AGAINST THE RULES TOO

Report of the Public Protector in terms of Section 182(1) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994 on an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the Department of Public Works and the South African Police Service (SAPS) relating to the leasing of SAPS office accomodation in Durban

PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness

ACRONYMS

BBBEE	**Broad Based Black Economic Empowerment**
BSC	**Bid Specification Committee**
C-AMP	**Custodian Asset Management Plan**
CBD	**Central Business District**
CFO	**Chief Financial Officer**
CIDB	**Construction Industry Development Board**
CI	**Crime Intelligence Unit**
DG	**Director-General**
DPW	**National Department of Public Works**
FCS	**Family Violence, Child Protection and Sexual Offences Unit (SAPS)**
GIAMA	**Government Immovable Asset Management Act, 2007**
HDI	**Historically Disadvantaged Individuals**
KAM	**Key Accounts Management**
KZN	**KwaZulu - Natal**
MTEF	**Medium Term Expenditure Framework**
NPV	**Nett Present Value**
PFMA	**Public Finance Management Act, 1999**
PPPFA	**Preferential Procurement Policy Framework Act, 2000**
PI	**Procurement Instruction**
RAG	**Resource Allocation Guide**
RPF	**Roux Property Fund (Pty) Ltd**
SAPS	**South African Police Service**

SCM	**Supply Chain Management**
SCM Guide	**Supply Chain Management: A Guide for Accounting Officers/Authorities**
Shabangu	**Roux Shabangu**
SIU	**Special Investigating Unit**
SIU Act	**Special Investigating Units and Special Tribunals Act, 1996**
SNBAC	**Special National Bid Adjudication Committee (DPW)**

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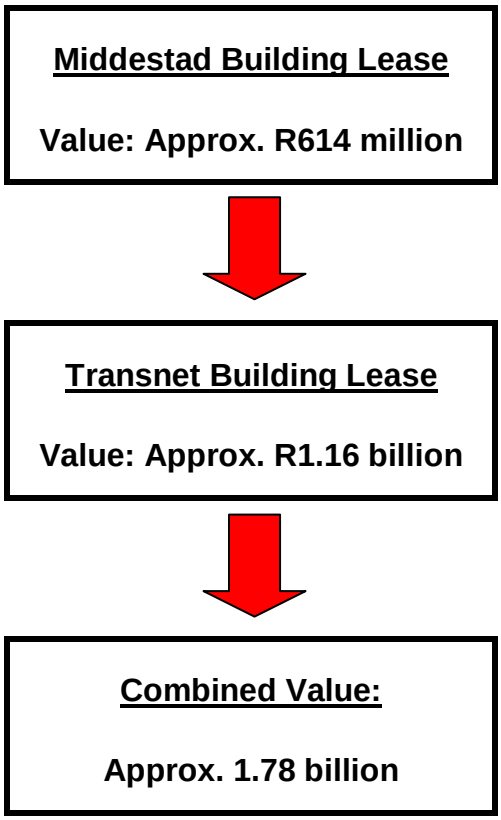
EXECUTIVE SUMMARY

(i) *AGAINST THE RULES TOO* is the second and final report of the Public Protector in response to a complaint, lodged with her office on 2 August 2010, in connection with the alleged improper procurement of the lease of office accommodation for the SAPS in the Middestad building (previously known as the Sanlam Middestad building) in Pretoria and the Transnet Building in Durban. These complaints originated from a newspaper article published on 1 August 2010 alleging improper conduct and maladministration by the National Commissioner of the South African Police Service (SAPS) and the Department of Public Works (DPW).

(ii) Primarily the complaint related to the alleged non-compliance with the requirements of section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution) by the SAPS and the DPW, and the alleged improper involvement the National Commissioner of the SAPS in the procurement of the two buildings. Questions were also raised regarding the SAPS's relationship with the preferred service provider and the cost effectiveness of the transaction. The sum total value of the leases complained of is reflected in the diagram below.



(iii) The Public Protector investigated the complaints with the cooperation of the Special Investigating Unit.

(iv) On 3 August 2010, the Public Protector requested the National Commissioner of the SAPS and the Director-General (DG) of the DPW not to proceed with the implementation of the leases, pending the finalisation of the investigation.

(v) Both parties responded with an undertaking not to proceed with the implementation of the said leases until the investigation was completed.

(vi) On 11 and 19 October 2010, the DG of the DPW informed the National Commissioner of the SAPS, on the basis of the findings of an internal inquiry and independent legal advice obtained, that the lease agreement between the DPW and Roux Property Fund (RPF) in respect of the Middestad building, was invalid and that a new procurement process had to be initiated for the leasing of accommodation for the SAPS in Pretoria and Durban. The Public Protector was advised of this development on 11 October 2010.

(vii) On 25 October 2010, the Public Protector issued a preliminary report on the investigation and informed the SAPS and the DPW of her concurrence with the decision of the DPW to commence with entirely new procurement processes in respect of the accommodation requirements of the SAPS in Pretoria and Durban.

(viii) The former Minister of Public Works, Mr G Doidge, was replaced by Ms Gwen Mahlangu-Nkabinde as from 1 November 2010.

(ix) Shortly after Ms Mahlangu-Nkabinde's appointment, her office obtained informal advice from the Office of the State Attorney on the lease agreement in respect of the Middestad building. The State Attorney's letter to the Minister's Special Advisor, date 11 November 2010, indicated that the lease agreement was enforceable. This advice was, however, given subject to a further legal opinion, to be obtained from senior counsel, at the request of the Minister's office.

(x) On 15 November 2010 the Minister's special advisor, accompanied by the DPW Director: Legal Services and Litigation met with the Public Protector in connection

with the advice obtained from the State Attorney. The Public Protector communicated the view that no weight should be attached to the hastily prepared opinion of the State Attorney and that she stood by contents of her preliminary report.

(xi) The opinion of senior counsel, which also considered the procurement process followed by the DPW, dated 22 November 2010, concluded that the contract between the DPW and RPF was unlawful and the lease agreement therefore invalid. It supported the legal advice previously obtained by the DPW, also from senior counsel, that the High Court should be approached with an application seeking judicial review and setting aside of its decision to enter into the lease agreement, and for an order declaring that the lease agreement was invalid on the basis of non-compliance with the relevant legislation and other prescripts.

(xii) The legal advice that was obtained by the DPW and the Office of the Minister of Public Works was also relevant to the investigation of the Public Protector into the procurement of the lease of the Transnet building in Durban as the same role players were involved and the same procurement process was followed. The two procurements were intertwined and the same legal principles therefore applied to both. No lease agreement existed in respect of the Transnet building at the time the investigation commenced.

(xiii) The investigation of the Public Protector that forms the basis of this report was conducted over a period of three months and included interviews with officials and former officials of the SAPS, including the National Commissioner, officials of the DPW (including the Director-General) and visits to relevant police stations in Durban and the KwaZulu-Natal Provincial Head Office. Voluminous documentation relating to the procurement and correspondence was perused and the relevant provisions of the Constitution, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations and other procurement prescripts considered and applied.

(xiv) The Public Protector also interviewed the Minister of Public Works.

(xv) The schematic illustration below represents a summary of the SCM process as pertains to the procurement of leased accommodation, as well the respective responsibilities of the DPW and the SAPS:

Schematic: Procurement Steps and areas of responsibility in respect of leased accommodation

	PROCUREMENT STEPS	RESPONSIBLE DEPARTMENT
Preparation & Demand Management	**INCEPTION/ NEEDS ANALYSIS** 1. Identify the need for accommodation 2. Compile needs assessment based on actual requirements 3. Determine nature and extent of the accommodation required 4. Ensure that all current departmental accommodations is adequately utilised in terms of GIAMA	**SAPS** Relevant SCM division within SAPS Demand Management
	FINANCIAL PLANNING 1. Ensure need / requirements are linked to budget plans 2. Determine if need is in line with the strategic Objectives of the department 3. Confirm availability of funding 4. Ensure funding allocation complies with relevant provisions of the PFMA 5. Submit needs analysis and funding confirmation to DPW in order to initiate the procurement process	**SAPS** Relevant SCM and Finance divisions within SAPS
Acquisition management	**PROCUREMENT PROCESS** 1. Fully assess client's need, including nature and extent of accommodation required based on needs assessment 2. Determine urgency and relevant other factors 3. KAM issues a procurement instruction (PI) to DPW Reg. Office	**DPW** Key Account Management division (KAM)
	Procurement Strategy (PS) 1. Regional BSC evaluates clients need and recommends suitable procurement strategy to SNBAC: 1.1 Bid process – open tender 1.2 Negotiated process – single service provider 2. SNBAC makes final decision on a suitable procurement strategy (PS) 3. DPW Regional office implements PS approved by SNBAC	Regional Bid Specification Committee (BSC) Special National Bid Adjudication Committee (SNBAC) Key Account Management division (KAM)
Evaluation	**EVALUATION OF BIDS** 1. Evaluation of Bids • Method - Price and Preference • Method - Price, Functionality and Preference 2. Recommend preferred bid or single service provider taking market prices and cost effectiveness into account	**DPW** Bid Evaluation Committee (BEC)
Award	**AWARD AND CONTRACT MANAGEMENT** 1. Adjudication and/ or award 2. Draft and sign contract with successful bidder in terms of the exact specifications of the bid awarded 3. Monitor and evaluate performance in respect of the terms and conditions of the contract	**DPW** SNBAC (All leases with net value above R5m must be approved by the SNBAC and not the DG (DPW SCM circular no.10 of 2010) DPW Project Manager

(xvi) The similarities identified in the procurement of the Middestad building lease and the Transnet building lease

The complaint lodged with the Public Protector related to both the Middestad and Transnet building leases. During the course of the investigation into the procurement of these leases a number of similarities were identified in the procurement processes and the role-players involved. Such similarities included:

(a) According to the documentation provided both buildings were identified by the SAPS (National Commissioner);

(b) The SAPS engaged the owners of the buildings prior to the DPW becoming involved in the procurement process, as was required;

(c) The total lettable area of the respective buildings had a direct influence on the demand management process of the SAPS as both buildings had been identified prior to the formal demand management process being initiated;

(d) In both instances there was no legitimate urgency that justified a deviation from the prescribed open tender process;

(e) RPF signed purchase agreements for both buildings shortly before the SAPS identified the buildings as alternative accommodation;

(f) In both instances the procurement strategy adopted by the DPW resulted in negotiations with RPF exclusively;

(g) The procurement of both leases was not reflected in the User Asset Management Plan;

(h) In both instances, funds had to be reprioritised due to insufficient funds being available in the SAPS leasing budget;

(i) In both instances, the deviation from the prescribed tender process was not recorded or reported to the National Treasury and the Auditor-General of South Africa, as required by Treasury prescripts;

(j) In both in instances, the service provider (RPF) made contact with officials at the SAPS and the DPW and is alleged to have put pressure on them in regard to the finalisation of the procurement process; and

(k) In both cases the buildings leased were of a Grade C standard and required major refurbishment at a significant cost to the State and were leased at a rental much higher than the market rate for such building.

As a result of the above similarities a number of the findings made in respect of the procurement of the lease of the Middestad building are also applicable to the leasing of the Transnet building. Furthermore, the process followed by the SAPS in respect of the Transnet building was extra ordinary in three ways:

- The original plan of the SAPS was to construct a building as opposed to the option leasing an existing building;
- A building was, however, subsequently identified to be leased, prior to the full extent of the need being determined by the SAPS; and
- The needs analysis of the SAPS closely corresponded with the available lettable floor space of the Transnet building.

(xvi) The general findings of the Public Protector are the following:

(a) The need was not dealt with in the SAPS Immovable Asset Management Plan and not budgeted for.

(b) The fact that the procurement of the lease of the Transnet building was not budgeted for and included in the Immovable Asset Management Plan of the SAPS, constituted maladministration.

(c) The involvement of the SAPS proceeded beyond the demand management phase of the SCM process.

(d) The warnings and advice from the DPW pertaining to the identification by the SAPS of a particular building and negotiating with a single service provider, was regarded by the SAPS as interference in its affairs.

(e) The Transnet building was identified prior to the determination of the specific nature and extent of the need for alternative accommodation.

(f) If the demand management process in respect of the FCS units was properly applied, prior to the identification of the Transnet building, the likelihood of the

DPW securing alternative accommodation closer to the respective clusters, in accordance with the vision of the National Commissioner, cannot be excluded.

(g) The market rental rate for a building such as the Transnet building was determined by the DPW at R40.00 per m^2. The lease agreement signed between RPF and the DPW in respect of the Transnet building reflect a rental rate of R125.30 per m^2. The procurement of the lease was not in accordance with a system that is cost effective.

(h) The full extent of the need for alternative accommodation was only determined by the SAPS, as reflected in the needs analyses, subsequent to the Transnet building being identified and the total lettable floor space being made known to the SAPS.

(i) The failure on the part of the KZN Regional Office to comply with the conditions of the SNBAC, which required that the reference to market related rental in the option analysis report be reconciled with the rental rate offered by RPF, further contributed a to lack of cost effectiveness, which amounted to maladministration.

(j) There was no legitimate justification for a deviation from the prescribed tender process.

(k) In violation of Treasury Regulations, the DPW did not record and report the reasons for deviating from a competitive process as required by SCM prescripts.

(l) The purpose of the reporting requirement is clearly to provide the National Treasury, as the custodian of public funds, with an opportunity to note, evaluate and, if necessary, intervene in the procurement process. The failure to report the deviation therefore accordingly deprived the National Treasury of the intended opportunity.

(m) The procurement process did not comply with the requirement of fairness, equitability and transparency.

(n) It appears from the very nature of the process followed, namely, by entering into a negotiated contract instead of a competitive bidding process, without justification, the constitutional requirements of fairness, equitability and transparency were also not complied with. The situation was exacerbated by the

fact that the contractor had already been involved in the process right from the beginning, even before the total extent of the need was established.

(o) The floor space leased from RPF exceeded the total guideline area determined by the DPW.

(p) The difference between the approved offer and the final DPW norm document equates to 4058.87m^2. The financial impact of the additional floor space amounted to R77 683 352.29, excluding operational costs, over the entire lease period (9 years11months) as reflected in the table below.

Table: Financial Impact of Additional Floor Space

Letter of Acceptance	DPW Norm Document	Difference	Additional Costs Over Lease Period Due To Difference
45499.10 m^2	41440.23 m^2	4058.87 m^2	Year 1: R4 992 410.10
			Year 2: R5 466 689.06
			Year 3: R5 986 024.52
			Year 4: R6 554 696.85
			Year 5: R7 177 393.05
			Year 6: R7 859 245.39
			Year 7: R8 605 873.70
			Year 8: R9 423 431.70
			Year 9: R10 318 657.72
			Year 10: R11 298 930.20
			Total: R77 683 352.29

This additional expenditure, resultant from maladministration on the part of the DPW, could further have led to fruitless and wasteful expenditure as contemplated by section 1 of the PFMA.

(q) The lease agreement entered into by the DPW and the RPF was invalid as the procurement of the lease was done in a manner that did not comply with the requirements of the Constitution, the PFMA and the Treasury Regulations and instructions for procurement by organs of state.

(r) The conduct of SAPS and DPW officials involved in the procurement of the lease was improper and unlawful.

(s) The failure of the National Commissioner to ensure that the procurement process complied with the said legal requirements and prescripts, as indicated in the findings above, resulted in the invalid conclusion of a lease agreement, to the detriment of the State, and therefore constituted maladministration.

(t) The original procurement instruction was issued on 1 July 2010, the same day on which the Director-General of the DPW took office. When the Director-General became aware of allegations with regard to the procurement process, he gave instructions in August 2010 to suspend the procurement process subject to an internal investigation that was being conducted.

(u) The SNBAC approved the lease of the Transnet building in terms of DPW Circular 10 of 2010. When the approval was brought to the attention of the Director-General, he added certain conditions in respect of the lease agreement. These conditions were, however, not complied with by the KZN Regional Office prior to or subsequent to the signing of the lease agreement with RPF the following day.

(v) Although the ultimate accountability in terms of the PFMA for the procurement of the lease remains that of the Director-General, as the accounting officer, the evidence shows that the process in respect of the procurement of the Transnet building had already progressed to an advanced stage at the time when he took office, on 1 July 2010.

(w) The evidence further indicates that the Director-General took additional steps to ensure that the procurement of the lease was cost effective by commissioning an option analysis report and conditionally agreeing to the procurement of the lease.

(x) The conduct of the KZN Regional Office of the DPW, by merely accepting that only the Transnet building could be procured and by advising the SNBAC, accordingly amounted to maladministration.

(y) The failure of the SNBAC to properly interrogate the recommended procurement strategy also amounted to maladministration.

(z) The failure of the KZN Regional Office to comply with the conditions imposed by the SNBAC and the Director-General was improper and amounted to maladministration.

(xvii) The Public Protector's specific findings in relation to the conduct of the SAPS are that:

(a) The lease agreement in respect of the Transnet building was signed between RPF and the DPW and not by the National Commissioner of the SAPS, as was alleged. However, the National Commissioner signed both the initial and re-submitted needs analyses and a memorandum, dated 28 June 2010, authorising funding for the Transnet building lease.

(b) Although the SAPS did not sign the lease agreement, its involvement in the procurement process was improper, as it proceeded beyond the demand management phase and it further failed to implement proper controls, as required by the PFMA and relevant procurement prescripts.

(c) The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to unlawful, improper conduct and maladministration.

(d) The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.

(e) On the evidence available it could not be found that an improper relationship between the preferred service provider (RPF) and the SAPS motivated the deviation from required tender procedures.

(f) The inclusion of the operational staff of the FCS units in the needs analyses does not fully reconcile with the vision of the Minister of Police and the National Commissioner of bringing the police closer to the communities that they serve.

