

# **“DOCKED VESSELS”**

*Report on an investigation into allegations of improper and irregular awarding of a tender to Sekunjalo Marine Services Consortium (SMSC) by the Department of Agriculture, Forestry and Fisheries*

*Report No:21 of 2013/14*



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**Accountability • Integrity • Responsiveness**

ISBN 978-1-920092-01-8

**A REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1) (b) OF  
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA OF 1996 AND  
SECTION 8(1) THE PUBLIC PROTECTOR ACT 23 OF 1994**



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AWARDING OF A TENDER TO SEKUNJALO MARINE SERVICES CONSORTIUM  
(SMSC) BY THE DEPARTMENT OF AGRICULTURE, FORESTRY AND  
FISHERIES (DAFF)**



## INDEX

<b>Executive summary</b>	<b>2</b>
1. INTRODUCTION	12
2. THE COMPLAINT	13
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	15
4. THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR	16
5. THE INVESTIGATION	18
6. THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION	23
7. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION	75
8. LEGAL AND REGULATORY FRAMEWORK	91
9. ANALYSIS AND CONCLUSION	98
10. FINDINGS	106
11. REMEDIAL ACTION	109
12. MONITORING	111



## Executive Summary

- (i) *"Docked Vessels"* is my report as the Public Protector issued in terms of section 182 (1) (b) Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act.
- (ii) The report communicates my findings and appropriate remedial action following an investigation into a complaint lodged on 19 February 2012, by the Democratic Alliance Member of Parliament, Honourable Mr. P Van Dalen, (the Complainant), who requested my office to investigate allegations relating to the improper award of an R800m tender for the fisheries patrol services to Sekunjalo Marine Service Consortium (SMSC). He further requested my office to investigate the Department of Agriculture, Forestry and Fisheries (DAFF)'s alleged subsequent failure to re-advertise the tender which meant that it was unable to fulfil its mandate to do scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities. He further alleged that the failure seriously jeopardises the research and protection of the country's fishing resources, and has far reaching economic consequences. The Complainant also requested a determination regarding the propriety of scoring allocating one of the bidders the score of 1 (very bad) on all the criteria and the one with least experience with the highest score of 5 (excellent) by one of the Bid Evaluation Committee (BEC) members (Mr Joseph Sebola). My office also received a substantially similar complaint from Mr Paul Maclons, the Managing Director of Smit Amandla Marine (Pty) Ltd.
- (iii) On 15 March 2012 and after the commencement of my investigation a further complaint was lodged by Smit Amandla, the company that had held the contract for 12 years, alleging that the Hon Minister Joemat-Pettersson had arbitrarily terminated its services at the end of the contract in retaliation to Smit Amandla's whistle-blowing on the SMSC award, and in contravention of the contract provision that provided a 3 month handover period be observed. Smit Amandla alleged that this would have an adverse impact on its employees and on a smooth handover. It further alleged that the SA Navy did not have the



necessary competencies and human resources for this undertaking. I met with Ms Manana of Smit Amandla on 28 March 2012 who requested me to ask the Minister to withdraw the 30 day notice and abide by the 3 months' notice that was in the original contract that had expired, a request I duly acceded to without success.

- (iv) As the investigation progressed, media reports regularly alleged that the patrol fleet was lying unattended to on account of the SA Navy's alleged lack of competencies and capacity to undertake the responsibility at the required magnitude and later that the vessels had been damaged by disuse.
- (v) As the investigation drew towards a conclusion, the investigation team was approached by a whistle-blower who alleged that DAFF had irregularly contracted with a company for the refurbishment of its vessels that had lost seaworthiness due to lying idle and lack of maintenance. I decided to defer this to an offshoot investigation. Accordingly, no determination is made in this report on this allegation.
- (vi) On being approached on the original complaint DAFF did not deny awarding the said tender irregularly to SMSC. DAFF went further to cancel the tender and committed itself to re-advertising the tender as soon as possible.
- (vii) When I approached Minister Joemat Pettersson, in writing on 29 March 2012 asking her to reconsider a one month handover period from Smit Amandla to the SA Navy as impractical, and to consider Smit Amandla's request that the three month period allegedly in the original contract be adhered to, Minister Joemat- Pettersson refused. The request included the need for a proper assessment of the SA Navy's readiness for the task in question. Minister Joemat-Pettersson contended that all was in place for a smooth handover and that she would provide me with a progress report, which to this end was never provided.
- (viii) On analysis of the complaints the following eight (8) issues were considered and investigated:

- (a) Was DAFF's irregular award of the R800 million tender for the crewing, management and maintenance of the research and fisheries patrol services, an act constituting improper conduct and maladministration?
- (b) Did Mr Joseph Sebola irregularly score SMSC 5/5 on everything, which did not have the relevant experience, while scoring Smit Amandla 1/5 on everything despite its (10) years' of experience conducting the exact service in question, and if so, does the action constitute improper conduct and maladministration?
- (c) Did the award of the patrol vessels tender to SMSC by DAFF in spite of the fact that Premier Fishing (a subsidiary of the Sekunjalo Group) has fishing rights accord SMSC the role of referee and player, and if so, did this create a conflict of interest for SMSC, and accordingly, an act of maladministration by DAFF?
- (d) Did the submission of four (4) tenders on the same bid by the entities (Premier Fishing, Premier Fishing Consortium, Sekunjalo Limited and SMSC) which fall under the Sekunjalo Group constitute collusive tendering? If so, did DAFF's entertainment of these bids constitute improper conduct and maladministration?
- (e) Did DAFF's failure to re-advertise the tender result in its inability to conduct scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities, and if so, does this constitute improper conduct and maladministration?
- (f) Did DAFF irregularly terminate Smit Amandla's services by ignoring a 3 month handover period and awarding the service to the SA Navy which did not have the necessary competencies, and if so did such action constitute improper conduct and maladministration?
- (g) Was Minister Joemat-Pettersson's rejection of the request to defer her planned abrupt handover to the SA Navy an imprudent act which



resulted in lack of proper patrols and deterioration of patrol vessels resulting in millions of Rand in refurbishment costs and rampant poaching? If so, does her action amount to fruitless and wasteful expenditure and accordingly, constitute improper conduct and maladministration?

- (h) Did DAFF irregularly contract a company that had been part of the SMSC, Nautic, to repair its vessels that had become unseaworthy at a cost exceeding R30m, and if so, does such action constitute improper conduct and maladministration?
- (ix) The investigation included correspondence, perusal and analysis of documents, telephonic and face to face interviews with officials of DAFF, Sekunjalo Investment Company and Smit Amandla and the South African Maritime Safety Authority (SAMSA). Informal discussions with industry role players such as officials from SAMSA and the Chairman of the Sekunjalo Group enriched the investigation team's appreciation of the configuration of the industry and histories of the role players involved in the impugned tender. Relevant legislation and prescripts were also sourced and considered.
- (x) A week before releasing this provincial report, I received a letter from the Minister of Justice and Constitutional Development (Minister of Justice), attaching a letter from Minister Joemat-Pettersson requesting the Minister of Justice to intervene in this investigation and that of the NPA, which she labeled unnecessary despite having cooperated throughout the investigation and twice agreeing to defer the processing of the new tender until having had sight of this provisional report. I consider Minister Joemat Pettersson's action as conduct constituting interference with my investigation and an attempt to incite the Minister of Justice and Constitutional Development to undermine the independence of two constitutional bodies. Such conduct, in my considered view is at odds with section 181(4) of the Constitution which states that 'no person or organ of state may interfere with the functioning of these institutions (this refers to Chapter 9 institutions)'.

(xi) I make the following findings:

**(a) Regarding DAFF's irregular award of the R800 million tender for the crewing, management and maintenance of the research and fisheries patrol services, an act of maladministration, I make the following findings:**

(aa) DAFF's immediate admission that the tender was irregularly awarded and proceeding to cancel it and commit to advertise the process anew was proper;

(bb) The award of the tender (MLRF 088) to SMSC was not in compliance with DAFF's Supply Chain Management requirements and processes and was therefore improper. The absence of legal and financial experts on the BEC rendered the subsequent award of tender (MLRF 088) to SMSC ill-advised, and thus constitutes maladministration.

(cc) DAFF in awarding the tender (MLRF 088) to SMSC failed to deal with apparent issues of conflict of interest and omissions by SMSC, and this amounts to maladministration.

**(b) Regarding Mr Joseph Sebola's alleged irregular scoring of SMSC 5/5 on everything which did not have the relevant experience while scoring Smit Amandla 1/5 which had (10) years of experience in conducting the exact service in question, I make the following findings:**

(aa) The allegation that Mr Sebola scored 1/5 to SMSC and 5/5 to Smit Amandla is substantiated and so is the allegation that of the two, it was Smit Amandla that had done the exact work specified in the tender for over ten (10) years; and





- (bb) Mr Sebola's conduct was, in the circumstances, irrational, subjective and biased, it thus constitutes improper conduct and maladministration.
- (c) **Regarding the award of the patrol vessels tender to SMSC by DAFF in spite of the fact that Premier Fishing (a subsidiary of the Sekunjalo group) had fishing rights accorded SMSC the role of referee and player and that this possibly creating a conflict of interest for SMSC and, accordingly, an act of maladministration by DAFF; I make the following findings:**
- (aa) The allegation that the Department's award of the contract to SMSC placed the company in the position of referee and player thus creating a conflict of interest is substantiated. Whilst it is true that there are safe guards put in place to limit the role of the management company in the patrol and the research vessels, and that thus reduced the conflict of interest, it is not eliminated.
- (bb) The conduct of DAFF in awarding SMSC a tender placing SMSC in this position constitutes improper conduct and maladministration.
- (d) **Regarding the submission of four (4) tenders on the same bid by the entities (Premier Fishing, Premier Fishing Consortium, Sekunjalo Limited and Sekunjalo Consortium) which fall under the Sekunjalo Group constitute collusive tendering, I make the following findings:**
- (aa) The allegation that the submission of four tenders on the same bid by the Sekunjalo Group entities has not been denied by any of the parties. I however have decided to refer the decision on whether or not the conduct constituted collusive to the Competition Commission.



- (bb) I am therefore unable to find improper conduct or maladministration on DAFF's part in this regard.
- (e) Regarding DAFF's alleged failure to re-advertise the tender resulting in its inability to conduct scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities; I make the following findings:**
- (aa) The allegation that DAFF failed to timely advertise the tender is substantiated, however its failure is partly justified in that it needed to identify and address the systemic administrative failures that led to the aborted tender process and to wait for the conclusion of the investigation .
- (f) Regarding DAFF's alleged irregular termination of Smit Amandla's services by ignoring a 3 month hand-over period and awarding the service to the SA Navy which allegedly did not have the necessary competencies, and if so, did such action constitute improper conduct and maladministration, I make the following findings:**
- (aa) The allegation that DAFF irregularly terminated Smit Amandla's contract by ignoring the 3 month handover period notice is not substantiated because the original contract requiring the 3 month handover period had lapsed and the arrangement was on a month to month basis.
- (bb) However, in view of the fact that the reasons for a prudent handover period persisted, the abrupt handover was ill advised. The conduct of Minister Joemat-Pettersson and DAFF in this regard is improper and constitutes maladministration.
- (g) Regarding Minister Joemat-Pettersson's rejection of the request to defer her planned abrupt handover to the SA Navy an imprudent**



**act which resulted in lack of proper patrols and alleged deterioration of patrol vessels amounting to millions of Rand in refurbishment costs and that this amounts to fruitless and wasteful expenditure and accordingly, improper conduct and maladministration, I make the following findings:**

(aa) The Minister's rejection of a request to defer her planned abrupt handover to the SA Navy which led to alleged lack of patrols and deterioration of patrol vessels was imprudent and led to fruitless and wasteful expenditure and;

(bb) The actions of the Minister constitute improper conduct and maladministration.

**(h) Regarding DAFF's alleged irregular award of a contract for the repair of its unseaworthy vessels, returned by the SA Navy, at a cost exceeding R30m, I intend to:**

Reserve my findings pending a full offshoot investigation on this matter.

(xii) Appropriate remedial action to be taken on my findings of maladministration and as envisaged by section 182(1) (c) of the Constitution is the following:

**General Comments:**

Cognizance is taken of the fact that at the time of commencement of the investigation into the allegations against DAFF, it had already revoked the contract it had awarded to SMSC and DAFF is commended for immediate withdrawal of the tender in response to Smit Amandla's justified legal action.



## **The President**

- (a) To consider taking disciplinary action against the Minister for her reckless dealing with state money and services resulting in fruitless and wasteful expenditure, loss of confidence in the fisheries industry in SA and alleged decimation of fisheries resources in SA and delayed quota allocations due to lack of appropriate research.

## **The Director General: National Treasury**

- (a) To ensure that the Chief Procurement Officer assist the Accounting Officer of DAFF by reviewing each stage of the bidding process to ensure that SCM statutory and regulatory requirements are complied with before the bid is awarded.

## **The Minister: DAFF**

- (a) To ensure that the already advertised tender for the services of a ship manager for the crewing, management and maintenance of the research and fisheries patrol vessels is finalised and the contract awarded within 60 days from the date of the final report.

## **The Director General: DAFF**

- (a) To ensure that the relevant legislation, SCM policies and prescripts are complied with, including in the appointment of the BSC, BEC and BAC members in the processing of this tender;
- (b) To investigate and, if warranted, take disciplinary action against Mr Sebola in respect of his conduct referred to in the findings made in this report.



**The Competition Commission:**

- (a) The Competition Commissioner is requested in terms of section 6(4)(c) to investigate the alleged collusive conduct and advise DAFF for future purposes.

FINAL REPORT



**A REPORT OF THE PUBLIC PROTECTOR ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR AWARDING OF A TENDER TO SEKUNJALO MARINE SERVICES CONSORTIUM (SMSC) BY THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES (DAFF)**

**1. INTRODUCTION**

1.1 *"Docked Vessels"* is my report as the Public Protector issued in terms of section 182(1) (a) of the Constitution of the Republic of South Africa (the Constitution), 1996; read with section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act, to

1.2.1 The Minister of Agriculture, Forestry and Fisheries (the Minister), Ms Joemat-Pettersson; and

1.2.2 The Director-General (DG) of DAFF, Prof Edith Veronica Vries;

1.2.3 The Director-General (DG) of Presidency, Dr C Lubisi;

1.2.4 The Director-General (DG) of National Treasury, Mr L Fuzile;

1.2.5 The Chief Executive Officer (CEO) of Sekunjalo Marine Services Consortium (SMSC), Mr Khalid Abdulla;

1.2.6 Secretary for Defence and Military Veterans, Dr Sam Gulube; and

1.2.7 Chief of SA Navy, Vice Admiral J Mudimu

1.3 To take cognisance of the report, copies are provided to the following people in terms of section 8(3) of the Public Protector Act:

1.3.1 The Complainants, Mr P Van Dalen and Mr P Maclons;

1.3.2 The Chairperson of the BAC, Mr Hlatshwayo;



1.3.3 The Director: Policy Research Support, Mr Joseph Sebola.

1.4 The report relates to an investigation into a complaint of an allegation of irregular awarding of a tender to Sekunjalo Marine Services Consortium (SMSC) by the Department of Agriculture Forestry and Fisheries (DAFF) under tender with reference number MLRF 088.

**2. THE COMPLAINT**

2.1 The complaint was lodged on 19 February 2012 by Mr Pieter van Dalen (Member of Parliament and Deputy Shadow Minister for DAFF). He requested that an investigation be conducted with the view of taking disciplinary action against those responsible for the alleged irregular award of the tender with reference MLRF 088.

2.2 The Complainant referred to a PricewaterhouseCoopers Advisory Services (Pty) Ltd ('PwC') report dated 17 October 2011 issued to DAFF, and titled "*Review of tender document for the procurement of the services of a ship manager for the manning, management and maintenance of the research and fisheries patrol vessels*".

2.3 He stated that:

*"The report raised serious questions about the adjudication and awarding of bid MLRF 088, under the Marine Living Resource Act.*

*1. This relates to the conflict of interest where the Acting Deputy Director General: Fisheries management branch, Mr Joseph Sebola, signed off on the approval of the Bid Specifications Committee and sits on the Bid Evaluation Committee. He cannot be both a player and a referee.*

*2. Concerns are raised to the fact that it could not be ascertained if the Bid Evaluation Committee had the expertise in the legal and financial field as required by the Bid Contract Specifications document.*

3. *Concerns were raised about the awarding of a tender to a company that has fishing rights, SMSC will have to police itself as they are likely to have insider knowledge of where and when the vessels are going and when it will be out of service. It is highly irregular to allow one company to be both player and referee in South African waters.*
  4. *Concerns were raised about the fact that one parent company known as Sekunjalo Investments Limited submitted 4 tenders for the same bid. They are Premier Fishing, Premier Fishing Consortium, Sekunjalo Ltd and Sekunjalo Consortium.*
  5. *The scoring of the different bidders was clearly biased where the company that had been doing the work for 10 years was scored 1 (very bad) on all the criteria, and the one with the least experience was scored 5 (excellent) by one of the members (Mr Sebola), who also happens to be the Acting Deputy Director-General and should probably not have been on the Bid Evaluation Committee in the first place."*
- 2.4 In August 2012, the Complainant raised further issues relating to the award of the tender, namely:
- 2.4.1 That the tendering process which culminated in the award of the tender to SMSC (which was subsequently withdrawn) was improper.
  - 2.4.2 DAFF's failure to re-advertise the tender means that it is currently unable to fulfil its mandate to do scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities. This failure seriously jeopardises the research and protection of the country's fishing resources, and has far reaching economic consequences.
  - 2.4.3 After the commencement of the investigation a further complaint was lodged by Smit Amanda, the company that had held the contract for 12 years, alleging that Minister Joemat Pettersson had arbitrarily terminated its service at the





end of the contract in retaliation to Smit Amandla's whistle-blowing on the SMSC award, and in contravention of the contract provision that a three (3) month handover period be observed. Smit Amandla alleged that this would have an adverse impact on its employees and on a smooth handover and that the navy did not have the necessary competencies and human resources for this undertaking. I was requested to ask the Minister to withdraw the 30 day notice and abide by the 3 months' notice in the contract, a request I duly acceded to without success.

