve all the tenders as delegated by the Central Procurement Committee”* However, no provision is made in the Policy for the establishment of a Central Procurement Committee.

9.3.7.5 The function of the DTSC is to *“approve all procurement quotation (sic) up to a predetermined limit by the Head of Department.”*

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9.3.7.6 The Policy does not provide for the establishment of bid specification, adjudication committees as prescribed by the Treasury Regulations

9.3.7.7 The only reference to a bid evaluation committee is to be found in paragraph 8.2.7, which provides that the accounting officer shall appoint the members of such a committee in writing. It is also stated that *“bids will be evaluated in terms of the criteria stipulated in the bidding documents.”*

9.3.8 The advice received from the Office of the Accountant-General

9.3.8.1 During the course of the investigation, the appointment to a BEC of persons who are not officials of the department concerned, was raised with the Office of the Accountant-General.

9.3.8.2 Ms Z Mxunyelwa of Specialised Audit Service advised as follows on 3 November 2011:

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

9.3.9 Opinion of Mr J Breytenbach of National Treasury

9.3.9.1 The Chief Director: Norms and Standards of the National Treasury, Mr J Breytenbach, was also approached for advice on 26 November 2011 in connection with the composition of a BEC by the accounting officer of a Department. Mr Breytenbach has more than 30 years’ experience in respect of the interpretation and application of legislation and other prescripts relating to procurement by government departments. He was also the drafter of, amongst many others, the *Circular* referred to in paragraph 18.3.4 above.

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9.3.9.2 Mr Breytenbach expressed the notion that a BEC should consist of officials of the department involved and that the accounting officer may co-opt an independent professional expert to the BEC in exceptional cases. The person co-opted to the BEC would be involved in an advisory capacity only and would not be a member of the BEC and participate in the actual evaluation and scoring process.

9.3.9.3 He also agreed with the opinion of the Office of the Accountant-General referred to in paragraph 18.3.8 above that experts who are not officials of the department can only form part of a particular BEC as a member in terms of a contractual arrangement with the department following a proper procurement process. The contract would regulate the involvement of the expert in the BEC and his/her responsibilities in this regard. It would obviously also provide for remedies in the event of improper conduct by the expert concerned that can impact on the validity of the procurement process and therefore on the ultimate accountability of the accounting officer.

9.3.10 Legal opinion of Adv B.R Tokota SC

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

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

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

9.3.11 The involvement of external advisors or experts as members of a BEC

9.3.11.1 From what is stated above, it appears that special circumstances may require the composition of the BEC to include in addition to officials of the department, external advisers or experts as scoring members of the committee. However, such persons, according to the advice and guidelines provided by the National Treasury, should not be appointed by the accounting officer as they are not officials. Their membership of a BEC will have to be regulated by means of a contractual arrangement following a proper procurement process for the specific service.

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

9.3.12 The findings of the Public Protector in the report titled: “Yes, We Made Mistakes: Report on an investigation into the alleged improper procurement of communication services by the Department of the Premier of the Western Cape Provincial Government: Report No: 1 of 2012/2013

9.3.12.1 This matter related, *inter alia*, to the appointment of Special Advisers of the Premier as members of the BEC of a department, based on their expertise and experience. The Special Advisers were not officials of the department.

9.3.12.2 Legal opinions obtained during this investigation and presented by the department involved to the Public Protector indicated that although there may be some merit in arguing that the appointment of the Special Advisers of the Premier as members of

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the BEC was unlawful, such an argument would have to be based on implied illegality in the absence of any explicit prohibition in law, in this regard. The implied illegality would have to include reliance on instructions and guidelines issued by the National Treasury that cannot be regarded with certainty as “*regulations and instructions*” as contemplated by the provisions of sections 1 and 76 of the PFMA. In the light of the uncertainty in respect of the legal status of circulars, practice notes and instruction notes issued by the National Treasury, it could not be contended with certitude that non-compliance with it constituted unlawful conduct.

9.3.12.3 However, the Public Protector found the appointment of Special Advisers as members of the BEC to have been improper. *“Appointing persons who have been employed specifically to advise the Executive Authority of the Department to be part of a procurement process, which resorts in the domain of the administration, raises the risk profile of the process and can create suspicions and perceptions of political interference or influence, which will be detrimental to its integrity. While the appointment of the two special advisers may not have violated the principle of legality it was ill-advised. It resulted in suspicions and perceptions of political involvement and influence in respect of the procurement process that should have been avoided. The appointment was not in line with the spirit and purpose of the National Treasury’s Guide for Accounting Officers which seeks to give meaning to the Treasury Regulations, the Public Finance Management Act, 1999 (PFMA) and section 217 of the Constitution.”*

9.3.12.4 The remedial action taken by the Public Protector in this report included that: *“The Director-General of the National Treasury to take urgent steps to ensure that the legal status of circulars, practice notes and other instructions are clearly determined and defined in terms of section 76 of the PFMA when it is issued.”*

9.4 The appointment of consultants

9.4.1 The procurement by government departments of the services of consultants is regulated by Chapter 5 of the *Supply Chain Management Guide for Accounting Officers* issued by the National Treasury in February 2004 (the Guide).

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9.4.2 In terms of paragraph 5.1.3 of the Guide, reference to *consultant*, includes, inter alia, consulting firms, engineering firms and construction managers.

9.4.3 Consultants should, according to paragraph 5.1.5, only be engaged when the necessary skills and/or resources to perform a project/duty/study are not available and the accounting officer cannot be reasonably expected to either train or to recruit people in the time available.

9.4.4 Paragraph 5.1.6 provides that:

“The relationship between the accounting officer/authority and the consultant should be one of purchaser/provider and not employer/employee. The work undertaken by a consultant should be regulated by a contract. The accounting officer/authority is, however, responsible for monitoring and evaluating contractor performance and outputs against project specifications and targets and should take remedial action if performance is below standard.”

9.4.5 In paragraph 5.14.6 it is specifically stated in this regard that:

“The consultant should not receive any remuneration in connection with the assignment except as provided in the contract. The consultant and its affiliates should not engage in consulting activities that conflict with the interests of the client under the contract, and should be excluded from downstream supply of goods or construction of works or purchase of any asset or provision of any other service related to the assignment other than a continuation of the “Services” under the ongoing contract.”

9.4.6 The evaluation of technical proposals in the bids of consultants is referred to in paragraph 5.9.5.5, inter alia, as follows:

“In respect of functionality, the accounting officer/authority should evaluate each technical proposal (using an evaluation panel of three or more specialists in that field of expertise) in terms of the specified evaluation criteria that may include the following:

(i) The consultant’s relevant experience for the assignment;

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-
- (ii) The quality of the methodology proposed;
 - (iii) The quality of the key staff proposed; and
 - (iv) Transfer of knowledge.

....

The accounting officer/authority should review the qualifications and experience of proposed key personnel in their curricula vitae which should be accurate, complete and signed by an authorized official of the consultant and the individual proposed.
When the assignment depends critically on the performance of key staff, such as a Project Manager in a large team of specified individuals, it may be desirable to conduct interviews.”(emphases added)

9.5 The prescripts in respect of the period of advertisement

- 9.5.1 As indicated in paragraph 18.2.5 above, the Treasury Regulations provide that bids must be advertised for a period of at least 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer may determine.
- 9.5.2 In terms of paragraph 9.5 of the Limpopo Preferential Procurement Policy, the accounting officer must ensure, inter alia, that: *“bids are advertised in the Provincial Tender Bulletin for a minimum period of 30 days before closure, except in urgent or emergency cases when bids may be advertised for such shorter period as the AO/AA may determine.”*
- 9.5.3 The following footnotes appear in the policy in this regard: *“Urgent cases are cases where early delivery is of critical importance and invitation of competitive bids are either impossible or impractical. Emergency cases are cases where immediate action is necessary in order to avoid a dangerous or risky situation or misery.”*
- 9.5.4 Paragraph 8.2.6 of the Department’s Supply Chain Management Policy provides that bids have to be advertised for a period of 30 days, but that the head of the Department may approve deviations from this requirement in *“exceptional cases”*.

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9.6 The requirement that the bid document has to include an original valid Tax Clearance Certificate

9.6.1 In terms of National Treasury Practice Note SCM 1 of 2006, accounting officers are required to utilize standard bidding document form SBD 2 (Tax Clearance Certificate Requirements) in all bid invitations relating to transactions exceeding R 30 000. This Practice Note replaced parts of the Practice Note SCM 1 of 2003, which established the requirement in respect of the submission of an original valid Tax Clearance Certificate as part of the bid documents.