The National Commissioner's contention that the operational staff of the FCS units would remain at their cluster stations, is not supported by the evidence in respect of the accommodation requirements of the SAPS, as contained in the needs analyses.

(xviii) The Public Protector's specific findings in relation to the conduct of the DPW are that:

(a) The procurement by the DPW of the lease was not in accordance with a system that is cost effective and competitive, as is required by section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.

(b) The reckless manner in which the DPW dealt with public funds in this case, particularly by not following the prescribed tender process without justification, not ensuring that the state received value for money, as well as ignoring containment process that was already in place, fell short of the requirements of good governance and administration.

(c) The conduct of the DPW KZN Regional Office and that of the SNBAC was in breach of those duties and obligations incumbent upon them in terms of section 217 of the Constitution, the PFMA and the relevant Treasury Regulations. These provisions require that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.

(d) The process that led to the conclusion by the DPW of a lease agreement with RPF was fatally flawed in various respects, including non-compliance with prescribed procurement procedures and conditions imposed by the SNBAC and the accounting officer. This rendered the process unlawful and further constituted improper conduct and maladministration.

(e) The lease agreement should not have been entered into as it did not comply with the validity requirements of the Constitution, applicable legislation, prescripts and the instructions of the accounting officer. The lease agreement entered into by the DPW and RPF was therefore invalid.

(f) The initiation of a new procurement process in April 2011, contrary to the undertaking given to the Public Protector by the DPW for the process to be held in abeyance pending the finalisation of this investigation and a pronouncement on the propriety of the procurement process followed, was improper and undermines public confidence in organs of state.

(g) The conduct of the Minister of Public Works in relation to the procurement by the DPW for the SAPS referred to in this report and in respect of the investigation by the Public Protector failed to meet the requisite stewardship expected from her, including the use of public resources as envisaged by sections 195 and 217 of the Constitution and the *Batho Pele Principles,* and her obligation to cooperate with the investigation in terms of the Public Protector Act, and accordingly constituted improper conduct as envisaged by sections 181(3) and 182(1) of the Constitution.

The schematic illustration below reflects a comparison of the above findings against the relevant phases of the procurement process as it pertains to leased accommodation:

Schematic: Findings is respect of the procurement process of the Transnet building

	INVESTIGATION FINDING	AREA OF RESPONSIBILITY
Preparation & Demand Management	**INCEPTION/ NEEDS ANALYSIS**	
	1. In Feb 2010 SAPS KZN Provincial office indicated the preferred option for accommodation is the construction of a new facility	**SAPS**
	2 19 March Transnet building is sold to Bon View Trading (RPF)	
	3. SAPS identified the Transnet building in March 2010 as alternative accommodation – approx 45000m^2 space available – DPW not consulted	**DPW**
	4. 1st SAPS needs analysis for KZN Provincial office finalised on 29 April 2011 – after building was already identified	
	5. Need has increased from 13000m^2 to 45 499m^2- includes additional components	
	FINANCIAL PLANNING	
	1. Need was not reflected in the SAPS Immovable Asset Plan	**SAPS**
	2. The existing lease budget was under severe pressure and the new lease was not planned for	**SAPS**
	3. Funds had to be reprioritised from elsewhere in the SAPS budget the new lease – Total cost R1.166 billion	**SAPS** in order to fund
Acquisition management	**PROCUREMENT PROCESS**	
	1. The SAPS proceeded beyond the demand management phase of the SCM process and engaged with service provider to exclusion of DPW	**DPW**
	Procurement Strategy	
	2. The DPW Regional Office (KZN) interpreted PI as an instruction to procure the Transnet building, to the exclusion of other potential service providers	**DPW**
	3. KZN Regional BSC recommends to SNBAC that a negotiated process with RPF implemented – SNBAC approves the negotiated strategy	be
	4. The reasons for deviating from a competitive process were not recorded and reported as required by SCM prescripts	**DPW**
Evaluatio	**EVALUATION PROCESS**	
	1. The procurement process did not comply with the requirement of fairness, equitability and transparency, and the deviation from a competitive bid process was improper	**SAPS &DPW**
Award	**AWARD AND CONTRACT MANAGEMENT**	
	1. The decision to proceed with a negotiated process was improper and should have gone out on tender	**DPW**
	2. The lease agreement entered in by DPW and RPF was invalid	**DPW**
	3. The cost implications of the lease indicate that the process was not market related and therefore not cost effective	**DPW**

(xvix) The non-compliance by the SAPS and DPW with the prescribed SCM process in the procurement of the Transnet building lease had the following impact:

(a) Due to the fact that the procurement was not cost effective it resulted in a significant potential monetary loss to the state and prejudice to the South African tax payers;

(b) Loss of public confidence in the SAPS, DPW and organs of state in general in open and transparent procurement of goods and services;

(c) The perception of potential service providers that they cannot expect fair and equal treatment from organs of state;

(d) A delay in improving the accommodation and working conditions of SAPS officials, which has a direct bearing on their level of service delivery;

(e) The perception created by the SAPS needs analyses that vulnerable members of the community, i.e. women and children will have limited access to units of the SAPS established specifically to deal with family violence, child protection and sexual offences related matters.

(f) As was the case in the Middestad investigation referred to above, it was evident throughout this investigation that a number of the officials interviewed had the perception that the SAPS could irregularly influence the procurement process. These perceptions were reinforced by the fact that when these officials raised serious concerns with the process followed by the SAPS and the DPW to procure the lease in writing in, they were sidelined and/or deliberately removed from the procurement process.

(g) By entering into long term lease agreements of substantial amounts (R1.1 billion in this instance), which includes operational costs aimed at upgrading buildings significantly, the DPW is essentially footing the bill for the improvement of properties owned by private entities. The expenditure incurred for such a lease could be better utilised for the construction of client specific accommodation and/or the purchasing of suitable property to accommodate client departments. It was noted from the response of the Minister of Public Works to the Provisional Report of the Public Protector that she intends formulating a policy in terms of

which the DPW will in future consider favouring the construction of buildings over leased accommodation.

(h) The total space requirement as reflected in the needs analysis in terms of which the PI of 17 March 2011 was issued by the DPW is exactly the same as was offered by and leased from RPF in terms of the lease agreement that lapsed. It was therefore clearly tailored to suit the previous offer made by RPF. The validity of this needs analysis is therefore highly questionable and should not have been accepted by the DPW at face value.

(xx) The remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution is the following:

(a) The President to consider taking action against the Minister of Public Works for her actions referred to in this report and the Report of the Public Protector on the procurement of the lease of the Middestad building (Report no 33 of 2010/11), issued on 22 February 2011.

(b) The Minister of Public Works to:

(i) Report to the Cabinet on her actions in relation to the procurement of the leases of the Middestad and the Transnet buildings by the DPW and her failure to fully cooperate with the Public Protector in connection with the investigation thereof, within 60 days of the date of the issuing of this report.

(ii) With the assistance of the National Treasury and the Department of Public Service and Administration, take urgent steps to ensure that the appropriate action is instituted against the relevant DPW officials that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.

(c) The SAPS should engage the DPW with a view to identifying alternative accommodation for the operational staff of the FCS units referred to in this report in closer proximity to the communities which they serve.

(d) The needs analysis of the SAPS should be reviewed and possibly amended and in accordance with the outcome of the process referred to above.

(e) The DPW should assist the SAPS to find suitable accommodation for the said operational staff of the FCS units and the Provincial Head Office, in accordance with a system that complies with section 217 of the Constitution.

(f) The National Treasury should closely monitor the process referred to above, including the revisiting of the needs analysis.

(g) The DPW must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts and the encroachment by its client departments on its mandate. In addition, the DPW must implement measures to ensure the verification of the floor space offered by service providers, prior to any lease agreement being concluded.

(h) The Acting Director-General of the DPW must ensure that any steps taken against Ms Irene Nel from the KZN Regional Office, as a result of her raising concerns in connection with the procurement of the Transnet building, are reversed and that she is reinstated in the position she occupied on 1 July 2010, should she so wish.

(i) The Minister of Police should, with the assistance of the National Treasury, take urgent steps to ensure that the appropriate action is instituted against all the relevant officials of the SAPS that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.

(j) The SAPS must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.

(k) The National Treasury should develop and introduce measures that will prevent a recurrence of a situation where client departments infringe on the functional areas of the DPW in respect of the procurement of leased accommodation.

(l) The DPW should expedite the formulation of a policy to implement its recent announcement regarding moving towards the building of accommodation for client departments above the procurement of long term leases of lower grade buildings.

1 INTRODUCTION

1.1 This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to:

1.2.1 The Speaker of the National Assembly;

1.2.2 The President of the Republic of South Africa;

1.2.3 The Minister of Police;

1.2.4 The Minister of Public Works;

1.2.5 The Minister of Finance; and

1.2.6 The Minister of Public Service and Administration.

1.3 Copies of the report are also circulated to:

1.3.1 The Chairperson of the National Council of Provinces;

1.3.2 Adv P Hoffman SC, the Director of the Institute for Accountability in Southern Africa and Mr P J Groenewald MP, the complainants in the matter that was investigated;

1.3.3 The Secretary to the Cabinet;

1.3.4 The Chairpersons of the Parliamentary Portfolio Committees on Police and Public Works;

1.3.5 The National Commissioner of the South African Police Service;

1.3.6 The suspended Director-General of the Department of Public Works;

1.3.7 The Acting Director-General of the Department of Public Works;

1.3.8 The Head of the Special Investigating Unit; and

1.3.9 Mr R Shabangu of RPF.

1.3.10 This is the second and final report containing the findings of the Public Protector on an investigation into complaints and allegations of maladministration, improper and unlawful conduct by the South African Police Service (SAPS) and the Department of Public Works (DPW). It deals with the leasing of accommodation for the SAPS Provincial Head Office in Durban.

2 THE COMPLAINTS LODGED WITH THE PUBLIC PROTECTOR

2.1 This report represents the outcome of the second part of the investigation by the Public Protector into a complaint lodged on 2 August 2010 by Adv P Hoffman SC, the Director of the Institute for Accountability in Southern Africa and Mr P J Groenewald MP, against the National Commissioner of the SAPS and the DPW.

2.2 The complaint was based on allegations contained in an article published by the *Sunday Times* the previous day, under the heading: "*Bheki Cele's R500m police rental deal."* In the article, it was stated, *inter alia*, that:

> "*The Sunday Times can reveal that Cele signed the deal to move S A Police Service top brass-including Minister of Police, Nathi Mthethwa, his deputy, Fikile Mbalula, and administrative staff-to Roux Shabangu's building almost two months before he bought it.*
>
> *The deal never went out on tender, violating Treasury regulations that all contracts over R500 000 must go through a competitive bid process. After three days of queries from the Sunday Times, the Department of Public Works could not explain why it had flouted Treasury rules."*

2.3 The said article further stated that the National Commissioner had ***"also signed a deal to move police in Durban to another building Shabangu is negotiating to buy."*** (emphasis added)

2.4 In essence, the second aspect of the complaint related to the alleged non-compliance with the requirements of section 217 of the Constitution in respect of procurement of leased accommodation in Durban for the SAPS by the DPW. The value of the alleged deal was estimated at approximately R1,166 billion spread over a period of 10 years. It was further suggested that the National Commissioner

of the SAPS was improperly involved in the procurement of the lease of the Transnet building, the building identified to accommodate the SAPS Durban.

2.5 The complaint was lodged in terms of section 182 of the Constitution and the Public Protector Act.

2.6 The allegations pertaining to the procurement of a lease for office accommodation for the SAPS in Pretoria was the subject of a separate investigation conducted by the Public Protector in respect of which a report was issued on 22 February 2011[1].

3 BACKGROUND

3.1 The procurement of office accommodation is one of government's major expenditure items. The DPW's leasing expenditure commitments on behalf of client departments for the 2010 calendar year amounted to an estimated R1.5 billion (rentals alone covering a 12 month period only).

3.2 The value chain for such procurements cuts across end user organs of state and the DPW, with the end users being responsible for the demand management and the DPW for the actual procurement of the acquired accommodation (acquisition management).

3.3 The total value of the procurement of the lease of the Transnet building in Durban for the accommodation of the SAPS, which is the subject of the investigation referred to in this report, amounted to approximately R1,166 billion over a period of 9 years and 11 months.

3.4 The combined value of the procurement of the Transnet building in Durban and the Middestad building in Pretoria for the accommodation of the SAPS was approximately R1,6 billion.

[1] See Report No 33 of 2010/11

3.5 In both cases the service provider contracted by means of a negotiated procurement process implemented by the DPW, was RPF. According to the DPW's own policies and prescripts the negotiated process is the least desirable method of procurement of leased accommodation. It entails foregoing the entire prescribed tender process in favour of negotiating with a single service provider and should only be used in exceptional circumstances.

4 COOPERATION WITH THE SPECIAL INVESTIGATING UNIT AND PROMPTACTION TAKEN BY THE PUBLIC PROTECTOR AT THE COMMENCEMENT OF THE INVESTIGATION

4.1 The President, by virtue of Proclamations R.38 and R.42 of 2010 published in the Government Gazette on 30 July 2010 and 10 August 2010 respectively, referred certain matters regarding the DPW and the SAPS to the Special Investigating Unit (SIU) for investigation. These matters included issues pertaining to the procurement of leased accommodation.

4.2 The subject matter of the complaints lodged with the Public Protector, referred to above, also formed part of the investigation to be conducted by the SIU, in terms of the said Proclamations. The Public Protector therefore requested the SIU, in terms of section 7(3)(a) of the Public Protector Act, to cooperate with the investigation into the alleged improprieties relating to the procurement of the lease of the Middestad and Transnet buildings and matters incidental thereto.

4.3 The cooperation of the SIU with the investigation was conducted in accordance with the relevant provisions of the Public Protector Act, referred to below.

4.4 The Public Protector approached the Director-General of the DPW and the National Commissioner of the SAPS in writing on 3 August 2010, in connection with the complaints lodged, and requested that the implementation of the lease agreements referred to in the said newspaper article (in respect of buildings in Pretoria and Durban) be suspended, pending the outcome of the investigation.

4.5 In his response, dated 10 August 2010, the National Commissioner undertook not to move personnel of the SAPS into the building in Durban (Transnet building), as requested by the Public Protector. This undertaking was again confirmed by the

National Commissioner in letters addressed to the DPW and the Public Protector on 16 and 18 February 2011, respectively.

4.6 The DG of the DPW responded on 10 August 2010, indicating that no lease agreement in respect of the Transnet building had been concluded between the DPW and RPF, and that the procurement process pertaining to the said building was under review.

4.7 On 25 October 2010, the Public Protector issued a preliminary report on the investigation, which was presented to the SAPS and the DPW. This preliminary report related primarily to the investigation of the procurement of the lease of the Middestad building in Pretoria.

4.8 In the covering letter that accompanied the preliminary report that was addressed to National Commissioner on 25 October 2010, the Public Protector, however, stated, *inter alia,* that:

> *"On the basis of the information and evidence obtained and considered to date, I concur with the views expressed by the Director-General of the Department of Public Works in his letters addressed to you on 11 and 19 October 2010, that an entirely new procurement process has to be conducted in respect of the leasing of accommodation for the SAPS headquarters in Pretoria* ***and the offices of the Kwazulu-Natal Provincial Commissioner in Durban****, which will be subject to the submission of revised needs analyses and the availability of funding."* (emphasis added)

4.9 The DPW and the SAPS did not oppose the approach taken in the preliminary report and the covering letter, in respect of the Transnet building in Durban.

5 THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINTS LODGED AGAINST THE DPW AND THE SAPS

Mandate of the Public Protector

5.1.1 The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. Section 182(1) of the Constitution provides that the Public Protector has the power:

5.1.1.1 To investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

5.1.1.2 To report on that conduct; and

5.1.1.3 To take appropriate remedial action.

5.1.1.4 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.

5.1.2 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia,* any alleged maladministration in connection with the affairs of government at any level and any alleged receipt of an improper advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level.

5.1.3 In terms of section 6(4), the Public Protector can also investigate any alleged improper conduct by a person performing a public function.

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

5.1.5 In terms of the mandate given to the Public Protector it is therefore expected of her/him to conduct an enquiry that transcends lawfulness and focuses on good administration and proper conduct. Such enquiry has three components:

5.1.5.1 What happened?

5.1.5.2 What should have happened?

5.1.5.3 Is there a discrepancy between the two; does this constitute improper conduct as envisaged in section 182(1) of the Constitution, or maladministration, or abuse of power, improper enrichment and conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act?

5.1.6 In determining whether conduct was improper or constituted maladministration or any of the violations envisaged in the Public Protector Act, the Public Protector compares the conduct of organs of state and persons complained against, with the relevant legislation and other prescripts, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, and transparency and local and international best practices. The mandate of the Public Protector is not limited to the investigation of complaints, but he/she can also investigate suspicions or allegations of improper conduct on own initiative.

5.1.7 The complaints lodged and the allegations made against the DPW and the SAPS, referred to in this report, fall within the jurisdiction and powers of the Public Protector.

5.1 The obligation of the Public Protector to follow due process

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

6 THE INVESTIGATION

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

6.1 Scope of the investigation

6.1.1 The scope of the investigation was restricted to the period 1 August 2009 to 31 May 2011.

6.2 Method of gathering evidence

The following methods of gathering and analysing information were employed:

6.2.1 Interviews conducted

Interviews were conducted with:

6.2.1.1 Ten officials and former employees of the Division: Supply Chain Management (National and Provincial) of the SAPS;

6.2.1.2 The National Commissioner of the SAPS;

6.2.1.3 The Chief Financial Officer of the SAPS;

6.2.1.4 The KZN Provincial Commissioner of the SAPS and two senior officers from KZN Provincial office;

6.2.1.5 15 DPW officials based at the National and KZN Regional Offices involved in the procurement process of the Transnet building lease;

6.2.1.6 The Director-General (now suspended) of the DPW; and

6.2.1.7 The Minister of Public Works, assisted by two special advisors, officials of the legal division of the DPW and the Office of the State Attorney.