- 2.4.4 As the investigation progressed, media reports regularly alleged that the patrol fleet was lying unattended to on account of the SA Navy's alleged lack of competencies and capacity to undertake the responsibility at the required magnitude and later that the vessels had been damaged by disuse.
- 2.4.5 As the investigation drew towards a conclusion, the investigation team was approached by a whistle-blower who alleged that DAFF had irregularly entered into a contract with Damen Shipyards for the repairs to the vessels.
- 2.4.6 On being approached, DAFF did not deny awarding the said tender irregularly to SMSC. DAFF went further to cancel the tender and committed itself to re-advertising the tender as soon as possible.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1 The Public Protector is an independent constitutional office established in terms of section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to



result in any impropriety or prejudice, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

- 3.3 The Public Protector is further mandated by the Public Protector Act, 23 of 1994 to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.4 The Department of Agriculture, Forestry and Fisheries is an organ of state and its conduct amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector's mandate.
- 3.5 The jurisdiction of the Public Protector was not disputed by any of the parties.

#### **4. THE ISSUES CONSIDERED AND INVESTIGATED**

On analysis of the matter, the following eight (8) issues were considered and investigated:

- (a) Was DAFF's irregular award of the R800 million tender for the crewing, management and maintenance of the research and fisheries patrol services, an act constituting improper conduct and maladministration?
- (b) Did Mr Joseph Sebola irregularly score SMSC 5/5 on everything, without the relevant experience while scoring Smit Amandla 1/5 on everything despite its (10) years of experience conducting the exact service in question and if so does the action constitute improper conduct and maladministration?
- (c) Did the award of the patrol vessels tender to SMSC by DAFF in spite of the fact that Premier Fishing (a subsidiary of the SMSC group) has fishing rights accord SMSC the role of referee and player and if so, did



this create a conflict of interest for SMSC and, accordingly, an act of maladministration by DAFF?

- (d) Did the submission of four (4) tenders on the same bid by the entities (Premier Fishing, Premier Fishing Consortium, Sekunjalo Limited and SMSC) which fall under the Sekunjalo Group constitute collusive tendering? If so, did DAFF's entertainment of these bids constitute improper conduct and maladministration?
- (e) Did DAFF's failure to re-advertise the tender result in its inability to conduct scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities and if so does this constitute improper conduct and maladministration?
- (f) Did DAFF irregularly terminate Smit Amandla's services by ignoring a 3 month handover period and awarding the service to the SA Navy which did not have the necessary competencies, and if so, did such action constitute improper conduct and maladministration?
- (g) Was Minister Joemat-Pettersson's rejection of the request to defer her planned abrupt handover to the SA Navy an imprudent act which resulted in lack of proper patrols and deterioration of patrol vessels resulting in millions of Rand in refurbishment costs and rampant poaching? If so, does her action amount to fruitless and wasteful expenditure and accordingly, constitute improper conduct and maladministration?
- (h) Did DAFF irregularly contract a company that had been part of the SMSC, Nautic, to repair its vessels that had become unseaworthy at a cost exceeding R30m, and if so, does such action constitute improper conduct and maladministration?



## **5. THE INVESTIGATION**

The investigation was conducted in terms of section 182(1) of the Constitution, and sections 6 and 7 of the Public Protector Act.

### **5.1 Scope of the investigation**

5.1.1 The scope of the investigation was limited to the items listed in paragraph 4 above.

5.1.2 It is worth noting that the allegation regarding the award of a fleet refurbishment contract was noted but not investigated and a spinoff investigation opened.

5.1.3 It is also worth noting that the investigation integrated two complaints from the complainant and additional complaints from Smit Amandla.

### **5.2 Investigation Methodology**

The following methods of gathering and analysing evidence and information were utilised:

#### **5.2.1 Interviews and Meetings**

(a) At the beginning of my investigation process I had a meeting with the CEO of Smit Amandla Ms Nhlahla Manana at our Cape Town Provincial Office on 28 March 2012. I also met with Minister Joemat-Pettersson on 12 and 25 July 2012 respectively.

(b) Interviews were conducted on the 2-3 May 2013 and 10-13 September 2013 with the following members of the Bid Evaluation Committee (BEC);

- (i) Ms Liezel Tsegarie;
- (ii) Ms Vanessa Damonse;
- (iii) Dr Johann Augustyn;
- (iv) Ms Sue Middleton;



- (v) Mr Saasa Pheeha;
  - (vi) Mr Wickness Rooifontein (twice);
  - (vii) Ms Abigail Booth;
  - (viii) Mr Keith Govender (twice);
  - (ix) Mr Siyabonga Tikayo;
  - (x) Mr Ceba Mtoba;
  - (xi) Mr Peter Thabethe; and
  - (xii) Mr Joseph Sebola.
- (c) The investigation team also consulted with attorneys representing Sekunjalo Group on 22 August 2013. I personally had telephonic conversations with Dr Surve of Sekunjalo and informal interactions, on flights, and other unplanned settings with him and other industry role players.
- (d) Further interviews were conducted on 4-6 September 2013 with the following persons at South African Maritime Safety Authority (SAMSA):
- (i) Mr Nkosi;
  - (ii) Mr S Tilayo;
  - (iii) Mr Ian Calvert;
  - (iv) Captain Grapow; and
  - (iv) Mr Nigel Campbell.
- (e) Final interviews were conducted on 18 November 2013 with the following SA Navy officials:
- (i) R Admiral W.H.O Teuteberg;
  - (ii) Captain Van Rooyen;
  - (iii) Captain Solly Pietersen;
  - (iv) Admiral Sgt Pillay;
  - (v) Captain R Pieterse; and
  - (vi) R Admiral Mondi Lubisi

## 5.2.2 Correspondence

The following documents were reviewed:

- (a) The original complaint submitted to the Public Protector and subsequent communication between the Public Protector and the Complainant;
- (b) E-mail between ENS Attorneys and the Protector Public on 3 August 2012;
- (c) E-mail correspondence between Smit Amandla and the Public Protector on 20 and 24 August 2012;
- (d) E-mail between the Public Protector and ENS Attorneys on 3 September 2012;
- (e) E-mail correspondence between DAFF and the Public Protector on 29 October 2012, 21 November 2012 and 10 December 2012;
- (f) Correspondence between the Public Protector and the Minister of Trade and Industry (now Agriculture, Forestry and Fisheries) on 1 August 2012, 15 August 2012 and 23 August 2012;
- (g) Correspondence between the Public Protector and DAFF on 30 March 2013; and
- (h) Correspondence between the Public Protector and ENS dated 30 August 2013.

## 5.2.3 Documents

The following documents from DAFF were obtained, perused and analysed:

- (a) Documents relating to bid MLRF 088 and specifically the following:
  - (i) The advertisement for the MLRF 088 tender;
  - (ii) Bid documentation received from the following bidders:



- (aa) Sekunjalo Marine Services in consortium with Nkiruka Investments & KND (this group has already been referred to as SMSC)
  - (bb) Sekunjalo Ltd
  - (cc) Premier Fishing SA (Pty) Ltd ('Premier Fishing');
  - (dd) Meihuizen Freight (Pty) Ltd t/a Southern Ship Management in association with Denmarine CC ('Meihuizen Denmarine');
  - (ee) Premier Fishing SA (Pty) Ltd Consortium in association with KDN ('Premier Fishing Consortium');
  - (ff) Smit Amandla Marine (Pty) Ltd ('Smit Amandla'); and
  - (gg) Magatyana Cleaning Service CC ('Magatyana').
- 
- (iii) Appointment of the BSC;
  - (iv) BEC minutes, BEC score sheets and declaration of interest by BEC members;
  - (v) BAC minutes of meetings;
  - (vi) Letter of acceptance by SMSC;
- 
- (b) Approval for cancellation of tender bids MLRF 086 and MLRF088;
  - (c) Internal legal memorandum by DAFF on the alleged irregularities with the award of the tender to SMSC, dated 30 November 2011;
  - (d) Memorandum to the State Attorney on case 24761/11 by Adv Duminy SC, dated 9 December 2011;
  - (e) Due diligence report by SizweNtsalubaGobodo ('SNG') dated 5 January 2012;
  - (f) Legal opinion on the award of tender number MLRF 088 by Adv Duminy SC, dated 2 February 2012;
  - (g) Summary of opinion on the award of tender number MLRF 088 by Adv Duminy SC, dated 13 February 2012;
  - (h) Copy of final report by PwC dated 17 October 2011, on the review of tender documents for the procurement of the services of a ship manager for the manning, management and maintenance of the research and fisheries patrol vessels (MLRF 088);

- (i) Memorandum of Understanding between DAFF and SA Navy;
- (j) Hand-over report from Smit Amandla to DAFF;
- (k) Hand-over report from DAFF to SA Navy and
- (l) Statement by the CEO of Sekunjalo, Mr Khalid Abdulla
- (m) Documents were also received from the original Complainant, Smit Amandla, Sekunjalo and SAMSA.

#### **5.2.4 Legislation and other prescripts and precedents**

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

- 5.2.4.1 The Constitution of the Republic of South Africa, 1996;
- 5.2.4.2 The Public Protector Act No.23 of 1994 ('PPA');
- 5.2.4.3 The Preferential Procurement Policy Framework Act No. 5 of 2000 ('PPPFA') and the Regulations issued in terms of the Act;
- 5.2.4.4 The Competition Act No.89 of 1998
- 5.2.4.5 Public Finance Management Act No.1 of 1999
- 5.2.4.6 National Treasury Regulations dated March 2005;
- 5.2.4.7 DAFF's Supply Chain Management Policy (SCMP)
- 5.2.4.8 DAFF's Financial Instructions

#### **5.2.5 Records of the Companies and Intellectual Property Commission (CIPC)**

We requested and reviewed CIPC records of the following entities:

- 5.2.5.1 Premier Fishing SA (Pty) Ltd - 1952/002671/07
- 5.2.5.2 KND Projects – registered name Odvest Pty Ltd -2009/007037/07
- 5.2.5.3 Sekunjalo Investment Limited -1996/006093/06
- 5.2.5.4 Sekunjalo Enterprise Development Pty Ltd -2005/030707/07
- 5.2.5.5 Nkiruka (Pantalon Pty Ltd) - 2011/001236/07
- 5.2.5.6 Magatyana Cleaning Services (Akwaaba Security & Cleaning) - 2009/123714/23



5.2.5.7 Smit Amandla Marine (Pty) Ltd - 1967/000290/07

5.2.5.8 Manuel Security CC - 2007/212249/2

5.2.5.9 Maritime Investment Holdings (Pty) Ltd

5.2.5.10 SMIT holdings SA (Pty) Ltd

5.2.5.11 Sekunjalo Marine Services

5.2.5.12 Premier Fishing SA (Pty) Ltd - 1952/002671/07

## 6 THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

### 6.1. The Award and Withdrawal of the Tender for crewing, management and maintenance of the research and fisheries patrol services by DAFF to SMSC

6.1.1. From the information and documents received from DAFF during the investigation, the following is how the tender process unfolded:

6.1.1.1 The DAFF's Financial Instructions prescribes that the Director-General ('DG') must approve bid specifications above R10 million.

6.1.1.2 According to the bid documents, The DG (Mr Langa Zitha) appointed the following officials as members of the Bid Specification Committee ("BSC") and such appointment was supported by the Director Supply Chain Management ("SCM") Mr Tikayo, the Acting Chief Finance Officer ('CFO') Mr Rooifontein, and the Acting DDG: General Fisheries Management Mr Sebola.

<b>BSC MEMBERS</b>	
<b>Name of official</b>	<b>Title</b>
Ms S du Plessis	Scientific Co-ordinator Research Vessels
Mr S Tikayo	Director: Supply Chain Management
Mr L Fikizolo	Director: Fisheries Patrol Vessels
Ms G Rangayi	Acting Director: Revenue Management



Mr K Govender	Deputy Director: Fisheries Patrol Vessels
Dr R Tam	Acting Director: Research Support

- 6.1.1.3 On 3 November 2010, the SCM division requested the Government Printing Works, City Press and The Weekend Argus to advertise three invitations to bid of which the one was *"MLRF088 Appointment of Ship Management Service Provider for Manning, Management and Maintenance of the Research, Fisheries and Environmental Patrol Vessels for a period of five years on behalf of Branch Fisheries"*.
- 6.1.1.4 DAFF is responsible, through the Deputy Director General ('DDG'): Fisheries Management, for the proper management of South Africa's marine living resources and the management of South Africa's interest in the Southern African Ocean. In support of these responsibilities, the DDG: Fisheries Management operates a fleet of 7 vessels. The fleet is composed of 5 fisheries patrol vessels and 2 research vessels.
- 6.1.1.5 The terms of reference for the advertisement stated that the bids would be evaluated according to the 90/10 preferential point's system and that the evaluation will be based on price (30) functionality (60) and equity (10) in terms of the PPPFA, and that all bidders must attend a compulsory tender briefing.
- 6.1.1.6 The closing date was stated as 10 December 2010 at 11h00. A re-invitation to bid was sent out on 11 February 2011 under bid number MLRF088. The closing date of the bid was indicated as 22 April 2011 and a compulsory briefing session was held on 25 March 2011.
- 6.1.1.7 Thirty One (31) individuals attended the briefing session and signed the attendance register. Site visits took place on 11 March 2011, 5 April 2011 and 7 April 2011.



6.1.2 An analysis of the bid documents indicated that the following bidders submitted completed bid documentation to DAFF in response to the invitation to bid MLRF088:

NAME OF BIDDERS	BID AMOUNT
Sekunjalo Ltd	R161 254 911.00
Sekunjalo Marine Services in consortium with Nkiruka Investments and KND	R124 724 911.00
Premier Fishing SA (Pty) Ltd	R239 561 043.00
Meihuizen Freight (Pty) Ltd t/a Southern Ship Management (in association with Denmarine CC)	R203 950 513.00
Premier Fishing SA (Pty) Ltd Consortium (in association with KDN)	R197 951 043.00
Smit Amandla Marine (Pty) Ltd	R131 400 000.00
Sharp MoveTrading 57 (Pty) Ltd t/a Lwandle Maritime Services (Pty) Ltd	R117 449 143.00
Magatyana Cleaning Service CC – Akwaaba Security	R14 900 000.00

Two bids (those of Selacor Investments and Gumbi Consortium) were received late and were not considered.

6.1.3 On 26 May 2011, the DG appointed the following officials as members of the Bid Evaluation Committee ('BEC') to evaluate the tenders received for the manning, managing and operation of DAFF vessels.

BEC MEMBERS	
Name of official	Designation
Mr P Thabethe (Chairperson) Acting DDG	Scoring



<b>BEC MEMBERS</b>	
<b>Name of official</b>	<b>Designation</b>
	member
Dr J Sebola: Acting DDG: Fisheries	Scoring member
Ms S Middleton: Acting DDG Economic Development Trade and Marketing	Scoring member
Dr M Mashaba: Chief Director Operation Support	Scoring member
Dr J Augustyn: Acting Chief Director: Resource Management	Scoring member
Ms S Peeha: Director Offshore and High Seas Fisheries Management	Scoring member
Mr L Fikizolo: Director Fisheries Patrol Vessels	Scoring member
Ms S Du Plessis: Scientific Co-ordinator Research Vessels	Non-scoring member
Mr S Tikayo: Director SCM	Secretariat non-scoring member
Ms V Damonse: Administrator	Secretariat non-scoring member

6.1.4 The bids received went through two phases of evaluation, namely:

6.1.4.1 Phase 1: an evaluation based on the bid submissions' adherence to the bid specifications; and

6.1.4.2 Phase 2: an evaluation of price, HDI ownership and specific RDP goals as per the terms of reference.

- 6.1.5 The BSC documents stated that the bids would be evaluated for functionality only after the bidders had done presentations to DAFF (referring to phase 2 of the evaluation); however it worked out differently in practice.
- 6.1.6 The bids were evaluated twice as part of phase 1, on 26 May 2011 and on 19 July 2011. The first evaluation (on 26 May 2011) took place without the bidders having done a presentation to the BEC.
- 6.1.7 The BEC met on 26 May 2011 and verified the received bids for adherence to the specifications. Two (2) companies were disqualified due to the fact that they did not comply with the bid requirements in respect of tax clearance certificates):
  - 6.1.7.1 Sharp Move Trading provided a copy of a tax clearance certificate and not an original;
  - 6.1.7.2 Magatyana Cleaning Services did not provide a tax clearance certificate.
- 6.1.8 The evaluation score sheet for functionality consisted of the following criteria and weighting, with a score to be awarded between 1 and 5 for each element:

	<b>Criteria</b>	<b>Weight</b>
1	Previous experience in this field and record of achievements. The applicable experience in the fields (give examples) includes both the public sector and the private sector	10
2	Ability to deliver the services as detailed in the scope of work including supporting documentation (Terms of Reference)	30
3	Level of experience and qualifications of personnel – CV have to be submitted. The experience and educational background of	6



	<b>Criteria</b>	<b>Weight</b>
	the personnel proposed to provide the service. Assessment of the condensed Curricula Vitae of personnel involved in the project (number of project team members to handle the	
4	Accreditation/registration with all the relevant institutions	4
5	Quality of proposal to DAFF. A proposed plan of action to achieve the objectives should be submitted for evaluation with allocated budget.	5
6	Cost saving mechanisms on the reimbursable costs. A proposed plan of action to achieve the objectives should be submitted for evaluation	5

6.1.9 The first evaluation was done by the panel members using the bid documentation only and without a presentation by the bidders. The BEC members completed individual score sheets for scoring the bidders.

6.1.10 The minutes of the BEC noted that the BEC members were concerned during the first evaluation that the evaluation criteria were not detailed enough and thus allowed for subjectivity when assessing the different bidders. The minutes also state that, after discussions, the BEC members were satisfied that the evaluation criteria was in order, however no detail of such discussions were provided.

6.1.11 The minimum score that a bidder had to obtain for functionality in order to be considered for the phase 2 evaluations was 80%.

6.1.12 We reviewed the score sheets and the minutes of the BEC for the first evaluation of 26 May 2011, and confirmed that the bidders obtained the following scores for functionality:

<b>Bidders</b>	<b>Total % scored during the 1st evaluation, based on the bid documents completed by individual BEC members and confirmed in the BEC minutes</b>
Premier Fishing (Pty) Ltd	46%
Premier Fishing Consortium	62%
Sekunjalo Ltd	56%*
SMSC	65%
Mehuizen/Denmarine	25%
Smit Amandla Marine	74%

6.1.13 None of the bidders met the minimum score of 80% for functionality during the first evaluation, therefore the process could not continue to phase two, which is the consideration of the price, HDI ownership and specific RDP goals as per the terms of reference.