9.6.2 Form SBD 2 provides, *inter alia*, that the original Tax Clearance Certificate must be submitted together with the bid. *“Failure to submit the original and valid Tax Clearance Certificate **will result in the invalidation of the bid.**”* (emphasis added)

9.6.3 Regulation 16 of the Preferential Procurement Regulations made in terms of the Preferential Procurement Policy Framework Act, 2000, provides that:

“No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service (SARS) certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS.” (emphasis added)

9.6.4 “Contract” is defined by Regulation 1 as: *“the agreement that results from the **acceptance of a tender** by an organ of state.”* (emphasis added)

9.6.5 On 10 October 2005, National Treasury issued a Circular, dealing, *inter alia*, with the evaluation of bids. Paragraph 1 of the Circular stated that:

*“National Treasury received several complaints regarding incorrect evaluation of bids. The Preferential Procurement Policy Framework Act, No 5 of 2000, prescribes that the lowest **acceptable** bid must receive 80 of 90 points for price. A bid is **regarded as acceptable** if:*

*(a) **It complies in all respects with the specification and conditions of the bid;***

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(b) ...

(c) ***the bidder submitted the required original tax clearance certificate and other clearance /registration forms as prescribed by various acts and/or in the bid documentation;***

(d) ...

*Bids may only be evaluated in accordance with the evaluation criteria stipulated in the bid documentation. When any bid is passed over or regarded as non-responsive, the reasons for passing over such bid must be defensible in any court of law. Examples in this regard may include negative banking reports, **non-submission of tax clearance certificates**”(emphasis added)*

9.6.6 Paragraph 4.10 of National Treasury’s *Supply Chain Management: A Guide for Accounting Officers/Authorities* deals with the receiving of bids. It states that if a bid does not include an original Tax Clearance Certificate, it is to be regarded as not substantially responsive and should not be considered further.

9.6.7 Paragraph 10 of the Limpopo Preferential Procurement Policy of prescribes the evaluation criteria relevant to bids. The following provisions are of particular significance to this report:

“10.1 Evaluation criteria must be fair, objective and acceptable to both government and bidders and must correspond with the defined scope of work, terms of reference and deliverables.

10.2 A bid must, subject to clause 10.3, be regarded as acceptable if-

(a) *all the specifications and conditions of the bid are complied with;*

(b) *the bidder completed and signed all the prescribed bid forms;*

(c) *original (sic) valid tax clearance certificate is included in the bid document; and*

(d) *any other clearance or registration form requires by the bid document or legislation is included in the bid.*

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10.3.1 The **evaluation committee must, before** disqualifying a recommended bidder for the non-submission of the original tax clearance certificate or any other clearance or registration form required by the bid document-

- (a) contact the bidder to submit, within two working days, the original valid tax clearance certificate or any other clearance or registration form required by the bid document; and
- (b) verify that-
 - (i) the taxes of the bidder are in order or that suitable arrangements have been made with SARS regarding the original tax clearance certificate;
 - (ii) any other clearance or registration form required by the bid document exists.” (emphasis added)

9.6.8 An analysis of the provisions and advice of the National Treasury referred to above shows that the inclusion of an original valid Tax Clearance Certificate in the bid document has to be determined at the latest at the evaluation stage. It is at this stage, according to the Limpopo Preferential Procurement Policy, that a bidder should be allowed to remedy a defect. A bid can only be evaluated by the BEC if it is regarded as “*acceptable*”, which means that an original valid Tax Clearance Certificate must have been included in the bid document **before** the evaluation process starts. If it is not included, the bid has to be regarded as not substantially responsive and be rejected. The defect cannot be remedied later as only “*acceptable*” bids qualify for evaluation.

9.7 The judgement of the Supreme Court of Appeal in the matter of Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others 2008(2)SA 481(SCA)

9.7.1 This matter related to the disqualification of the Appellant’s bid by the departmental tender committee for not complying with an administrative requirement, i.e. “*failing to sign a form titled ‘declaration of interest.’*”

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9.7.2 At the time of the evaluation of the bid in question, the provisions of the Regulations made in terms of the Limpopo Tender Board Act, 1994, were still in place. Regulation 5 provided that the Tender Board “*may accept any offer notwithstanding the fact that the offer was not in response to any particular tender invitation, or does not comply with the tender invitation in respect of which the offer has been made.*” (This Act was repealed by the Limpopo Tender Board Repeal Act, 2005, with effect from 1 August 2005.)

9.7.3 The Supreme Court of Appeal (SCA) was asked to determine, *inter alia*, whether the disqualification of the appellant’s bid violated its right to procedural fairness.

9.7.4 With reference to the provisions of Regulation 5, referred to above, the SCA in the first place, found that the Tender Board was afforded a discretion to consider accepting the bid, which it did not exercise at all.

9.7.5 Secondly, the SCA held that [at 17]:

*“Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted. In this case condonation of the appellant’s failure to sign would have served the public interest **as it would have facilitated competition among the tenderers.** By condoning the failure the tender committee would have promoted the values of fairness, competitiveness and cost effectiveness which are listed in s 217 (of the Constitution).*

..

I turn to the question whether the appellant’s tender constitutes an acceptable tender as defined in the Preferential Procurement Act. It defines an acceptable tender as ‘any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.’ When Parliament enacted the Preferential Procurement Act it was complying with the obligation imposed by s 217(3) of the Constitution which required that legislation be passed in order to give effect to the implementation of a procurement policy referred to in s 217(2). Therefore the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which

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promotes 'the spirit, purport and object of the Bill of Rights' as required by s 39(2) of the Constitution.

...

In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight."

...

Since the adjudication of tenders constitutes administrative action, of necessity the process must be condoned in a manner that promotes the administrative-justice rights while satisfying the requirements of PAJA. Conditions such as the one relied upon by the tender committee should not be mechanically applied with no regard to a tenderer's constitutional rights. By insisting on disqualifying the appellant's tender for an innocent omission, the tender committee acted unreasonably."

9.8 Financial misconduct

9.8.1 Regulation 4.1 of the Treasury Regulations provides that:

"4.1.1 If an official is alleged to have committed financial misconduct, the accounting officer of the institution must ensure that an investigation is conducted into the matter and if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts and agreements applicable in the public service.

4.1.2 ...

4.1.3 If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into

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the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable in the public service.

4.1.4 *A relevant treasury may-*

(a) direct that an official other than an employee of the institution conducts the investigation; or

(b) issue any reasonable requirement regarding the way in which the investigation should be performed.”

9.9 The Trust Property Control Act

9.9.1 This Act regulates the control of trust property and provides for matters connected therewith.

9.9.2 In terms of section 9, a trustee shall in the performance of his/her duties and the exercise of his/her powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

9.9.3 Whenever a person receives money in his/her capacity, he/she are compelled, in terms of section 10, to deposit such money in a separate trust account at a banking institution or building society.

9.9.4 The authority of the Master of the High Court to call upon a trustee is provided for in section 16, which provides that:

“(1) A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master’s requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of trust property.

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(2) *The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property."*

9.9.5 A trustee may, in terms of section 20, on the application of the Master or any person having an interest in the trust property, at any time be removed from his/her office by the High Court, if the Court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

9.9.6 As far as the remuneration of a trustee is concerned, section 22 provides that:

"A trustee shall in respect of the execution of his official duties be entitled to such remuneration as provided for in the trust instrument or, where no such provision is made, to a reasonable remuneration, which shall in the event of a dispute be fixed by the Master."

10 ANALYSIS OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION AND THE RESPONSES TO THE PROVISIONAL REPORT

10.1 THE EVIDENCE AND THE LEGAL FRAMEWORK

10.1.1 As indicated in paragraph 8.1 above, it was established from the evidence that the bid for the PMU was only advertised for 20 days. This was in violation of the provisions of relevant prescripts of the Treasury Regulations, which require a period of at least 21 days, and the Limpopo Preferential Procurement Policy, in terms of which the advertisement should run for at least 30 days.

10.1.2 A proper interpretation of the prescripts and guidelines of the National Treasury and the applicable procurement policies indicates that only officials should ordinarily be appointed as members of the BEC. External experts can assist the BEC in an advisory capacity, but can only be voting members in terms of a contract between them and the

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Department that provides specifically for their appointment to the BEC. It was established during the investigation that the HOD on several occasions appointed persons to the BEC who are not officials of the Department and who were not specifically contracted for that purpose. The provisions of the Limpopo Provincial Policy on Bid Committees that allows for the appointment to the BEC of an external technical expert is not in accordance said interpretation of the relevant provisions and advice from National Treasury.

- 10.1.3 From an evaluation of the evidence obtained during the investigation, as discussed in paragraph 8.2 above, it was concluded that the awarding by the Department of the tender for the PMU was improper. In terms of the applicable legal framework referred to in paragraph 9 above, the procurement process failed to comply with the constitutional requirements of fairness, competition and cost effectiveness. The evidence clearly show that On-Point was given preferential treatment, that the BEC, BAC and the HOD failed to properly apply their minds to On-Point's bid, as required by the PFMA, the Treasury Regulations and prescripts.
- 10.1.4 The BEC failed to ensure that On-Point submitted a valid Tax Clearance Certificate in its name before the evaluation process commenced, as required by National Treasury, the Preferential Procurement Regulations and the Limpopo Preferential Procurement Policy.
- 10.1.5 The BEC also overemphasised non-compliance by other bidders of administrative requirements, which amounted to a mechanical application thereof that was not in the interest of fairness, competition and cost effectiveness.
- 10.1.6 As stated in paragraph 8.3 above, it was established from the evidence that On-Point entered into back-to-back agreements with Professional Service Providers relating to its brief as the PMU of the Department. This was in direct violation of National Treasury's advice and guidelines in terms of which consultants should not receive any remuneration in connection with their assignment, except as provided in the contract. The General Conditions of Contract that apply to the agreement between On-Point and the Department provides for it to be terminated if On-Point engages in corrupt practices in competing for or in executing the contract.