6.2.2 Analysis of documentation and/or information

The following were analysed and perused:

6.2.2.1 Documentation

6.2.2.1.1 Voluminous documentation obtained from the SAPS and the DPW, including:

6.2.2.1.2 Correspondence between the DPW and the SAPS;

6.2.2.1.3 Internal SAPS information notes and memoranda;

6.2.2.1.4 Needs analyses compiled by the SAPS;

6.2.2.1.5 Internal DPW memoranda and reports;

6.2.2.1.6 Norm documents and cost estimates compiled by the DPW;

6.2.2.1.7 Minutes of meetings of the Regional Bid Specification Committee (BSC) and the SNBAC;

6.2.2.1.8 SAPS resource allocation guides;

6.2.2.1.9 A lease agreement between RPF and the DPW; and

6.2.2.1.10 Correspondence between the DPW and external parties.

6.2.2.2 Correspondence

Correspondence between the Public Protector and:

6.2.2.2.1 The Minister of Public Works;

6.2.2.2.2 The National Commissioner and senior officials of the SAPS;

6.2.2.2.3 The Director-General and the Acting Director-General of the DPW;

6.2.2.2.4. The Chief Financial Officer of the SAPS;

6.2.2.2.5 Advocate P Hoffman SC and Mr P Groenewald MP, the complainants in this matter; and

6.2.2.2.6 Attorneys representing RPF.

6.3 Legislation and other prescripts

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

6.3.1.1 The Constitution;

6.3.1.2 The Public Protector Act;

6.3.1.3 The Special Investigating Units and Special Tribunals Act, 1996;

6.6.1.4 The Public Finance Management Act, 1999;

6.3.1.5 The Treasury Regulations and instructions for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management, 1999;

6.3.1.6 Government Immovable Asset Management Act, 2007;

6.3.1.7 The Prevention and Combating of Corrupt Activities Act, 2004; and

6.3.1.8 The Preferential Procurement Policy Framework Act, 2000 and Regulations issued in terms of the section 5 thereof.

6.4 Responses to the preliminary report of the Public Protector, dated 25 October 2010

6.4.1 Relevant responses to the preliminary report of the Public Protector on the Middestad building investigation, insofar as it pertained to the Transnet building investigation were considered.

6.5 Visits to KZN FCS units at the Phoenix, Inanda, Pinetown and Brighton Beach clusters and to the Servamus building (Durban)

6.5.1 On 24 and 25 May 2011 visits were conducted to the above Family Violence, Child Protection and Sexual Offences (FCS) units and the current Provincial Head Office of the KZN Provincial Office.

6.6 Responses to the Provisional Report of the Public Protector, dated 8 June 2011

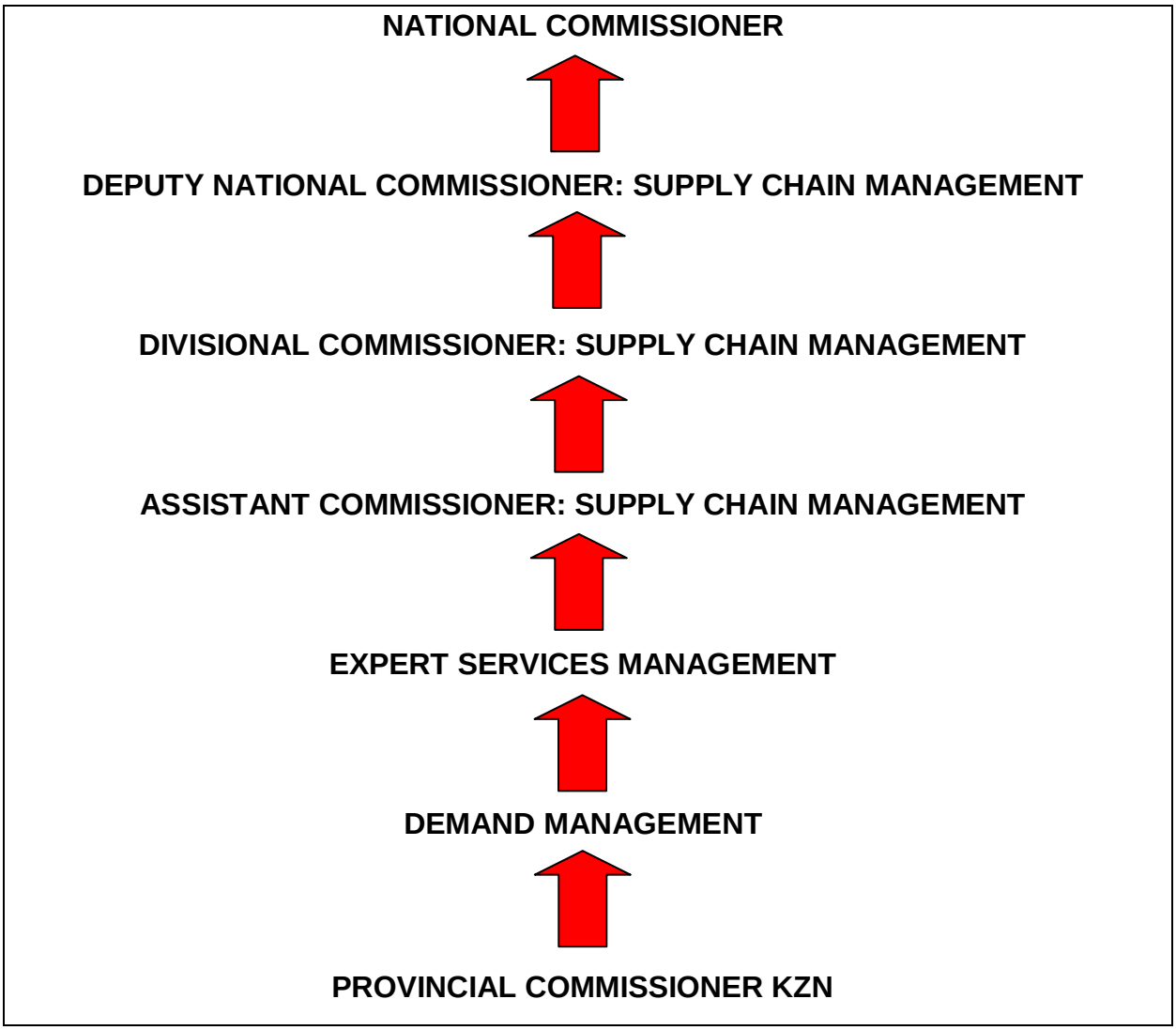
6.6.1 The responses received from the Minister of Public Works, The Minister of Finance, the National Commissioner of the SAPS, the complainants, attorneys representing RPF and the Director-General of the DPW were considered.

6.6.2 The Public Protector met with Shabangu of RPF, at his request, in connection with the Provisional Report on 13 June 2011. Subsequent to a written response to the Provisional Report received from attorneys representing RPF, the Public Protector also met with Shanbangu and the attorneys on 13 July 2011.

7 SAPS CHAIN OF COMMAND APPLICABLE TO INVESTIGATION

7.1 At all material times during the course of the period under investigation the chain of command of the SAPS, as applicable is reflected in the diagram below:

Diagram: Chain of Command of the SAPS applicable to issues investigated



8 LEGAL FRAMEWORK

8.1 Introduction

8.1.1 In evaluating the role of the SAPS and the DPW during the procurement of the Transnet building lease, it is prudent to establish the legal framework that governs the role of, and relationship between the two parties.

8.1.2 The SAPS and the DPW are national departments and as such fall within the dictates of the PFMA and the Regulations and Treasury Instructions issued by the National Treasury in terms of section 76 of the PFMA (Treasury Regulations).

8.1.3 The procurement of leased accommodation on behalf of the SAPS falls within the purview of the DPW. In terms of the Schedule to the Appropriation Act, 2010 the aim of the DPW is to ***"provide and manage the accommodation****, housing, land and infrastructure needs of National Departments …."* (emphasis added)

8.1.4 The devolution of custodial functions from the DPW to the SAPS with regard to property management started in December 2005, but has not yet been concluded. A Memorandum of Understanding was signed by the SAPS and the DPW on 31 January 2006, and covered 4 areas including: maintenance and property rates, payment of municipal services, property leases, and capital works. On 3 December 2008, the National Treasury approved *"SAPS' State of Readiness on the Devolution of Custodial Responsibilities from NDPW to SAPS"*. Currently, neither property leases, nor the payment of municipal services have been devolved and therefore remains the responsibility of the DPW.

8.1.5 In keeping with its mandate the DPW has put into place business processes which manage the procurement of goods and services from the stage that a need is identified and communicated to it. The identification of needs falls within the purview of user departments, in this case the SAPS.

8.2 General Procurement Legislation

8.2.1 Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is **fair, equitable, transparent, competitive and cost effective**.

8.2.2 The key instrument regulating procurement is the PFMA the purpose of which is set out in the preamble to the Act, which reads as follows:

> *"To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the*

responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith."

8.2.3 In terms of section 76(4)(c) of the PFMA, the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning, *inter alia,* the determination of a framework for an appropriate procurement and provisioning system which is in keeping with the dictates of Section 217(1) of the Constitution (supply chain management {SCM} framework).

8.2.5 The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all departments in national and provincial governments (see Regulation 16A2.1 (a)).

8.2.6 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A.3.2 which reads as follows:

"*16A 3.2A supply chain management system referred to in paragraph 16A.3.1 must –*

(a) be fair, equitable, transparent, competitive and cost effective;

(b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);

(c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and

(d) provide for at least the following: –

(i) demand management;

(ii) acquisition management;

(iii) logistics management;

(iv) disposal management;

(v) risk management; and

(vi) regular assessment of supply chain performance."

8.2.7 The procurement of leased accommodation is unique in the sense that the procurement functions are spread over many departments. The legislative mandate of the DPW makes it the responsibility of the department to procure leased accommodation (acquisition management component), whilst the demand management component (establishing the need) is the prerogative of the end user, in this case the SAPS.

8.2.8 Regulation 11(a) of the Regulations issued in terms of the Preferential Procurement Policy Framework Act, 2000, provides that **an organ of state must, prior to making an invitation for tenders properly plan for and as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made.**

8.3 Supply Chain Management

8.3.1 In February 2004, the National Treasury issued a document entitled "*Supply Chain Management: A Guide for Accounting Officers/Authorities*" **(SCM Guide)**. The purpose of the SCM Guide was to give guidance to accounting officers in fulfilling their roles within the SCM framework

8.3.2 Paragraph 3 of the SCM Guide sets out guidelines in regard to demand management and reads as follows:

"Demand management

3.1 Introduction

3.1.1 Demand management is the first phase of SCM. The objective is to ensure that the resources required to ***fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs****. As part of this element of SCM, a total needs assessment should be undertaken. This analysis should be included as part of the strategic planning process of the institution and hence will incorporate the future needs.*

3.1.2 It is vital for managers to understand and utilise sound techniques to assist them in their planning, implementation and control activities. ***As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be clearly analysed****. This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, etc."*(emphasis added)

8.3.3 This document is applicable to all accounting officers and contains the following principles:

a) The identification of a need is the initiating trigger to a procurement process.

b) The fulfilment of the need should form part of the strategic objectives of the department and a needs analysis should therefore be part of the strategic planning process.

c) Sound techniques should be utilised in conducting the needs analysis.

d) The need should be linked to the budget.

8.3.4 Paragraph 1.3.2.2 of the SCM Guide states that Demand Management is the beginning of the supply chain where:

- a needs assessment is done to ensure that goods or services are acquired in order to deliver the agreed service;
- specifications are precisely determined;
- requirements are linked to the budget; and
- the supplying industry has been analysed.

8.3.5 Planning therefore plays an integral part in supply chain management. The above principles are legislatively enshrined in the Government Immovable Asset Management Act, 2007 (GIAMA). The purpose of this Act is to provide a framework for the management of immovable assets held by a national or provincial department and to provide minimum standards in respect of immovable asset management. In terms of GIAMA immovable assets **acquired in terms of a**

lease are deemed to be subject to the dictates of this Act. Section 5 of the Act sets out the principles of asset management and reads as follows:

"5. Principles of immovable asset management.—(1) The following are principles of immovable asset management:

(a) ***an immovable asset must be used efficiently*** *and becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level;*

(b) to minimise the demand for immovable assets, alternative service delivery methods that do not require immovable assets must be identified and considered;

(c) in relation to an acquisition, it must be considered whether—

(i) a non-immovable asset solution is viable;

(ii) an immovable asset currently used by the state is adequate to meet a change in its service delivery objectives; and

(iii) ***the cost of the immovable asset as well as operational and maintenance cost throughout its life cycle justifies its acquisition in relation to the cost of the service;***

(d) immovable assets that are currently used must be kept operational to function in a manner that supports efficient service delivery;

(e) when an immovable asset is acquired or disposed of best value for money must be realised;. . ." (emphasis added)

8.3.6 The effect of GIAMA is, *inter alia,* to enforce optimal use of immovable property. GIAMA, through section 21, creates a criminal offence should an accounting officer wilfully or negligently contravene or fail to comply with any provision of this Act.

8.3.7 In terms of GIAMA, the DPW must annually prepare a custodian asset management plan (C-AMP). A comprehensive C-AMP will include an acquisition

plan, refurbishment plan, maintenance & repairs, and disposal plan. In the interim, the needs for built environment, professional services, construction, building and contracting services, land, buildings and facilities will have to be estimated based on the annual budget and the business plan of the units involved in the acquisition of construction related services.

8.4 Budget

8.4.1 The DPW business processes require a client department to confirm availability of funding prior to the procurement process being embarked upon. Although the DPW is involved in the actual acquisition of the property, the costs of leasing are borne by the client department.

8.4.2 The DPW, upon receiving a request to satisfy a need, embarks upon a process of estimating the costs to the client department over the period of the lease based on market analysis. This document allows the client department to estimate the costs it would possibly incur and allows the department to assess its budget and to plan for future budgets.

8.4.3 As stated earlier, the National Treasury guidelines expect a need to be linked to a budget and strategic objectives. Each department is expected to have a strategic plan in place that identifies the aims of the department and provides a budget towards achieving the said aims.

8.4.4 Regulation 5.1 of the Treasury Regulations makes it mandatory for the accounting officer of an institution to prepare a strategic plan for the forthcoming Medium Term Expenditure Framework (MTEF) cycle.

8.4.5 Regulation 5.2.2 requires that the strategic plan include the following:

"5.2.2 The strategic plan must –

(a) cover a period of three years and be consistent with the institution's published medium term expenditure estimates;

(b) include specific Constitutional and other legislative, functional and policy mandates that indicate the output deliverables for which the institution is responsible;

(c) include policy developments and legislative changes that influence programme spending plans over the three-year period;

(d) include the measurable objectives, expected outcomes, programme outputs, indicators (measures) and targets of the institution's programmes ;

(e) include details of proposed acquisitions of fixed or movable capital assets, planned capital investments and rehabilitation and maintenance of physical assets;

(f) include details of proposed acquisitions of financial assets or capital transfers and plans for the management of financial assets and liabilities;

(g) include multi-year projections of income and projected receipts from the sale of assets;

(h) include details of the Service Delivery Improvement Programme;

(i) include details of proposed information technology acquisition or expansion in reference to an information technology plan; and

(j) for departments, include the requirements of Chapter 1, Part III B of the Public Service Regulations, 2001." (emphasis added)

8.4.6 The PFMA, together with the Treasury Regulations and guidelines, ensure that proper planning is in place when setting out a budget and as a consequence, needs are prioritised and budgeted for. The ideal scenario being that a need is identified, analysed, and included in the strategic planning and therefore budgeted for.

8.4.7 The Medium Term Expenditure Frame Work (MTEF) issued by the National Treasury in 2007, which covers the period under review in this Report, emphasises this point and the following is contained in the document –

"*The link between strategic planning, budgeting and spending plans is important in compiling a credible budget, as inadequate planning could lead to budgets which do not give effect to strategic priorities".*

8.4.8 Section 38(2) of the PFMA reinforces this principle of proper planning. This section reads as follows:

> *"(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated."*

8.4.9 Expenditure must be in accordance with the vote of the department and the main divisions within the vote. This requirement is encapsulated in section 39 of the PFMA. Read with section 38(2), the principle of proper planning is once again highlighted.

8.4.10 The PFMA, however, recognises situations where a need is not linked to a budget. In these instances four options are available to a department to fund such needs.

8.4.11 The first option deals with a situation where no funding has been appropriated, but due to an emergency, funds are required for the purposes of procurement. Section 16 of the PFMA allows the Minister of Finance to authorise the use of funds from the National Revenue Fund to defray expenditure provided that:

a) the expenditure is of an exceptional nature;

b) expenditure is not currently provided for; and

c) the expenditure cannot be postponed to a future appropriation cycle without serious prejudice to the public interest.

8.4.12 The second option is in the form of section 43 of the PFMA which allows an accounting officer to utilise a saving in an amount appropriated under a main division within a vote towards the defrayment of excess expenditure under another main division within the same vote. This virement of funds is, however, limited to 8% of the amount appropriated under that main division and a report concerning

the utilisation of the savings must be presented to the Executive Authority (Minister) and the relevant treasury.

8.4.13 The third option open to departments is to request further funds from the National Treasury. This is, however, limited in its application and would only be applicable to situations where:

a) a department inherited new functions; or

b) where due to policy decisions new needs arise.

8.4.14 The fourth option is to re-prioritise expenditure within a main division of a vote to accommodate the need.

8.5 Acquisition process

8.5.1 According to the SCM Policy of the DPW the purpose of acquisition management is to ensure that acquisition delegations are in place in the organisation, the market is assessed and a sourcing (procurement) strategy is determined, bid documents are compiled, bids are solicited, responses are received, responses are evaluated, and assessed and awarded by the bid adjudication committees.