6.1.14 At the first evaluation, the BEC deliberated on the fact that the current service provider (Smit Amandla) did not meet the minimum requirement of 80% for functionality - based on this the members agreed that the minimum functionality of 80% was too high and decided to escalate it to the DG with three (3) proposed actions (as reflected in the BEC minutes), being:

- a) *"The specifications to be sent back to the specifications committee to amend the minimum functionality requirement to 60%.*
- b) *Bidders to be invited to do oral presentations and in so doing members can obtain a final score for functionality as they will obtain clarity in certain issues that is not clear in the proposals received from the various bidders.*
- c) *The bid is re-advertised with more detailed evaluation criteria".*

6.1.15 It appears that the DG approved a submission to invite the bidders to make oral presentations to the BEC, however no written authorisation in this regard



was provided for review. The evaluation was done again, and during this second evaluation (still part of phase 1) bidders were evaluated based on a presentation to the BEC where the BEC had the opportunity to ask questions and clarify any questions emanating from the written bid submissions. The same criteria as in the first evaluation was used, but a new (and exact copy) of the score sheet was used.

6.1.16 The DG re-appointed the entire BEC except for the following change: Dr Augustyn replaced Mr Fikizolo. The DG also included the following officials as non-voting members: Ms Du Plessis, Mr Tikayo and Ms Damonse.

6.1.17 On 19 July 2011, the BEC did the second evaluation. During this phase the bidders were requested to make presentations to the BEC. According to the scores sheets of the individual BEC members and the BEC minutes, the bidders received the following scores:

<b>Bidders</b>	<b>Total % scored during the 1st evaluation, based on the bid documents completed by individual BEC members and confirmed in the BEC minutes</b>
Premier Fishing (Pty) Ltd	53%
Premier Fishing Consortium	67%
Sekunjalo Ltd	56%
SMSC	81%
Mehuizen/Denmarine	28%
Smit Amandla Marine	60%

*\* Please note that we checked the scores as per the individual score sheets and compared those to the BEC minutes. It became evident that in all the instances, the BEC rounded the percentages off. Our calculation of the Mehuizen/Denmarine scores reflect that the correct rounded off percentage for them should have been 29%.*





- 6.1.18 When reviewing the individual score sheets by the various BEC members, it was notable that Mr Sebola in the second evaluation marked Smit Amandla, (who had significant experience in the field) the lowest score possible (being a '1' which indicates 'poor'); and had scored SMSC (with no proven experience on an assignment of this nature and extent) a consistent '5' (the highest score possible, which indicates 'excellent'). It is also worth noting that Smit Amandla's score fell from 74% and highest scorer in the previous round to 60% and third highest scorer in the new round.
- 6.1.19 Moving from the second highest scorer behind Smit Amandla in the previous round, SMSC became the highest scorer and the only bidder that received the minimum required scoring of 80% on functionality and the only bidder that moved to phase 2 of the process.
- 6.1.20 On 20 July 2011 the Chairperson of the BEC recommended to the BAC that the tender should be awarded to SMSC as they were the only company that met the functionality criteria and scored the highest points i.e. *"96.63 made up as follows (90 points for price, 2.45 points for HDI ownership, 0.18 points for women equity, 1 point for SA owned, 1 point for the development of human resources, 1 point for the upliftment of communities and 1 point for empowerment of the workforce"*.
- 6.1.21 Since there were no competitive bidders in phase 2 of the process (as no other bidder had scored a minimum of 80% during phase 1), it appears that the maximum points for price was awarded to SMSC.
- 6.1.22 The DG appointed the following officials as members of the BAC for purposes of adjudicating the tender.

<b>BAC MEMBERS</b>
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<b>BAC MEMBERS</b>	
<b>Name of official</b>	<b>Title</b>
Mr J Hlatshwayo (Chairperson)	
Mr W Rooifontein	Acting Chief Financial Officer
Mr S Tikayo	Director: SCM
Mr M Ramasodi	Acting Chief Director: APIS
Mr R Seleke	Chief Director Policy Development
Ms B Molatlhegi	Director: ICT
Ms V Damonse	Administrative Assistant to the SCM Secretariat

- 6.1.23 The BAC met for the first time on this tender on Wednesday 27 July 2011, where it was decided to postpone the discussion to Monday 1 August 2011 due to the enormity and value of the bid, as BAC members needed more time to work through the submission from the BEC.
- 6.1.24 On 1 August 2011, the BAC met again. Two members (Messrs Seleke and Rooifontein) were unable to attend: During this meeting the BAC raised various questions and concerns; *inter alia* the identity of SMSC (referring to SMSC) and the potential of conflict of interest in that Premier Fishing (a company in the SMSC) had fishing quotas allocated to it.
- 6.1.25 Mr Tikayo, Head: SCM informed the BAC that four (4) separate bidders resorted under the same umbrella company, referring to "Sekunjalo Ltd, Sekunjalo Consortium, Premier Fishing and Premier Fishing Consortium". The minutes do not indicate whether the BAC asked further questions in this regard.
- 6.1.26 The potential conflict of interest was apparently a big concern for the BAC. Mr Tikayo explained to the BAC that the BEC had raised the same question,



and that Sekunjalo's response was that they have different components/entities within the group which operate entirely separate from one another and therefore it does not pose a risk to DAFF if SMSC were to manage the patrol vehicles. The minutes do not indicate whether the BAC asked further questions in this regard.

- 6.1.27 The Chairperson asked Mr Tikayo whether the correct procurement processes had been followed and Mr Tikayo confirmed that all procurement prescriptions had been complied with.
- 6.1.28 The BAC conditionally awarded the bid to SMSC, with the following stated conditions (and a deadline of 31 August 2011):
- 6.1.28.1 Obtain minutes of the BEC meeting of 26 May 2011;
  - 6.1.28.2 Obtain the DG's signed approval to do the second stage of evaluations (referring to the evaluations conducted during presentations by bidders, after the first set did not result in any of the bidders scoring the minimum of 80% for functionality);
  - 6.1.28.3 Obtain an Internal Audit certificate verifying that SCM processes has been followed;
  - 6.1.28.4 Obtain a legal opinion to verify that SCM processes has been followed;
  - 6.1.28.5 Consult with National Treasury to concur with the award (since all bids in excess of R10 million should be awarded in concurrence with National Treasury in line with the National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management issued on 31 May 2011); and
  - 6.1.28.6 Extend the validity period of the tender (since all the conditions had not yet been complied with)



- 6.1.29 In addition to the above conditions that had to be complied with, Mr Tikayo also had to report back to the BAC by 1 October 2011 on the following questions:
1. *"How will the option of the SA Navy managing our vessels impact on DAFF.*
  2. *If DAFF should manage the vessels themselves what impact will it have, and will we be able to source the same staff that are currently being used?"*
- 6.1.30 On 28 September 2011, Mr Tikayo, Head: SCM, addressed a 'Request for Extension' document to the Chairperson of the BAC, stating that the bid expired on 30 September 2011, that the following conditions had not yet been met and therefore a further extension was requested to 31 March 2012:
- 6.1.30.1 An Internal Audit certificate verifying that SCM processes has been followed;
  - 6.1.30.2 Consult with National Treasury to concur with the award (he stated that this step could only be done after receiving the Internal Audit certificate); and
  - 6.1.30.3 The DG's signed approval to do the second stage of evaluations (referring to the presentations); and
  - 6.1.30.4 The chairperson of the BAC approved the extension on 28 September 2011.
- 6.1.31 The BAC met again on 2 November 2011. Mr Tikayo reported that he had not yet received a response from National Treasury. He was instructed to call a specific individual at National Treasury and report back to the BAC before the end of the day. The meeting was thereafter adjourned.

6.1.32 On 11 November 2011, Mr Tikayo recommended in writing that the award be made to SMSC and it was approved by the Chairperson of the BAC, subject to the following conditions:

6.1.32.1 The signing of a service level agreement;

6.1.32.2 The issuing of an official purchase order;

6.1.32.3 Finalisation of the due diligence assessment by the Marine Living Resources Fund.

6.1.33 On 21 November 2011, DAFF informed SMSC in writing that their bid for the tender had been accepted, subject to the completion of a due diligence and the finalisation and signing of a service level agreement.

6.1.34 On 24 November 2011, DAFF issued a press release and announced the award of the bid to SMSC.

6.1.35 On 8 December 2011, the Accountant-General of the National Treasury addressed a letter to Mr Langa Zita, DG of DAFF, informing him that the sections of the Instruction Note which required the following, was delayed for implementation and that a circular in this regard was issued on 28 September 2011:

6.1.35.1 that DAFF obtain National Treasury concurrence with awards above R10 million;

6.1.35.2 that the SCM process followed must be audited and a certificate issued by the internal or external auditor; and

6.1.35.3 that the SCM process followed must be legally vetted.

6.1.36 The result of the above was that the requirements to obtain National Treasury concurrence for awards above R10 million, have internal or external audit confirm the SCM process and have the SCM process legally vetted, was not compulsory at the time of the award of the tender.



- 6.1.37 It appears that DAFF's SCM was not aware that the implementation of these provisions had been delayed, as they went ahead with steps to fulfil the requirements (until informed by National Treasury that it was not required yet).
- 6.2. The BAC requested the internal auditors PriceWaterhouseCoopers (PwC) to certify that the procurement prescriptions had been followed in the award of the bid to SMSC - this was apparently done to ensure compliance with National Treasury Instruction Note 32 (DAFF was apparently at the time not aware that the implementation had been delayed). PwC's instruction was to *"perform a review of the tender documents and process for bid number MLRF 088 in order to determine whether MRLF's procurement policy and procedures have been complied with"*.
- 6.2.1 PwC issued a report dated 17 October 2011 in which they confirmed that they reviewed all the available procurement documentation (including tender advertisements, tender specifications, tenders submitted, scoring documentation, and minutes of the committee meetings and declarations of interests by committee members) in relation to tender MLRF 088.
- 6.2.2 PwC interviewed Mr Rooifontein, Mr Tikayo and Ms Damonse to clarify policies and the procedures followed.
- 6.2.3 PwC identified a conflict of interest in the 'key process event' identified as 'Approval of the Specifications Committee by the Director General', however they gave no further information relating to what the conflict of interest would be.
- 6.2.4 PwC stated that they were not able to determine whether the BEC comprised of legal and financial specialists as required in the bid specifications. No further finding was made in this regard.



- 6.2.5 PwC stated that they were unable to determine how financial viability was measured and assessed in the evaluation criteria.
- 6.2.6 PwC commented on the BEC minutes of 26 May 2011, where it was stated that:  
*"...the members of the committee expressed concerns that the evaluation criteria were not detailed enough, which meant that they have to be subjective when assessing the different bidders" and*  
*"...further discussion ensued around the detail of the evaluation criteria to which the members concurred that the evaluation criteria were adequate and clear."*
- 6.2.7 PwC commented that they were not able to determine how the BEC members' concerns regarding the evaluation criteria were resolved (it was not part of their mandate to interview the BEC members).
- 6.2.8. PwC commented as follows on the process followed by the BEC:
- 6.2.8.1 There was confusion about the process to follow with the scoring since the scoring was supposed to be done only after presentations by the bidders - however the first round of scoring was done without presentations;
- 6.2.8.2 The BEC then requested permission from the DG to call for presentations, despite the fact that it was a requirement in the bid specifications;
- 6.2.8.3 They were not provided with the DG's written permission to continue with the presentations.
- 6.2.9 PwC commented as follows on the scoring of the bidders:
- 6.2.9.1 The individuals score sheets did not request BEC members to document reasons for their scoring;
- 6.2.9.2 The individual scoring by some BEC members between the two rounds of scoring for the same bidder differs substantially, which raises questions;

6.2.9.3 In this regard they referred to the scoring in round one and two of Smit Amandla by Mr Thabethe and of Smit Amandla and SMSC by Mr Sebola. On criteria 2 (ability to deliver the service):

- (a) Mr Thabethe scored Smit Amandla 3 during the first round and 1 during the second round;
- (b) Mr Sebola scored SMSC 5 (excellent) for all 5 criteria and Smit Amandla 1 (very bad) for all 5 criteria during the second round; and
- (c) PwC remarked that this was questionable as Smit Amandla had been delivering the service to DAFF for the past 10 years, and should thus possess the necessary skills and expertise.

6.2.10 PwC recommended that DAFF discusses the findings contained in their report with National Treasury prior to awarding the tender, and they did not certify that DAFF had complied with the MLRF's procurement policy and procedures.

6.3 Smit Amandla challenged DAFF on the award of the contract to SMSC. According to the correspondence from DAFF, On 4 November 2011 Smit Amandla wrote to the DG (Mr Zita) in respect of tender number MLRF 088, questioning the awarding of the tender to SMSC (it is not clear on which date DAFF received the letter). The following is a summary of their concerns:

6.3.1 There was collusive tendering in that at least four (4) of the six (6) bidders were 'connected' parties, referring to Premier Fishing (Pty) Ltd, Premier Fishing Consortium, Sekunjalo Ltd and SMSC;

6.3.2 In support of the above statement they mentioned that the Sekunjalo website state that Premier Fishing is wholly owned by Sekunjalo Investment Ltd (except for a 16% shareholding by the Premier Fishing Share Trust), and the companies share common directors;





- 6.3.3 Even though the different bidders were not entitled to be present during one another's bid presentations, it was apparent from the presentation process that a core team of presenters remained throughout all four of the presentations for the above four (4) entities;
- 6.3.4 There is a reasonable suspicion that there may have been consultation, communication and arrangement amongst the four (4) entities listed above since they all tendered for the same contract and they all sit in on one another's presentations - this is forbidden by the Certificate of Independent Bid Determination (SBD9) which all the parties had to sign;
- 6.3.5 This is also in contravention of the Constitution (in that the tender process was not fair, equitable, transparent, competitive and cost effective), the PFMA, National Treasury Regulations and may constitute a prohibitive practice in terms of the Competition Act;
- 6.3.6 Smit Amandla suggested DAFF should investigate the tender award in light of the above complaint, if it did not wish the tender process to be challenged;
- 6.3.7 On 17 November 2011, DAFF Legal adviser wrote a memorandum regarding the letter received from Smit Amandla, to the Acting CFO (Mr Rooifontein). DAFF legal adviser concluded that the issues raised by Smit Amandla pose significant and/or major risks for DAFF, as the possible collusive tendering as alleged by Smit Amandla is in direct contravention with Section 4(1)(b)(iii) of the Competition Act No. 89 of 1998;
- 6.3.8 DAFF legal adviser further recommended that Senior Counsel's opinion be obtained to guide DAFF in order to prevent and/or mitigate the possible legal risks that DAFF may face upon awarding of the bid;



6.3.9 As stated above, the award of the bid to SMSC was published on 24 November 2011;

6.3.10 Subsequently Smit Amandla's lawyers (Shepstone & Wylie) wrote to DAFF on 29 November 2011, requesting copies of the bid supporting documentation and reasons why the award was made to SMSC and reasons why it was not awarded to Smit Amandla;

6.3.11 DAFF Legal Services was requested to respond. On 30 November 2011 it wrote to the Acting DDG: Fisheries (Mrs Middleton) that:

6.3.11.1 The allegations are serious;

6.3.11.2 It poses a problem in that, if an award has been made, the successful bidder will have a right to provide the services and be paid therefore in the absence of DAFF proving corruption and/or collusion or anything irregular pertaining to the bid process; and

6.3.12 DAFF legal adviser recommended the following:

1. *"That the DDG be informed that it is the recommendation of the Legal Services that the entire matter be thoroughly investigated and the implementation phase of award be pended, pending the outcome of the investigation.*
2. *The successful bidder (SMSC) be informed of the challenge to the process and that an investigation will be conducted.*
3. *A letter be done to Shepstone and Wylie informing them that the matter will be investigated."*

6.4 On 20 December 2011, (after the award of the bid to SMSC) SizweNtsalubaGobodo (SNG) was appointed to conduct a detailed review on SMSC's bid submission. This was apparently a result of the condition in



the award to SMSC that a due diligence had to be completed. SNG issued a report dated 5 January 2012.

6.4.1 SNG performed a detailed evaluation on each company within the Sekunjalo Group and also looked at the technical criteria that SMSC responded to in their bid submission.

6.4.2 SNG made the following key findings relating to the companies within the consortium and SMSC itself:

6.4.2.1 The bid documentation was completed in the name of SMSC. SMSC consist of four (4) entities, being:

- (a) Sekunjalo Investment Ltd;
- (b) Sekunjalo Enterprise Development (Pty) Ltd [listed in the bid documents as Sekunjalo Marine Services Consortium (Pty) Ltd];
- (c) KND Naval Design [the supporting documentation however reflected two different entities being Nautic Africa (Pty) Ltd and Odvest 110 (Pty) Ltd trading as KND Projects];
- (d) Nkiruka Investment (Pty) Ltd.

6.4.3 In respect of the entity listed in the bid submission as Sekunjalo Investment Ltd, SNG found that:

6.4.3.1 Only this entity submitted a BBBEE certificate which was valid at the time of the bid submission (it is a 65% consortium member);

6.4.3.2 It is a majority black-owned and black-controlled investment holding company situated in Southern Africa with international partners;

6.4.3.3 Premier Fishing is a subsidiary of this entity; and

6.4.3.4 Some of the directors of this entity are also directors of Premier Fishing SA (Pty) Ltd, Nkiruka Investment (Pty) Ltd and other entities within the Sekunjalo Group (referring to Mr K Abdulla, Mrs CF Hendricks and Dr MI Surve);



6.4.4 In respect of the entity listed in the bid submission as Sekunjalo Marine Services Consortium (Pty) Ltd, SNG found that:

6.4.4.1 No BBBEE certificate was provided and the shareholding could not be confirmed;

6.4.4.2 The entity was deregistered at the time of the bid submission (final deregistration was cancelled on 19 June 2011);

6.4.4.3 The company name does not match CIPC records (as reflected above it is registered as Sekunjalo Enterprise Development (Pty) Ltd) and no name change certificate was submitted; and

6.4.4.4 The directors of the entity are also directors of other companies in the SMSC.

6.4.5 In respect of the entity listed in the bid submission as KND Naval Design, SNG found that:

6.4.5.1 There is no evidence that KND Naval Design is empowered; and

6.4.5.2 The tax clearance certificate is in the name of Odvest 110 (Pty) Ltd trading as KND Projects, but the CIPC registered name for the entity is Nautic Africa (Pty) Ltd.

6.4.6 In respect of the entity listed in the bid submission as Nkiruka Investment (Pty) Ltd:

6.4.6.1 It was a shelf company at the time of the bid submission.

6.4.6.2 The intention was to utilise the entity to incorporate a broad base of SMME's to deliver various services to DAFF under the contract, such as cleaning and electricity, in line with the enterprise development programme of SMSC.

6.4.6.3 The final structure of the entity would only be completed once a SLA with DAFF was signed, and once the SMSC understood the extent of the services required.

6.4.6.4 No BBBEE certificate was submitted for the Nkiruka Investments. It was claimed that the company is a broad based black women's grouping. The HDI workings in the bid submission claimed 100% for both HDI and female ownership, but no evidence was presented in support of this; and



6.4.6.5 The registered director (Mrs Hendricks) is also a director of Sekunjalo Investment Ltd and Premier Fishing SA (Pty) Ltd.'