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10.1.7 It was furthermore concluded from the investigation referred to in paragraph 8.4 above that the Ratanang Family Trust benefitted improperly from the tender that was awarded to On-Point. Assets and property of a Trust have to be managed by the appointed Trustees in a responsible manner and in the interests of the beneficiary of the Trust. Non-compliance with the provisions of the Trust Property Control Act must be investigated by the Master of the High Court.

10.1.8 The awarding by the Department of contracts to Arandi Trading and Sizani Build It complied essentially with the relevant legal procurement framework.

10.2 MR GWANGWA'S RESPONSE TO THE PROVISIONAL REPORT

Mr L Gwangwa of On-Point submitted his response to the Provisional Report under a covering letter from his attorneys, Mpoyana Ledwaba Inc, on 6 September 2012. The salient points thereof (in addition to what was already contained in his evidence referred to in paragraph 7.11 above), are the following:

10.2.1 The establishment of On-Point

10.2.1.1 He emphasised that On-Point was formed prior to the tender for the PMU being advertised by the Department.

10.2.1.2 However, he also stated in this regard that:

"As I have already pointed out, On-Point was put into operation to house the contract with the Department, should the tender be awarded to it."

and

"It was consequently possible for me to form a company with other black professionals that would be the core tenderer and form associations with other persons or entities and so to form a team to provide all the different types of services contemplated in the request for proposals."

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and

“What I had in mind when I put together the proposal that On-Point in due course submitted was to have a central company formed by Messrs Dichabe, Rasethaba and myself. Around us we would have various professionals and entities on whom we could call on short notice, as and when necessary, to provide On-Point with the capacity to perform its obligations owing to the Department. I decided to create a new project management company, without any historical baggage, to house this new venture as well as project management ventures that may follow in the future.”

and

“The tender related to project management services and my idea was to form a new company that would be dedicated to this type of service.” (emphases added)

10.2.2 The composition of On-Point at the time of the tender

10.2.2.1 Mr Gwangwa confirmed in his response that On-Point had no employees at the time when he submitted its bid to the Department. He further stated in this regard that:

“It (On-Point) nevertheless had a team of persons who were closely associated with myself and my partners and who would become employees or other associates of the company should it obtain the tender. If the company did not obtain the tender and it had employees it would have no business but would have the obligation to pay salaries to the employees. It would have been reckless to appoint employees without any contract. The company was thus formed for the potential of business and the team of persons that I identified would be its employees or associates should the tender be won.” (emphases added)

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10.2.2.2 In his response, Mr Gwangwa also denied that he and/or On-Point included the CV's of persons in the bid document without their knowledge and consent. He continued in this regard:

"I understand from the public protector (sic) that a number of these persons have now disowned their relationship with On-Point. It is perfectly clear that they are doing so because it has become politically unwise in the current temperature to admit a link, direct or indirect, to Mr Julius Malema."

11.2.2.3 According to Mr Gwangwa every person whose CV was included in the bid document *"authorised me and my partners to do so, were aware what we were trying to achieve and were in full agreement to become part of the team."* He described denials in this regard as *"self serving lies"* which might be based on grudges against On-Point for a variety of reasons (which were not explained)

10.2.3 The bid submitted to the Department by On-Point

10.2.3.1 Mr Gwangwa holds the view that the Department's Request for Proposal did not require that the tenderer should be a company that has the capacity to provide all the services in respect of the various elements *"under one roof."* What was required, according to him, was *"a team"*. On-Point therefore presented the Department with such a team of professionals and entities *"on whom we could call on short notice, as and when necessary, to provide On-Point with the capacity to perform its obligations owing to the Department."*

10.2.3.2 He further explained in respect of the Tax Clearance Certificate that was included in the bid document that at the time when the bid document was prepared, the name change of Achir Shelf 8 (Pty) Ltd to On-Point had not been formalised. Accordingly, the Tax Clearance Certificate of Achir Shelf was presented to the Department at the time. On-Point's Tax Clearance Certificate was subsequently obtained and provided to the Department, at its request.

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10.2.3.3 As far as On-Point's response to a question in the bid document relating to its total number of years in business is concerned, Mr Gwangwa stated that:

"When I completed the form I considered this question and felt that it would be wrong to state that the de facto partnership between me and the two other directors of On-Point had not been in business at all (sic). On-Point was effectively a private company in the nature of a professional partnership and when I answered the question I intended to convey the period that the three of us had acted as partners in different formats. I thought nine years was the correct period to indicate to the bid committee what the relevant combined experience of the partners was who formed the partnership that was the substratum of the 'firm' and that became On-Point Engineers (Pty) Ltd.

10.2.3.4 Mr Gwangwa denied that On-Point's bid document stated that it was actively involved in the promotion of youth owned business enterprises and that it had outsourced work in this regard during 2009/10 in the amount of R1,2 million.

10.2.4 The appointment of Mr Phetla as a Director of On-Point

10.2.4.1 In his response in this regard, Mr Gwangwa stated that he and Mr Phetla had an understanding that *"we would bring each other into whatever venture we would separately embark upon."*

10.2.4.2 He *"might"* have told the accountant of the company, Mr Ravat, or the latter *"might have assumed"* that the default position would be that Mr Phetla would be a Director of On Point.

10.2.4.3 According to Mr Gwangwa, he did not pay any attention to *"this part of the administration"* of On-Point at the time.

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10.2.5 Mr J Malema's interest in On-Point

10.2.5.1 Mr Gwangwa indicated in his response that he decided to offer 50% of his interests in Guilder Investments to Mr Malema, after the tender for the PMU was awarded by the Department to On-Point. Mr Malema accepted his offer and requested that the shares be registered in the name of the Ratanang Family Trust.

10.2.5.2 He explained the reasons why he offered the said shares to Mr Malema, *inter alia* as follows:

"Mr Malema and I grew up together. He is a childhood friend of mine.

Mr Malema is an intelligent and resourceful person with many friends and acquaintances both here and internationally. His personal friendly relationships with business leaders across the globe have made him into an invaluable asset for any business."

10.2.5.3 He further stated in this regard that from the time that Mr Malema obtained an interest in Guilder Investments, through the Ratanang Family Trust, he became entitled to share in its proceeds by means of dividends and loans.

10.2.6 The back-to-back agreements

10.2.6.1 In his response relating to the back-to-back agreements referred to in paragraph 8 above, Mr Gwangwa stated that:

"It so happened that some of the consultants who were appointed by the Department has, themselves, lack of capacity and they from time to time requested me or members of my staff or any of the companies in the Guilder group to provide the necessary support services to them. There is nothing untoward in this type of arrangement, it happens all the time with engineering and other professional companies throughout the world. All that would happen in this type of case is that where one of my companies had capacity to assist the consultant that had been duly

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appointed by the Department, my company would be appointed on a sub-consultant basis and the departmentally appointed consultant would pay the sub-consultant for work done, the type of service rendered has no bearing on the appointment of the consultant nor effect in how they conduct themselves, it is merely an exchange of technical skills.

There were no 'back-to-back' transactions, there were no 'kick-backs'. All that happened was that where consultants were appointed by the Department, such as H L Matlala & Associates CC, Baitseanape Consulting Engineers CC and Mpotseng Infrastructure CC on various projects On-Point, or one of its sister companies, rendered services to those entities and raised invoices to them." (emphasis added).

10.2.6.2 He also denied that there was anything secret in the so-called 'back-to-back' agreements.

10.2.7 The involvement of Ms Maake and Mr Mamabolo of On-Point in the BEC of the Department

10.2.7.1 Mr Gwangwa denied that the involvement of Ms Maake and Mr Mamabolo in the BEC of the Department was improper.

10.3 EVALUATION OF MR GWANGWA'S RESPONSE TO THE PROVISIONAL REPORT

10.3.1 The establishment of On Point and its composition at the time of the tender

10.3.1.1 From his response to the Provisional Report in this regard it is obvious that On Point was created and the so called "*team*" composed with the sole aim at the time of submitting a bid for the tender of the PMU advertised by the Department.

10.3.1.2 However, it was not explained by Mr Gwangwa how he became aware of the tender to be advertised by the Department, prior to it being published.

10.3.1.3 It is also clear from the explanations provided by Mr Gwangwa that it was never his intention to appoint permanent employees for On-Point. Its future existence and

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operations only depended at the time on whether or not it was awarded the bid for the PMU by the Department.

10.3.1.4 It was noted that during Mr Gwangwa's interview, he stated that the majority of the persons whose particulars appeared in the bid document as being part of On-Point's team, in some or other capacity, agreed to it in writing. He was requested to provide copies of the written consent, but only managed to present the Public Protector with confirmation from three persons, whose consent was not in dispute.