8.5.2 For the purposes of this policy the process has been divided into 5 steps:

- Initiation;
- Preparation of bid documents;
- Solicitation;
- Evaluation;
- Assess and award by the bid adjudication committees.

8.5.3 The policy requires that:

"the department must comply with the principles of fair, equitable, transparent, competitive and cost effective processes throughout acquisitions."

8.5.4 In implementing the policy, the DPW must:

a. Ensure that bid documentation and the general conditions of a contract are in accordance with –

i) The instructions of the National Treasury; or

ii) The prescripts of the CIDB, in the case of a bid relating to the construction industry

b. Determine an acquisition strategy for quotes (where applicable) and for bids, which promotes competition

c Determine scoring models and the ratios to be used for the combination of price and functionality which will be determined and approved by the Bid Adjudication Committee process, and must be communicated to suppliers in all the advertisement and bid documents

d. Advertise bids in at least the Government Tender Bulletin for at least 30 days before closure, except in urgent cases where bids may be advertised for a shorter period on approval of the Bid Adjudication Committee

8.5.5 All bids must be evaluated by a Bid Evaluation Committee prior to submission to the Bid Adjudication Committee for approval of bids. A Bid Evaluation Committee must consist of at least four people, one of which must be an SCM specialist. Bid Adjudication Committees are established in terms of Regulation 16A to the PFMA to provide a control function to assess and award bids. The responsibility of the Bid Adjudication Committee is to ensure that the process of soliciting and evaluating bids is fair, equitable, transparent, competitive and cost effective.

8.5.6 In terms of DPW SCM Circular of 2009/10, issued on 25 May 2009, a Special National Bid Adjudication Committee (SNBAC) was appointed for acquisitions exceeding R20 million. On 26 February 2010, the DPW issued a further circular (10 of 2010), in terms of which all leases with a nett present value (NPV) exceeding R5 million **must be approved by the SNBAC and <u>not</u> the Director-General**.

8.5.7 The SCM Policy takes its guidance on empowerment in property related acquisitions from the document: "*Property Management Strategy on Black Economic Empowerment (BEE), Job Creation and Poverty Alleviation*". The document places emphasis on the following empowerment aspects related to property acquisitions:

8.5.7.1 Property leases

8.5.7.1.1 The DPW will promote empowerment by offering long term leases to companies that are contributing the most to empowerment. The thresholds to determine lease periods per empowerment contribution are articulated in this document.

8.5.7.2 Lease to specification

8.5.7.2.1 The DPW will foster empowerment by entering into long-term leases with Historically Disadvantaged Individuals(HDI) landlords to manage and or construct buildings that government will lease from them, with an option for the DPW to own those properties upon expiry of those leases. Such leases will be governed by Regulation 16 of the PFMA Regulations on Public Private Partnerships.

8.5.7.3 Tenant installation

8.5.7.3.1 When government leases new properties, or renews the leases of existing properties, there is often anteed to refurbish such properties. The DPW will promote the objectives of the Extended Public Works Programme and National Youth Service by specifying participation goals based on the goals of these two programmes.

8.6 Urgency

8.6.1 The PFMA and Treasury Regulations require that the default position in regard to procurement is that a competitive bid procedure be embarked upon.

8.6.2 The legislation, however, recognises that in certain cases it is impractical to invite competitive bids and as such it is permissible to procure goods or services by other means, provided that reasons for the deviation are recorded and approved by the accounting officer (Regulation 16A6.4).

8.6.3 The National Treasury issued Practice Note 8 of 2007/08 wherein, *inter alia,* urgent, emergency or sole supplier cases were further regulated. Paragraph 3.4.3 thereof provides as follows:

> *"Should it be impractical to invite competitive bids for specific procurement ,e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury*

Regulation 16A6.4. ***The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4****. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process."*(Emphasis added)

8.6.4 The SCM Guide at paragraph 4.7.5.1 notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process but must act in a manner that is in the best interest of the State.

8.6.5 The SCM Guide defines an "emergency case" as -

"A case where immediate action is necessary in order to avoid a dangerous or risky situation or misery." (Emphasis added)

8.6.6 An "urgent case" is defined as *"a case where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical."This definition is, however, subject to the qualification that* ***"A lack of proper planning should not be constituted as an urgent case."*** (Emphasis added)

8.6.7 The following principles can be gleaned from this definition of urgency:

a) The early delivery is the key requirement which would decide the success or failure of the project.

b) The time period available for the acquisition makes it impractical or impossible to pursue a competitive bid process.

c) The urgency was not foreseeable or the result of dilatory conduct.

8.6.8 for a situation to be classified as urgent all three the above requirements must be met.

8.7 The responsibilities of accounting officers in respect of SCM

8.7.1 Section38(1)(a)(iii) of the PFMA prescribes that the accounting officer for a department must ensure and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

8.7.2 In terms of section 38(1) (c) (ii) of the PFMA, an accounting officer must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure. It is expected of the accounting officer to take effective and appropriate disciplinary steps against any official in the service of the department who makes or permits an unauthorised, irregular and fruitless and wasteful expenditure. Irregular, unauthorised or fruitless and wasteful expenditure is regarded as an act of financial misconduct in terms of section 38(1) (h) (iii) of the PFMA.

8.7.3 An accounting officer is, in terms of section 86(1) of the PFMA guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, if he or she wilfully or in a grossly negligent way fails to comply with a provision of, *inter alia,* section 38, referred to above.

8.8 Assignment of powers and duties by accounting officers

8.8.1 In terms of section 44 of the PFMA, the accounting officer for a department may in writing delegate any of the powers entrusted or delegated to him/her to an official in that department.

8.8.2 However, in terms of section 44(2) (d) of the PFMA, a delegation to an official does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

8.9 The powers of the National Treasury

8.9 Section 6(2) of the PFMA provides that the National Treasury must intervene by taking appropriate steps to address the serious material breach of the Act by a department and may do anything further that is necessary to fulfil its responsibilities effectively.

8.10 Role of the DPW Regional Offices in the SCM process as pertaining to leases

8.10.1 It was established through the course of the investigation that the client department submits a needs analysis and funding confirmation to the Key Accounts Management (KAM) division located at the head office of the DPW.

8.10.2 The KAM division then fully assess the client's need, including the nature and extent of the accommodation required.

8.10.3 When satisfied that the relevant requirements are met the KAM division then issues a procurement instruction (PI) to the DPW Regional Office in whose area the accommodation is to be procured.

8.10.4 The PI requires of the Regional Office to follow the SCM principles and leasing procedures and processes in the procurement of the accommodation to the satisfaction of the client department, in terms of the approved space and cost norms.

8.10.5 The regional Bid Specification Committee (BSC) is convened to determine:

8.10.5.1 The client department's exact requirements in terms of the prescribed norms document;

8.10.5.2 The urgency of the accommodation required; and

8.10.5.3 The cost implications. If the cost exceeds R20 million a recommendation relating to an appropriate procurement strategy must be submitted to the SNBAC for approval.

8.10.6 Once approved by the SNBAC, the procurement strategy must be implemented by the Regional Office.

8.10.7 The Regional Office then becomes responsible for the initiation of the procurement process in compliance with the approved procurement strategy.

8.10.8 The Regional Office is required to provide regular feedback to the KAM division of the progress made throughout the procurement process.

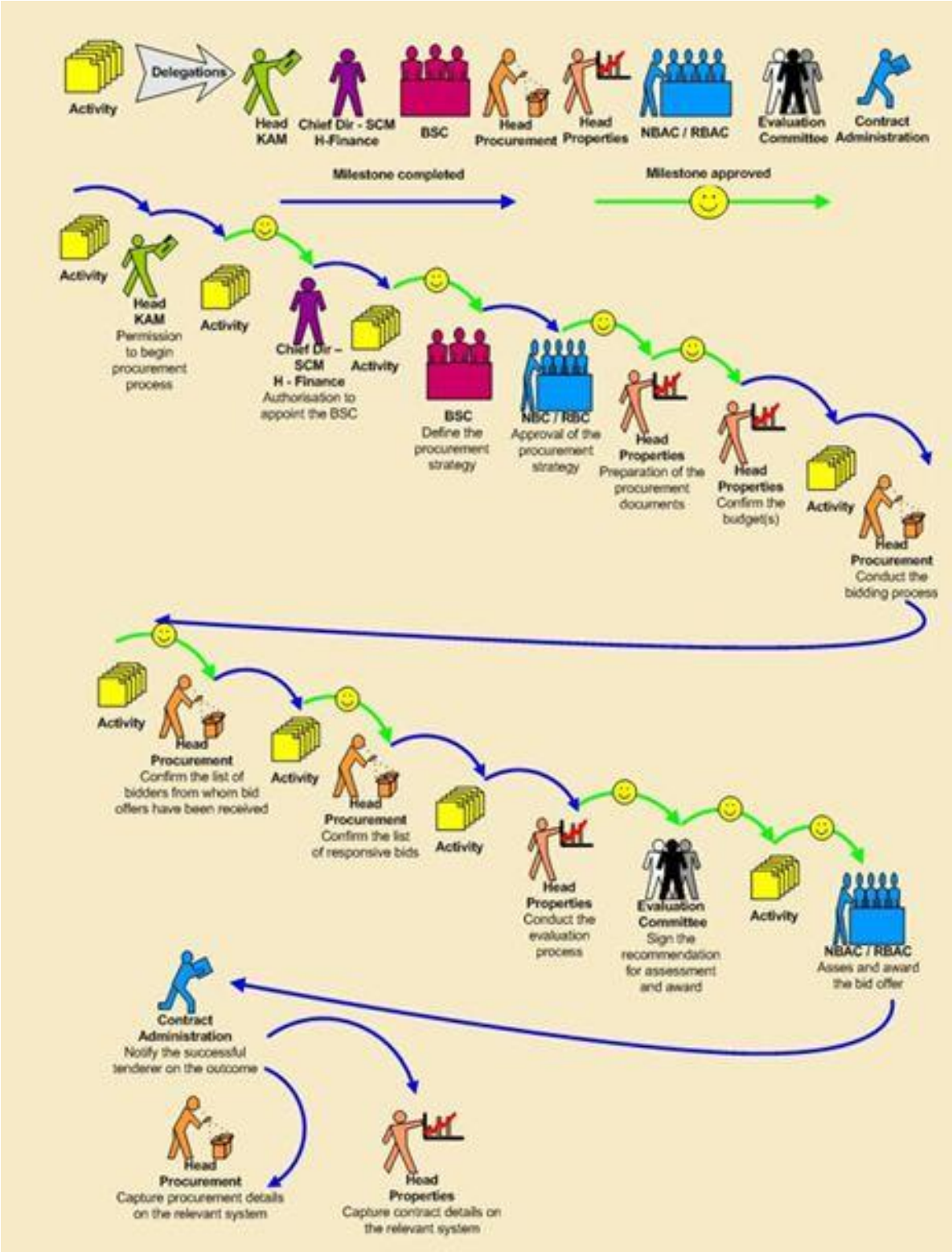
8.10.9 Schematic Illustration of the SCM process as it pertains to leases and relevant areas of responsibility

8.10.9.1 A schematic illustration is provided below as a summary of the SCM process as it pertains to the procurement of leased accommodation. This schematic further highlights the areas of responsibility relating to the DPW and the SAPS as the client department in the matter investigated.

Schematic: Procurement Steps and areas of responsibility in respect of leased accommodation

	PROCUREMENT STEPS	RESPONSIBLE DEPARTMENT
Preparation & Demand Management	**INCEPTION/ NEEDS ANALYSIS** 1. Identify the need for accommodation 2. Compile needs assessment based on actual requirements 3. Determine nature and extent of the accommodation required 4. Ensure that all current departmental accommodations is adequately utilised in terms of GIAMA	**SAPS** Relevant SCM division within SAPS Demand Management
	FINANCIAL PLANNING 1. Ensure need / requirements are linked to budget plans 2. Determine if need is in line with the strategic Objectives of the department 3. Confirm availability of funding 4. Ensure funding allocation complies with relevant provisions of the PFMA 5. Submit needs analysis and funding confirmation to DPW in order to initiate the procurement process	**SAPS** Relevant SCM and Finance divisions within SAPS
Acquisition management	**PROCUREMENT PROCESS** 4. Fully assess client's need, including nature and extent of accommodation required based on needs assessment 5. Determine urgency and relevant other factors 6. KAM issues a procurement instruction (PI) to DPW Reg. Office	**DPW** Key Account Management division (KAM)
	Procurement Strategy (PS) 1. Regional BSC evaluates clients need and recommends suitable procurement strategy to SNBAC: 1.1 Bid process – open tender 1.2 Negotiated process – single service provider	Regional Bid Specification Committee (BSC) Special National Bid Adjudication Committee (SNBAC)
	2. SNBAC makes final decision on a suitable procurement strategy (PS) 3. DPW Regional office implements PS approved by SNBAC	Key Account Management division (KAM)
Evaluation	**EVALUATION OF BIDS** 1. Evaluation of Bids • Method - Price and Preference • Method - Price, Functionality and Preference 2. Recommend preferred bid or single service provider taking market prices and cost effectiveness into account	**DPW** Bid Evaluation Committee (BEC)
Award	**AWARD AND CONTRACT MANAGEMENT** 1. Adjudication and/ or award 2. Draft and sign contract with successful bidder in terms of the exact specifications of the bid awarded 3. Monitor and evaluate performance in respect of the terms and conditions of the contract	**DPW** SNBAC (All leases with net value above R5m must be approved by the SNBAC and not the DG (DPW SCM circular no.10 of 2010) DPW Project Manager

The flow chart below provides a brief description of the steps involved in the procurement process of leased accommodation. This document was taken off the DPW toolkit.



9 ANALYSIS OF INFORMATION OBTAINED DURING THE INVESTIGATION

The following is an analysis of evidence and information relied upon, as supported by the relevant official documentation, obtained from the SAPS and the DPW during the course of the investigation.

9.1 Appointment of the National Commissioner on 1 August 2009 and a directive issued on 30 September 2009

9.1.1 The National Commissioner took office with effect from 1 August 2009. On 30 September 2009, he issued a directive in terms of which all procurement of goods and services by the SAPS in excess of R500 000, had to be approved by him. This directive effectively withdrew all existing delegations (as contemplated in section 44(3) of the PFMA), as the National Commissioner was of the opinion that he, as the accounting officer of the SAPS, needed to address the persistent problems experienced within the SAPS supply chain management. As of 30 September 2009, the final approval for the procurement of all goods and services in excess of R500 000 by the SAPS was brought under the direct authority of the National Commissioner.

9.2 Expiry of the lease of the Servamus building

9.2.1 The lease of the Servamus building in Durban, on behalf of the Provincial Commissioner of the SAPS, expired on 31 August 2010.

9.2.2 On 2 October 2009, approximately 10 months before the expiry of the lease, the DPW informed the KZN Provincial Logistical Services of the SAPS that the lease was due to expire on 31 August 2010. The SAPS were also requested to indicate whether it envisaged a renewal of the lease or whether alternative accommodation had to be procured.

9.3 Alternative accommodation for the office of the Provincial Commissioner

9.3.1 On 4 November 2009, the SAPS Divisional Commissioner: SCM informed the KZN Provincial Commissioner that the National Commissioner had instructed that the

feasibility of constructing a Provincial Head Office in Durban must be investigated. In addition, the KZN Provincial Commissioner was provided by the office of the Divisional Commissioner with a proposal relating to the possible leasing of the Standard Bank building, located at 275 Smith Street in the Durban CBD. The Provincial Commissioner was further requested to visit the site and inform the Divisional Commissioner as to whether the building conformed to the requirements of the KZN Provincial office. It was noted from the documentation provided that the total lettable area of the Standard Bank building was 11 500m^2 with 97 parking bays available.

9.3.2 During November 2009, a site visit was conducted at the Standard Bank building, by officers of the KZN Provincial SCM Division. The building was found to have been vandalised to the extent that the cost of repairs would have been exorbitant. It was also found to have insufficient parking facilities for the purposes of the SAPS and it was therefore concluded that the building did not meet the requirement of the KZN Provincial Office. This was again confirmed by the SAPS KZN Provincial Property Division on 25 March 2010.

9.3.3 Internal communication in the DPW Regional Offices, dated 4 February 2010, indicates that the possibility of constructing a Provincial Head Office to suite the requirements of the SAPS was still under consideration at the time.

9.3.4 On 12 February 2010, the KZN Regional Office of the DPW again approached the KZN Provincial Commissioner in connection with the impending expiry of the Servamus building lease. The letter forwarded to the SAPS, *inter alia*, states that:

> *"During the 8-year period that SAPS have occupied the Servamus building there has been a sign of intent (NDPW as well as SAPS) to construct a facility on State Owned Land* (sic) *for the sole purpose of accommodating the Provincial Commissioner's Office. Land parcels identified were Ridge Road and the land located just behind the Natalia Court Married Quarters. NDPW had further done extensive research on a Government Mall concept. In order for any planning to take place, which will ultimately lead to the allocation of a budget; an approved space and cost norm is required a Capital Instruction. This mandate has still to be received by this office."*

9.3.5 The KZN Provincial Commissioner informed the Divisional Commissioner SCM in writing, on 23 February 2010, that it was decided at a meeting held by the KZN Provincial Commissioner and senior officers the previous day, that the best option for the accommodation of the KZN Provincial Head Office was the construction of a new facility. Furthermore the Ridge Road site referred to above was found to be the most suitable. The Divisional Commissioner was further requested to initiate the relevant process. The Provincial Commissioner also stated that:

> ***"However it will not be feasible at this stage to enter a new lease and relocate the entire Servamus building to alternative leased accommodation due to the financial impact it will have on relocation costs, including the installation of new telephone and data lines. Therefore this office recommends the renewal of lease (*sic*) for Servamus building for a period of two years, pending the construction of a new building."*** (emphasis added)

9.3.6 The Regional Office of the DPW was also informed on8 March 2010 of the above decision to proceed with the renewal of the Servamus building lease for a period of two years.