6.4.7 SNG summarised that DAFF ran a risk of not being able to hold any specific entity liable for wrong-doing if there is not a clear understanding of which entities they have engaged with.

6.4.8 SNG made the following key findings relating to the technical part of SMSC's bid submission:

6.4.8.1 Sekunjalo Enterprise Development (Pty) Ltd (listed in the bid submission as Marine Services Consortium (Pty) Ltd) does not have any direct dock or quay space. SNG's site inspection showed that they would utilise the quay space of Premier Fishing (Pty) Ltd and some other subsidiaries of Sekunjalo Investment Limited; and

6.4.8.2 Some of the proposed space in Cape Town (i.e. tying some vessels up three deep) created practical difficulties and potential problems, in that:

- (a) Not having direct access to the quay side made routine maintenance of vessels not completely possible because of adjacent vessels;
- (b) A vessel that needed to sail or prepare for sailing would require several vessels to be shifted, which would require tugs to be used - this could be costly and time consuming;
- (c) General access to the vessels was more difficult;
- (d) Maintaining security access by vessel would be difficult to maintain - monitoring the movement of crew, visitors and contractors between vessels tied to one another would be difficult unless additional security personnel is positioned on each vehicle; and
- (e) Practical problems with simultaneously allocating space to DAFF vehicles and vehicles of other companies that SMSC provide services to.

6.4.9 SMSC gave information as to previous experience which SNG could not independently verify, due to the fact that:



- 6.4.9.1 The vessel management experience that SMSC relied on was concentrated on entities related to the consortium members, specifically related to SMSC Investment Ltd;
- 6.4.9.2 Even though the CEO of Sekunjalo Investment Ltd mentioned that they have other clients for whom work was done, no details of such entities were provided to SNG;
- 6.4.9.3 SMSC did not provide sufficient information on the vessels they use to allow SNG to make a comparison of these vessels to DAFF vessels that SMSC would be managing; and
- 6.4.9.4 Discussions with consortium representatives showed that the members of SMSC have not previously managed vessels of the size specified in the bid.
- 6.4.10 When reviewing the section on compliance with South African law regarding crew members, SNG identified that SMSC made a statement that there would be compliance with all South African labour and maritime legislation, but there was no indication on how this was to be implemented and continuously monitored. In addition, when SNG asked SMSC for their current human resource policies (since they did not provide any sample of their policies in their bid submission), SNG was given policies relating to Premier Fishing on occupational health and safety for the fishing industry. The policy was last updated in 2003.
- 6.4.11 When reviewing individual employment contracts, SNG commented that CV's for key employees provided to them indicated that these individuals were employed by Premier Fishing SA (Pty) Ltd (a subsidiary of Sekunjalo Investment Ltd and also a competing bidder).
- 6.4.12 When reviewing an insurance contract to determine whether there was indemnification of ships' owners against claims from crews, SMSC gave SNG an insurance contract in the name of Premier Fishing (a subsidiary of Sekunjalo Investment Ltd and also a competing bidder).



- 6.4.13 When reviewing whether security requirements were met, SMSC gave SNG a policy and procedure manual for Premier Fishing (a subsidiary of Sekunjalo Investment Ltd and also a competing bidder).
- 6.4.14 The bid submission does not deal with all the technical detail required in the technical specifications document comprehensively, with specific reference to the following which did not appear in the bid submission:
- 6.4.14.1 A draft plan for the supervision of dry dockings, repairs and alterations;
  - 6.4.14.2 The methodology to be used to determine how changes to routine practices are to be recommended;
  - 6.4.14.3 The draft policies to be implemented to improve efficiencies and reliability;
  - 6.4.14.4 The methodology that is going to be used to liaise with DAFF to minimise the impact in operations of the vessels;
  - 6.4.14.5 The methodology to be used to supervise private contractors;
  - 6.4.14.6 The methodology to be used to maintain the appearance of the vessels;
  - 6.4.14.7 The draft procedures to be followed to arrange all surveys to meet classification society and SAMSA requirements;
  - 6.4.14.8 The draft procedures to be followed to ensure the vessels are prepared for the surveys; and
  - 6.4.14.9 The draft procedures to be followed to maintain proper records for all surveys and submitting copies of the certificates to DAFF.
- 6.4.15 SNG's discussion with SMSC members showed that members of SMSC have limited knowledge in the operation of vessels of the nature and size specified in the bid documents. Also that the key focus of some of the SMSC members were in the fishing industry and the design and construction of boats.
- 6.4.16 SNG established that all the operations of the main consortium member (being Sekunjalo Investment Ltd) has been in South African coastal waters and they do not have experience in operating in international waters or

undertaking research missions to e.g. Antarctica (as required for DAFF research vessels).

6.4.17 During interviews with Sekunjalo Investment Ltd representatives they stated that they planned to capacitate themselves with the required skills by appointing staff members who were at that stage working for Smit Amandla, and had the required knowledge. Also, some key positions had been allocated to persons at that stage employed by Premier Fishing.

6.4.18 SNG identified various instances where SMSC did not respond to information requested in the bid documentation. Such items include:

- 6.4.18.1 Determination of skills level for crews;
- 6.4.18.2 Determination of required teams per vessel;
- 6.4.18.3 General operations;
- 6.4.18.4 Safety;
- 6.4.18.5 Appointment of specialists;
- 6.4.18.6 Indemnification of ship owners against claims from crew;
- 6.4.18.7 Planned changes in officer personnel;
- 6.4.18.8 Limited 20% crew change per department;
- 6.4.18.9 Owner dissatisfaction with crew;
- 6.4.18.10 Absence of crew from the vessels;
- 6.4.18.11 Draft relief and leave programme;
- 6.4.18.12 Development of an establishment plan (partly addressed);
- 6.4.18.13 Maintain ISM levels of vessels;
- 6.4.18.14 Crew insurance;
- 6.4.18.15 Managing connected persons' access to vessels; and
- 6.4.18.16 Crew to have sufficient command of the English language.

6.4.19 SMSC's explanation to SNG as to why they did not respond to the above sections in the bid submission, was two-fold, namely:

6.4.19.1 They were of the view that these issues would be dealt with in a SLA between them and DAFF; and



- 6.4.19.2 Insufficient information was made available in the bid documentation and in the briefing session to enable them to respond to the issues in their bid documents.
- 6.4.20 SNG found that SMSC did not, at the time of the submission and award of the bid, have the required staff capacity (on and off-shore) to staff DAFF vessels as required in the contract. SNG specifically identified two critical positions that were not filled:
- 6.4.20.1 Procurement Manager; and
- 6.4.20.2 Engineer responsible for managing the vessels.
- 6.4.21 SMSC indicated that it planned to fill all the required positions by appointing Smit Amandla staff members.
- 6.4.22 SNG commented that there was no guarantee that all the required staff would be available to appoint, or that SMSC would be able to recruit staff to fill all the required positions. What compounded the challenge was the specialised nature of the environment and the general skills shortages in the industry.
- 6.4.23 Finally, SNG commented that SMSC did not respond to their approach in maintaining ISM levels/standards for DAFF vessels this refers to compliance with a stringent set of safety requirements for all vessels with a gross tonnage of 500 tons and vessels sailing in international waters. If these standards are not complied with, the safety of a vessel could be compromised. SNG found that the consortium does not have any experience in dealing with maintaining a vessel's ISM standards, since they operate in the fishing industry and fishing vessels do not have any specific ISM rating requirements.
- 6.5 On 6 December 2011, Smit Amandla launched an urgent application in the Western Cape High Court to *inter alia*:



- 6.5.1 Have the tender awarded to SMSC reviewed and set aside,
- 6.5.2 Obtain an interim interdict to restrain DAFF (and other parties) from implementing the tender awarded to SMSC;
- 6.5.3 Obtain the documentation on which DAFF based the decision to award the bid to SMSC;
- 6.5.4 Obtain reasons from DAFF for the award of the tender to SMSC;
- 6.5.5 Have any agreement concluded with SMSC in relation to the tender award, reviewed and set aside; and
  
- 6.5.6 Smit Amandla based its application on the alleged conflicts of interest and collusive tendering (already dealt with in detail *supra*). A summary of the grounds for their application is:
  - 6.5.6.1 Conflict of interest;
  - 6.5.6.2 Collusion among bidders; and
  - 6.5.6.3 Irrationality of the award to SMSC.
  
- 6.5.7 For purposes of brevity I will not repeat all the grounds of Smit Amandla's application.
  
- 6.6 On 9 December 2011, Senior Counsel provided a legal opinion to DAFF on the above matter, and stated *inter alia* that:
  - 6.6.1 Smit Amandla's court papers make out a *prima facie* case for review, and unless there are proper answers to the allegations, the applicant may well succeed;
  - 6.6.2 The PWC report raises substantive issues/concerns regarding the tender process.
  - 6.6.3 On 17 January 2012, the State Attorney briefed Senior Counsel to advise on the following:



- 6.6.3.1 Whether the award is valid and binding;
- 6.6.3.2 Whether the due diligence report raises or infer non-compliance by SMSC in its bid documentation and presentation to DAFF? Should this be so, does such non-compliance warrant the proposed award being set aside or considered by DAFF?
- 6.6.3.3 Whether the entire bid process was procedurally and substantively regular;
- 6.6.3.4 If the court finds in favour of Smit Amandla, can the award be set aside by the court, even though SMSC was not party to or involved in any irregularities?
- 6.6.4 On 2 February 2012, Counsel advised *inter alia* that (for purposes of brevity only a summary is provided):
- 6.6.5 In respect of conflict of interest (due to Premier Fishing having fishing rights allocated to it) could probably be successfully opposed.
- 6.6.6 In respect of collusive tendering, that the inter-relationships between the four related parties were openly declared to the BEC, so there could be no suggestion that the parties secretly conspired with one another.
- 6.6.7 There is no indication of bid rigging or collusive bidding.
- 6.6.8 However, the information contained in the SMSC submission raises the questions whether the four related parties complied with the conditions of SBD9.
- 6.6.9 The Senior Counsel stated that *"...there are prima facie indications that the entities in the SG (Sekunjalo Group), in submitting bids in the manner which they did, and the level of what can be described as an "intermingling" of resources in order to deliver in relation to the Tender, could not have signed SBD9. This aspect at least called for careful scrutiny by the BEC and BAC, failing which the considerations of the bids were inadequate. There is no indication that such scrutiny took place."*

- 6.6.10 Counsel advised that there is a substantial risk that the award cannot be justified rationally.
- 6.6.11 After the first round of evaluations, none of the bidders scored the required minimum of 80% for functionality - this was apparently due to the BEC having difficulty with evaluating the bids in the absence of benchmarks.
- 6.6.12 Even though it remained a concern of the BEC that there were no benchmarks by which to score the bids, it was not sent back for the specifications to be amended since it weighed heavily with the BEC that the bid invitation had already been issued thrice.
- 6.6.13 The tender process should have been aborted after round 1 of the evaluations, the tender specifications revisited to include criteria to measure compliance and the tender should have been re-issued.
- 6.6.14 The scoring was entirely subjective and the scoring conducted during May 2011 and July 2011 differed in some instances significantly.
- 6.6.15 At the second round of evaluations Dr Augustyn was the only BEC member with the relevant technical expertise. He received 20 minute notice to serve on the BEC, did not have an opportunity to review the bid documents and scored the bidders solely on their oral presentations. He was of the view that the Smit Amandla's presentation was focused and outstanding, by far the best and that they had adequately covered the criteria. He was most surprised to learn that they did not reach the minimum level of 80% functionality to proceed to the next stage.
- 6.6.16 The scoring was subjective and almost without consultation and discussion/debate in the BEC in relation to the respective bids submitted, or the basis for awarding scores under the various criteria.



- 6.6.17 Both technical experts indicated that their expertise were not expressly sought or provided to the BEC - the BEC members had scored individually on a subjective basis.
- 6.6.18 Senior Counsel stated that *"...The absence of benchmarks and objective scoring criteria will in our view probably be decisive. The prospects of successfully defending the review are not good and in our view the review is likely to succeed on the basis that scoring was irrational and cannot be rationally and fairly correlated with the information which served before the BEC"*.
- 6.6.19 Senior Counsel refers to internal legal advice given to DAFF with regard to the tender on 12 September 2011, which already at that point recommended that the scoring could not be objectively justified. There is no explanation as to why this legal advice was ignored.
- 6.6.20 The BAC made the award based on the recommendation of the BEC, notwithstanding the PwC report (which was commissioned by the BAC), which did not confirm that all procurement prescriptions had been followed, and which highlighted concerns with the process.
- 6.6.21 The BAC chairperson (Mr Hlatswayo) stated that it was not the task of the BAC to score the bids and that the BAC had been satisfied with the aggregate scorings calculated from the BEC's scoring. He further explained the BAC's task was limited to reviewing the process and establishing whether the minutes agree to the recommendations, whether the majority of BEC members agree or whether there was consensus. Mr Hlatswayo's view was that the BAC had to satisfy themselves that the bid process had followed the bid prescripts. They obtained this by getting an assurance from Mr Tikayo



(Head: SCM) that the correct process had been complied with (as confirmed by the BAC minutes).

- 6.6.22 The BAC, as the duly delegated decision maker, did not question the discrepancies underlying the process of the award of the tender.
- 6.6.23 Senior Counsel stated that the award to SMSC is not likely to withstand a challenge on the basis of rationality, but is also vulnerable to attack based on the Promotion of Administrative Justice Act ('PAJA').
- 6.6.24 The DAFF Financial SCM policy requires that the evaluation of the tender be conducted by a team comprising of *"...technical, financial and legal specialists appointed by the DD-G: Fisheries Management"*.
- 6.6.25 There was no person with legal expertise serving on the BEC. The chairperson of the BEC had been Acting DD-G for Legal Services but had no legal expertise or qualifications.
- 6.6.26 On the financial expertise, it appears that it vested in the senior management members who served on the BEC in so far they would have financial management expertise given their level of seniority. Mr Tikayo had financial expertise as an accountant, and assisted the BEC but only provided secretarial and technical services. He served on the BAC.
- 6.6.27 During the first round of evaluations, Mr Fikizolo had the requisite technical expertise to serve on the BEC. When he became unavailable he was replaced with Dr Augustyn, who also had the requisite technical expertise to serve on the BEC.
- 6.6.28 There appears to be merit to the complaint that the bids were evaluated by a BEC who did not have the requisite legal and financial expertise to do so.

- 6.6.29 Senior Counsel advised that there are a number of grounds on which the award can be set aside and a court is likely to review and set the award aside.
- 6.6.30 The bid invitation require that bidders have to provide adequate information and proof of their financial viability and ability to perform the obligations performed under the contract.
- 6.6.31 The due diligence report of the SNG identifies *lacunas* (gaps) in the SMSC bid submission which indicate that SMSC did not in material respects comply with this requirement and also did not fully and completely respond to the bid invitation.
- 6.6.32 The SNG team identified further important concerns (already dealt with above) related to *inter alia*:
1. *previous experience in the industry;*
  2. *knowledge of the operation of vessels the nature and size which DAFF required;*
  3. *experience in operating in international waters;*
  4. *the required manpower (capacity),*
  5. *membership of accreditation societies,*
  6. *safety measures.*
- 6.6.33. The Senior Counsel concludes that the SNG report clearly identified significant shortcomings in the SMSC bid which would probably result in the award being set aside.
- 6.6.34 The Senior Counsel concluded that the process was procedurally and substantively irregular and there is a substantial risk that it can be set aside. He went further and stated that "*...the MLRF is duty bound to set it aside*".
- 6.6.35 Since the scope of this investigation deals with the award of tender MLRF088, I will not deal with the new tender but will deal briefly with effects



of the cancellation of the tender. The information below is provided purely to inform the reader of the eventual outcome of the Smit Amandla's legal action, as it impacts on the management and maintenance of DAFF's fleet of research and fisheries patrol vessels.

6.6.36 SMSC withdrew its participation in tender MLRF 088. The CEO of Sekunjalo Investments Ltd wrote a letter to Ms Middleton dated 23 February 2012, confirming that it will not oppose the relief sought by Smit Amandla.

6.6.37 Thereafter DAFF revoked the award of the tender to SMSC.

6.7 The withdrawal of Smit Amandla's services and the transfer of operations to the SA Navy

6.7.1 Smit Amandla is the second Complainant in this matter. Smit Amandla wrote to me and later met with me in our Cape Town offices on 28 March 2012 where I was requested to intervene to stop Minister Joemat Pettersson from abruptly terminating its services on a one month notice instead of the three months' notice provided for in the contract that had since ended.

6.7.2 Smit Amandla's contract with DAFF had expired at the end of March 2012. It was required to hand all DAFF vessels over to the South African SA Navy (effective midnight) on 31 March 2012 on the understanding that the SA Navy would take over the research and fisheries patrol functions on behalf of DAFF, for 12 months, with effect from 01 April 2012 as per a Memorandum of Understanding entered into between DAFF and the Department of Defence on 30 March 2013.

6.7.3 Before the handover, Smit Amandla requested that I intervene and advise Minister Joemat Pettersson that this was impractical, that the haphazard transition would harm its own operations, its staff and a smooth handover to the new service provider. It further alleged that the SA Navy did not have the requisite capacity and that the longer (three months) handover period would provide an opportunity for a prudent assessment of SA Navy's readiness to perform the task in question.



- 6.7.4 My attempts to sway the Minister to withdraw her hasty notice to Smit Amandla and allow them the three months period were unfortunately unsuccessful. The Minister insisted that it was not necessary to do so as she had everything under control. She further emphasised that the issues I raised with her would be addressed by the SLA to be entered with the SA Navy. Had the Minister acceded to my request, subsequent problems with the SA Navy might have been averted.
- 6.8 The provision of services by the SA Navy and the alleged neglect of the fleet leading to unseaworthiness and rampant poaching at sea.
- 6.8.1 Media reports started circulating within months of the handover, alleging that the vessels handed over to the SA Navy were standing by and not performing the work they were meant to perform. Later, the allegations included deteriorating conditions of the vessels and rampant poaching of fish in the absence of comprehensive patrols. Extensive articles in this regard, regularly featured in the *Business Day* newspaper, among others.
- 6.8.2 In terms of clause 13 of the MoU, part of the SA Navy's responsibilities was that the role of the crew was to ensure that the Fisheries Protection Vessels are kept and maintained in a presentable manner at all times, assist in seamanship evolutions, provide support for the Fishery Control Officers when on the water i.e. assist if there is a mechanical defect with rubber ducks during a deployment.
- 6.8.3 DAFF however later alleged that the SA Navy had capacity challenges for the crewing and management of the DAFF's vessels and therefore hardly conducted any shipping management functions such as scientific surveys, anti- poaching patrols and inspections of fishing trawlers for illegal activities.
- 6.8.4 The alleged non-crewing and lack of manning the patrol vessels by the SA Navy would have led to the deterioration of their mechanical condition, which was also allegedly aggravated by the theft of some of the utensils and



decoders from the vessels which left them vandalised and in unseaworthy state. This was confirmed during interviews with DAFF officials with my team.