10.3.1.5 Notwithstanding not having provided copies of the written consent of the other persons referred to in On-Point's bid document, as promised, Mr Gwangwa claimed that the reason why a number of the persons whose CV's were included in On-Point's bid document deny any knowledge thereof or that they consented thereto, is because they might have a grudge against On-Point (for reasons not explained) or because it is currently politically unwise to admit a link to Mr Malema.

10.3.1.6 The services of the persons who denied any involvement with On-Point were not utilised during the execution of the contract, despite the fact that they were presented to the Department as part of the multi-disciplinary team. They were therefore not involved with On-Point during its operations as the PMU of the Department and could accordingly not be associated with the negative publicity that was later generated due to the link between On-Point and Mr Malema.

10.3.1.7 Under the circumstances there could not be any reason for them to deny that they were originally included in the "team" as there was no indication at the time of the submission of the bid that On-Point would become linked to negative publicity relating to Mr Malema.

10.3.2 The bid submitted to the Department

10.3.2.1 Mr Gwangwa's response should be considered against the contents of the Request for Proposal, which in clear terms stated that:

- The Department was in need of a PMU;

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- Respondents had to be multi-disciplinary, in other words have several skills and appropriate experience;
- Multi-disciplines could be achieved by respondents by means of joint ventures or by appointing sub-agents. In order for the Department to evaluate compliance with this requirement, such joint ventures or appointment of sub-agents obviously had to be stated in the bid document, hence the reference thereto in the Request for Proposal.
- The proposal by respondents had to include a joint venture with a reputable BEE company.

10.3.2.2 The Request for Proposal clearly envisaged proposals by entities that employed a **team** that had all the necessary skills and experience or an entity that could enhance its skills by having entered into a joint venture agreement with another entity and/or by appointing sub-agents to perform certain tasks.

10.3.2.3 It could not reasonably have envisaged a bid by a respondent that has no employees and that consisted of a team that would only possibly come together if the tender was awarded to it. If that was the case, the Department would have run the risk of awarding the tender to an entity that has no track record of its experience and achievements working together as a team, which was the essential requirement. It also posed the risk of accountability in terms of performance, which would be that of the PMU and not of separate individuals operating on their own.

10.3.2.4 Mr Gwangwa's explanation in connection with the failure of On-Point to include a valid Tax Clearance Certificate in its bid document is inconsistent with the records of the CIPC, in terms of which a Certificate of Change of Name was issued to On-Point by the Registrar of Companies and of Close Corporations on 25 September 2009, i.e. before the bid was submitted.. No explanation was provided in the bid document as to why a valid Tax Clearance Certificate in the name of On-Point, as was required, was not included.

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- 10.3.2.5 It was noted that when Mr Gwangwa was eventually requested by the Head of the Department to submit a valid Tax Clearance Certificate in the name of On-Point, he managed to do so within two days.
- 10.3.2.6 His explanation in regard to stating in the bid document that On-Point had been in business for nine years is furthermore inconsistent with the question in the Bid Invitation Form that he was responding to.
- 10.3.2.7 The “*INVITATION TO BID*” document that had to be completed consisted of several parts. In the introductory part thereof (Form SBD 1) Mr Gwangwa certified, on behalf of On-Point that all the information contained in the bid document is true and correct. He also acknowledged that if it was found to be incorrect, the Department could cancel the contract.
- 10.3.2.8 Form SBD 6.1 of the bid document relates to preference points claimed in terms of the Preferential Procurement Regulations. Paragraph 9.7 of this form poses the following unambiguous question: “*Total number of years the firm has been in business?*” To this question, Mr Gwangwa responded: “*9 years*”. There was no indication in the form or the question that the firm (respondent) could refer to the number of years of experience of its Directors or employees.
- 10.3.2.9 The explanation provided by Mr Gwangwa in this regard in his response to the Provisional Report is also inconsistent with his evidence provided during his interview, referred to in paragraph 11.8.6 above, when he stated that his response to the said question in the bid document was based on a misunderstanding, that it was made because English is not his first language and it was an oversight.
- 10.3.2.10 In addition, it was noted that Mr Gwangwa stated in Form SBD 6.3 that On-Point had six full time employees at the time of the submission of the bid, that it had an annual turnover of R2 million and that its total gross asset value was R 400 000. These statements are inconsistent with his concessions made during the investigation that On-Point had no employees and no assets. It also could not have had an annual turnover as it was only effectively in existence for 4 days at the time when the bid was submitted.

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10.3.2.11 The following were the questions relating to the promotion of Youth Owned Business contained in and the answers provided by Mr Gwangwa in Form SBD 6.14 of the bid document:

Q: *"Indicate whether the company is actively involved in the promotion of Youth owned businesses defined in the Limpopo Preferential Procurement Policy of 2005, by subcontracting any of its business functions to Youth inter alia manufacturing, packaging, distribution, etc..."*

A: *"Yes"*

Q: *"Specific business function(s) subcontracted/outsources:"*

A: *"Dichabe Engineering"*

Q: *"Value subcontracted/outsourced to Youth owned business for the previous financial year."*

A: *"2009/10 R1,2 million."*

10.3.2.12 When he was requested by the Public Protector during his interview to confirm, in the light of the short existence of On-Point at the time of the bid, that it had outsourced work to Dichabe Engineering, as indicated in form SBD 6.14, his response was: *"Not at this stage, no."*

10.3.3 The appointment of Mr Phetla as a Director of On-Point

10.3.3.1 Mr Gwangwa's response regarding the appointment of Mr Phetla as a Director of On-Point is inconsistent with the evidence of Mr Phetla, who indicated that he was surprised to learn about it from media reports published in August 2011. He immediately instructed his attorney to approach Mr Gwangwa in this regard.

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10.3.3.2 His explanation that it was probably On-Point's accountant (bookkeeper), Mr Ravat, who just assumed that Mr Phetla would be a Director of On-Point, is furthermore inconsistent with the documentation filed with the CIPC in respect of Mr Phetla's appointment and resignation, which were signed by Mr Gwangwa himself. There is no indication in the relevant documentation that the accountant was involved in the appointment whatsoever.

10.3.3.3 If Mr Gwangwa's evidence and explanation regarding this matter is true, it would mean that On-Point fraudulently misrepresented to the CIPC that proper Director's meetings were held and that Mr Gwangwa approved Mr Phetla's appointment.

10.3.3.4 However, when Mr Ravat was approached about Mr Gwangwa's response, he indicated that he was instructed by Mr Gwangwa to appoint Mr Phetla as a Director of On-Point as he required his qualifications in respect of a tender that he wanted to bid for. When a dispute later arose between Mr Gwangwa and Mr Phetla about payment for services, Mr Gwangwa instructed him to remove Mr Phetla as a Director.

10.3.4 Mr Malema's interest in On-Point

10.3.4.1 Mr Gwangwa's response in this regard confirms that he and Mr Malema made no distinction between Mr Malema as an individual and his position as a Trustee of the Ratanang Family Trust, in respect of dividends paid and loans granted to it by Guilder Investments. According to Mr Gwangwa, Mr Malema was entitled to share in the proceeds of Guilder Investments. His explanation therefore confirms the view that the Ratanang Family Trust was merely used as a vehicle to channel funds directly to Mr Malema.

10.3.5 The back-to-back agreements

10.3.5.1 The response provided by Mr Gwangwa in this regard confirms the evidence obtained during the investigation that that On-Point rendered services to H L Matlala & Associates, Baitseanape Consulting Engineers and Mpotseng Infrastructure, that was appointed by the Department as Professional Service Providers. It therefore confirms

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that On-Point was rendering services to the Department as a subcontractor in respect of projects that it was contracted to manage in its capacity as the PMU.

10.3.5.2 Mr Gwangwa's response that there was nothing wrong with On-Point rendering services to the said appointed consultants is inconsistent with his evidence during his interview that the agreement between On-Point and Baitseanape Consulting Engineers was retracted on the basis of legal advice, which indicated that it constituted a conflict of interests.

10.4 THE RESPONSE OF THE HEAD OF THE DEPARTMENT TO THE PROVISIONAL REPORT

The Office of the State Attorney: Johannesburg submitted a response to the Provisional report on behalf of the Department, the Head of the Department, the members of the BEC and BAC of the Department that were involved in the evaluation and adjudication of the bid that was awarded to On-Point, on 6 September 2012. The salient points of the response, which were not already contained in the evidence that he provided in during his interview referred to in paragraph 7.9 above, are the following:

10.4.1 The advertisement of the tender

10.4.1.1 It was emphasised that the Head of the Department was authorised in terms of the Department's Supply Chain Management Policy to deviate from the prescribed period of advertisement in exceptional cases. The response contends that the Head of the Department concluded that the explanation provided for the deviation, i.e. *"the amount of work which was still to be done in that financial year"* was sufficient reason for him to approve the request.

10.4.2 The Procurement Policies applied by the Department

10.4.2.1 It was further emphasised that the officials of the Department acted in terms of the Procurement Policies of the Department when they performed the actions referred to in this report.