9.3.7 During March 2010 the Provincial Commissioner indicated, in writing to the DPW, that the construction of a new building for the SAPS provincial headquarters was preferred to leased accommodation.

9.3.8 On 9 April 2010, the Facility Management Section of the office of the Provincial Commissioner requested all provincial components, as well as units that were supposed to be accommodated in the Servamus building to submit their post structures and specialised needs to enable them to commence with the process of finding alternative accommodation.

9.4 Purchase of Transnet building by Bon View Trading 126 (Pty) Limited (RPF) on 19 March 2010

9.4.1 The Transnet building was sold to Bon View Trading 126 (Pty) Limited (Bon View) in terms of an agreement of sale signed by Mr Roux Shabangu on behalf of the said company, on 19 March 2010. The agreement of sale also involved an

intermediary and the ultimate purchase price agreed upon by all the parties involved, amounted to R50 786 000, excluding VAT.

9.4.2 The suspensive conditions to the agreement of sale included that Bon View had to obtain approval of finance in respect of the full purchase amount, within 60 days of the date of conclusion of the agreement. Furthermore, Bon View was required to obtain minimum tenant occupancy of 70% of the total lettable area of the property within 60 days of the date of conclusion of the agreement.

9.4.3 Bon View changed its name to Roux Property Fund (Pty) Limited (RPF) in terms of a certificate of change of name issued by the Registrar of Companies on 18 May 2010.

9.4.4 It was established that Mr Roux Shabangu is the only director of RPF and that the Roux Shabangu Family Trust is the only shareholder.

9.5 First engagement between the SAPS and RPF in respect the Transnet building

9.5.1 According to the SAPS KZN Head: Property Management, Colonel AT Ngema (Ngema), the Provincial Commissioner requested him and other SAPS officials to accompany her to a site visit of the Transnet building in March 2010. Representatives of RPF were present at this meeting, where the suitability of the building for the requirements of the SAPS was discussed. The DPW was not represented at this meeting. Ngema allegedly expressed his concern to the Provincial Commissioner about meeting the landlord of the building in the absence of the DPW, however, the meeting continued despite his concerns.

9.5.2 Following a second site visit, again in the absence of the DPW, a presentation on the building was made to the Provincial Commissioner and other senior SAPS officials by a representative of RPF. The presentation included references to the gross lettable area available in the building as well proposed rates.

9.6 First engagement between the SAPS and the DPW in connection with the Transnet building on 15 April 2010

9.6.1 From the available documentation the first reference to the Transnet building is contained in a letter from the KZN Deputy Provincial Commissioner addressed to

Ms Irene Nel (Ms Nel) of the DPW KZN Regional Office, dated 15 April 2010. The letter stated the following:

> *"We would like to inform your office that we are interested in your Proposed Construction of Provincial Head Office Kwazulu-Natal at 477 Smith Street* (Transnet building) *Durban. This office would like to have the* (sic) *meeting with your office for further advice to go forward."*

Although the letter related to construction, the address referred to is that of the Transnet building.

9.6.2 Ms Nel responded on the same day in an e-mail addressed to the SAPS Provincial Logistics KZN office as follows:

> *"Receipt is acknowledged of your letter indicating your acceptance to the proposed construction at 477 Smith Street, Durban. Kindly confirm as to whom had proposed this construction to your office and with whom your office has been conducting discussions with in this regard; as NDPW has no knowledge of such need nor has this office received any Planning Instruction via either Head Office. Your urgent attention and prompt response to this enquiry will be appreciated please as I am perturbed at the developments as illustrated in your letter.*

9.6.3 No response from the SAPS to Ms Nel's enquiry could be located in the documentation provided.

9.7 Meeting between the SAPS and the DPW KZN Regional Office held on 21 April 2010 regarding the acquisition of alternative accommodation

9.7.1 The KZN Deputy Provincial Commissioner invited senior SAPS officials and Ms Nel to a meeting held on 21 April 2010 to discuss the acquisition of alternative accommodation of the KZN Provincial Head Office. However, due to the late start of the meeting; Ms Nel was unable to attend.

9.7.2 During the course of the meeting, Ngema again expressed his concern with the process that was unfolding. He further reiterated his concerns to the Deputy Provincial Commissioner in an email addressed to him on 22 April 2010. The

essence of Ngema's concerns were that correct procedures were not being followed and that the SAPS were encroaching on the functional area of the DPW by negotiating directly with the landlord of the Transnet building. The e-mail further reflects the following:

> *"Due to the magnitude of this requirement* (SAPS requirement) *NDPW will have no option except to go out on open tender as stipulated by Treasury, however it should also be noted that the South African Police will be part of the process and they will choose the property that is suitable for their needs.*
>
> ***Based on the above I would like to advise the management to refrain from engaging with the prospective landlords i.e. 477 Smith Street as this will jeopardise the tender processes, create false hope or give unfair advantage to them.***
>
> ***I would like to end by committing my support to my management with whatever decisions they take but also ensuring that they are protected from the bad publicity and unnecessary media attention which might be raised by matters like this."*** (emphasis added)

9.7.3 Ngema claimed that he never received a response to this email and the procurement of the Transnet building was subsequently removed from his area of responsibility.

9.8 The identification of the required accommodation needs of the KZN office of the Provincial Commissioner

9.8.1 The process of determining the exact required accommodation needs of the KZN office of the Provincial Commissioner for alternative accommodation, as requested by the KZN Provincial Commissioner, was subsequently concluded by the Demand Management Division of the SAPS, located in Pretoria, by 29 April 2010, after the Transnet building had already been identified by the SAPS. **The required floor space indicated by the needs at the time was 29 747.84m^2**.

9.8.2 On 4 May 2010, the KZN Provincial Property Management division submitted additional accommodation requirements to the office of the Divisional Commissioner: SCM, requesting the inclusion of such requirements in the needs

assessment to be submitted to the DPW. The additional accommodation requirements pertained to the following components:

9.8.2.1 Crime Intelligence clusters for Inanda, Phoenix and Durban Central

9.8.2.2 FCS Units for Durban, Phoenix, Brighton Beach and Umlazi

9.8.2.3 Operational Support PSS

9.8.2.4 Commercial Crime including DPCI

9.8.2.5 Organised Crime including DPCI

9.8.5.6 250 additional parking bays

9.8.3 On 19 May 2010 the Divisional Commissioner: SCM approached the CFO of the SAPS stating the following:

"1. A request has been received from the office of the Provincial Commissioner: KZN for alternative / additional / new accommodation due to the expansion of personnel.

2. The needs assessments have been compiled and an amount of R81,744 million will be required to accommodate the Provincial Commissioner: KZN as well as the following units:

- *Crime Intelligence Clusters for Inanda, Phoenix and Durban Central;*
- *FCS Units, Durban, Phoenix, Brighton Beach and Umlazi;*
- *Operational Support PSS;*
- *Commercial Crime including DPCI;*
- *Organised Crime including DPCI; and*
- *Additional parking 250*

3. This is a ***new need which was not received in time for inclusion in the current MTEF cycle and therefore this office cannot make provision for funding required.***

4. *It will be appreciated if your office could approve additional funding to enable this office to procure the necessary accommodation for the Provincial Commissioner: KZN."*(emphasis added)

9.9 Funding requirements for the procurement of the Transnet building

9.9.1 On 8 June 2010, the Divisional Commissioner: Financial and Administration Services, Lt General SJP Schutte(the CFO) responded to the above letter of the Divisional Commissioner: SCM as follows:

> ***"From the available information in your letter it is questionable why the Crime Intelligence clusters for Inanda, Phoenix and Durban Central should all be vested in one location and not in their respective locations. Similar approaches are taken with FCS Units in Durban, Phoenix, Brighton Beach and Umlazi locating services away from communities. An important aspect thus entail <u>how was the need established, and is the extent of the need justified in relation to other priorities and costs.</u>***
>
> ***The current baseline of the Vote: Police cannot additionally accommodate an amount of R81,744 million (recurring it is assumed), excluding data lines and tenant specific extras etc which would have to be added."*** (emphasis added)

9.9.2 The explanation provided by the KZN Provincial Commissioner for the additional accommodation requirements of the SAPS referred to above is encapsulated in a letter, dated 15 June 2010, addressed to the National Commissioner for the attention of the Divisional Commissioner: SCM. The essence of the Provincial Commissioner's explanation was that:

9.9.2.1 Some of the personnel of the Provincial Office and specialised units were located in buildings dispersed throughout Durban, due to a shortage of accommodation.

9.9.2.2 The ideal situation would be the location of all SAPS components and units in common premises, as in her opinion this would improve and facilitate management, as well as security and computer network infrastructure requirements.

9.10 Directive of the National Commissioner of the SAPS in respect of the procurement of leases for SAPS accommodation

9.10.1 On 18 June 2010, the National Commissioner of the SAPS issued a directive to the Deputy National Commissioner: SCM, Lt General MH Hlela, instructing that no lease agreements were to be entered into or renewed without prior consent of the National Commissioner.

9.11 Transnet building identified as alternative accommodation by the National Commissioner of the SAPS

9.11.1 The needs assessment, including the additional requirements as determined by the KZN Provincial Commissioner, was signed by her on 22 June 2010 and by the Divisional Commissioner: SCM and the National Commissioner, on 23 June 2010. The total gross area reflected in the needs assessment amounted 41 431.36m^2.

9.11.2 In his letter addressed to the DG of the DPW on 23 June 2010, Col Meiring on behalf of the Divisional Commissioner, to which the certified needs assessment was attached stated as follows:

> *"The **National Commissioner of the SAPS** has identified the Transnet building in Smith Street to be leased as alternative accommodation for the Provincial Commissioner of KZN.*
>
> *Kindly forward the approved norm document and cost analysis this office and issue a Procurement Instruction to your Regional Office as a matter of urgency. Please note that funding will be confirmed in due course."* (emphasis added)

9.11.3 The norm document compiled by the DPW Regional Office on 25 June 2010 reflected a "total guideline area" of 45 499.91m^2. This norm document together with a preliminary cost analysis was forwarded to Col Meiring on the same day requesting confirmation of funding.

9.11.4 An Information Note from the Divisional Commissioner SCM, dated 28 June 2010, to the National Commissioner, Deputy National Commissioner Hlela and the Divisional Commissioner: Financial and Administration Services stated, *inter alia*, the following with regard to additional funding required in respect of the accommodation requirements determined by the KZN Provincial Commissioner:

> *"**The Transnet building situated in Smith Street, Durban was identified to be leased as alternative accommodation for the Provincial Commissioner of KZN.***
>
> *As this urgent request was not part of previous priorities it was not received timeously for inclusion in the current MTEF cycle therefore additional funding will have to be approved by the Divisional Commissioner: Financial and Administration Service.*
>
> *The needs assessment for the additional accommodation in Durban was finalised and forwarded to the Department of Public Works for approval of the norms and a cost estimate. The cost to lease the required accommodation would be +/- R60.7 million per annum with a 10% escalation in future financial years. The actual cost required for the remainder of this financial year will however be +/- R*27.3 million.
>
> ***By instruction of the National Commissioner of the SAPS, this office must proceed with the procurement of suitable accommodation for the Provincial Commissioner in Durban.*** *It will be appreciated if confirmation of approved funding could be provided in order for this office to instruct the Department of Public Works to commence with the procurement process."*(emphasis added)

9.12 Approval by the National Commissioner of funding for the procurement of the Transnet building

9.12.1 The National Commissioner approved the request for additional funding on 28 June 2010. However, it was noted that the request for additional funding was only considered by the Divisional Commissioner: Finance and Administration Services, Lt Gen Schutte, the following day. In the Information Note containing the approval Lt General Schutte stated:

> ***"As Nat.Com. approved the lease already, funds would have to be found and made available, with opportunity costs, meaning that something else would have to be forgone (reprioritised)."***(emphasis added)

9.12.2 When interviewed during the course of the first part of the investigation, Lt General Schutte was unable explain why the above Information Note was brought to him for consideration only after the National Commissioner had already approved the additional funding.

9.12.3 The National Commissioner also signed the preliminary cost analysis submitted by the DPW, as referred to above, on 28 June 2010.

9.13 Request for an option analysis and an explanation in respect of the SAPS need of 45 499.1m^2

9.13.1 On 29 June 2010 the DPW Director: KAM/SAPS requested the Director PPM: SAPS to request the Directorate: Investment Analysis to advise regarding the most feasible option for the procurement of a building/property that will meet the SAPS accommodation requirements in Durban. The request was clearly based on the understanding that the DPW was requested by the SAPS to specifically procure the Transnet building in Durban, with a significantly higher lettable area than the Servamus building in which the SAPS KZN Provincial Head Office is currently housed.

9.13.2 The DPW Director: PPM responded on 8 July 2010 concluded that it made better business sense to address the SAPS's requirements by accommodating it in a state owned facility, taking into account the extent required and the monthly rental costs in respect of leasing. <u>She further cautioned the DPW Key Accounts Manager (SAPS) to sensitise the SAPS about the consequences of not submitting User Asset Management Plans, as failure to do so amounted to a contravention of the provisions of GIAMA.</u>

9.13.3 The Director: PPM further recommended that:

> *"A suitable building with extent of with the extent of 45 499.91m^2 be procured* ***as a temporary solution and through the open tender approach.*** *The lease agreement should not exceed a period of eight years. The intention is to implement CAMP* (Custodian Asset Management Plan) *solutions before the above lease period expires****. The procurement of the above accommodation should be based on the best value for money in favour of government and***

not necessarily on what SAPS is recommending. Therefore, procured building may not be the Transnet building." (emphasis added)

9.14 The DPW Procurement Instruction issued on 1 July 2010

9.14.1 The Key Account Manager (SAPS) issued a Procurement Instruction (PI) to the DPW KZN Regional Manager on 1 July 2010. The PI indicated that the National Commissioner of the SAPS had identified the Transnet building as possible alternative accommodation for the KZN Provincial Office. The document further emphasised that the lease of the Servamus building was expiring on 31 August 2010.The PI requested the KZN Regional Manager to procure the required accommodation to the satisfaction of the SAPS in terms of the approved space and cost norms.

9.14.2 The PI specifically stated that the relevant SCM principles and leasing procedures and process had to be followed in the procurement of the accommodation.

9.15 The appointment of Mr S Dongwana as the Director-General of the DPW

9.15.1. Mr Siviwe Dongwana was appointed as the Director-General of the DPW with effectfrom1 July 2010.

9.16 The KZN Provincial Commissioner confirmed the lease of the Servamus building will not be renewed.

9.16.1 The KZN Provincial Commissioner again confirmed to Deputy National Commissioner Hlela in writing, on 1 July 2010 that she had taken into account the need accommodate all units and components attached to the province within close proximity for the purpose of efficient and effective command and control. The KZN Provincial Commissioner further remarked that:

"The required alternative accommodation (Transnet building) *is not ready for immediate occupation, due to renovations that need to be conducted to suit our needs. The situation may necessitate us to lease the old building on a month to month basis for a period not exceeding 6 months. This office will not renew the current long term lease."*

9.17 Concerns raised by Ms Irene Nel from the DPW Regional Office – KZN and the impact / consequences thereof

9.17.1 Ms Nel received the PI on 1 July 2010. She responded via email on the same day to Mr C Bunu of the Key Account Management section of the DPW Head Office and further copied her response to a number of DPW and SAPS officials. In her response she raised, *inter alia*, the following concerns for clarification prior to submitting the PI to the Property Management section for execution:

> *"To secure an area of 41 431.35 m^2 within the Durban Area* (we) *WILL HAVE to follow due process and be advertised* (sic) *in the open market for a realistic comparison as to the market trends.* ***Negotiated Procedure SHOULD NOT be entertained. In such event, this office must be prepared for scrutiny and severe criticism.***
>
> *In view of the above, all efforts should thus be made to renew the current lease until such time as suitable accommodation has been secured. There has been no communication from the landlord indicating that he was not prepared to renew the lease.*
>
> *It is with grave concern that it is noted that the Transnet Building has been identified as a possible alternative accommodation****. It must be questioned as to whether SAPS have, by acting outside of their mandate, not created expectations. Failure to meet such expectation can possibly further result in severe negative consequences to the State as whole."***(emphasis added)

9.17.2 The following morning Ms Nel sent a further email to Mr Bunu (again copying the e-mail to a number of officials from both the DPW and the SAPS) in which she questioned the inclusion of non-command units in the approved norm document. She further queried whether accommodation for these non-command units should not be secured closer to the communities they are intended to serve. In light of the fact that funds had already been approved, Ms Nel suggested that accommodation could be secured in terms of the individual needs of the non-command units.

9.17.3 The essence of the response to Ms Nel by the DPW Key Account Manager (SAPS), Mr M Mabinja, dated 2 July 2010, was that it was for the Regional Office to recommend an appropriate procurement strategy to the SNBAC. He further

stated that if the SAPS had indeed acted outside of their mandate "*it is for them to deal with. Ours is to do our job."*

9.17.4 The e-mail enquiries of Ms Nel were forwarded to Deputy National Commissioner Hlela, who brought it to the attention of the National Commissioner and provided him with copies thereof. According to General Hlela the National Commissioner was extremely upset and questioned how a low-level official in the DPW could challenge his authority. General Hlela indicated during the investigation that he was in full agreement of the concerns raised by Ms Nel.