- 6.8.5 During their interviews, Messrs Nkosi and Tilayo of SAMSA informed the investigation team of the technical challenges involved when DAFF's vessels were taken over by SA Navy. The SA Navy required the vessels to be militarised. Also, SA Navy operates under different laws and protocols.
- 6.8.6 They, however, confirmed that SAMSA had certified the patrol vessels as seaworthy upon being handed over to the SA Navy by DAFF. Furthermore the vessels sailed to Simonstown bearing testimony to their seaworthiness.
- 6.8.7 According to SAMSA, the deterioration in the vessels' mechanical conditions would have been attributable to the non-operation thereof for long periods of time as the vessels' engines needed to be started and left to idle every morning to avoid filter blockages and rust from the effects of sea water.
- 6.8.8 This was also confirmed by other SAMSA officials, namely Messrs Ian Calvert, Nigel Campbell and Captain Grapouw who were also interviewed by the investigation team.
- 6.9.9 Three DAFF officials, Messrs Ceba Mtoba, Keith Govender and W Rooifontein informed my investigation team of DAFF's urgent need to source assistance for the conducting of ship management functions which led to a short -term contract between DAFF and the two companies, namely Nautic and Damen Shipyards which were contracted to assist with the repairs, restoration and refurbishment of the patrol vessels to make them seaworthy again.
- 6.9.10 The investigation team was informed and assured that two of the patrol vessels were currently out at sea conducting the shipping management functions while awaiting the finalisation of the award of the tender by DAFF.

This occurred after they were repaired, restored and refurbished by Damen Shipyards.

- 6.10 Information obtained during the interviews of the BEC members, DAFF employees and SAMSA officials.
- 6.10.1 During an interview with my investigation team, Ms Liezel Tsegarie stated that she was just the secretariat and that she therefore did not participate in the deliberations nor was she a scoring member of the BEC.
- 6.10.2 Ms Vanessa Damonse also informed the team that she was just assisting with administrative work such as tallying of the scoring sheets and therefore did not participate in any specialist role in the BEC.
- 6.10.3 Mr Keith Govender informed the team that his role was in the drawing up of the bid specifications as a member of the Bid Specifications Committee and that he never played any part at all in the BEC and that he was therefore unable to assist the team other than to say that the bid specifications were very clear and unambiguous.
- 6.10.4 The investigation team learned from Ms Sue Middleton that the bids were received in a meeting, and that they had to go through each bidder's pack just prior to the deliberations and presentations. According to her, deliberations were quite challenging because of the weak, generic and vague specifications and also non-compliance by some of the bidding companies, thus making the BEC members' work difficult.
- 6.10.5 Dr Augustyn informed the investigation team that he was asked to be a member of the BEC just 20 minutes before the deliberations, commenced as he had to replace Mr Fikizolo as the technical expert. According to him they were given the packs just before the meeting and therefore had no chance to read through the voluminous documents. This limited his participation and hindered his full and informed contribution in the evaluation process.



- 6.10.6 Dr Augustyn's view which he never expressed during the deliberations is that the bid should have been cancelled and new bids called for just upon the realisation that the bidding companies did not meet the 80% minimum functionality requirement.
- 6.10.7 Ms Abigail Booth informed the investigation team that she was not directly involved in the evaluation process, but had been asked by Mr Tikayo to take the minutes of the presentations, and therefore did not take part in the scoring of the bids evaluations and presentations.
- 6.10.8 Mr Saasa Pheeha informed the investigation team that he was appointed by the Director General of DAFF in 2009 and that his role in the BEC was merely asked as a replacement of someone who had not availed himself. Mr Pheeha informed the team that he sat in both sittings of the BEC on 26 May 2011 and 19 July 2011. He stated that the bid should have been cancelled during the first presentations when the bidding companies did not 80% minimum functionality requirement.
- 6.10.9 The investigation team established from Mr Wickness Rooifontein who was the financial expert in the BEC that they had deliberated upon all the challenges before them including the question of perceived collusive trading by the four (4) bidders under one company. But that this was never interpreted as such because the companies had stated their relationship in advance to the BEC.
- 6.10.10 Mr Siyabonga Tikayo informed my investigation team that his role as the SCM Head was that of a financial expert, but that he was a non-scoring member of the BEC.
- 6.10.11 Mr Joseph Sebola informed the team that his scoring was solely based on his assessment of the oral presentations made by SMSC and Smit Amandla, respectively.

- 6.10.12 According to Mr Sebola, Smit Amandla's bid was good on paper but they had performed poorly in the oral presentation which was surpassed by the presentation made by SMSC.
- 6.10.13 Mr Peter Thabethe also echoed Mr Sebola's sentiment that Smit Amandla's presentation was not convincing that they could do the work.
- 6.10.14 However, Mr Thabethe could not elaborate further to the team when asked whether his lack of technical expertise may have influenced his understanding of Smit Amandla's presentation thereby resulting in him scoring them very low compared to SMSC.
- 6.11 Submission by SMSC
- 6.11.1 The investigation team met with Edward Nathan and Sonnenbergs (ENS) Attorneys representing SMSC.
- 6.11.2 The consultation was followed by a statement from the CEO of Sekunjalo, Mr Abdulla. In his statement, Mr Abdulla dealt with:
- 6.11.2.1 The perceived lack of experience and expertise of the Sekunjalo Consortium;
- 6.11.2.2 The apparent conflict of interest between the SMSC and the research and patrol functions of DAFF fleet; and
- 6.11.2.3 The alleged collusive tender between the four Sekunjalo bids.
- 6.11.3 Regarding the issue of perceived lack of experience and expertise by the Sekunjalo Consortium, the submission was that Sekunjalo Group housed the necessary skill, experience and expertise for the SMSC to have discharged its obligations under the tender.



- 6.11.4 Regarding the perception of conflict of interest, the submission was that it was based on a fundamental misconception of the role played by the main participants in the fishing industry in South Africa. It was further submitted that the role of the fishing vessels is to provide the crew to sea to do the sample fishing which is used to determine the biomass of fish caught at sea.
- 6.11.5 The data from the sample fishing is analysed on shore by scientist from the University of Cape Town and the University of Stellenbosch, and by a consultant firm called Olfish which is retained by the fishing industry. The determination of the biomass of a particular species is influenced by many factors, and none of these is determined or influenced by the crew of the research vessels.
- 6.11.6 SMSC further contents that it is ludicrous to suggest that by having a presence on the research vessels, the SMSC somehow derived a competitive advantage or gained an advance insight into the result of the research and through that, advanced knowledge of the Total Allowable Catch (TAC) quota.
- 6.11.7 Regarding the issue of collusive tendering, the submission was that the bids as submitted by the Sekunjalo Group did not constitute collusive tendering. It contended that collusive tendering occurs when two or more parties that are in a competitive relationship agree, instead of submitting independent bids, to tender in such a manner that competition between them for that tender is eliminated. The outcome of collusive tendering is that the customer pays an artificially high price. A tender process, by its very design, fosters competitive interactions between bidders with the aim to achieve competitive outcomes. In order to conceal that there is no true competitive interaction between bidders, collusive tendering occurs in a clandestine manner.
- 6.11.8 It was further submitted that section 4(5) of the Competition Act provides that section 4(1) does not apply to constituent firms within a single economic



entity, such as a company, its wholly owned subsidiary, or any combination of them, as it is the case in the present instance.

- 6.11.9 To demonstrate their assertion further, it was submitted that unlike the covert nature of tender collusion, in the present instance the relationships and common ownership structures pertaining to the four bids were never disguised or concealed in any way.
- 6.11.10 In addition, it was submitted that it is further important to note that the intention behind the provisions of section 4(1) is to prohibit anti-competitive practices and not to curb healthy practices which foster the development of competitive offerings through the provision to the consumer of various options or solutions available to it as had been done in the present instance.
- 6.12 I also consulted with various maritime experts.
- 6.12.1 The vessels voyage schedules and patrol destination is set by DAFF and circulated to the Ship Manager 12 to 24 hours prior to sailing.
- 6.12.2 On board the patrol vessels the crew including the engineers and the Ship Master are employed by the Ship Management Company (viz Ship Manager)
- 6.12.3 In conducting the patrol vessels, both the Ship Manager and the DAFF officials, are involved.
- 6.12.4 With regards to research vessels, DAFF will provide scientists who will conduct the surveys. Some of the tests are conducted on board while with some, the scientists will obtain samples for further testing off-shore.
- 6.12.5 The scientific surveys conducted are necessary to determine the TAC which will then also determine the quotas allocated to fishing companies.
- 6.12.6 A number of safeguards are put in place by DAFF to prevent the Ship Manager to influence or report on when and what area is targeted by the



FCO's. This includes for instance the practice that all cellphones are removed from the Ship Managers' offices and the crew before departure.

## **6.12. Responses to the Provisional Report of the Public Protector issued on 7 October 2013.**

6.12.1 A Provisional Report was issued on 7 October 2013 and distributed to the Complainants, other relevant parties involved, including the Minister of Agriculture, Forestry and Fisheries, Honourable Minister Tina Joemat-Pettersson.

6.12.2 The Provisional Report was distributed on the basis of confidentiality to provide the recipients with an opportunity to respond to its contents.

6.12.3 All the parties' attention was specifically directed to the provisions of section 7 (9) (a) of the Public Protector Act which provides that:

*"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 afford such person an opportunity to respond in connection therewith in any manner that may be expedient under the circumstances.**" (Emphasis added)*

6.12.4 Subsequent to issuing the Provisional Report, the Public Protector received correspondence from Minister Tina Joemat-Pettersson dated 20 October 2013 with a request for an extension to give her response to the Public Protector.

6.12.5 The Public Protector considered the Minister's request for an extension and acceded to it with a return date of 21 November 2013.





6.12.6 Honourable Minister Joemat-Pettersson's response was received on 21 November as had been agreed upon with the Public Protector.

6.12.7 The Minister's response to the Provisional Report was put together to include the following issues:

#### PRELIMINARY ISSUES

6.13.7.1. The alleged interference with the investigation; and

6.13.7.2. The inappropriate title;

#### THE ISSUES UNDER INVESTIGATION

6.14.7.3. The alleged irregular award of the R800 million tender to SMSC;

6.14.7.4. The score 5/5 score awarded to SMSC by Mr Sebola;

6.14.7.5. SMSC's alleged conflict of interest;

6.14.7.6. The alleged collusive tendering by 4 entities in the Sekunjalo group;

6.14.7.7. The Department's alleged failure to re-advertise the tender timeously or at all;

6.14.7.8. The termination of Smit Amandla's services and the Department's alleged failure to implement a 3 month handover period;

6.14.7.9. My rejection of the request to defer the handover and whether this resulted in a lack of patrols and deterioration of patrol vessels resulting in unnecessary refurbishment costs; and

6.14.7.10. The alleged award of a contract to an entity that had been part of SMSC to repair the patrol vessels.

6.15.1. In connection with preliminary issues, the Minister commented about her earlier letter to the Minister of Justice and Constitutional Development which I had pointed out that it amounted to interference with my investigation and



was also a violation of section 181(4) of the Constitution, the Executive Members Ethics Act and section 11(1) of the Public Protector Act.

- 6.15.2. In her response, the Minister commented that she had all along co-operated with my investigation since its commencement and that her concern had primarily been rather about a duplication of investigations by the National Prosecuting Authority and my office.
- 6.15.3 The Minister further stated that she had no intention of interfering with my investigation as her department shared the same objective as my office in rooting out irregular activities and ensuring that public funds are well-spent and not wasted.
- 6.15.4 The Minister also alluded to the involvement of SAPS (Commercial Crime Unit) in the investigation of procurement processes in the Fisheries Branch for the period 1999 to 2012 which included the Smit Pentow Marine contract and its various extensions as well as the award to SMSC.
- 6.15.5 In the end, the Minister requested that I should withdraw all allegations concerning the alleged interference from the report, because despite respecting my views, she noted that there was no finding following a fair and lawful process that she had contravened any or code of ethics.
- 6.15.6 She also argued that the title of my report was inappropriate as it demonstrated prejudice in the mind of the author and appeared to similarly introduce prejudice to the reader's mind.
- 6.15.8 The Minister further dealt with the eight (8) issues under investigation, starting off with the first four issues listed in paragraphs 17.1 to 17.4 of my Provisional Report.
- 6.15.9 The Minister intimated that in terms of the PFMA, the Director General of the Department is responsible for procurement and that she was never, nor does



she ever intend to involve herself with the actual procurement processes of the Department.

- 6.15.10. She however, conceded that the process followed in awarding the tender to SMSC was flawed, as a result of which DAFF withdrew the tender.
- 6.15.11 In connection with tender procedural irregularities, the Minister further indicated that it had been established that the previous procurement processes and systems in respect of the maintenance and manning of the vessels in the Fisheries Branch (with Smit Pentow Marine) had also to be investigated by the Hawks and Asset Forfeiture Unit. The outcome of these investigations is awaited and if found that an official or role-player acted in a corrupt manner, improperly or had failed to comply with the SCM system, the department will take the necessary disciplinary and other steps against such officials or role-player.
- 6.15.12 As far as the scoring is concerned; the Minister commented that the Department conceded that some members of the BEC had no appreciative previous exposure to the kinds of issues that had to be considered which made the subjective approach to the evaluation indefensible at the level of rationality.
- 6.15.13 In the Department's own assessment, the process followed by the BAC had also raised concerns as nothing done by the BAC corrected the errors of the BEC.
- 6.15.14 In connection with potential conflict of interest, the Minister indicated that this was discussed at great length by the BEC and BAC, and according to the Department, the possibility of a conflict was not such as to automatically disqualify entities within the Sekunjalo group from participating in the bid process nor did it preclude an award to SMSC. The Department was also advised by Senior Counsel that there was no reviewable irregularity in relation to this issue.



- 6.15.15 With regard to the allegation of collusive tendering, she submitted that she had been advised that no bid-rigging took place as the BEC and BAC had to make a careful scrutiny of the bids before them to prevent any inadequacies.
- 6.15.16 The Minister proceeded to deal with the alleged harm associated with the handover, specifically the requisite notice given. She responded to my reference to a three-month handover period as per paragraph 7.6.1. of my provisional report which states that " it was indeed found that the contract between Smit Amandla and DAFF provided for a three month handover period".
- 6.15.17 On the issue of the handover, she argued that there was no contractual obligation as the original agreement which contained such a clause had lapsed. Beyond the legal argument, she failed to address me on how her new process had accommodated the original vision behind the agreement to enable a seamless handover.
- 6.15.18 The Minister submitted that she had relied on the advice of the Accounting Officer, and that she had no reason to question such decision, given the assurances by the SA Navy.
- 6.15.19 The Minister conceded that while there were some difficulties with SA Navy, she maintained that the important surveys were carried with DAFF vessels. She argued that all critical surveys related to the setting of Total Allowable Catches (TAC's) and Total Allowable Effort (TAE's) were successfully completed.
- 6.15.20 She further argued that the patrols that were conducted satisfied the Marine Stewardship Council which certifies the Hake Deep Sea Trawling Fisheries.

- 6.15.21 She also conceded that the condition of the vessels had deteriorated. However she denied the link between her abrupt handover and proceeded to blame the deterioration on the SA Navy.
- 6.15.22 She also contended that it was unfair to accuse her Department and herself for not re-advertising, because when the tender had been re-advertised and the bid process begun, I requested them to postpone the process pending the finalisation of my investigation.
- 6.16.1 Response of the South African Navy (SA Navy) re: the handover process and the state of the vessels prior and post-handover process.**
- 6.16.1.1 A response to the Provisional Report was received from the SA Navy on 17 October 2013. The SA Navy specifically challenged the scope of the Public Protector's investigation relating to the involvement of SA Navy in terms of the DAFF vessels.
- 6.16.1.2 The SA Navy further stated that the Public Protector never interacted with them during the investigation concerning the handover process. The Chief of the SA Navy, Vice-Admiral J. Mudimu stated in this regard that the above impression could have been created as the investigation at no stage checked with the SAN on the DAFF statements/allegations referring to SA Navy operation. The Public Protector did telephonically request an interview with the Chief of the Navy or representatives. However, the Public Protector was referred to liaise via the Minister of Defence and Military Veterans in order to follow the established command lines within the Department of Defence.
- 6.16.1.3 Vice-Admiral Mudimu further stated that the vessels were already in an unseaworthy state when they were handed over to DAFF. He also added that SAMSA withdrew their seaworthiness certificate before the handover process was completed.



- 6.16.1.4 However, the vessels were eventually handed over from DAFF to SA Navy on 31 March 2012. SA Navy stated that with limited time in which the service provider allowed their staff to handover these vessels, no adequate or meaningful handover could be achieved. They submitted that in many cases no documentation on the status of equipment was handed over. Many defects were not disclosed by the previous service provider and were only discovered once the machinery was started. Various defects were discovered on all DAFF vessels, which ranged from the mundane to very serious threat to safety. In fact, the state of disrepair on some of these vessels was so severe that some of the equipment were condemned and had to be replaced in total.
- 6.16.1.5. SA Navy provided evidence in support of Vice-Admiral Mudimu's submission through one of the Report on Status of DAFF Vessels dated 21 February 2013. The Information Brief on the Status of DAFF vessels indicated a number of defects on the vessels, such as the malfunctioning of cathodic protection on SAS RUTH FIRST, the Fire Alarm System on-board the SAS HELEN KHUZWAYO and the Main Engine Monitoring System on-board the SAS SARAH BAARTMAN.
- 6.16.1.6 The report, on SAS ELLEN KHUZWAYO stated that she was handed to the SA Navy on 14 May 2012 as she had been on a charter contract to a third party. The vessel was scheduled to dock for her annual maintenance period and 5 years Lloyds Class Surveys from 04 December 2012. The annual leave period of contractors and suppliers caused a further delay in repairing the defects.
- 6.16.1.7 On SAS SARAH BAARTMAN the Report stated that due to the amount of defects that existed on the vessel upon handover meant that she was unable to sail. The biggest challenge, according to the Report, was the overhauling of her underwater valves that formed part of the Lloyds Class Surveys.