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10.4.2.2 The response did not dispute that the Limpopo Provincial Policy on Bid Committees and the Supply Chain Management Policy of the Department are not in line with the procurement system contemplated by the provisions of section 217 of the Constitution, the PFMA and Treasury Regulations, directives and guidelines.

10.4.3 The appointment by the Head of the Department of Mr K C Marobela of Denel Aviation to the BEC

10.4.3.1 The response reiterated that Mr Marobela was appointed as an external expert in terms of the Limpopo Provincial Policy on Bid Committees. It further indicated that his appointment was also questioned by the Auditor-General, to whom it was explained that Mr Marobela had extensive experience in relation to the transport sector, extensive legal experience in matters relating to bid adjudications and matters that pertained to the evaluation of bids on functionality, as he had in the past managed the following projects:

- *“The upgrade of Polokwane International Airport runway;*
- *Appointment of consultants for the upgrade of the PIA Terminal building;*
- *Appointment and management of the upgrade of the runway lights at PIA Grintek;*
- *Appointment of consultants and contractors of market halls at the Johannesburg Fresh Produce Market;*
- *Appointment of consultants and contractors for the construction of Port Elizabeth Airport entrance and terminal building.”*

10.4.4 The disqualification by the BEC of three bidders for the PMU on the basis of not having included a covering letter accepting the conditions of the Request for Proposals

10.4.4.1 The response stated in this regard that:

“The covering letter was an integral part of the Request for Proposals because it required an unequivocal undertaking by a bidder to be bound by all the conditions set

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out in the Request for Proposals. These conditions, in the Request for Proposals, would form part of the agreement ultimately to be concluded with a successful bidder. Accepting the conditions constituted a formal and valid offer, upon whose acceptance a contract would come into place, which would be formalised in a written and signed contract.

A failure to indicate an unequivocal acceptance of all the conditions of the Request for Proposals meant that it was unclear whether a bidder intended to be bound by all the conditions of the Request for Proposals or not. Its bid in that regard was non-responsive and its acceptance would not result in a binding agreement based on all the terms of the Request for Proposals.”

10.4.5 The failure by the BEC to request an original valid Tax Clearance Certificate from On-Point before its bid was evaluated

10.4.5.1 It is contended in the response that the inclusion by On-Point of the Tax Clearance Certificate of Achir Shelf together with a copy of the special resolution of the company to change its name to On-Point, constituted sufficient compliance with the relevant requirement.

10.4.5.2 Furthermore, it is explained in this regard that the BAC *“formed the view that because after the award of the bid to On Point, the Department would be paying it on invoices submitted in its name, for its records it required a Tax Clearance Certificate in On-Point’s name. Even according to the BAC this had nothing to do with the validity of the award because at the stage when the letter requesting a Tax Clearance Certificate in On Point’s name was sent to it, the BAC had already recommended On-Point’s bid for award.”*

10.4.5.3 According to the response, the letter addressed to On-Point in this regard was prepared by Mr Mashila of the Secretariat of the BAC. It is further stated that:

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“There is a standing practice in the Department that all letters sent out on behalf of the Department, in any capacity, have to be signed by Letebele as the Head of the Department. Mashila wrote the letter at the instance of, and on behalf of, the BAC and Letebele merely signed it in line with the aforesaid standing practice.” (emphasis added)

10.4.6 The evaluation of On-Point’s bid

10.4.6.1 In this regard, the response states that the BEC did not evaluate the experience of companies, but the individual and cumulative experience of the individuals that were to form part of the company’s team for the delivery of the relevant services. The Department was looking for a multi-disciplinary team and On-Point’s presented a bid that was compliant in this regard.

10.4.6.2 The fact that On-Point had no employees at the time when the bid was submitted is of no relevance as required multi-disciplinary team *“may be achieved by means of joint ventures or appointment of sub-agents with local empowerment. The Department’s understanding was that these persons were to form part of On-Point’s team through arrangements between On-Point and them.”*

10.4.6.3 It is furthermore contended that there was no requirement or system in place obligating the BEC, the BAC or the Head of the Department to conduct a due diligence investigation before awarding the bid to On-Point.

10.4.6.4 It is also denied that the Request for Proposals required of bidders to be involved in a joint venture.

10.4.6.5 As far as requirement in the bid documentation pertaining to the promotion of youth owned business enterprises is concerned, the response stated that:

“What was required of bidders was to indicate the number of youth in the company or the team to be deployed. It is not about previous contributions by the company to youth empowerment.”

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10.4.6.6 Pertaining to the statement in the bid documentation that On-Point had 9 years' experience, the response contends that it was of no consequence as the evaluation focussed on the experience and skills of the individuals that formed the proposed team.

10.4.7 The appointment by the Head of the Department of Ms P Maake and Mr F Mamabolo as members of the BEC's

10.4.7.1 According to the response, the agreement between On-Point and the Department included the following as part of the PMU's functions:

"Support for the management and approval of the bid documents, bids adjudication, recommendations and award in association with the relevant PSP's, Departmental Supply Chain Management (SCM) Directorate and the Departmental Bidding Committee."

10.4.7.2 On the basis of this provision, it is contended that the Head of the Department could appoint employees of On-Point as members of the BEC.

10.4.7.3 Furthermore, the response asserts that Mr Mamabolo and Ms Maake was appointed to the BEC due to their expertise and competencies. *"The Department had limited experience in the nature and quality of the materials to be obtained for the construction of roads. Maake and Mamabolo, being civil engineers and having the requisite experience and expertise, were able to deploy their expertise to assist the BEC in its evaluation."*

10.4.7.4 The response also states that the contractors that were awarded the bids concerned were not those managed by On-Point and that there was therefore no apparent or actual conflict of interest in this regard.

10.4.7.5 It is also pointed out that the appointment of Ms Maake and Mr Mamabolo was done in terms of the Limpopo Provincial Policy on Bid Committees.

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10.4.8 The failure to negotiate with On-Point as resolved by the BAC

10.4.8.1 The response contends in this regard that there was no obligation on the Head of the Department to act in accordance with the relevant resolution of the BAC, as it was not contained its recommendation presented to him.

10.5 EVALUATION OF THE RESPONSE OF THE HEAD OF THE DEPARTMENT

10.5.1 The advertisement of the tender

10.5.1.1 The response stated that the Head of the Department held the view, after only a few days in office, that the indication that the Department still had a lot of work to do in the financial year, was sufficient justification for him to authorise a deviation from the prescribed advertisement process in respect of the tender.

10.5.1.2 The obvious purpose of the prescribed advertisement period is to provide as many respondents as possible an opportunity to submit a bid, in the interest of competition and cost effectiveness. Hence the prescripts of the relevant departmental and provincial policies, referred to in paragraph 9.5 above, that allows for shorter periods only in exceptional, urgent or emergency cases. No explanation was provided in the response as to why the mere fact that the Department still had a lot of work to do in the financial year, was regarded as exceptional. There was also no indication that the appointment of the PMU was such an emergency or so urgent that the tender could not have been advertised for an additional 10 days.

10.5.2 The appointment by the Head of the Department of Mr K C Marobela of Denel Aviation to the BEC

10.5.2.1 It was noted from the response that none of Mr Marobela's experience, that according to the Head of the Department qualified him to have been regarded as an external expert, related to the procurement of a PMU for a government department and/or the maintenance, construction and upgrading of roads.

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10.5.2.2 When he was interviewed during the investigation, the Head of the Department justified the appointment of Mr Marobela because he knew him *“as a legal person who has done contracts.”*

10.5.2.3 No explanation was provided as to the specific legal intricacies of the contract between On-Point and the Department that required special legal knowledge. The standard *General Conditions of Contract* applicable to procurement by government departments was used. It is also not clear how Mr Marobela’s experience in managing projects mainly relating to airports could have been beneficial to the BEC who had to evaluate bids for a PMU that had to manage the roads infrastructure of the Limpopo Province.

10.5.3 The disqualification by the BEC of three bidders for the PMU on the basis of not having included a covering letter accepting the conditions of the Request for Proposals

10.5.3.1 As indicated in paragraph 9.7 above, the Supreme Court of Appeal held in the *Millennium Waste Management* case that our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if condonation is granted by the body in whose benefit the provision was enacted.

10.5.3.2 The BEC was in a position to condone the failure by certain bidders to include a covering letter accepting the conditions and requesting same from them, without causing any prejudice to other bidders to do so. Such condonation would have served the public interest as it would have facilitated competition among the tenderers. It would have promoted the constitutional values of fairness, competitiveness and cost effectiveness.

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10.5.4 The failure by the BEC to request an original valid Tax Clearance Certificate from On-Point before its bid was evaluated

10.5.4.1 On-Point's bid document included a copy of the application lodged with the Registrar of Companies and Close Corporations to change the name of Achir Shelf to that of On-Point. However it did not include any approval of the Registrar in this regard.

10.5.4.2 Included as "Annexure C" under the heading "ORIGINAL TAX CLEARANCE CERTIFICATE" were two documents. A Tax Clearance Certificate in the name of Achir Shelf, valid until 18 August 2010 and a certificate issued by the Registrar on 29 September 2009 confirming the registration of On-Point as a company that had been in business since 9 April 2009. There was however no information before the BEC, confirming that the name change applied for had been registered. To the contrary, the BEC was presented with information indicating that two companies with different names had the same registration number. These discrepancies could easily have been clarified by the BEC before the evaluation process commenced, but was not.