9.17.5 Ms Nel was subsequently transferred internally to another portfolio.

9.18 Meeting called by the National Commissioner of the SAPS on 7 July 2010 in connection with the concerns raised by Ms Irene Nel

9.18.1 On 7 July 2010 the National Commissioner is said to have called a meeting with the newly appointed DG of the DPW, Mr Siviwe Dongwana, to discuss the fact that it appeared to him that Ms Nel was challenging his authority. According to Mr Dongwana the National Commissioner was extremely upset that a junior official of the DPW (Ms Nel) had raised concerns about the accommodation requirements of the SAPS and the identification of the Transnet building as alternative accommodation for the KZN Provincial Head Office. The National Commissioner regarded Ms Nel's enquiries as meddling in the affairs of the SAPS and further stated that *"she was running his department for him."*[2]

9.18.2 It should be noted that all the officials interviewed during the course of the investigation that had direct dealings with Ms Nel, described her as being highly competent, professional, committed and always acting in the best interests of the SAPS. These officials further expressed their dissatisfaction with the decision to

[2]See the response of the National Commissioner in this regard referred to in paragraph 9.36.9 below.

remove Ms Nel from the SAPS portfolio, as in their opinion she had not acted improperly and was being unfairly prejudiced.

9.18.3 Mr Dongwana denied giving any instructions that Ms Nel should be removed from the SAPS portfolio.

9.19 The response of the DPW Deputy Director General: AIM to the concerns raised by Ms Nel

9.19.1 The DPW Deputy Director General, Ms S Subban, responded to the concerns raised by Ms Nel referred to above in an internal memorandum addressed to the KZN Regional Manager on 13 July 2010. Her response emphasised that the PI of 1 July 2010 required the Regional Office to follow the SCM principles and leasing procedures in the procurement of the accommodation for the SAPS.

9.19.2 With reference to the information provided to Ms Subban that the SAPS required the accommodation urgently and that a form of screening of the Durban CBD property marked had been performed; she recommended that a shortened tender process be applied.

9.19.3 During an interview with Ms Subban she conceded that there was no real urgency to acquire the building that would have justified a deviation from the prescribed open tender process, which in her view should have been followed. Ms Subban could further not explain why her recommendation of a shortened tender process had not been adhered to.

9.20 Meetings held and resolutions taken by the KZN Regional Bid Specification Committee (BSC) on 14 and 15 July 2010

9.20.1 According to the minutes, the purpose of the meeting of the Regional BSC on 14 July 2010 was to engage with the SAPS on their requirements for alternative accommodation. The KZN Provincial Commissioner also attended the meeting and explained the need for alternative accommodation as reflected above. The Committee resolved *"to ensure procurement policies are followed and also ensuring of compliance* (sic) *open procedure will be the first criteria* (sic) *failing on that negotiated procedure can then be used."*

9.20.2 It was further minuted that it was resolved to meet on 15July 2010 to decide on a procurement strategy for submission to the SNBAC.

9.20.3 At the meeting of the BSC on 15 July 2010, a presentation was made on a desk-top analysis conducted by the DPW to determine the availability of accommodation, of the extent required by SAPS, in the Durban CBD. Subsequent to the presentation it was resolved to recommend a negotiated procurement strategy to the SNBAC, based only on a desktop analysis that found that the Transnet building was the only building in the Durban CBD that could accommodate the requirements of the SAPS. The recording of the proceedings indicate that this resolution was taken without interrogating the SCM prescripts relating to a deviation from an open tender process and the implications thereof.

9.20.4 Following the above meeting, the regional BSC submitted an internal memorandum to the SNBAC on 16 July 2010, recommending a negotiated process in respect of the procurement of a lease for accommodating the SAPS in the Transnet building.

9.20.5 It was noted from the documentation provided by the DPW that the Chairperson of the regional BSC (the DPW KZN Regional Manager) had already signed an internal memorandum addressed to the DG of DPW recommending a negotiated procurement process on 9 July 2010, i.e. before the regional BSC was convened and this resolution adopted. No explanation as to why this was done was provided during the investigation.

9.21 Approval of the negotiated procurement strategy by the SNBAC on 22 July 2010

9.21.1 The SNBAC approved the negotiated procurement strategy, as recommended by the regional BSC, on 22 July 2010. This approval was, however, subject to the following:

9.21.1.1 A detailed investment analysis being conducted by the DPW; and

9.21.1.2 A declaration of interest being signed by all members of the regional BSC.

9.22 Offer to lease the Transnet building from RPF

9.22.1 On 28 July 2010 RPF provided the KZN Regional Office of the DPW with a document entitled *"Offer to lease office space"* It confirmed the availability of office space in the Transnet building on, *inter alia*, the following terms and conditions:

9.22.1.1 Gross lettable area 45 499.91m^2

9.22.1.2 Monthly rental of R115 / m^2 excluding VAT

9.22.1.3 Monthly operational costs of R20 / m^2

9.22.1.4 Monthly parking rental of R250 800.00 (R 550 per bay), excluding VAT.

9.22.1.5 An annual escalation rate of 9.5% per annum

9.22.1.6 A lease period of 9 years and 11 months

9.23 Total cost of the lease as calculated by the DPW on 3 August 2010

9.23.1 The actual total cost calculation for the entire period, made in terms of the offer by RPF, amounted to R1 166 594 081.46. This calculation, made by the KZN Regional Office of the DPW, was based on a lease period of 9 years 11 months and included an annual escalation rate of 9.5%.

9.24 Findings of the requested option analysis

9.24.1 The DG of the DPW gave instructions on 20 September 2010 for an option analysis study to be conducted that was aligned to a leasing methodology for the identification of suitable office accommodation for the SAPS in Durban. According to Mr Dongwana, the purpose of the study was to provide him with information on the extent of available accommodation for the SAPS in the Durban CBD, in order to assess the viability of embarking on a formal tender process in terms of a new procurement instruction.

9.24.2 The essential elements of the terms of reference of the study included:

9.24.2.1 Identifying buildings that meet the requirements of the SAPS in terms of location, gross lettable area, functionality, parking and date of availability of accommodation.

9.24.2.2 Establishing the grade of buildings identified.

9.24.3 The report on the study by the Acting Director: Investment Analysis of the DPW, dated 1 October 2010, indicated that 10 buildings, including the Transnet building, were considered. The study found that the Transnet building had the potential to meet the accommodation requirements of the SAPS**. However, the building was found to be of a "Grade C" quality – requiring major refurbishment and upgrades, that could be executed but at a premium in terms of costs. The period estimated for such refurbishment was 20 months.**

9.24.4 According to the report, the market analysis as at the third quarter of 2009 for rentals in the Durban CBD revealed that the rental for the different grades of buildings was as follows:

- Grade A Approximately R82.50/m^2
- Grade B Approximately R 57.59/m^2
- Grade C Approximately R 40.00/m^2

9.25 Internal investigation conducted by the DPW and subsequent request for a revised needs analysis from the SAPS

9.25.1 In response to the reports that appeared in the media alleging that the procurement process in respect of the leases for the SAPS in Pretoria and Durban were irregular, the DPW conducted an internal investigation into the procurement of the lease of the Middestad Building in Pretoria.

9.25.2 On 19 October 2010, the Director-General of the DPW informed the National Commissioner of the SAPS that the internal investigation had been concluded. He further advised that:

> *"We are at the stage where our initial investigation has now been completed and the outcome thereof has been made known to us. The investigation focused, inter alia, at the procurement process on the part of the Department.*

Moreover, the Department has received an independent legal opinion which states that the lease agreement (in respect of the Middestad building) *itself was not concluded according to legal requirements and is accordingly not valid and legally enforceable for various reasons.*

The Department has already advised attorneys for the Roux Property Fund and the Public Protector of the above position and has furthermore advised of the Department's intention to conduct an entirely new procurement process in due course in respect of the national headquarters of the South African Police Service.

In the premises, we would be pleased if your office could favour us with a revised needs assessment *in respect of the premises to be sourced for both Pretoria and Durban, together with the relevant SAPS funding certificates in order that we may begin the procurement process without delay."* (emphasis added)

9.26 The preliminary report of the Public Protector

9.26.1 On 25 October 2010, the Public Protector issued a preliminary report on the investigation and informed the National Commissioner of the SAPS of her concurrence with the decision of the DPW to commence with entirely new procurement processes in respect of the accommodation requirements of the SAPS in respect of Pretoria and Durban.

9.27 The Cabinet reshuffle and appointment of Ms Gwen Mahlangu-Nkabinde as the Minister of Public Works

9.27.1 On 31 October 2010, the President announced a Cabinet re-shuffle, resulting in Mr Geoff Doidge being replaced by Ms Gwen Mahlangu-Nkabinde as the Minister of Public Works as from 1 November 2010.

9.28 The revised needs assessment of 1 November 2010

9.28.1 The KZN Provincial Commissioner of the SAPS requested the Divisional Commissioner on 27 October 2010 to compile a new needs assessment based on the accommodation requirements submitted. The difference between the needs assessments compiled by the SAPS and approved by the National Commissioner

on 23 June 2010 and that of 1 November 2010, amounted to 341.55m^2 of additional space required.

9.28.2 The revised needs assessment was presented to the DPW under a covering letter addressed to the Director-General, signed by Deputy National Commissioner BC Mgwenya on 1 November 2010. In her letter, the Deputy National Commissioner also indicated that the lease had to be procured for a period of 9 years and 11 months.

9.28.3 It was noted, however, that the norm document prepared by the DPW on the revised needs assessment stated the total guideline area as 41440.23m^2 . This document was approved on 22 November 2010. The difference between the original total guideline area approved on 25 June 2010 (45499.91m^2)[3] and the total guideline area approved on 22 November 2010 was 4059.68m^2.

9.28.4 On 24 November 2010, the office of the SAPS Divisional Commissioner, under the signatures of Lt Gen Kruser and Brig M E Mantsi, provided the DPW with confirmation of the availability of funding for the procurement of the lease. The approved funding certificate, however, indicates that the calculations of the cost of the lease were made on a total guideline area of 45499.1m^2 (and not on the approved 41440.23m^2 as indicated above). This led to an additional approximately R500 000 rent resulting in a total monthly rental of R5 232 396.50 (excluding parking and VAT) for the first year alone. Neither the DPW nor the SAPS were able to provide the investigation with an explanation as to the additional 4059.68m^2.

9.29 The instruction of the DG of the DPW for the KZN Regional Office to proceed with the procurement of the Transnet building

9.29.1 The Director-General of the DPW instructed the KZN Regional Manager on 17 November 2010, to *"proceed with the process to procure the accommodation*

[3]See paragraph 12.2.32 below

for the SAPS in Durban and make the necessary submissions to the Special National Bid Adjudication Committee as per the approved strategy.'

9.29.2 According to Mr Dongwana the intention of this instruction was to place the responsibility on the SNBAC to decide on an appropriate procurement strategy for the procurement of the alternative accommodation for the KZN Provincial Head Office.

9.30 Recommendation of the Regional BEC to enter into a new lease agreement with RPF

9.30.1 The Regional BEC met with Shabangu on 19 November 2010 to discuss the lease of the Transnet building. Following the meeting, the KZN Regional Manager recommended in writing to the SNBAC that approval is granted for the lease to be entered into with RPF, at the following rates:

- Monthly rental of R 5 964 932.01 (VAT inclusive) for office accommodation at R 131.10 per m^2;
- Monthly rental of R 282 777.00 (VAT inclusive) for 451 parking bays at R627.00 per bay;
- An annual escalation rate of 9.5%.

9.30.2 It was, however, noted that from the RPF written offer to lease the building, dated 28 July 2010, that parking was reflected at R550 per bay for 456 bays, at a total cost of R250 800 per month (excluding VAT). No explanation for this escalation in the price was provided during the investigation.

9.30.3 Shabangu of RPF indicated the Transnet building could accommodate 45 000m^2 by availing the retail space on the ground floor, should it be required by the SAPS.

9.31 Approval of the SNBAC to enter to a lease agreement between DPW and RPF in respect of the Transnet building

9.31.1 The recommendation of the KZN Regional Manager was approved by the SNBAC on 22 November 2010, subject to further negotiation with the RPF on the rental rate and the escalation percentage. **The SNBAC further required that the true**

market rental rate be determined by means of reconciling the option analysis report (dated 1 October 2010) with the rate offered by RPF.

9.32 Internal DPW memorandum recommending the procurement of the lease of the Transnet building, dated 25 November 2010

9.32.1 On 23 November 2010, the DPW Director: Property Management submitted an internal memorandum to the Director-General informing him that the SNBAC had **recommended on 22 November 2010 that a escalation rate of 8% be negotiated with the RPF and that the true market related rental for the building be determined**. There is, however, no indication from the documentation availed that the DPW attempted reconcile the market related rental rate, as determined by the option analysis report, with the offer made by RPF.

9.32.2 The Director: Property Management further indicated that negotiations with RPF had resulted in an agreed monthly rental of R 90/m^2 (excluding VAT and operational costs). The escalation rate however remained at 9.5% per year. He also indicated that the investment analysis had not been obtained. The said rental amounted to more than twice the market related rate that was determined by the options analysis report referred to above.

9.32.3 It was recommended to the Director-General that he grants approval for the conclusion of the lease of the Transnet building subject to the following conditions:

9.32.3.1 The submission of an approved funding certify certificate by the SAPS;

9.32.3.2 The DPW were to appoint a professional team to monitor the upgrading of the Transnet building to ensure that the state obtained full value for money;

9.32.3.3 The landlord was to provide a project execution plan to be signed by SAPS, confirming the date of occupation, to avoid fruitless and wasteful expenditure; and

9.32.3.4 Prior to the occupation of the building the landlord was to provide a pre-occupation certificate approved by the relevant municipal authorities

9.32.4 The Director-General in turn approved this internal memorandum on 25 November 2010, subject to:

"The following issues must be addressed prior to concluding the lease agreement:

- *There has to be an independent confirmation of the gross leasable area by an independent professional, an architect or a quantity surveyor;*
- *Ensuring that in the event of the client moving into the building in stages the rent must be pro-rated to the occupied space;*
- *The consideration of all parallel leases be managed by the Regional Office in order to avoid any fruitless expenditure;*
- *A comprehensive strategy be developed by the Regional Office to ensure that the planned refurbishment costs as outlined in the project and refurbishment plans are:*

  (i) incurred to the full amount; and

  (ii) *result in the expected A-grade building.*
- *The reasons provided in previous submission by the Regional Office to the Special National Bid Adjudication Committee and by the Acting Director: Investment Analyses in his 1 October 2010 report have been properly recorded in these documents."*

9.32.5 There is no indication that any of the above conditions were met prior or subsequent to the signing of the lease agreement the following day on 26 November 2010.

9.33 Letter of acceptance and the signing of the Transnet building lease agreement

9.33.1 The KZN Regional Manager of the DPW sent a letter of acceptance to RPF on 26 November 2010 and on the same day the lease agreement was signed between the DPW and RPF, on the following terms:

9.33.1.1 A total lettable area of 45 499.1m$^{2;}$

9.33.1.2 A monthly rental rate of R 102.50/m^2 (VAT inclusive);

9.33.1.3 456 parking bays @ R 627 per bay per month (VAT inclusive); and

9.33.1.4 Monthly operational costs of R 22.80 per m^2.

9.33.2 The total amount payable per month was R 5 986 949.23 (first year only)

9.33.3 It was noted that Mr BV Ngubane signed the lease agreement on behalf of the DPW in his capacity as Acting Regional Manager.

9.34 Repudiation of the Transnet building lease agreement

9.34.1 On 24 February 2011, Messrs Gideon Pretorius Inc, attorneys acting on behalf of RPF, informed the KZN Regional Manager of the DPW that:

> "*You* (the DPW) *have repudiated the agreement of lease dated 26 November 2010 in respect of the building, by amongst others "suspending" same, resulting in the transaction underlying same not materialising. Such repudiation is accepted by our client and therefore the agreement has come to an end."*

9.34.2 The Regional Manager responded on 11 March 2011, in which he disputed that the lease agreement was repudiated or that the DPW was liable for any damages. He added that:

> "*Your attention is drawn to clause 16.3 of the lease agreement. It common clause* (sic) *that as at 27 February 2011 the lease agreement is null and void as your client had failed to register the leased premises into its name within three (3) months from the date of signature of the lease agreement.*
>
> *The Department currently has no leasing obligation with your client and shall seek alternative accommodation."*

9.34.3 It was noted that the suspensive condition apparently referred to by the Regional Manager in his letter, is actually contained in clause 17 of the lease agreement between RPF and the DPW, which stated as follows:

> "*The condition of this lease agreement is that the property, incorporating the Building, should be transferred into the Lessor's name within the period of three (3) months after the signing of this agreement. Upon expiry of the three months period, an in the event that the condition has not been fulfilled, the Lessee shall*

be entitled to cancel this lease agreement by giving one (1) months (sic) *notice to the Lessor."*

9.35 Revised procurement instruction

9.35.1 The Acting Director-General of the DPW (Mr S Vukela) wrote to the National Commissioner of the SAPS on 17 December 2010 advising as follows:

"*As you may be aware, the above prolonged transactions* (Pretoria Middestad and Durban Transnet leases) *were recently concluded by the National government and Roux Property fund, however according to the particulars of claim, the landlord (Roux Property fund) has already suffered damages as a result of the sellers not willing to proceed with the sale for the Durban building mainly due non-performance of the purchaser (Roux Property fund) failure to issue guarantees in the beginning of the month of November 2010.*

It is however evident that the signing of the contract on 26 November 2010 by the National Government meant that the above date was not practical and the landlord-purchaser relies on this argument.

Whilst the above is being sent to the state law adviser, your office is requested to confirm if circumstances have not changed with regard to securing office accommodation in particular Durban and therefore allow this Department to proceed with the procurement process.

In the interim this office will advise Roux Property fund with its intension (sic) *to cancel in line with clause 17 " SUSPENSIVE CONDITIONS" of the lease."*

To date, no information regarding the advice of the State Law Adviser, as referred to above, has been provided to the Public Protector.