- 6.16.1.8 On SAS LILLIAN NGOYI, the Report revealed that the vessel had to overhaul her two main engines as part of the 9 000 hour service.
- 6.16.1.9 The SA Navy Report indicated that only three of DAFF fleet went to sea, namely; SAS AFRICANA (first sailing on April 2012), SAS VICTORIA MXENGE (September 2012), and SA RUTH FIRST (first sailing on October 2012).
- 6.16.1.10 It was further stated in the Status Report that none of the vessels were handed over with maintenance schedules. This led to the difficulty in equating DAFF systems and equipment to existing SA Navy maintenance schedules.
- 6.16.1.11 On 18 November 2013, a meeting was held between the Public Protector's investigation team and the SA Navy officials to get clarification and further documentation in support of their written response to the Provisional Report.
- 6.16.1.12 SA Navy officials stated that the handover process by DAFF was not a smooth and efficient one due to a variety of factors including, among other things, the disgruntled and hostile staff of Smit Amandla, less involvement and facilitation of the process by DAFF, the lack of a technically qualified person from DAFF, and the absence of DAFF officials on board the ships during the handover process.
- 6.16.1.13 According to them, these factors hampered the smooth handover of the vessels to SA Navy. It was also stated that during the handover process, DAFF did not provide SA Navy with the necessary Logistics Support Documents, detailing the previous routine maintenance or service history, upkeep schedules and service plan of the ships. Smit Amandla when approached could also not provide same. The poor mechanical conditions of some vessels meant that they could not sail immediately. For instance,

a broken anchor cable which needed replacement, a sewerage system which had been by-passed etc.

- 6.16.1.14 The SA Navy officials further stated that SAMSA's withdrawal of the Seaworthy Certificates of the vessels, meant that the vessels then had to be certified and operated under the Defence Act. Therefore the standards and requirements on the ships had to be adjusted to meet those of the Defence Act. The officials indicated that the standard of SA Navy vessels in terms of equipment and crew is higher than the ordinary standards on the merchant commercial vessels.
- 6.16.1.15 The investigation team was further informed that there were serious defects on some of the vessels. For instance, Sara Baartman had a flat battery and this affected the ship's computer memory resulting in an engine malfunction. A mechanic had to be called from Europe to come and fix the battery memory of the ship.
- 6.16.1.16 The SA Navy then had to commission a survey to be conducted by Lloyds Class Surveys on the vessels. The Survey revealed numerous defects due to lack of regular maintenance of all the ships.
- 6.16.1.17 The SA Navy then contracted a company called Damen Shipyards to repair the vessels as quickly as possible in order to put them to sea, and the costs thereof had to be borne by the SA Navy for which they were eventually refunded for by DAFF.
- 6.16.1.18 The SA Navy also disputed the assertion by DAFF that the SA Navy had capacity challenges, but instead blamed the vessels' capacity which according to them, was small to carry all their personnel. However, they stated that whenever they felt stretched they called in some reserves to assist.





6.16.1.19 In conclusion, the SA Navy refuted the allegations that they were responsible for the deterioration and vandalism of the vessels. They even provided the investigation team with supporting documentation to confirm their role in the manning, management and maintenance of the vessels during the 12 month period of their contract with DAFF.

#### **6.16.2 The response of Dr Joseph Sebola**

6.16.2.1 Dr Joseph Sebola who was a member of the BEC, whose scoring of the two companies, SMSC and Smit Amandla was dubbed inconsistent and irrational, commented on the Provisional Report on 17 October 2013.

6.16.2.2 Dr Sebola indicated that the report referred critically and unfairly to his scoring despite having made an appearance before the investigation team where he felt that he had explained the rationale for his scoring.

6.12.2.3 Dr Sebola remained adamant that should he be faced with the same situation again, he would not hesitate to do the same thing again as a matter of principle not a favour.

#### **6.16.3. The Response of Mr Jacob Hlatshwayo**

6.16.3.1 Mr Hlatshwayo the CFO of DAFF who was the Chairperson of the Bid Adjudication Committee, responded to the Provisional Report on 21 October 2013 by indicating that the he had consulted with the Director General of DAFF and that the Department would respond to the content of the report on behalf of its officials.

#### **6.16.4. The Response of Mr Keith Brown, the Chief Procurement Office, National Treasury**

6.16.4.1 Mr Brown acknowledged the contents of the report especially the remedial action to be taken by the DG of National Treasury and advised that there



are no statutory and regulatory requirements relating to supply chain management which empowers the Director General of National Treasury to approve tenders on behalf of other Accounting Officers.

6.16.4.3 He undertook to assist the Accounting Officer of DAFF, in his capacity as the Chief Procurement Officer in National Treasury, by reviewing each stage of the bidding process to ensure that SCM and regulatory requirements are complied with before the bid is awarded.

#### **6.16.5. The Response of Mr Van Dalen**

6.16.5.1 Mr Van Dalen, one of the Complainants responded to the Provisional Report on 18 October 2013 through the signature of his attorneys, Advocate Shareen Moolla. In general, the response was in agreement with the contents even though questioning a few intended findings in the Provisional Report, and thanked the Public Protector for a job well done.

6.16.5.2. Mr Van Dalen pointed out the negative impact the whole matter had on the country's ecological security as a result of the halting and/or delay to award the research and fisheries patrol vessels contract by DAFF.

6.16.5.3. Mr Van Dalen proposed several changes to the Provisional Report relating to the findings as well as remedial action, and he went as far as tabulating what in his view, needed to be added to the Final Report of the Public Protector.

6.16.5.4. Mr Van Dalen proposed a couple of suggestions regarding remedial action.

6.16.5.5. Mr Van Dalen further suggested additions to the Public Protector's findings and remedial action in connection with collusive practice and bid rigging involving Premier Fishing, Premier Fishing Consortium and Sekunjalo Ltd. For instance that the Competition Commission and

National Treasury should be informed of the findings of collusion and that the said companies be restricted from doing business with the public sector for a period not exceeding ten (10) years in terms of the Prevention and Combating of Corrupt Activities Act No 12 of 2004.

**6.16.6. The Response of Mr Paul Maclons**

6.16.6.1 Mr Maclons one of the Complainants, and the Managing Director of Smit Amandla responded to the Provisional Report on 21 October 2013.

6.16.6.2 Mr Maclons pointed out a few specific corrections which needed to be effected in certain paragraphs of Provisional Report for example, the fact that the Agreement with DAFF would be terminated upon the expiration of a period of two months from the date upon which a notice was given, and yet the terms of DAFF MLRF 088 tender required a 3 months handover period between outgoing and incoming ship managers.

6.16.6.3 The response further commented about Smit Amandla's challenge to DAFF about the anomalies in the bidding process leading to the award of the tender to Sekunjalo, including Smit Amandla having to file their application in court requesting that the awarded tender should be cancelled.

**6.16.7. The Response from Sekunjalo Marine Services Consortium (SMSC)**

6.16.7.1 SMSC responded to the Provisional Report on October 2013 under the signature of their attorneys, Messrs Edward Nathan Sonnenbergs (ENS), requesting to be provided with several documents in order to enable them to make an informed response to the report and the Public Protector acceded to their request on 28 October 2013.

6.16.7.2 SMSC thereafter responded to the Provisional Report on 8 November 2013 again under the signature of their attorneys, ENS raising a number



of concerns in connection with the investigation in general, as well as specific findings made by the Public Protector.

- 6.16.7.3 ENS raised 5 issues viz. missing evidence; the finding of conflict of interest; the finding of collusive tendering; the reasons for the delay in the completion of the report; and the missing par.11.2 in the Provisional Report.
- 6.16.7.4 ENS complained about my refusal to provide them with the evidence submitted to her by the Complainants, Messrs Van Dalen and Maclons, respectively which in their view deprived their clients of an opportunity to deal with and respond to the evidence provided by the Complainants to the Public Protector.
- 6.16.7.5 In connection with the finding of conflict of interest, ENS argued that their clients would not gain any unfair advantage from the management of the patrol vessels, nor would they gain any competitive advantage from the management of the supply vessels as there were adequate safeguards in place to prevent the Ship Manager from being able to influence or report on where and what area is being targeted by the FCO's. ENS indicated that there were no fixed routes or times nor are they readily able to dispatch information to fishing vessels forewarning them of FCO inspections.
- 6.16.7.6 With regard to the adverse finding of conflict of interest against SMSC, ENS was therefore adamant that there was no basis for such a finding and that it should be excised from the Provisional Report.
- 6.16.7.7 According to ENS the factual basis and the legal premise on which the adverse finding of collusive tendering was based is wrong because the relationships and common ownership structures pertaining to the four bids were never disguised or concealed in any way, as they were pertinently disclosed unlike in the covert nature of tender collusion.



- 6.16.7.8 In their view, the actions of the parties in the above-mentioned scenario does not resemble the conduct contemplated in section 4(1)(b)(iii) of the Competition Act which was specifically intended to outlaw agreements between competitors not to compete.
- 6.16.7.9 ENS insisted on being provided with evidence which shows that the same directors presented all four bids.
- 6.16.7.10 ENS complained about the amount of time afforded to them to participate in the investigation and what it perceived as an insinuation that they had caused a delay in the finalisation of the investigation.

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

### **7.1 Was DAFF's irregular award of the R800 million tender for the crewing, management and maintenance of the research and fisheries patrol services, an act of maladministration?**

- 7.1.1 It is common cause that the R800 million tender (MLRF 088) was awarded to SMSC by DAFF on November 2011. However, it was later withdrawn after the filing of a court challenge by one of the unsuccessful bidding companies, Smit Amandla which had caused DAFF to seek legal advice prior to reviewing its decision. It is also common cause that the tender was irregularly awarded.
- 7.1.2 DAFF admitted that the procedure and processes followed in the awarding the contract initially was flawed.
- 7.1.3 I have established that SMSC withdrew its participation in the tender; the CEO of Sekunjalo Investments Ltd wrote a letter to DAFF on 23 February 2012 confirming that it will not oppose the relief sought by Smit Amandla. Thereafter DAFF revoked the award of the tender to SMSC.



7.1.4 I also consider the following factors as important in determining the regularity or otherwise of the tender:

7.1.4.1 The role of Mr Sebola;

7.1.4.2 The allegations of lack of appropriate experience and conflict of interest on the part of SMSC; and

7.1.4.3 Alleged collusive behaviour by Sekunjalo.

7.1.5 Since DAFF has not disputed the facts I consider it unnecessary to make an issue of the facts. What is clear from the facts is that procedures as stipulated in Treasury Guides and own internal prescripts were not fully followed. But of real importance is the miraculous rise of SMSC from trailing Smit Amandla to leading that pack. This is compounded by scores changing from high to low for Smit Amandla and low to high for SMSC.

7.1.6 On the facts before me, it is difficult to understand how a company with a track record in the fishing industry but none in the specific field that is the subject of the tender, no employees in many of the requisite performance areas and a bidder that left many key questions on the bid document unanswered, scored 80 on functionality and let alone how it ended up being the only company passing the functionality threshold.

7.1.7 DAFF has not disputed that the scoring was arbitrary in the absence of scoring guidelines for the committees and that the changes in the second round of scoring which saw SMSC not only supersede the two companies that had scored higher than it in the first round but also becoming the only company considered to pass the functionality threshold of 80 points.

**7.2. Did Mr Joseph Sebola irregularly score SMSC 5/5 which did not have the relevant experience while scoring Smit Amandla 1/5 which had (10) years' of experience in conducting the exact service in question and did his involvement in two aspects of the bid process constitute a conflict of interest?**



- 7.2.1 Evidence in the form of bid documents shows that the BEC's scoring of the bid submissions differed dramatically from the first to the second evaluations. This is particularly the case with Mr Thabethe and Mr Sebola whose scoring of Smit Amandla decreased dramatically in the second round.
- 7.2.2 During the interview with the BEC members it was also established that when the score sheets by the various BEC members were reviewed, Mr Sebola in particular, had scored Smit Amandla lowest (1/5 despite its significant experience in the field), and yet he had scored SMSC with no proven experience in the business, the highest consistent score 5/5.
- 7.2.3 There was no motivation or substantiation for such inconsistent scoring by Mr Sebola and during an interview he could not explain why he disregarded Smit Amandla's experience.
- 7.2.3.1 When asked to explain the scoring of Mr Sebola, SMSC responded by indicating that they cannot explain the scoring and further that they did not know him or had any kind of ties with him.
- 7.2.4 There was also an allegation of conflict of interest in that Mr Joseph Sebola (the Acting Deputy Director General: Fisheries Management Branch) signed off on the approval of the BSC and also sat on the BEC. The Complainant stated that *"he cannot be both a player and a referee"*.
- 7.2.5 Mr Sebola supported the appointment of the BSC by the DG (Mr Langa Zitha). On 26 May 2011, Mr Sebola was appointed as a scoring member of the BEC. He accordingly did play two roles. The legal implication of his role is discussed in 9 below.
- 7.3 Did the award of the patrol vessels tender to SMSC by DAFF in spite of the fact that Premier Fishing (a subsidiary of the Sekunjalo group) has fishing rights accorded SMSC the role of referee and player and if so did this create a conflict of interest for SMSC?**



- 7.3.1 The awarding of the tender to a consortium(SMSC) where another company in the group (Premier Fishing) has fishing rights raised serious concerns as they were likely to have insider knowledge of where and when the vessels are going and when it will be out of service.
- 7.3.2 The research and patrol vessels (of which the management was the subject of tender in question) are essential for DAFF's functions under the Marine Living Resources Act 18 of 1998 (MLRA) and would be managed by SMSC. Research vessels are used to gather information upon which the TAC is based. Patrol vessels are used to convey Fisheries Control Officers (FCO's) to fishing grounds to enforce provisions of the MLRA and to combat poaching.
- 7.3.3 The available evidence indicates that the question whether there was a conflict of interest was discussed by both the BEC and BAC. Both committees recognised that there is a possibility of conflict of interests. The view by both committees was that this possibility did not automatically disqualify the SMSC Group from participating in the bid process or to preclude an award to SMSC.
- 7.3.4 The SMSC Group made it clear that there were different components/entities operating entirely separately from one another, therefore DAFF should not view the management of the patrol vessels as a risk.
- 7.3.5 According to the opinion of Adv Duminy SC, the technical specialists provided reasons why the potential conflict of interest should not preclude DAFF from appointing a member of the Sekunjalo Group:
- 7.3.5.1 Mr Fikizolo informed Adv Duminy SC that they assume that the current safeguards in place are adequate to prevent the Ship Manager from being able to influence or report on where, when and what area is being targeted by the FCO's. There are no fixed routes or times nor are they readily able to despatch information to fishing vessels forewarning them of FCO inspections;



- 7.3.5.2 According to Dr Augustyn, a ship manager with a commercial interest in the fishing industry would not be precluded from operating the research vessels and any information that they might become privy to would not give them any competitive advantage in the fishing industry or in relation to the TAC. The data gathered by DAFF from various sources is processed through complex mathematical models and operational management procedures in the recommendation of TACs. In some sectors the vessels of rights-holders are used to conduct the necessary research. Industry information in the form of catch returns also forms an important element of the data on which the TAC recommendations are made.
- 7.3.5.3 According to SMSC, the role of the crew of the research vessels is restricted to the tasks set out in the 'scope of work/technical specifications'. This entails assisting in doing sample fishing which will be used by the scientists to determine the biomass of the fish caught which together with information captured by commercial vessels will be used to determine the TAC.
- 7.3.5.4 According to the Senior Counsel's legal opinion, in essence the role of the crew is to assist DAFF officials as well as the scientist to retrieve the data required to determine the TAC. The analysis of the work carried out by the crew suggest that the crew manning the research vessels would derive an advantage or gain inside knowledge which can then be used in their favour in their fishing company.
- 7.3.6 The following still remains as a concern, despite the views of Mr Fikizolo, Dr Augustyn and the assurances provided by the Sekunjalo Group re: setting up Chinese walls:

- 7.3.6.1 The CV's of the same employees who work for Premier Fishing (who has the fishing rights), were submitted with SMSC's bid pack as part of Sekunjalo's staff complement and specialists;
- 7.3.6.2 When SMSC had to provide proof of insurance and safety policies, they provided those of Premier Fishing to DAFF.
- 7.3.7 Just on a review of the bid submissions, it seemed as if SMSC could not at the time of bid submission have operated as a service provider separate from Premier Fishing. This places a question mark over the Sekunjalo Group's practical ability to implement and maintain Chinese walls sufficiently strong to prevent any conflict of interest.
- 7.3.8 SMSC did indicate in their bid submission and apparently during the presentations that they would appoint Smit Amandla employees in key positions if they were awarded the tender. There was at the time of the award, however, no guarantee that SMSC would be able to secure the services of such individuals.
- 7.3.9 These issues were apparently not considered by the BEC or the BAC to be concerning enough to question the award of the tender to SMSC based on a potential conflict of interest, despite the assurance they gave during their presentation(s).
- 7.3.10 From the technical experts, it is clear that the Ship Management company's role in both the patrol and research vessels would create a potential conflict of interest. The Ship Manager would derive an advantage or gain insider knowledge which can be used in favour of their fishing company. For instance the Ship Manager would be privy to the information regarding where and when the patrol vessels will be.
- 7.3.11 The patrol vessels are the fishing industry's first line of defence. In an industry that is already compromised and riddled with corruption with regard



to overfishing, it becomes crucial to have clear and sufficient distance between the Ship Manager and the fishing companies.

**7.4 Did the submission of four (4) tenders on the same bid by the entities (Premier Fishing, Premier Fishing Consortium, Sekunjalo Ltd and SMSC) which fall under Sekunjalo Group constitute collusive tendering?**

7.4.1 The available evidence indicates that out of the eight bids considered, four (4) were submitted by related entities, being:

7.4.1.1 Sekunjalo Ltd;

7.4.1.2 Sekunjalo Ltd in consortium with Nkiruka Investments and KND (SMSC);

7.4.1.3 Premier Fishing SA (Pty) Ltd; and

7.4.1.4 Premier Fishing SA (Pty) Ltd Consortium (in association with KND).

7.4.2 Premier Fishing, Premier Fishing Consortium, Sekunjalo Ltd and Sekunjalo Consortium have the same parent company known as Sekunjalo Investment Limited.

**The inter-relationship was disclosed to DAFF**

7.4.3 The relationship between the four (4) entities was not hidden - the evidence indicates that on 19 July 2011 during the bid presentations, the Sekunjalo Group openly stated their involvement in all four bids. Since the inter-relationships between the four related parties were openly declared to the BEC, so there could be no suggestion that the parties secretly conspired with one another.

7.4.4 This was also disclosed to the BAC - on 1 August 2011 during the BAC meeting Mr Tikayo informed the BAC that four separate bidders sorted under



the same umbrella company, and he mentioned "Sekunjalo Ltd, SMSC, Premier Fishing and Premier Fishing Consortium".