10.5.4.3 The explanation provided by the Head of the Department in respect of the letter signed by him addressed to On-Point in this regard on 7 October 2009, implies that he merely signed it, without even considering the contents. The practice referred to that all letters sent out on behalf of the Department had to be signed by Head of the Department, clearly envisioned the opposite.

10.5.4.4 The explanation that the said letter related to the name in which invoices would have to be paid shows that even at that time the BAC was unsure as to whether the change of the name of Achir Shelf to On-Point had been approved. It is also inconsistent with the purpose of the BAC, which relates only to the adjudication of bids and not to the financial administration of contracts.

10.5.4.5 Furthermore, the justification for the letter, i.e. that it had nothing to do with the awarding of the bid, is in direct contrast to its contents, which stated:

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“Failure to submit the required document within two days after receipt of this notice will be regarded as non submission of the correct tax clearance certificate, which will disqualify you from further participation in this process.” (emphases added)

10.5.5 The evaluation of On-Point’s bid

10.5.5.1 What is stated in paragraph 10.3.2 above also applies to the explanation provided by the response in this regard.

10.5.5.2 It is furthermore alarming to note that the Head of the Department is of the view that no due diligence enquiry is required from him as the Accounting Officer, when awarding a contract of almost R 52 million to be paid from public funds. His statement in this regard is inconsistent with his evidence during the investigation that as the Accounting Officer of the Department, it is expected of him to consider the contents of the relevant bid documents, ensure that the recommended bidder complies with all the requirements and that the adjudication process was performed properly.

10.5.5.3 His views expressed in the response are also inconsistent with the provisions of section 38 of the PFMA, which makes him responsible for, *inter alia*, the effective, efficient, economical and transparent use of the resources of the Department. Furthermore, it is in direct contrast with the advice of the National Treasury relating to the responsibility of accounting officers when appointing consultants and especially project managers, as referred to in Chapter 5 of the *Supply Chain Management Guide for Accounting Officers*. (see paragraph 9.4 above)

10.5.5.4 His denial that it was required of bidders to be involved in a joint venture is inconsistent with the conditions contained in the Request for Proposal.

10.5.5.5 The question in the bid document relating to the promotion of youth owned business had nothing to do with the number of youth in the company or team to be deployed, as contended by the response. The questions in this regard were specific and to the point.

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10.5.5.6 It was not explained by the Head of the Department why a question relating to the experience of the response was included in the Department's Invitation to Bid document, if it was of no consequence, as argued in the response.

10.5.6 The appointment by the Head of the Department of Ms P Maake and Mr F Mamabolo as members of the BEC's

10.5.6.1 The argument contained in the response that the agreement between On-Point and the Department provided for the appointment of employees of On-Point as members of the BEC cannot be upheld. The particular provision of the agreement referred to in the response relates to support functions to be performed by the PMU, which do not include evaluation of bids.

10.5.6.2 Ms Maake conceded during the investigation that she was mostly involved in paperwork for On-Point. The two bids concerned only related to price versus quantity of the materials required and not to the specification of the materials specifically. The Department's employees should be conversant in these matters, due to its function, and no external expertise was necessarily required, as contended by the response.

10.5.6.3 The explanation that the contractors that were awarded the bids were not managed by On-Point cannot be accepted. According to the evidence of the Chief Financial Officer, the contracts were not implemented. The provision of the materials to be provided in terms of these contracts relate directly to the maintenance and upgrading of the roads infrastructure of the Limpopo Province, which fall under the brief of On-Point, as the PMU. The potential for a conflict of interests in relation to On-Point to arise the moment that these contracts became active, was therefore already a reality at the time that Ms Maake and Mr Mamabolo participated in the evaluation conducted by the BEC.

10.5.7 The failure to negotiate with On-Point as resolved by the BAC

10.5.7.1 As indicated above, the Head of the Department conceded during his interview it was his duty as the Accounting Officer, to consider all the relevant documents relating to the procurement process when the recommendation of the BAC was presented to him.

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This, of course, included the Minutes of the meetings of the BEC and the BAC. He should therefore have taken notice of the resolution of the BAC that the price of certain items had to be negotiated with On-Point and have given effect thereto.

10.6 THE RESPONSE OF MR J MALEMA TO THE PROVISIONAL REPORT

10.6.1 Mr J Malema was also provided with a copy of the Provisional Report, on 3 August 2012.

10.6.2 Brian Kahn Incorporated, attorneys representing Mr Malema and the Ratanang Family Trust responded on 13 August 2012. The response, in the main, noted that the Public Protector did not intend making a negative finding in respect of the conduct of Mr Malema and the Ratanang Family Trust. However, it raised an objection on behalf of Mr Malema and the Ratanang Family Trust that they were not interviewed during the investigation and before the Provisional Report was issued.

10.6.3 The Public Protector responded to the said attorneys, on 14 August 2012, explaining that the purpose of providing Mr Malema and the Ratanang Family Trust with a copy of the Provisional Report was to enable them to respond to the contents thereof and the evidence considered during the investigation. It was further stated that:

“The Public Protector is most willing to conduct an interview with Mr Malema, should he still be of the view that it will provide him with a better opportunity to respond to the contents of the evidence referred to in the Provisional Report, as far as it relates to him and the Ratanang Family Trust. The investigation of the matters concerned is only finalized when the final report is issued.”

10.6.4 Messrs Brain Kahn Incorporated replied on 31 August 2012, declining the Public Protector’s invitation to interview Mr Malema, should he so request, and providing no response to the contents of the Provisional Report

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10.7 MS KOHLER-BARNARD'S RESPONSE TO THE PROVISIONAL REPORT

10.7.1 Mr Kohler-Barnard of the Democratic Alliance, one of the complainants in respect of the matters investigated, requested clarification in regard to two aspects of the Provisional Report on 14 August 2012, but made no comments on the contents thereof.

11. CONCLUSIONS AND GENERAL FINDINGS

The **Conclusions and General Findings** of the Public Protector are that:

- 11.1 On 11 September 2009, 10 days after Mr Letebele took office as the Head of the Department (HOD), the Department advertised a tender for the procurement of a PMU for the construction and maintenance of roads. The advert ran for 20 days from 11 September 2009, the closing date being 01 October 2011. This timeline did not comply with the National Treasury requirement of a minimum of 21 days and the Provincial Treasury requirement of 30 days. The Department's argument for urgency, as envisaged under Regulation 16A6.3 of the Treasury Regulations, on account of thereof that a lot of work still had to be done before the end of the financial year, is not convincing.
- 11.2 Out of 16 bids that were received, only On-Point was eventually considered to qualify for consideration, with all of the others having been eliminated on account of various administrative infractions, including failure to indicate acceptance of bid terms in the covering letter, not separating the price and functionality envelopes and failure to score a minimum of 30 points for functionality.
- 11.3 The Tax Clearance Certificate submitted by On-Point with its bid document belonged to **Achir Shelf, a five month old shelf company** it had bought one month earlier, whose area of business was registered as ***"all aspects of general trading"***.
- 11.4 In the same bid document, On-Point represented its credentials as a **9 year old engineering company** with a solid track record and a sound management structure boasting, among others, an annual turnover of R2 million, an Executive Team, comprising a Chief Executive Officer, Chief Operations Officer, Chief Financial Officer

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- and various departments, including a Corporate Services Department, and a sizeable workforce purportedly having many of the skills identified in the call for bids. The bid document also claimed youth empowerment points on account of having subcontracted to Dichabe Engineers to the value of R1.2 million while in fact Mr Dichabe was one of the three equal share holders of the newly established On-Point.
- 11.5 When the HOD requested a valid Tax Clearance Certificate for On-Point, with the threat of cancelling the deal should such certificate be not submitted within three days, Mr Gwangwa's response was that Achir Shelf was On-Point, having been purchased as a shelf company and the name changed to On-Point.
- 11.6 It is mind boggling why the stark discrepancies between the bid document and the Tax Clearance Certificate did not disqualify On-Point or present red flags regarding the possibility of tender fraud, to those who dealt with the bid, particularly the HOD.
- 11.7 The reality is that at the time of the bid, On-Point only existed on paper, with Segwalo Engineering's premises and staff being used. This did not seem to bother the Bid Committees and the HOD when they considered On Point's bid submission. It is worth noting that not even Segwalo Engineering or the combined workforce of the three agencies that were purportedly meant to eventually constitute On-Point, accounted for the structure and staff compliment represented in the bid submitted to the Department and on the basis of which On-Point scored super high functionality points.
- 11.8 Evidence suggests that Mr Gwangwa and company began preparations for the PMU tender long before it was advertised in September 2009. Such evidence includes the fact that the shelf company, Achir Shelf, which according to Mr Gwangwa was acquired solely for the PMU tender, was purchased in August 2009.
- 11.9 Members of the BEC that evaluated the bid for the PMU included an external person from Denel who was not an appropriate expert and who participated fully, including in the scoring process. This was against the requirements of National Treasury prescripts and guidelines that only officials of the Department or experts specifically contracted for that purpose may be appointed to the BEC.