9.35.2 In his response to the above letter, dated 17 November 2010, the National Commissioner of the SAPS confirmed the circumstances regarding office accommodation in both Pretoria and Durban had not changed.

9.35.3 The Director: KAM (SAPS & ICD) Mr M Mabinja, issued a new Procurement Instruction to the KZN Regional Office for the alternative accommodation of the SAPS KZN Provincial Office on 17 March 2011.It was noted that the norm document attached to PI, dated 26 June 2010, reflected a total space requirement

of 45 499.91m^2, the exact floor space that was previously offered by RPF in respect of the Transnet building. However, paragraph 1.3 of the PI refers to a certified needs assessment with a total space requirement 41 431.36m^2.

9.35.4 Paragraph 2.3 of the PI indicates that a response is still awaited from the SAPS confirming whether the procurement of the new Provincial Office will result in other offices being consolidated in the new accommodation as well as an explanation on the increase of the required space from 13 368m^2 to 45499.91m^2 . From the documentation provided to the Public Protector, no further explanation was provided in this regard subsequent to the date of the issuing of the PI.

9.36 Interview conducted with the National Commissioner of the National of the SAPS on 18 April 2010

9.36.1 On 18 April 2011 an interview was conducted with the National Commissioner of the SAPS, General Bheki Cele, to discuss his knowledge and involvement in his capacity as the accounting officer of the SAPS in relation to the procurement of the lease of the Transnet building.

9.36.2 General Cele indicated that the Provincial Commissioner was responsible for determining the accommodation needs of the KZN Provincial office. He confirmed, however, that the needs assessment document, compiled by the Demand Management section of the SAPS, was submitted to and approved by him.

9.36.3 With regard to the centralisation of clusters of the Family Violence, Child Protection and Sexual Offences (FCS) unit, General Cele stated that the unit had previously been disbanded and subsequently had to be reinstated on the instruction of the Minister of Police. It was then decided that the said unit had to be centralised for improved command and control reasons. In the General's opinion the FCS unit is one of the specialised units of the SAPS that can be deployed from a centralised base.

9.36.4 General Cele denied that he had identified the Transnet building as alternative accommodation for the KZN Provincial Head Office and that he had given instruction for the building to be considered for that purpose. He further denied being aware of or giving any instructions for the SAPS to meet with RPF in connection with the procurement of the Transnet building.

9.36.5 With regard to the funding of the alternative accommodation, General Cele indicated that in his view, leases are regarded as goods and services and that the budget for leasing a building should be made available as and when the need arises. He agreed, however, that the funding for the Transnet building was only possible through the reprioritisation of the SAPS operations budget.

9.36.6 When presented with the information note relating to the funding of the Transnet building lease, signed by General Cele 28 June 2010, he confirmed that he had signed the document prior to it being submitted to the SAPS CFO, Lt General Schutte, for consideration. However, General Cele claimed that subsequent to him approving the funding for the lease, he gave an instruction that the information note be submitted to the CFO for consideration and comments. According to General Cele, the document was never returned to him and he also did not enquire as to whether any reservations had been raised by the CFO.[4]

9.36.7 General Cele indicated that he was satisfied that there were sufficient funds available to procure the Transnet building lease. However, he could not explain where exactly the additional funds were to be diverted from.

9.36.8 When questioned on the planning for the expenditure of the SAPS budget, General Cele disagreed that the leasing of alternative accommodation of the KZN Provincial Head Office should have been provided for in the Strategic Plan of the SAPS for the current MTEF cycle. He further could not indicate with certainty whether the lease was provided for in the User Asset Management Plan of the SAPS.

9.36.9 General Cele confirmed that a meeting was held early in July 2010 between him and the Director-General of the DPW where reference was made to the concerns raised by Ms Irene Nel of the DPW KZN Regional Office. He denied that he insisted that he DG of the DPW should take action against Ms Nel.

[4] See paragraph 9.9 above

9.36.10 The National Commissioner conceded that as the accounting officer of the SAPS he assumed ultimate responsibility for the actions of the SAPS in relation to the procurement of the Transnet building. He also conceded that at the time all procurement exceeding R500 000 had to be approved by him, as he had withdrawn all delegations in this regard shortly after he was appointed. General Cele, however, maintained that although he had indeed withdrawn the said delegations, he was nevertheless reliant on information, submissions and recommendations made to him by officials with the necessary expertise within the SAPS SCM division. General Cele was of the view that there was no need for him to thoroughly interrogate documents and information submitted to him by officials which he regarded as experts in their field.

9.36.11 General Cele was adamant that client departments engaging with prospective service providers / landlords, to the exclusion of the DPW, was a regular occurrence and not particular to the SAPS alone.

9.36.12 General Cele concluded by stating that he was of the firm view that a definite need existed for the KZN Provincial Head Office to relocate to alternative accommodation.

9.36.13 When questioned with regard to RPF being involved in the procurement of two leases under circumstances where tender processes were not applied for the accommodation of the SAPS, in excess of R1.5 billion in value in a short period of time, General Cele claimed that he did not necessarily view this as suspicious.

9.37 Additional written submissions volunteered by the National Commissioner of the SAPS subsequent to his interview

9.37.1 On 10 May 2011, the National Commissioner of the SAPS provided the Public Protector with additional written submissions in connection with certain aspects raised during the interview referred to above. These submissions are contained in a letter titled *"Providing context to the decision to withdraw delegations, and providing additional information as requested: Meeting on 18 April 2011"*

9.36.2 In the opening paragraphs of the letter the National Commissioner stated the following:

"In the said meeting (Interview of 18 April 2011) *I made a strong appeal that the withdrawal of delegations should be an issue that is discussed within a particular context. Without this context any finding around this issue will be misleading and inaccurate."*

9.37.3 The National Commissioner explained that shortly after him assuming office in August 2009, he became concerned about a number of procurement practices in the SAPS. The SCM Division was also put under *"parliamentary spotlight"* with respect to unsatisfactory explanations provided regarding process and expenditure aspect relating capital projects.

9.37.4 As a result of the above concerns, the management of the SAPS took a decision in December 2009 that all procurement contracts in excess of R500 000 would have to be approved by the National Commissioner.

9.37.5 According to General Cele:

"The withdrawal of the delegations did not imply that I had to perform the procurement functions myself. The procurement functions remained the responsibility of the respective line managers, which were led by the Deputy National Commissioner, and the Divisional Commissioner responsible for Supply Chain Management. These line managers would perform their functions and submit the documents to my office for signature after having been convinced that all the prescripts have been complied with and all the processes have been followed. This would place me in a better position to exercise control on all significant procurement in the South African Police Service.

The above arrangement is in line with my duties and functions as the National Commissioner of the South African Police Service, which is primarily policing. I therefore rely on the advice of functionaries in various Divisions of the South African Police Service to discharge my functions, which need expert knowledge that I personally do not possess. It is for this reason that, even though I have withdrawn the delegations, the performance of the procurement functions still remained the responsibility of the Divisional Commissioner and the Deputy National Commissioner responsible for Supply Chain Management."

9.37.6 The National Commissioner emphasised that his withdrawal of the delegation was ignored by certain line managers and cited the procurement of the leases of the Middestad and Transnet buildings as examples thereof. He explained that:

> *"In this regard, the only documents that were placed before me for sanctioning and approvals were the confirmations of the availability of funds. The rest of the correspondence between the South African Police Service and the Department of Public Works were signed by functionaries within the Supply Chain Management* (sic)*, thereby deliberately ignoring my withdrawal of delegations."*

9.37.7 General Cele also referred to the budget speech of Minister of Police, delivered to Parliament on 6 May 2010. Minister Mthethwa stated *inter alia* that:

> *"Strengthening the fight on crime against women and children, Chairperson, during last year's Budget Vote emphasis was placed on the need to review the establishment of specialised units with particular emphasis on violence against women and children. Following on from this, extensive work has been done on the feasibility of the re-establishment of the Family Violence, Child Protection and Sexual Offences (FCS) units.*
>
> *FCS structures will be aligned with the cluster policing model to serve the stations."*

9.37.8 In his submissions, the National Commissioner further referred to a letter from the Provincial FCS Co-ordinator: Head: KwaZulu-Natal (KZN), addressed to the Divisional Commissioner Detective Services on 23 March 2011, in which he provided detailed information in respect of the FCS clusters within the KZN region. The Brighton Beach, Durban Central, Inanda, Pinetown, Chatsworth Phoenix and Umlazi clusters were referred to in the letter and the number members pertaining to each cluster listed as follows in the table below:

Table: Members of FCS members per cluster (KZN)		
Name of Cluster	**No of Commanders**	**No of Members**
Brighton Beach	1	8
Chatsworth	1	14
Durban Central	1	12
Inanda	1	27
Phoenix	1	15
Pinetown	1	16
Umlazi	1	34

9.37.9 Attached to the submissions of the National Commissioner was a written explanation from the Divisional Commissioner: Financial and Administration in connection with the re-prioritisation of funds in order to increase the SAPS lease budget to allow for the procurement of the Transnet building in Durban, in which he stated the following:

> *"Similar as for the Middestad building, funds for the KZN: Durban building, were reallocated (shifted) to the sub programme Property Management, lease of accommodation from other cost centres within the same programme (Programme 1: Administration) at the time. In particular from the sub programme corporate services at the cost centres Technology Management Services, Supply Chain Management and Human Resources Development. (in other words funds were thus reprioritised within Programme 1: Administration for the lease.)"*

9.37.10 In addition to the above, the National Commissioner provided further information regarding the structure and accommodation of the FCS unit in KZN. This information is contained in a letter, dated 20 May 2011, addressed to the Public Protector in which General Cele stated, *inter alia*, that:

> *"According to the FCS structure, the management of the units will be placed at the Provincial Head Office under the command of the Provincial Head: Detective Services. The Provincial Head: FCS will comprise the FCS Coordinator, FCS Investigations and Forensic Social Work offices. These*

offices will have their staff accommodated at the Provincial Head Office for command and control of the cluster units. The total number of staff members for FCS units at Provincial level tallies with the needs assessments. ***The operational FCS units at the clusters will remain in the clusters to serve the police stations falling under their clusters.***

The accommodation of FCS units at police stations is problematic as police stations are not victim-friendly. The environment is traumatic to victims of crime and there are no facilities such as trauma rooms. In Phoenix for instance, the FCS offices are just next to a mortuary in the police station premises and sometimes the staff members in that building do post mortem operations outside the building. There is a struggle between FCS units and the detectives for resources. ***For these reasons, it is desirable that FCS's be moved away from police stations.*** *Such a move would be in line with best practices adopted in other countries."*(emphasis added)

9.37.11 At a meeting held on 24 May 2011 between, *inter alia,* the KZN Provincial Commander: Detective Services, the Provincial Head: Organisational Development and members of the investigation team, the contentions of the National Commissioner as referred to above, were again reiterated.

9.38 Visits to the current KZN Provincial Head Office and FCS units during the investigation

9.38.1 On 24 May 2011 members of the investigation team, accompanied by the KZN Provincial Commander: Detective Services, visited the office of the FCS units of the following clusters:

9.38.1.1 Phoenix;

9.38.1.2 Inanda;

9.38.1.3 Pinetown; and

9.38.1.4 Brighton Beach

9.38.2 During the course of the above visits it was observed that the accommodation of these FCS units is totally inadequate, not victim friendly and do not possess the

facilities required to effectively conduct investigations into sexual offences and family violence. It was noted that investigating officers at the above stations have to share offices, have no interview and trauma rooms and waiting facilities for witnesses and victims.

9.38.3 It was also observed that the police stations where the above units are based do not have additional available space to accommodate the FCS units in question.

9.38.4 The Servamus and iTalk buildings, where the current Provincial Head Office is accommodated were also visited during the investigation. The general impression was that the current Provincial Head Office indeed requires additional space and parking facilities.

9.39 Meeting with the Director-General of the DPW, Mr S Dongwana, on 20 April 2011

9.39.1 Mr Dongwana confirmed that an internal DPW enquiry was initiated following an article that appeared in the Sunday Times on 1 August 2010 relating to alleged improprieties in the procurement of the leases of the Middestad and Transnet buildings for the SAPS.

9.39.2 The internal inquiry was conducted by an independent firm of attorneys with the approval of the former Minister of Public Works, Mr Geoff Doidge. The DPW took the decision to put the implementation of both leases on hold, pending the finalisation of the internal investigation.

9.39.3 A legal opinion from senior counsel was obtained on the validity of the Middestad lease as part of the internal inquiry. The opinion obtained from Adv Jamie SC stated that the lease was unlawful for a number of reasons.

9.39.4 According to Mr Dongwana, Minister Doidge was concerned at the time that the alleged improprieties under investigation might have been indicative of bigger problems within the leasing environment of the DPW. Minister Doidge was committed to improving the business of the DPW for it to be more professional and cost effective.

9.39.5 Towards the end of September 2010, minister Doidge enquired as to how long it would take re-start the procurement processes for the leasing of accommodation for the SAPS in Pretoria and Durban that were put on hold.

9.39.6 Mr Dongwana got the impression that Minister Doidge was under pressure to finalise the internal investigation, although he was not informed where the pressure was coming from.

9.39.7 During the period in which the internal investigation was conducted, Mr Dongwana received calls from Shabangu on a regular basis. Shabangu claimed that the DPW had an agenda against him and accused Mr Dongwana and other officials of the DPW as being obstructive.

9.39.8 Mr Dongwana also had several meetings with Shabangu at the latter's insistence. However, as time progressed Shabangu's demeanour is alleged to have become more aggressive. Mr Dongwana further alleged that he had to implement additional security measures at his office in order to avoid confrontations with Mr Shabangu.

9.39.9 According to Mr Dongwana, Shabangu indicated that the bank that he was dealing with wanted the lease agreements for both the Middestad building and the Transnet building to be concluded simultaneously as they were dependent on each other in terms of his finance arrangements.

9.39.10 Mr Dongwana further explained that after Minister Doidge was replaced by the current Minister (1 November 2010), Shabangu's approach towards him became much more confident and demanding. Shabangu further referred to the new Minister as his "elder sister" and showed him SMS messages on his cellphone of communications between him and the new Minister in connection with the new leases.

9.39.11 Mr Dongwana described his relationship with the current Minister as not being pleasant right from the beginning. When he initially discussed the issue of the two leases with the Minister, she told that him that she had done a bit of law in her studies and was satisfied that there was nothing wrong with the lease agreement that was signed between RPF and the DPW in respect of the Middestad building.

9.39.12 On or about 11 November 2010, Mr Dongwana received a call from the Minister informing him that she had been advised by the State Attorney that there was nothing wrong with the Middestad building lease and that he should inform Nedbank that the transaction was proceeding. Shortly thereafter he was called by Shabangu who informed him that he was aware of the advice of the State Attorney and further enquired as to when the letter to Nedbank would be delivered. Mr Dongwana claimed to be surprised when informed of the advice of the State Attorney as he was not even aware that the State Attorney had been approached by the DPW for advice on the issue.

9.39.13 Mr Dongwana approached Mr Kleynhans of the State Attorney's office, who advised that he had received verbal submissions from members of the DPW and that he was briefed to obtain a more detailed legal opinion from senior counsel on the matter. Mr Dongwana therefore took the decision to wait for the opinion of senior counsel before informing Nedbank that the transaction was proceeding, as instructed by the Minister. The opinion eventually received from Adv Pat Ellis SC was that the lease was invalid.

9.39.14 It was Mr Dongwana's impression that the Minister was angry with him for not obeying her instruction to inform Nedbank that the transaction was proceeding. He was further of the opinion that from that point onward the relationship between him and the Minister deteriorated rapidly.

9.39.15 With regard to the conclusion of the Middestad building lease, Mr Dongwana stated:

> *Due to the pressures put on me by the new Minister and Shabangu and the uncertainties raised by the different sets of lawyers, I signed a letter to Nedbank. If it was not for the pressures put on me and the directive of the new Minister referred to above, I would never have done so. I was very uncomfortable with the continuation of the process....*
>
> *I am also convinced that communications on my phone and that of my wife were being intercepted. I say so because every time that I had a conversation about this matter, Shabangu would call me about the contents of the conversation, shortly thereafter.*

By this point I was extremely stressed, tired and scared and was concerned for my personal safety and that of my family."

9.39.16 According to Mr Dongwana the position of the DPW in respect of the procurement of the Transnet building was that the process would start afresh and that an open tender process would be followed. The view of the DPW in this regard was conveyed to the SAPS and the Public Protector. However, this position changed after the new Minister was appointed as she expressed her view that there was nothing wrong with the new leases. It appeared to Mr Dongwana that Shabangu had a favourable ear with the Minister and that he communicated directly with her and her advisors. He was also of the impression that Shabangu was very confident that the procurement of the accommodation for the SAPS in Durban would not go the open tender route.

9.37.17 Mr Dongwana explained that he reluctantly agreed to the lease of the Transnet building only as a result of the pressures placed on him by the Minister and Shabangu. He was further adamant that he would not have approved the lease under normal circumstances.

9.39.18 The pressures put upon him by the Minister and Shabangu in regard to the leases concerned had, according to Mr Dongwana, a serious impact on his health, his personal security and that of his family.

9.40 Complaint regarding the invitation to tender for accommodation for the SAPS published by the DPW on 1 April 2011

9.40.1 On 10 May 2011, an anonymous complaint was lodged with the Public Protector in connection with the invitation to tender published by the DPW on 1 April 2011 for the provision of alternative accommodation for the KZN Provincial Head Office of the SAPS.

9.40.2 In the complaint it was alleged that:

9.40.2.1 It was improper to advertise the tender in the month of April 2011 due to the number of public holidays that made it difficult for tenderers to properly prepare their bids within the set period. In this regard it was further suggested that April

2011 was chosen by the DPW to benefit RPF who had prior knowledge of the tender and its specifications.