#### SNG due diligence results regarding the related entities

- 7.4.5 The SNG due diligence process found that only one of the members of the SMSC provided proof of its claims to black ownership - for the rest of the members no proof was provided. This was apparently not questioned by the BEC.
- 7.4.6 After doing company searches and analysing the relationship between the role players (related entities) SNG summarised that DAFF ran a risk of not being able to hold any specific entity liable for wrong-doing if there is not a clear understanding of which entities they have engaged with.
- 7.4.7 The due diligence exercise by SNG has clear findings to the effect that SMSC would be relying on some of the related entities to enable it to deliver services to DAFF under tender MLRF 088.

#### Smit Amandla's allegations

- 7.4.8 On 4 November 2011, Smit Amandla wrote to the DG (Mr Zita) in respect of tender number MLRF 088, questioning the award of the tender to SMSC and alleging that there was collusive tendering in that at least four (4) of the six (6) bidders were 'connected' parties (referring to Premier Fishing (Pty) Ltd, Premier Fishing Consortium, Sekunjalo Ltd and SMSC).
- 7.4.9 Smit Amandla mentioned that the Sekunjalo website state that Premier Fishing is wholly owned by Sekunjalo (except for a 16% shareholding by the Premier Fishing Share Trust), and the companies share common directors.

- 7.4.10 They also mentioned that even though the different bidders were not entitled to be present during one another's bid presentations, it was apparent from the presentation process that a core team of presenters remained throughout all four of the presentations for the above four (4) entities.
- 7.4.11 To Smit Amandla, this created a reasonable suspicion that there may have been consultation, communication and arrangement amongst the four (4) entities listed above since they all tendered for the same contract and they all sat in on one another's presentations - this is forbidden by the Certificate of Independent Bid Determination (SBD9) which all the parties had to sign.
- 7.4.12 Smit Amandla further contended that this is also in contravention of the Constitution (in that the tender process was not fair, equitable, transparent, competitive and cost effective), the PFMA, National Treasury Regulations and may constitute a prohibitive practice in terms of the Competition Act.
- 7.4.13 Smit Amandla suggested to DAFF to investigate the tender award in light of the above complaint, if it did not wish the tender process to be challenged.

#### Bid rigging or collusive bidding

- 7.4.14 Bid rigging (or collusive bidding) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods and / or services for purchasers who wish to acquire goods and/or services through a bidding process. Bid rigging is thus an agreement between competitors not to compete.
- 7.4.15 Since the relationship between the related bidders was disclosed, it cannot be said to have amounted to 'secretly conspiring'.



7.4.16 However, the information contained in the SMSC submission raises the questions whether the four related parties complied with the conditions of SBD9.

7.4.17 The Certificate of Independent Bid Determination (SBD9) serves as a certificate of declaration that is used by institutions to ensure that when bids are considered reasonable steps are taken to prevent any form of bid rigging.

7.4.18 SBD9 states/requires *inter alia* that:

"5. For the purposes of this Certificate and the accompanying bid, I understand that the word "competitor" shall include any individual or organization, other than the bidder, whether or not affiliated with the bidder, who:

- (a) has been requested to submit a bid in response to this bid invitation;
- (b) could potentially submit a bid in response to this bid invitation, based on their qualifications, abilities or experience; and
- (c) provides the same goods and services as the bidder and/or is in the same line of business as the bidder"

"6. The bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with any competitor. However communication between partners in a joint venture or consortium<sup>3</sup> will not be construed as collusive bidding".

"7. In particular, without limiting the generality of paragraphs 6 above, there has been no consultation, communication, agreement or arrangement with any competitor regarding":

- (a) prices;
- (b) geographical area where product or service will be rendered (market allocation)



- (c) *methods, factors or formulas used to calculate prices;*
- (d) *the intention or decision to submit or not to submit, a bid;*
- (e) *the submission of a bid which does not meet the specifications and conditions of the bid; or*
- (f) *bidding with the intention not to win the bid.*

*"8. In addition, there have been no consultations, communications, agreements or arrangements with any competitor regarding the quality, quantity, specifications and conditions or delivery particulars of the products or services to which this bid invitation relates."*

7.4.19 The provisions of SBD9 exclude communication between partners in a joint venture or consortium as collusive bidding.

7.4.20 Senior Counsel stated that *"...there are prima facie indications that the entities in the SG (Sekunjalo Group), in submitting bids in the manner which they did, and the level of what can be described as an "intermingling" of resources in order to deliver in relation to the Tender, could not have signed SBD9. This aspect at least called for careful scrutiny by the BEC and BAC, failing which the considerations of the bids were inadequate. There is no indication that such scrutiny took place."*

7.4.21 At the least it is clear that the four related entities made false statements when they signed SBD9. This issue could have been identified by the BEC and BAC, had they scrutinised the documents carefully and diligently.

**Code of Conduct for Supply Chain Management Practitioners (Practice Note SCM4/2003)**

7.4.22 This code requires that BEC and BAC teams should ensure that supply chain management is done in an honest, fair, impartial, transparent, cost effective and accountable manner.



7.4.23 The BEC and BAC teams should be familiar with and adhere to the prescribed legislation, directives and procedures in respect of SCM.

#### **BAC Code of Conduct**

7.4.24 In terms of the Code of Conduct for Bid Adjudication Committee (National Treasury circular reference 3/4/3/2/10 with effective date 24 March 2006), the BAC must ensure that:

7.4.24.1 All necessary bid documents have been submitted;

7.4.24.2 Disqualifications are justified and that valid and accountable reasons/motivations were furnished for passing over of bids;

7.4.24.3 Scoring has been fair, consistent and correctly calculated and applied; and

7.4.24.4 Bidders' declarations of interest have been taken cognizance of.

7.4.25 In order to meet their obligations, committee members must be familiar with and adhere to all relevant SCM legislation, policy, guides, practice notes and circulars.

7.4.26 Under 'Duties of Committee Members' it is stated that members of the BAC shall:

*"Clause 8: ...be fully conversant with the powers and limitations of the Committee as well as all directives pertaining to Supply Chain Management, including the relevant sections of the Constitution, Public Finance Management Act and accompanying Treasury Regulations, Preferential Procurement Policy Framework Act, Broad Based Economic Empowerment Act and accompanying regulations, all directives issued by National Treasury/relevant provincial treasury as well as the delegated powers issued*





*by the accounting officer/authority and at all times act in accordance with above-mentioned legislation, regulations and procedures;*

*Clause 9 "Apply their minds to matters at hand in order to take meaningful and accountable decisions and in the event of doubt or uncertainty, to propose that matters be referred back for clarification..."*

- 7.4.27 When comparing their actual conduct with the award of the tender to the Code of Conduct for BAC members, it is clear that the BAC members did not comply with the requirements as stated in the BAC Code of Conduct.
- 7.4.28 In addition, when comparing the BEC and BAC to the Code of Conduct for Supply Chain Management practitioners, it is clear that the basic requirements were not complied with.
- 7.4.29 The available evidence does not indicate that either the BEC or the BAC applied their minds when evaluating and adjudicating this tender.
- 7.4.30 In responding to the issue of collusive bidding, Sekunjalo is adamant that their conduct does not constitute collusive tendering. Their submission is that section 4(5) of the Competition Act provides that section 4(1) does not apply to constituent firms within a single economic entity, such as between a company, its wholly owned subsidiary or any combination of them as in the manner they bid for the tender MLRF088.
- 7.4.31 The submission by Sekunjalo is that by presenting separate and distinct economic models and modes of delivery for the provision of the service, DAFF was presented with a variety of options and solutions to consider. This, is argued is the opposite of what is sought to be achieved when there is collusive tendering which is that the customer pays an inflated price.
- 7.4.32 They maintain that their bid was open and offered DAFF with various options or solutions. The relationship and common ownership structures were indeed

disclosed upfront to DAFF. This was confirmed by members of the BEC and BAC.

7.4.33 The legal opinion of the senior counsel sought by DAFF also confirmed that in his view there was no evidence of bid rigging or collusive bidding by the 4 bidding companies.

7.4.34 I am of the view that the parties' action did not resemble the conduct contemplated in section 4(1)(b)(iii) of the Competition Act which is covert in nature and was not between parties in a horizontal relationship. Evidence provided to me confirms that the relationship has been disclosed prior to the bid evaluation and award of the tender.

**7.5 Did DAFF's failure to re-advertise the tender result in its inability to conduct scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities?**

7.5.1 I have established that after the withdrawal of the tender for the crewing, management and maintenance of the research and fisheries patrol services by DAFF, the South African coastline was left without any vessels to perform all shipping management functions.

7.5.2 I also found evidence that DAFF while waiting for the re-advertisement of the said tender, it assigned such shipping management services to the SA Navy as per MoU signed between DAFF and Department of Defence.

**7.6 Did DAFF irregularly terminate Smit Amandla's services by ignoring a 3 month handover period and awarding the service to the SA Navy which allegedly did not have the necessary competencies, and if so, did such action constitute improper conduct and maladministration?**

7.6.1 The Minister Joemat Pettersson has conceded that she gave Smit Amandla a month's notice. She has also conceded that she rejected my request for her to review her decision in this regard.



- 7.6.2 All parties agree that the Service Level Agreement (SLA) entered into between Smit Amandla and DAFF in the original contract provided for a three month handover period. The parties also agree that the contract was now running on a month to month basis.
- 7.6.3 What is in dispute is whether or not it was still necessary to keep to the three month. The answer to this question must transcend the legal claim by Smit Amandla that despite the contract having lapsed, DAFF was still obliged to stick to a three month period.
- 7.6.4 An objective assessment to the situation has to look into why there was a three months handover period. It seems to me that such handover period was to ensure a seamless transition from one service provider to another with a view to avoid an interruption of service. This was to ensure that the vessels was ready and the new staff had enough time to familiarise themselves with the vessels. It also appears that Smit Amandla has a point in arguing that the three months handover period was also meant to ensure it adjusts its business processes and gives its staff sufficient notice.
- 7.6.5 Also in dispute was the question whether or not the vessels deteriorated due to the alleged abrupt handover process. All the parties concede that by the beginning of my investigation the condition of the vessels had deteriorated. All parties except the SA Navy agree that the deterioration happened when the vessels were under the custody of the SA Navy.
- 7.6.6 However, the vessels were eventually handed over from DAFF to SA Navy on 31 March 2012. SA Navy stated that the entire handover process was hurried resulting in no adequate or meaningful handover being achieved. In many cases no documentation on the status of equipment was handed over. Many defects were not disclosed by the previous service provider and were only discovered once the machinery was started. Various defects were discovered on all DAFF vessels, which ranged from the mundane to very serious threat to



safety. In fact, the state of disrepair on some of these vessels was so severe that some of the equipment were condemned and had to be replaced in total.

7.6.7 It would be a reasonable conclusion to attribute this situation to the alleged undue handover process was abrupt. This blame game also supports the assertion that there was insufficient time to assess the vessels before they were handed over to the SA Navy.

7.6.8 On the question of capacity, DAFF maintains that the SA Navy had insufficient capacity whilst the SA Navy denies it. The reality though is, DAFF is conceding that it did not assess the capacity of SA Navy. It is therefore not unreasonable to conclude that the abrupt handover process denied DAFF the opportunity to properly assess the SA Navy's capacity before the handover.

**7.7 Was Minister Joemat-Pettersson's rejection of the request to defer her planned abrupt handover to the SA Navy an imprudent act which resulted in lack of proper patrols and deterioration of patrol vessels resulting in millions of Rand in refurbishment costs and rampant poaching? If so, does her action amount to fruitless and wasteful expenditure and accordingly, constitute improper conduct and maladministration?**

7.7.1 I have established that the Service Level Agreement (SLA) entered into between Smit Amandla and DAFF on the original contract provided for a three month handover period.

7.7.2 The Minister contended that the Handover Protocol refers to a handover period of three months, but that it was not clear to her what the legal status of this was as to her best knowledge, it was not a contractual obligation, notwithstanding my comments in that regard. Despite its mention in several contexts in clause 13 of the main agreement, the Minister was of the view that none of that constituted a contractually binding handover period on termination of the agreement.



7.7.3 As a result of this view, the Minister declined to accede to my request for the deferment of the handover which resulted in a hasty handover process. The Minister insisted on the abrupt handover to the SA Navy.

**7.8 Did DAFF irregularly contract Nautic to repair the unseaworthy vessels at a cost exceeding R30m and if so does such action constitute improper conduct and maladministration?**

7.8.1 I have decided to defer the investigation of this contract in a separate offshoot investigation.

## **8. LEGAL AND REGULATORY FRAMEWORK**

### **8.1. The Constitution, 1996**

8.1.1 Section 217(1) of the Constitution deals with procurement and states that:

*"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."*

8.1.2 In terms of section 217(1) of the Constitution DAFF has an obligation to contract goods and services in a fair, equitable, transparent, competitive and cost effective manner.

### **8.2. Preferential Procurement Policy Framework Act, 5 of 2000**

8.2.1. The process of the bidding of a tender is regulated by section 1 of the PPPFA which provides that:

*"An organ of state must determine its preferential procurement policy and implement it within the following framework:*

*a) A preference point system must be followed;*

- b) ...
- (i) *for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*
  - (ii) *for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;*
- c) *any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;*
- d) *the specific goals may include-*
- ...
- (i) *contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;*
  - (ii) *implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;*
- e) *any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender;*
- f) *The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*



*g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have."*

8.2.2. The preference points claim form in terms of the preferential procurement regulations 2001 (SBD 6.1), paragraph **9.9 Consortium/Joint Venture**:

*"9.9.1 In the event that preference points are claimed for Historically Disadvantaged Individual members by consortia/joint ventures, the following information must be furnished in order to be entitled to the points claimed in respect of the HDI member.*

*Name of HDI member (to be consistent with paragraph 9.8) and*

*Percentage (%) of the contract value managed or executed by the HDI member.*

9.10 *I/we, the undersigned, who warrants that he/she is duly authorised to do so on behalf of the firm certify that points claimed, based on the equity ownership, indicated in paragraph 8 of the foregoing certificate, qualifies the firm for the preference(s) shown and I/we acknowledge that:*

*(i) The information furnished is true and correct..."*

### **8.3. Supply Chain Management Policy and Regulations**

8.3.1. The issue of awarding of the tender is regulated by the DAFFs Supply Chain Management Policy and Regulations. The Bid Specification Committee (BSC) provides that:



- "a) Clear, comprehensive and unbiased bid specifications are compiled to ensure that potential bidders are given an equal opportunity to bid.*
- b) The Terms of Reference compiled with for services must clearly indicate:
  - (i) The scope of the requirement;*
  - (ii) The ratio between price and functionality i.e. 50% price 50% functionality, the evaluation criteria for measuring the functionality;*
  - (iii) The weight of each criterion; and*
  - (iv) The applicable values as well as the minimum threshold for functionality..."**

8.3.2. The Financial Instructions prescribes the *"Roles and responsibilities of the Bid Evaluation Committee as:*

*"(a) The Bid Evaluation Committee must consist of the following:*

- (i) Chairperson (in terms of delegated authorities);*
- (ii) One or two members from the specification committee;*
- (iii) One Supply Chain Management Practitioner to provide a secretariat function and advice to the committee.*
- (iv) If possible one or two knowledgeable member(s) from another directorate/institution."*

8.3.3. In terms of the Financial Instruction the roles and responsibility of the Bid Adjudication Committee is the following:

*"(a) The Accounting Officer must appoint the Bid Adjudication Committee of which the Chairperson must be the Chief Financial Officer. The Director: Supply Chain Management must also be a member of the committee. Other members appointed must be at least on the level of*





*Director. Representatives of relevant Directorates may attend meetings to explain bids.*

- (b) The Bid Adjudication Committee may approve all bids and contract up to an unlimited amount.*
- (c) A quorum will be deemed the Chairperson and two members..."*

**8.4. The Standard Bidding Document SBD9 and the Certificate of Independent Bid Determination states the following:**

*"...*

- 5. For the purpose of this Certificate and the accompanying bid, I understand that the word "competitor" shall include any individual or organization, other than the bidder, whether or not affiliated with the bidder, who:
  - (a) Has been requested to submit a bid in response to this bid invitation;*
  - (b) Could potentially submit a bid in response to this bid invitation, based on their qualifications, abilities or experience; and*
  - (c) Provides the same goods and services as the bidder and/or is in the same line of business as the bidder.**
- 6. The bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with any competitor. However communication between partners in a joint venture or consortium will not be construed as collusive bidding.*
- 7. In particular, without limiting the generality of paragraphs 6 above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:
  - (a) prices;**



- (b) *geographical area where product or service will be rendered (market allocation);*
- (c) *methods, factors or formulas used to calculate prices;*
- (d) *the intention or decision to submit or not to submit, a bid;*
- (e) *the submission of a bid which does not meet the specifications and conditions of the bid; or*
- (f) *bidding with the intention not to win the bid."*

8. *In addition, there have been no consultations, communications, agreements or arrangements with any competitor regarding the quality, quantity, specifications and conditions or delivery particulars of the products or services to which this bid invitation relates..."*

#### **8.5. Public Finance Management Act, 1 of 1999**

8.5.1. The issue of awarding of the tender is regulated in the main by the provisions of section 38 of the PFMA. Section 38 of the PFMA provides general responsibilities of Accounting Officers. It provides that Accounting Officers "must ensure that DAFF has and maintains (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective"

#### **8.6. National Treasury Regulations dated March 2005**

8.6.1. The issue of the conduct of officials involved in the bidding process is regulated by paragraph 16A9 of the National Treasury Regulation. Paragraph 16A9 of the National Treasury Regulations prescribes that "Accounting Officers and Accounting authorities take all reasonable steps to prevent abuse of the Supply Chain Management system and authorizes accounting authorities to ; (a) *disregard the bid of any bidder if that bidder or any of its directors have abused the institution of SCM system and/or committed fraud*



or any other improper conduct in relation to such system; (b) cancel a contract awarded to a supplier of goods and services if the supplier committed any corrupt or fraudulent act during the bidding process or the execution of the contract”

## **8.7. Competition Act, No.89 of 1998**

8.7.1. The issue of collusive tendering is regulated by section 4(1)(b)(iii) of the Competition Act of 1998. Section 4(1)(b)(iii) provides that:

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

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

...

(iii) collusive tendering.”

8.7.2. Section 4(1)(b)(iii) prohibits collusive tendering between entities which are in a horizontal relationship to each other.

8.7.3 To determine whether there is a conflict of interest in Mr Sebola supporting the appointment of the BSC, and being a scoring member of the BEC, cognisance has to be taken of the relevant legislative prescripts.

8.7.4 In the National Treasury Supply Chain Management Guide, 2004, Para 4.3 and 4.6.3. it is prohibited for a member of the BEC (or someone who assisted the BEC) to also sit on the BAC. The regulatory framework does not however contain a prohibition to prevent a BEC member from supporting (as part of a management team) the appointment of BSC members.