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- 11.10 The powers and responsibilities of On-Point as the PMU, mainly focused on the supervision/overseeing of the work of Professional Service Providers engaged by the Department to plan, design, build, upgrade and maintain roads and bridges in the Limpopo Province.
- 11.11 Despite denials, there is incontrovertible evidence confirming that On-Point entered into the alleged “*back-to-back*” agreements with some of the Professional Service Providers doing work under its supervision, on the basis of which On-Point had to do some or most of the work and was to be paid for such by them. In one case, the Professional Service Provider was only entitled to 5% of the amount paid by the Department as its input was confined to reviewing work done by On-Point.
- 11.12 Though not part of the original bid, during the execution phase, On-Point was paid to do similar work to that of the Professional Service Providers it was supervising. At least in one case, it was paid for doing the same work.
- 11.13 Despite denials, incontrovertible evidence uncovered also shows that On-Point was paid by the Professional Service Providers under its supervision. Verified payments include R1 million paid by Mpotseng Infrastructure on 29 April 2011 into On-Point’s bank account with the relevant bank statement curiously showing the same amount being withdrawn for payment towards the “*Ratanang Farm*”, 5 days later. Another verified payment is an amount of R1,2 million by H L Matlala & Associates on 12 July 2011.
- 11.14 On-Point has one share holder, Guilder Investments, which in turn has two equal shareholders, the Gwangwa Family Trust and the Ratanang Family Trust. The sole beneficiary of the Ratanang Family Trust is Mr Malema’s son. Originally, Mr Julius Malema was the sole Trustee. His grandmother, who is 83 years old, was later added as a Trustee.
- 11.15 Bank statements of On-Point show, in addition to the Ratanang Farm payment, the payment of regular amounts of R100 000 to the Ratanang Family Trust totaling R2,17 million over a period of 17 months. Only one payment of R60 000 appears for the

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Gwangwa Family Trust. Undefined loans of R200 000 each are also reflected on the bank statements.

- 11.16 Regarding contracts, awarded by the Department to Arandi Trading Enterprise and Sizani Build It, the evidence shows that such contracts were awarded following a tender process.
- 11.17 Regarding the propriety of the conduct of the Department, particularly the HOD, the Chief Financial Officer and Bid Committees, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations, directives and guidelines stipulate the standard to be complied with and the specific findings below address the question whether or not the conduct investigated complied accordingly.

12. SPECIFIC FINDINGS

The specific findings of the Public Protector are that:

Finding 1: Was the awarding of the tender for a Project Management Unit (PMU) by the Department to On-point Engineering improper and in violation of the provisions of the Prevention and Combatting of Corrupt Activities Act?

- 12.1 The failure by the Department, specifically the Bid Committees and the HOD, to notice obvious discrepancies in the bid, particularly the Tax Clearance Certificate and company registration documents, showing the company to be not older than 5 months while the bid document claimed 9 years of experience, leaves a lot of questions to be answered regarding the relationship between the HOD and some or all of the departmental players that took part in the bid process and On-Point. That On-Point was given preferential treatment is without doubt. The unanswered questions are further compounded by the fact that evidence suggests that On-Point knew about and started preparing for the bid some time prior to September 2009. The Public Protector does not make a finding on the possibility that such relationship(s) may be in violation of the Prevention and Combating

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of Corrupt Activities Act and leaves this to be concluded under the investigation currently being undertaken by the Directorate: Priority Crime Investigation of the South African Police Service (Hawks). **The Public Protector accordingly reserves her findings on whether or not the awarding of the tender constitutes a corrupt practice as envisaged under the Prevention and Combatting of Corrupt Activities Act.**

- 12.2 On-Point should never have been awarded the tender for the PMU as it did not qualify by a long stretch. The bid it presented to the Department on 29 September 2009 for the PMU tender consisted of a deliberate and fraudulent misrepresentation in respect of the profile, composition, experience, personnel, assets, annual turnover and contribution to youth business development, and therefore the functionality and track record of the company. It was represented to the Department that On-Point was an established and experienced company with management teams and professional staff that complied with the requirements of the *Request for Proposal*.
- 12.3 The reality was that at the time of the submission of the bid document, On-Point had existed for approximately one month, had no employees, no assets or annual turnover and several of the purported key management personnel and staff members were not involved with it at all. It also had made no contribution to youth business development.
- 12.4 As a company, On-Point had no profile, track record and experience and therefore no functionality that could have made it eligible to be considered as a competent bidder.
- 12.5 The submission of the bid therefore violated the provisions of clause 23.1(a) of the General Conditions of Contract and amounted to an abuse of the supply chain management system, which is prohibited by Treasury Regulation 16A9. The conduct was unlawful and constituted fraud.
- 12.6 **The Public Protector is accordingly of the view that the crime of fraud has been committed.**
- 12.7 The failure by the BEC, BAC and the HOD to properly interrogate the bid presented by On-Point and to perform a due diligence test on and verification of its functionality and

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compliance with the requirements of the bid, was improper and constituted maladministration. The fact that On-Point had no employees and that it misrepresented its experience, involvement in youth business development and annual turnover is obvious and evident from the bid document itself. None of these obvious discrepancies were noted and considered during the procurement process.

12.8 The awarding of the tender by the Department to On-Point was unlawful, improper and constitutes maladministration.

Finding 2: Did On-Point engage in any corrupt practices in violation of the Prevention and Combatting of Corrupt Activities Act, in its dealings with the Departmental Professional Service Providers under its supervision as the Project Management Unit?

12.9 On-Point entered into “back-to-back” agreements in terms of which it received or was supposed to have received payment from Professional Service Providers for designs which it had drawn in respect of projects that it was contracted to manage and supervise. This constituted a direct conflict between On-Point’s obligations to objectively manage and supervise projects on behalf of the Department, its own financial interests and that of Mr Gwangwa, its sole Director. These agreements clearly constituted kickbacks, a form of gratification under section 12(1) of the Prevention and Combatting of Corrupt Activities Act.

12.10 The manner in which these agreements were couched further suggests that the existence thereof was to remain a secret.

12.11 The Department made double payments in respect of the designs of certain projects as a result of these agreements. On-Point was paid as well as a Professional Service Provider contracted for the same designs.

12.12 Mr Gwangwa’s involvement in these agreements, in his capacity as the Director of On-Point and a “Registered Person” in terms of the Engineering Profession Act, 2000 may

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also have constituted a violation of the *Rules of Conduct for Registered Persons: Engineering Profession Act, 2000*.

- 12.13 As the receiving or requesting of double payments for the designs concerned constituted a fraudulent practice in the executing of the contract between On-Point and the Department, it violated the provisions of Treasury Regulation 16A9 and the General Conditions of Contract that applied.
- 12.14 In terms of section 12(1) of the Prevention and Combatting of Corrupt Activities Act **any person who accepts or agrees to accept any gratification from any other person or gives or agrees to give to any other person any gratification in order to improperly influence in any way the execution of a contract with a public body, is guilty of an offence.** The evidence and information obtained during the investigation leads to the unavoidable inference that On-Point/Mr Gwangwa acted in contravention of these provisions when it/he entered into the “*back-to-back*” agreements which impacted on the execution of the contract between On-Point and the Department, and accepted payments from the Professional Service Providers and the Department relating thereto.
- 12.15 **The Public Protector is of the view that the conduct of On-Point as the PMU of the Department in entering into agreements with Mpotseng Infrastructure, Baitseanape Consulting Engineers and H L Matlala & Associates respectively, constitutes corrupt practices, as envisaged under section 12 of the Prevention and Combatting of Corrupt Activities Act. It also amounted to an inappropriate conflict between the obligations and responsibilities of On-Point as the PMU of the Department and its own interests.**
- 12.16 The Public Protector is accordingly of the view that a crime under the Prevention and Combatting of Corrupt Activities Act has been committed.

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Finding 3: Did the Ratanang Family Trust and/or Mr J Malema benefit improperly from the tender that was awarded to On-Point?

- 12.17 On-Point paid more than R2 million directly to the Ratanang Family Trust from November 2010 to May 2012 in the form of “dividends” and loans. The amount of R1 million withdrawn 5 days after one of the kickbacks was paid under the back-to-back agreements, is further accounted for in the bank statements as having been paid towards the Ratanang Farm. Further amounts of R160 000 and R100 000 are reflected as having been paid in respect of the “*Sandton Property*” and “*Sandowns Property*”, respectively. Payments were also made to Tshiamo Dichabe, the Makatele Family Trust, Guilder Investments and the Gwangwa Family Trust (former and current shareholders of Guilder Investments, which is the sole shareholder of On-Point).
- 12.18 The evidence of Mr Gwangwa in respect of how and by whom it was decided that On-Point should pay (monthly) dividends to the Ratanang Family Trust and make payments to the Gwangwa Family Trust (via Guilder Investments) furthermore supported the allegation that the Trusts were probably used as vehicles for the transfer of funds obtained through an unlawful process.
- 12.19 **As the main source of income of On-Point during this period was the payments made to it by the Department in terms of the agreement and On-Point owed its existence as a profit making establishment that could declare regular dividends thereto, the Ratanang Family Trust as one of two shareholders of Guilder Investments (as the holding company), accordingly benefitted improperly from the unlawful, fraudulent and corrupt conduct of On-Point and maladministration of the Department.**

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Finding 4: Was the awarding of tenders for the provision of goods by the Department to the other two companies referred to in the allegations, Sizani Build It and Arandi Trading Enterprise, improper?