## **8.8 Case Law: Competition Commission v Murray & Roberts Ltd (017277) 2013 ZACT 75 on 22 July 2013**



8.8.1 The issue of what constitutes collusive bidding was dealt with in the matter *Competition Commission v Murray & Roberts Ltd (017277) 2013 ZACT 75*. In this matter, it was held that:-

*"Collusive tendering involves particular conduct by firms whereby as competitors they collude regarding a tender resulting in the tender process being distorted. The bid prices and bid submissions by these competitors as well as the outcome of the tender process is not the result of a competition on the merits. "Cover pricing" in this context occurs when conspiring firms agree that one or more of them will submit a bid that is not intended to win the contract. The agreement is reached in such a way that among the colluding firms, one firm wishes to win the tender and the others agree to submit to non-competitive bids with prices that would be higher than the bid of the designated winner, or the price will be too high to be accepted, or the bid contains special terms that are known to be unacceptable to the client. Collusive tendering therefore applies to agreements or concerted practices which have as their object or effect the prevention, lessening, restriction and distortion of competition in South Africa'*

## **9 ANALYSIS AND CONCLUSION**

**9.1 On the issue of DAFF's irregular award of the R800 million tender for the crewing, management and maintenance of the research and fisheries patrol services:**

9.1.1. As indicated earlier, DAFF never contested that the R800 million tender (MRLF 088) was improperly awarded to SMSC by DAFF on 21 November 2011. DAFF withdrew the tender shortly after this complaint was lodged and in response to a court challenge by one of the unsuccessful bidding companies, Smit Amandla, which had caused DAFF to seek legal advice prior to reviewing its decision.



- 9.1.2. The only value that this investigation could possibly achieve in this regard was to identify the acts of maladministration that led to the tender fiasco with a view to ensuring that DAFF bears these in mind as it moves forward with the process.
- 9.1.3. Section 38 (iii) of the PFMA prescribes that Accounting Officers ensure that DAFF has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.
- 9.1.4. The evidence discussed above, which includes failure to provide proper guidelines to bid committees, failure to ensure that committees are properly constituted and failure to identify glaring scoring anomalies, leaves me with no option other than to conclude that DAFF did not maintain a procurement system that is fair, equitable, transparent, competitive, and cost effective as required by section 217 of the Constitution, the Preferential Procurement Policy Framework Act and Treasury regulations on SCM.
- 9.1.5. In terms of the Code of Conduct for Bid Adjudication Committee (National Treasury circular reference 3/4/3/2/10 of 24 March 2006 the BAC members must ensure that the prescribed legislation, directives and procedures in respect of SCM are complied with.
- 9.1.6. Clause 9, provided that the BAC apply their minds to matters at hand in order to take meaningful and accountable decisions and in the event of doubt or uncertainty, to propose that matters be referred back for clarification.
- 9.1.7. Code of Conduct for SCM Practitioners (Practice Note SCM4/2003) implores the BEC and BAC teams to ensure that supply chain management is done in an honest, fair, impartial, transparent, cost effective and accountable manner.
- 9.1.8. The BEC and BAC proceeded to award tender no MLRF 088 to SMSC, notwithstanding the fact that it did not comply with the above basic supply chain management requirements, and thus rendered the award of the contract improper.



9.1.9. Contrary to DAFF's own SCM Policy there was no person with legal expertise serving on the BEC while the member who had financial expertise just served as the secretariat of the BEC thus not providing much assistance in the deliberations.

9.1.10 It is particularly a serious concern that DAFF refused to listen to its own internal voices of reason, as evidenced by the BEC's reluctance to proceed on account of anomalies that included a suspected conflict of interest on the part of the preferred service provider.

9.1.11 Ultimately the bid process was characterised by bundling and anomalies, including the lack of due diligence in evaluating the preferred service provider's track record in the specific task advertised beyond general experience in the shipping industry. How this company even got considered beyond the clerical point of bid checking, having failed to answer crucial documents in the bid documents is totally perplexing.

**9.2 On the allegation that Mr Joseph Sebola irregularly scored SMSC 5/5 which did not have relevant experience while scoring Smit Amandla 1/5 which had (10) years of experience in conducting the exact service in question constitute improper conduct:**

9.2.1 Section 1 of the Preferential Procurement Policy Framework Act prescribes that Departments must, when developing the Preference Point Scoring, use a clear and objective scoring system.

9.2.2 The issue for my determination was whether or not Mr Sebola's scoring was consistent with his legal responsibilities.

9.2.3 In the legal framework, I indicated that the standard that Mr Sebola and his colleagues had to meet was that of reasonableness, fairness and acting in good faith. It cannot be said there was reasonableness, fairness or good faith in acting in the manner he acted. How is it possible that a seasoned player scores poorest on functionality while a "new kid on the block" gets full marks?



- 9.2.4 With regard to the allegation that Mr Sebola's dual role as accounting officer during the BSC's appointment and also being member of the BEC constituted a conflict of interest, the National Treasury Supply Chain Management Guide, 2004, paragraph 4.3. and 4.6.3. prohibits a member of the BEC (or someone who assisted in the BEC) to also sit on the BAC.
- 9.2.5 The regulatory framework does not however, contain a provision that prohibits a BEC member (as part of management team) from supporting the appointment of the BSC members.
- 9.2.6 The evidence I have outlined earlier points to Mr Sebola's participation as part of management to support the appointment of BSC and also sitting on the BEC, which in my considered view does not constitute a conflict of interest.
- 9.3 On the alleged irregularity of awarding the patrol vessels tender to SMSC by DAFF in spite of one of its subsidiaries, Premier Fishing, having fishing rights accorded to SMSC the role of referee and player:**
- 9.3.1 As indicated in the legal framework, conflict of interest arises when a person is placed in a position of divided loyalties. The role of a patrol vessel was explained by industry experts, DAFF as well as SMSC.
- 9.3.2 Having established that the patrol and research vessels and personnel are managed by the Ship Management Company, the question for my determination was the extent to which the Ship Management Company exercises control over operations.
- 9.3.3 On the facts I could not help but conclude that Ship Management Company exercises meaningful control over the operations, it would follow that a Ship Management Company that has fishing interests would be placed in a position of policing as well as being policed. That would constitute a conflict of interest.



9.3.4 The next question to be answered involved the adequacy of the safeguards created to limit access to information by the Ship Management Company's crew for the management of the conflict of interest. Such safeguards include the co-ordination of operations by the Chief Marine Conservation Inspector and the fact that it is the DAFF's inspectors who decide where each vessel goes and control the inspections. The safeguards also include the prevention of the ship manager from being able to influence or report on where, when and what area is being targeted.

9.3.5 The reality though is that all coordination at operations level is conducted by the Ship Management company. I had to ask if this amounts to wearing two hats my conclusion was affirmative although admitting that the second hat was to be worn with constraints. The allegation that by awarding the patrol vessels contract to SMSC which had fishing rights would in essence be required to police itself, accordingly, has merit.

**9.4 On the submission of four (4) tenders on the same bid by the entities (Premier Fishing, Premier Fishing Consortium, Sekunjalo Ltd and SMSC) which fall under Sekunjalo Group being challenged as collusive tendering?**

9.4.1 It was held in *Competition Commission v Murray & Roberts Ltd (017277) 2013 ZACT 75* on 22 July 2013 that *'collusive tendering involves particular conduct by firms whereby as competitors they collude regarding a tender resulting in the tender process being distorted. The bid prices and bid submissions by these competitors as well as the outcome of the tender process is not the result of a competition on the merits. "Cover pricing" in this context occurs when conspiring firms agree that one or more of them will submit a bid that is not intended to win the contract. The agreement is reached in such a way that among the colluding firms, one firm wishes to win the tender and the others agree to submit to non-competitive bids with prices that would be higher than the bid of the designated winner, or the price will be too high to be accepted, or the bid contains special terms that are known to be unacceptable to the client. Collusive tendering therefore applies to*





*agreements or concerted practices which have as their object or effect the prevention, lessening, restriction and distortion of competition in South Africa'*

9.4.2 Neither DAFF nor SMSC have disputed the fact that four companies from the Sekunjalo stable submitted bids in respect of the same tender invitation. I would be speculating if I found that these four companies discussed and possibly colluded on pricing.

9.4.3 The issue as to whether this conduct constitutes collusive tendering is referred to the Competition Commission for a determination.

**9.5 On DAFF's alleged failure to re-advertise the tender result in its inability to conduct scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities?**

9.5.1 The facts do show that the tender was only advertised about two months ago. The issue for my determination was whether such conducted was in violation of any legal duty.

9.5.2 Clearly DAFF had a responsibility to ensure that the patrol services meant to ensure adherence to the law in the fisheries industry and research meant to inform the regulation of this industry proceeded uninterrupted. Through botching the tender, the DAFF had already created an interruption.

9.5.3 However, it is my considered view that not rushing to advertise before understanding what went wrong with the previous attempts on the tender was prudent. Perhaps the process could have been swifter.

9.5.4 But DAFF can legitimately argue that in any event after advertising, the award process was stopped by me, asking that this process needs to be factored in the considerations informing the new process. That I would accept as a legitimate response except that the investigation did not delay the advert and in fact the investigation was delayed by DAFF's tardiness in providing required information.



**9.6 On DAFF's irregular termination of Smit Amandla's services by ignoring a 3 month handover period and awarding the service to the SA Navy which allegedly did not have the necessary competencies, and if so, did such action constitute improper conduct and maladministration?**

9.6.1 It is not in dispute that the Service Level Agreement (SLA) entered into between Smit Amandla and DAFF in the original contract provided for a three month handover period. The parties also agree that the contract was now running on a month to month basis.

9.6.2 An objective assessment to the situation has to look into why there was a 3 month handover period. It seems to me that such handover period was to ensure a seamless transition from one service provider to another with a view to avoid an interruption of service. This was to ensure that the vessels were ready and the new staff had enough time to familiarise themselves with the vessels. It also appears that Smit Amandla has a point in arguing that the 3 month handover period was also meant to ensure it adjusted its business processes and gives its staff sufficient notice.

9.6.3 What is in dispute was the question whether or not the vessels deteriorated due to the alleged abrupt handover process. All the parties concede that by the beginning of my investigation the condition of the vessels had deteriorated. All parties except the SA Navy agree that the deterioration happened when the vessels were under the custody of the SA Navy.

9.6.4 The Minister's insistence to abruptly handover the vessels to SA Navy was improper. Had the Minister acceded to my request, consequential problems with the vessels might have been averted.

9.6.5 The withdrawal of the seaworthiness of the certificates by SAMSA is also telling on the conditions of the vessels upon handover thereof to the SA Navy.



9.6.6 There is no evidence to support the assertion that the SA Navy did not have the competency and capacity to man, maintain and manage the vessels. The record of costs incurred by SA Navy for the repairs, restoration and refurbishment of the DAFF vessels attest to the contrary to what was alleged by the complainant. In addition, the record of sailing schedules provided to the investigation team also attest to the SA Navy's manning, management and maintenance of the vessels during their tenure.

**9.7 On Minister Joemat-Pettersson's rejection of the request to defer her planned abrupt handover to the SA Navy an imprudent act which resulted in lack of proper patrols and deterioration of patrol vessels resulting in millions of Rand in refurbishment costs and rampant poaching? If so, does her action amount to fruitless and wasteful expenditure and accordingly, constitute improper conduct and maladministration?**

9.7.1 The Minister's contention that she was not bound by the handover protocols is imprudent. Her conduct resulted in the abrupt handover of the vessels which was not preceded by a technical audit which would have detected the status of the defects on-board the DAFF vessels. This resulted in DAFF incurring fruitless and wasteful expenditure in the subsequent repairs to the vessels.

9.7.2 As a result of this view, the Minister declined to accede to my request for the deferment of the handover which resulted in a hasty handover process. The Minister insisted on the abrupt handover to the SA Navy.

**9.8 On the allegation that DAFF irregularly contracted a company that is part of the SMSC that won the impugned bid, Nautic to repair the unseaworthy vessels at a cost exceeding R30m:**

9.8.2 I have established that the fears expressed that the abrupt handover of the vessels and services handled for years by a professional company did not work out and that one of the consequences was vessels lying idle without



going to sea or receiving maintenance services and eventually losing their seaworthiness.

9.8.3 I have found evidence which confirms that from May 2013, DAFF contracted two companies Damen shipyards and Nautic for the repairs and refurbishments (technical) of the vessels as well as conducting ship management functions, respectively.

9.8.4 In the process, it has been alleged to me that the contract for the refurbishment was irregularly awarded. I have deferred the testing of this allegation to a separate offshoot investigation.

## 10 FINDINGS

I intend to make the following findings:

**10.1 Regarding DAFF's irregular award of the R800 million tender for the crewing, management and maintenance of the research and fisheries patrol services, an act of maladministration, I intend to find that:**

10.1.1 DAFF's immediate admission that the tender was irregularly awarded and proceeding to cancel it and commit to advertise the process anew was proper;

10.1.2 The award of the tender (MLRF 088) to SMSC was not in compliance with DAFF's Supply Chain Management requirements and processes and was therefore improper. The absence of legal and financial experts on the BEC rendered the subsequent award of tender (MLRF 088) to SMSC ill-advised, thus constitutes maladministration.

10.1.3 DAFF in awarding the tender (MLRF 088) to SMSC failed to deal with apparent issues of conflict of interest and omissions by SMSC, and this amounts to maladministration.



**10.2 Regarding Mr Joseph Sebola's, alleged irregular scoring of SMSC 5/5 on everything which did not have the relevant experience while scoring Smit Amandla 1/5 which had (10) years of experience in conducting the exact service in question, I intend to find that:**

10.2.1 The allegation that Mr Sebola scored 1/5 to SMSC and 5/5 to Smit Amandla is substantiated and so is the allegation that of the two, it was Smit Amandla that had done the exact work specified in the tender for over ten (10) years; and

10.2.2 Mr Sebola's conduct was, in the circumstances, irrational, subjective and biased, it thus constitutes improper conduct.

**10.3 Regarding the award of the patrol vessels tender to SMSC by DAFF in spite of the fact that Premier Fishing (a subsidiary of the Sekunjalo group) has fishing rights accorded SMSC the role of referee and player and that this possibly creating a conflict of interest for SMSC and, accordingly, an act of maladministration by DAFF; I intend to find that:**

10.3.1 The allegation that the Department's award of the contract to SMSC placed the company in the position of referee and player thus creating a conflict of interest is substantiated. Whilst it is true that there are safe guards put in place to limit the role of the management company in the patrol and the research vessels, and that thus reduced the conflict of interest, it is not eliminated.

10.3.2 The conduct of DAFF in awarding SMSC a tender placing SMSC in this position constitutes improper conduct and maladministration.

**10.4 Regarding the submission of four (4) tenders on the same bid by the entities (Premier Fishing, Premier Fishing Consortium, Sekunjalo Limited and SMSC) which fall under the Sekunjalo Group) constitute collusive tendering, I intend to find that:**

10.4.1 The allegation that the submission of four tenders on the same bid by the Sekunjalo Group entities has not been denied by any of the parties. I however have decided to refer the decision on whether or not the conduct constituted collusive to the Competition Commission.

10.4.2 I am therefore unable to find improper conduct or maladministration on DAFF's part in this regard.

**10.5 Regarding DAFF's alleged failure to re-advertise the tender resulting in its inability to conduct scientific surveys, anti-poaching patrols and inspections of fishing trawlers for illegal activities; I intend to find that:**

10.5.1 The allegation that DAFF failed to timely advertise the tender is substantiated, however its failure is partly justified in that it needed to identify and address the systemic administrative failures that led to the aborted tender process and to wait for the conclusion of the investigation .

**10.6 Regarding DAFF's alleged irregular termination of Smit Amandla's services by ignoring a 3 month hand-over period and awarding the service to the SA Navy which allegedly did not have the necessary competencies and if so did such action constitute improper conduct and maladministration, I intend to find that:**

10.6.1 The allegation that DAFF irregularly terminated Smit Amandla's contract by ignoring the 3 month handover period notice is not substantiated because the original contract requiring the 3 month handover period had lapsed and the arrangement was on a month to month basis.

10.6.2 However, in view of the fact that the reasons for a prudent handover period persisted, the abrupt handover was ill advised. The conduct of Minister Joemat-Pettersson and DAFF in this regard is improper and constitutes maladministration.

**10.7 Regarding Minister Joemat-Pettersson's rejection of the request to defer her planned abrupt handover to the SA Navy an imprudent act which resulted in lack of proper patrols and alleged deterioration of patrol vessels amounting to millions of Rand in refurbishment costs and that this amounts to fruitless and wasteful expenditure and accordingly, improper conduct and maladministration, I intend to find that:**

10.7.1 The Minister's rejection of a request to defer her planned abrupt handover to the SA Navy which led to alleged lack of patrols and deterioration of patrol vessels was imprudent and led to fruitless and wasteful expenditure and;

10.7.2 The actions of the Minister constitute improper conduct and maladministration.

**10.8 Regarding DAFF's alleged irregular award of a contract, for the repair of unseaworthy vessels returned to DAFF by the SA Navy, at a cost exceeding R30m, I intend to:**

Reserve my findings pending a full offshoot investigation on this matter;

## **11. REMEDIAL ACTION**

11.1 General Comments:

11.1.1 Cognizance is taken of the fact that at the time of commencement of the investigation into the allegations against DAFF, it had already revoked the contract it had awarded to SMSC and DAFF is commended for immediate withdrawal of the tender in response to Smit Amandla's justified legal action.

11.2 Appropriate remedial action to be taken on the findings of maladministration and as envisaged under section 182(1) (c) of the Constitution is the following:

### **11.2.1 The President**

11.2.1.1 To consider taking disciplinary action against the Minister for her reckless dealing with state money and services resulting in fruitless and wasteful expenditure, loss of confidence in the fisheries industry in SA and alleged decimation of fisheries resources in SA and delayed quota allocations due to lack of appropriate research.

### **11.2.2 The Director General: National Treasury**

11.2.2.1 To ensure that the Chief Procurement Officer assist the accounting officer of DAFF by reviewing each stage of the bidding process to ensure that SCM statutory and regulatory requirements are complied with before the bid is awarded.

### **11.2.3 The Minister: DAFF**

11.2.3.1 To ensure that the already advertised tender for the services of a ship manager for the crewing, management and maintenance of the research and fisheries patrol vessels is finalised and the contract awarded within 60 days from the date of the final report.

### **11.2.4 The Director General: DAFF**

11.2.4.1 To ensure that the relevant legislation, SCM policies and prescripts are complied with, including in the appointment of the BSC, BEC and BAC members in the processing of this tender;