- 12.20 Apart from the appointment by the HOD of employees of On-Point to the BEC that evaluated the tenders, which was improper, the awarding of the contracts to Arandi Trading Enterprise and Sizani Build It was in accordance with the prescribed tender process.
- 12.21 **In view of the irregular participation of the employees of On-Point in the BEC's of the Department, in violation of National Treasury Guidelines and prescripts, the awarding of these contracts was improper. However, it was not necessarily unlawful.**

Finding 5: Was the conduct of the Department, particularly its Head of Department, Chief Financial Officer and members of the BEC and BAC, lawful and proper?

- 12.22 In terms of the provisions of section 38 of the PFMA, it was expected of the HOD to act in the best interests of the Department and to ensure that the procurement process complied with the provisions of section 217 of the Constitution, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations and directives, and other relevant legislation and policies.
- 12.23 The HOD conceded during the investigation that as the accounting officer of the Department, he was ultimately responsible for the procurement of the services of On-Point. He also agreed that it was expected of him to consider the minutes of the tender committee meetings and the disqualification and recommendations of bidders.
- 12.24 No indication could be found during the investigation that the HOD applied his mind to the disqualification of bidders. He made no effort to ensure that the awarding of the bid to On-Point was in accordance with the principles of a system that promotes competition and cost effectiveness in the interest of the Department and the public. The HOD also could not provide any satisfactory explanation for his failure to act in

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accordance with the resolution of the BAC that the price on certain items had to be negotiated with On-Point, which was recorded in the Minutes of the relevant BAC meeting.

- 12.25 The HOD also failed to pick up obvious anomalies in On-Point's bid document, including the discrepancy between the claim that it had 9 years' experience while its registration documents showed that On-Point was converted from a shelf company that had been in existence for about five (5) months.
- 12.26 **The conduct of the Department, specifically that of Mr Letebele the HOD and the BEC and BAC failed to meet the standard stipulated under the PFMA, particularly section 38, thereof and relevant Treasury Regulations, inclusive of Regulation 16A6, read with National Treasury's *Supply Chain Management Guide for Accounting Officers*. The conduct was accordingly unlawful, improper and constitutes maladministration.**

13. REMEDIAL ACTION

The remedial action to be taken as envisaged by section 182(1)(c) of the Constitution, is the following:

- 13.1 The Head of the Department to take urgent steps to:
- 13.1.1 Immediately cancel the agreement between the Department and On-Point in terms of clause 23.1(a) of the General Conditions of Contract and Treasury Regulation 16A9;
- 13.1.2 Instruct the State Attorney to institute legal proceedings against On-Point and its shareholders that benefitted from the awarding of the tender, in order to recover any amount to which the Department is entitled to, due to On-Point's fraudulent misrepresentation in respect of its bid and the improper financial benefit that it and its shareholders gained as a result thereof;

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- 13.1.3 Commence the process of imposing a restriction penalty on On-Point and Mr Gwangwa in terms of the provisions or clause 23 of the General Conditions of Contract;
- 13.1.4 Ensure that the officials of the Supply Chain Management Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management;
- 13.1.5 Ensure that officials appointed as members of BEC's are properly trained in respect of the proper application of the procurement system as contemplated by the provisions of section 217 of the Constitution, the PFMA, Treasury Regulations and prescripts and the relevant procurement policies;
- 13.1.6 With the assistance of National Treasury, conduct a reconciliation of all the payments made to On-Point in terms of the agreement and to service providers appointed by the Department in respect of the period that On-Point was appointed as the PMU of the Department, in order to determine the total value of double payments made to On-Point and any other payments that should not have been made, taking into account the BAC directive on price negotiation.
- 13.1.7 Recover the total amount of double and other undue payments made to On-Point from it;
- 13.1.8 Institute disciplinary steps against the officials who served as members of the BEC and the BAC in respect of their failure to perform their functions diligently, which resulted in the findings made in connection with the impropriety, unlawfulness and maladministration in paragraph (ix) above pertaining to the awarding of the tender to On-Point;
- 13.1.9 Bring the Supply Chain Management Policy of the Department in line with the provisions of section 217 of the Constitution, the PFMA and Treasury Regulations and directives; and
- 13.1.10 Improve the demand management process of the Department in respect of the drafting of specifications for the supply and delivery of goods and services.

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13.2 The Director-General of the National Treasury to:

13.2.1 Ensure that the restriction of On-Point and Mr L Gwangwa referred to in paragraph 13.1.3 above is captured in the database of the National Treasury, as contemplated by clause 23 of the General Conditions of Contract, should it be imposed; and

13.2.2 Issue instructions in terms of section 76 of the PFMA to compel and guide the accounting officers of organs of state to perform a proper due diligence investigations into the profile, composition, status and financial viability of bidders during the procurement process.

13.3 The Member responsible for the Provincial Treasury of the Executive Council of the Limpopo Provincial Government to:

13.3.1 Ensure, in terms of Treasury Regulation 4.1.3, that the Executive Authority of the Department initiates an investigation into the conduct of the Head of the Department referred to in paragraph 12 above, with a view of taking disciplinary action against him; and

13.3.2 Take urgent steps to bring the Limpopo Provincial Policy on Bid Committees in line with the procurement system contemplated by the provisions of section 217 of the Constitution, the PFMA and Treasury Regulations and directives.

13.4 The Chairperson of the Engineering Council of South Africa to take appropriate steps to determine whether the conduct of Mr L Gwangwa referred to in this report complied with the *Rules of Conduct for Registered Persons: Engineering Profession Act, 2000* and if not, to ensure that appropriate action is taken.

13.5 The Master of the North Gauteng High Court to take urgent steps to initiate an investigation into the administration and disposal of the trust property of the Ratanang Family Trust and the Gwangwa Family Trust, with specific reference to the payments made to it by On-Point and any assets it acquired, referred to in this report, as provided

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for by section 16 of the Trust Property Control Act, and to take appropriate legal action, if required.

13.6 The Acting National Director of Public Prosecutions and the Head of the Asset Forfeiture Unit of the National Prosecuting Authority to:

13.6.1 Take note, in terms of section 6(4)(c)(i) of the Public Protector Act, that the evidence and information obtained during the investigation, as referred to in Findings 1 and 2 of paragraph 12 above, disclosed the commission of the criminal offences fraud and a contravention of section 12 of the Prevention and Combatting of Corrupt Activities Act, 2004;

13.6.2 Take urgent steps to deal with the evidence of the commission of the criminal offences in the appropriate manner, as envisaged under section 6(4) (c) (i) of the Public Protector Act; and

13.6.3 Ensure that the investigation of the criminal offences referred to in paragraph (aa) above by the Directorate: Priority Crime Investigation of the South African Police Service includes a thorough scrutiny of the relationships between the representatives of the shareholders of On-Point, the top management of the Department, members of the relevant BEC's and the BAC of the Department and all the recipients of contracts awarded with On-Point's participation.

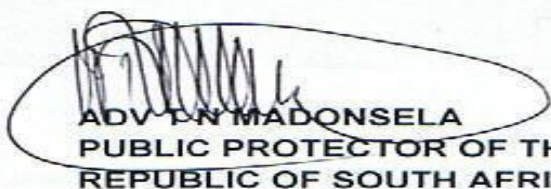
14 MONITORING

14.1 The Head of the Department is to:

14.1.1 Submit to the Public Protector an implementation plan in respect of the remedial action taken in paragraph 13.1 above within 30 days of the date of the issuing of this report; and

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- 14.1.2 Submit a report to the Public Protector on the implementation of the remedial action referred to in paragraph 13.1 above within 90 days of the date of the issuing of this report.
- 14.2 The Director-General of the National Treasury submit a report to the Public Protector on the implementation of the remedial action taken in paragraph 13.2 above within 60 days of the date of the issuing of this report.
- 14.3 The Member responsible for the Provincial Treasury of the Executive Council of the Limpopo Executive Council is to provide the Public Protector with a report on the implementation of the remedial action taken in paragraph 13.3 above within 60 days of the date of the issuing of this report.
- 14.4 The Chairperson of the Engineering Council of South Africa is to advise the Public Protector of the steps taken, as referred to in paragraph 13.4 above, within 60 days of the date of this report.
- 14.5 The Master of the North Gauteng High Court is to advise the Public Protector of investigation, as referred to in paragraph 13.5 above, within 60 days of the date of this report.
- 14.6 The Acting National Director of Public Prosecutions is to submit a report to the Public Protector on the criminal action taken as referred to on paragraph 13.6 above within 60 days from the date of this report.



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

10 October 2012