9.40.2.2 The needs assessment was not an accurate reflection of the accommodation requirements of the SAPS, as the centralisation of Units which should be stationed in the communities they serve is questionable.

9.40.2.3 Only two properties within the Durban CBD meet the special requirements of the tender and Mr Roux Shabangu was involved in both properties.

9.40.2.4 The tenders were opened by the DPW at a meeting held on 4 May 2011.

> *"We were taken aback to learn that the chairperson at the tender meeting informed five out of the six bidders that their documentation was incomplete. The only bidder whose documentation met the requirements according to the chairperson was Roux Properties. The chairperson created the distinct impression that, apart from Roux Properties, all other bids would not be considered. Those bidders who apparently did not have complete bids were missing documents such as architectural certificate confirming the square metres of the buildings, construction engineers certificate as to the soundness of the buildings. One tenderer was disqualified for use of Tippex. In our experience, DPW normally requests outstanding documents and provide an opportunity to submit same.....The chairperson advised that no further documentation would be accepted."*

9.40.2.5 The tendered rental rate per square metre is significantly higher than the current market rate.

9.40.2.6 The tender process did not comply with section 217 of the Constitution.

9.40.3 The above complaint was taken up in writing with the Acting Director-General, Mr Sam Vukela, on 10 May 2011. Mr Vukela responded in a letter dated 26 May 2011 in which he indicated that the tender is awaiting evaluation by the Special Bid Specification Committee. According to his response, six bids were received by the DPW, however, no decision on the final award of the tender has been made to date.

9.41 Interview conducted with the Minister of Public Works on 27 May 2011

9.41.1 The Public Protector conducted an interview with the Minister of Public Works on 27 May 2011. At the commencement of the interview there appeared to be some confusion on the part of the Minister regarding the purpose thereof. The controversy was, however, resolved when the Minister's Special Advisor (Adv B Khutsoane) was requested by the Public Protector to read the contents of a letter that was addressed to the Minister on 18 April 2011, which was in the possession of the Special Advisor. The contents of the letter included the following:

> *"I have decided that it would be prudent to conduct an interview with you in connection with your response and the response of the Department to my Report* (Middestad Report). *I also wish to discuss with you the procurement by the Department of Public Works of the lease of the Transnet building in Durban, for the accommodation of the KwaZulu-Natal Provincial Head Office of the South African Police Service, which I am currently investigating.*
>
> *It would be appreciated if you could kindly, but urgently advise of the earliest date that you will be available for the interview."*

9.41.2 During the course of the interview several questions in connection with the legal advice obtained by the Minister's office pertaining to the procurement process and the validity of the Middestad lease agreement, were put to the Minister. It was explained to the Minister that in the view of the Public Protector, these questions were relevant to the investigation into the procurement of the lease of the Transnet building as the procurement processes were intertwined and involved the same role-players. Some of the questions covered actions in respect of both buildings. The Minister declined to answer any questions relating to the Middestad lease, including questions pertaining to both.

9.41.3 In respect of the procurement of the lease of the Transnet building the Minister denied any involvement. She stated that the Director-General was responsible for the procurement thereof. The Minister also denied that she was informed of the decision of her Department to suspend the procurement process until the investigation of the Public Protector had been completed.

9.41.4 In connection with the recent complaint regarding the tender advertised on 1 April 2011 for the procurement of accommodation for the SAPS in Durban, the Minister indicated that she had instructed the Acting Director-General that the tender process be suspended pending the finalisation of the report of the Public Protector on the investigation into the procurement of the Transnet building. The Minister claimed to have taken this action in response to reports in the media in connection with the tender process and not as a result of a letter addressed to her in this regard by the Public Protector on 6 May 2011.

10 PERTINENT ISSUES ARISING DURING THE INVESTIGATION

The following pertinent issues arose during the course of the investigation:

10.1 The procurement process

The SAPS:

10.1.1 From the information obtained during the investigation, it was apparent that the identification of the Transnet building by the SAPS, as alternative accommodation for the KZN Provincial Head Office, was viewed by a number of senior officials in the DPW and SAPS as irregular. The interactions between the SAPS and the owners of the Transnet building overlapped with the legislative mandate and objectives of the DPW. The statement of the National Commissioner that engagement of service providers / landlords to the exclusion of the DPW was a regular occurrence, was refuted by officials within the SAPS and the DPW interviewed during the investigation.

The DPW*:*

10.1.2 There was a general acceptance by the DPW officials interviewed that the deviation from the open tender process and the recommendation and approval of a negotiated process was irregular. It was not properly considered by the DPW KZN Regional BEC and the National SNBAC, as was required of them.

10.2 The Need

The SAPS:

10.2.1 In this instance, the process followed by the SAPS was extraordinary in three ways: firstly the original plan of the SAPS was to construct a building to accommodate the Provincial Head Office. Secondly, a building was identified to be leased prior to the full extent of the need being determined by the SAPS. Thirdly, the needs analysis was then found to closely correspond with the available lettable floor space of the Transnet building.

10.3 Budget

The SAPS:

10.3.1 From the information obtained during the investigation into the procurement of the lease of the Middestad building and the investigation referred to in this report, there was no evidence that the SAPS planned and/or budgeted for either lease in the current MTEF cycle.

10.3.2 The SAPS's immovable asset portfolio requirements were previously significantly underestimated and immovable asset planning was not always done in a strategic manner.

10.3.3 It was further ascertained that at the time the procurement of the lease was initiated, both the SAPS lease and capital works budgets were significantly overextended. A reprioritisation of the SAPS budget was therefore required in order to make the necessary funds available, which had to be reallocated from other cost centres within the SAPS.

10.3.4 No explanation was provided for the departure from the original decision to construct a building for the SAPS and to renew the lease of the Servamus building for a period of two years whilst the construction was taking place, to the identification of the Transnet building to be leased to accommodate the Provincial Head Office.

10.4 Deviation from prescribed SCM processes

The SAPS and the DPW:

10.4.1 Officials from the SAPS and the DPW conceded there was no legitimate urgency in procuring the lease, as it was known for approximately 18 months prior to the date of expiry that a decision on alternative accommodation or the renewal of the lease had to be taken. In addition, no reasonable explanation could be provided for the deviation from a prescribed tender process in the procurement of the Transnet building lease.

11 EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

11.1 The SAPS

11.1.1 During his interview, the National Commissioner conceded that the procurement process could have been compromised as a result of the SAPS's early negotiations with RPF, to the exclusion of the DPW. He also conceded that as the accounting officer of the SAPS, he is ultimately accountable for the procurement processes followed by the SAPS for alternative accommodation for the KZN Provincial Head Office. The National Commissioner, however, insisted that he is reliant upon the submissions made to him by the relevant SCM officials within the SAPS.

11.1.2 The KZN Provincial Commissioner's evidence did not make any significant contribution to furthering the investigation, as she was unable to recall a number of relevant meetings and interactions with various role-players. She further disputed the contents of certain documents, despite acknowledging that her signature was present on the document and that it was prepared by her office.

11.1.3 As far as compliance with the SCM legal framework was concerned, the KZN Provincial Commissioner indicated that she was not conversant with such prescripts and relied on the officials in the KZN Provincial office to advise her.

11.1.4 The information provided and evidence submitted by the other officials and former officials of the SAPS are generally consistent with the relevant documentation that was reviewed and considered during the investigation.

11.2 The DPW

11.2.1 The evidence of the DG of the DPW is consistent with the information obtained from other witnesses and the documentation reviewed during the investigation. Although disputed by Shabangu, the DG's explanation that he eventually agreed to the lease of the Transnet building due to the pressure placed upon by the Minister and Shabangu, appears to be plausible when taking into account the circumstances surrounding both the Middestad and the Transnet building leases that prevailed at the DPW subsequent to the appointment of the new Minister.

11.2.2 Of particular significance is the conduct of the DG prior to the appointment of the Minister on 1 November 2010 and shortly thereafter.

11.2.3 The contention of the KZN Regional Manager that the reference to the Transnet building in the Procurement Instruction was directive from DPW Head Office to proceed with the procurement of the said building, to the exclusion of others, was found to be inconsistent with the Procurement Instruction itself, the SCM prescripts and policies of the DPW and the evidence of other senior DPW officials.

11.2.4 The failure by the Minister to respond to all questions put to her by the Public Protector, and her apparent reluctance to fully co-operate with the investigation made it extremely difficult to obtain her version of the events after her appointment and to evaluate that against evidence obtained from officials before the interview with her. Her written submission in response to the Provisional Report did not shed significant light on key questions.

11.2.5 It was noted that the Minister conceded that she had telephonic contact with Mr Shabangu and that she met with him personally on more than two occasions, both at her office and outside thereof. She further appeared to have accepted Shabangu's version that he was being prejudiced by the failure of the DPW to implement the Middestad lease.

11.2.6 The information provided and evidence submitted by the other officials of the DPW is generally consistent with the relevant documentation that was reviewed and considered during the investigation.

12 THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

12.1 The Public Protector issued a Provisional Report on the investigation to the complainants and other relevant parties involved on 8 June 2011.

12.2 The Provisional Report was distributed on the basis of confidentiality to provide the recipients thereof and the individuals implicated therein an opportunity to respond to its contents.

12.3 On 19 June 2011, the *Sunday Times* published an article on the contents of the Provisional Report that was leaked to them by unknown person(s).

12.4 The recipients of the Provisional Report were requested to submit their responses thereto by 23 June 2011.

13 RESPONSES TO THE PROVISIONAL REPORT

13.1 The response of the National Commissioner of the SAPS

13.1.1 The National Commissioner responded on 23 June 2011. In his introductory remarks he insisted that certain aspects of the report should be better contextualised in order to provide a more explanatory exposition of the facts.

13.1.2 It was noted with concern by the National Commissioner that the scope of the investigation was restricted to the period from his appointment (1 August 2009) to 31 May 2011. In this regard he stated, inter alia, that:

> *"The general perception created is that the National Commissioner drove the procurement of the building, and that there was no need for such procurement of for a new lease. On the contrary, there was a need to either relocate to a new building or construct one long before he came into this Department in August 2009."*

13.1.3 It was however clearly stated in the Provisional Report, and it is further reiterated below that it was not disputed during the course of the investigation that the need

for alternative accommodation of the SAPS in Durban exists. The concerns raised by the National Commissioner in this regard are therefore unfounded.

13.1.4 One of the main aspects of the Provisional Report disputed by the National Commissioner in his response was that he identified the Transnet building as alternative accommodation for the SAPS in Durban. He raised his concern as follows:

> *"The Public Protector's finding in this regard is based on a letter dated 23rd June 2010 and signed by a Colonel Meiring. The letter does not state how the instruction was issued. The National Commissioner has never given Colonel Meiring any instruction and the contents of the documents in the possession of the Public Protector does* (sic) *not provide such information. The report is also silent on the source of the instruction. It is unthinkable in the South African Police Service that such an instruction could have been given to a Colonel. This information on Colonel Meiring's letter contradicts paragraph 3 of the Information Note for the approval of funds in terms of which an instruction was given to procure "suitable accommodation" for the Provincial Commissioner. It is contended that the latter document is more reliable than the other as being signed by senior officers.* ***There is no document in existence, signed by the National Commissioner, identifying a building."***(emphasis added)

13.1.5 When interviewed during the investigation, Colonel Meiring stated that he was instructed by his superiors that the Transnet Building had been identified by the National Commissioner to be procured for the SAPS in Durban. Both Generals Hlela and Terblanche confirmed, independently of each other, that they were indeed instructed by the National Commissioner to procure the lease of the Transnet Building.

13.1.6 The opening paragraph of the Information Note referred to by the National Commissioner, dated 28 June 2010, stated that:

> *"The Transnet building situated in Smith Street, Durban was identified to be leased as alternative accommodation for the Provincial Commissioner of KZN."*

This document was approved and signed by the National Commissioner on the same date. The contention of the National Commissioner that no document signed by him identifying a building is in existence is thus clearly incorrect.

13.1.7 In view of the above, it is difficult to ignore evidence suggesting that the National Commissioner identified the Transnet Building.

13.1.8 It was also noted that the National Commissioner holds the view that since an instruction to procure the lease of a specific building would have been unlawful, the SCM officials involved ought not to have complied therewith. He stated further:

> "*The SCM officials who were involved in the procurement of the leases are in better position to know that they had no obligation to comply with an unlawful instruction in terms of section 199(6) of the Constitution and section 47 of the South African Police Service Act, 1995 (Act No. 68 of 1995)."*

13.1.9 The National Commissioner conceded that the SAPS engaged the owner the Transnet building prior to the DPW becoming involved and that the SAPS were involved beyond the demand management stage of the procurement process.

13.1.10 As far as the requirement of the SCM guide pertaining to the development of an Immovable Asset Management Plan is concerned, the National Commissioner repeated his contention made during the first part of the investigation that related to the procurement of the lease of the Middestad building, that it was merely a guideline and therefore not obligatory.

13.1.11 The National Commissioner expressed the view that it would be incorrect to find *"that there was no budget for the procurement of the Provincial Head Office in Durban."* The basis of his contention is that *"the budget for the continued lease of the Provincial Head Office was included in the lease budget for the SAPS."*

13.1.12 However, the pertinent issue that arose during the investigation was that at the time when the procurement process of the lease of the Transnet building commenced, the lease and capital works budget of the SAPS were significantly overextended, as was confirmed by the CFO, and therefore could not accommodate the substantial additional expenditure that was required to procure the lease of the Transnet building.

13.1.13 In response to the provisional finding of the Public Protector that the procurement of the lease was not in accordance with a system that is cost effective, the National Commissioner contended that the inclusion of the FCS units in the accommodation needs of the SAPS was misunderstood. According to Gen Cele, it was never his intention that operational members of these units should be based at the Provincial Head Office. In terms of the structure of these units only the management staff would be accommodated at the Provincial Head Office.

13.1.14 However, the Provisional Report clearly indicated that the finding was based on the information extracted directly from the approved SAPS needs analyses submitted to the DPW that clearly included operational staff. [5]

13.1.15 In determining the required floor space, the DPW considered the full extent of the needs analyses, which included management staff as well as operational members, for FCS and other units.

13.1.16 The intention to also accommodate operational staff at the Provincial Head Office was also confirmed during interviews conducted with senior officers of the SAPS based in Durban, during the investigation.

13.1.17 The National Commissioner's contention that no adverse finding can be made in this regard is therefore not supported by the evidence.

13.1.18 The National Commissioner further disputed that the total lettable area of the Transnet building had a direct influence on the demand management process of the SAPS. The basis for his argument was that "*all the units*(by implication not limited to management staff only) *that were included in the needs assessments would ordinarily resort in the Provincial Head Office."*

13.1.19 However, the provisional finding of the Public Protector in this regard was based on the fact that the evidence indicates that the inclusion of operational units, such as the FCS units, was a direct result of the total lettable floor space available in

[55] See Table 2 reflected in Paragraph 14.2.12 below

the Transnet building, which was identified as alternative accommodation prior to the commencement of the demand management process. This process was initiated with the submission of the SAPS needs analysis to the DPW, subsequent to the Transnet building being identified by the SAPS, as alternative accommodation.

13.1.20 The National Commissioner conceded that *"SAPS officials went beyond the demand management stage."*

13.1.21 General Cele, however, disputed that by virtue of his withdrawal of all delegations in respect of the procurement of goods and services over an amount of R500 000, he was solely responsible for ensuring that that the procurement of the lease of the Transnet building complied with the relevant legal prescripts. He emphasised that the delegations were withdrawn *"in order to put a stop to certain suspicious and questionable practices in the procurement environment…".* However, despite the fact that he had withdrawn the delegations for the reason stated, Gen Cele was, according to his response, still relying on the expertise of the very same officials who had their delegated powers withdrawn, for advice on procurement matters, which advice informed his decisions.

13.1.22 Section 44(2) of the PFMA states very clearly that a delegation by an accounting officer does not divest him or her of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty. The responsibility of the delegated power therefore remained that of the National Commissioner in any event. The fact that he relied on the advice of officials, some of whom he did not trust, to advise him, could not have had any impact on his responsibilities as the accounting officer to ensure compliance with the relevant legal prescripts.

13.1.23 The National Commissioner further conceded that he approved the expenditure relating to the lease of the Transnet building *"prior to the CFO advising on the budgetary implications."* He further indicated that he never saw the comments made by the CFO contained in the Information Note concerned. He stated in this regard that: *"The National Commissioners'* (sic) *understanding was that the CFO was required to find the money within the scope of the law to finance the lease."*

13.1.24 Gen Cele contended that the DPW was in the main responsible for complying with the provisions of section 217 of the Constitution, the PFMA and the Treasury

Regulations and that the DPW *"is solely responsible for the unlawful conclusion of the lease agreement."*

13.1.25 Concluding his response to the Provisional Report, the National Commissioner referred to findings which, in his view, were not related to the complaint that was investigated. Gen Cele did not identify the findings he was referring to, but stated the following:

> *"These are findings that have nothing to do with the incident of unlawfulness with respect to Middestad and Transnet* (sic) *buildings. They are just shortcomings in process that the Public Protector would possibly have discovered whether there was investigation of a complaint or not. It is submitted that in making these findings, the Public Protector should not unnecessarily intermesh them with the specific unlawfulness with respect to Middestad and Transnet buildings* (sic). *To do this is misleading and creates the impression that these shortcomings were deliberately created to provide opportunity for the unlawfulness that was subsequently discovered in relation to those two buildings. In other words, let the findings, if any, have connection with the unlawfulness discovered by the Public Protector. Alternatively, the Public Protector must explain in full that the process shortcomings were there in any event, whether there was a Middestad or Transnet complaint* (sic)."

13.1.26 The National Commissioner submitted a further response on 13 July 2011 in which he raised his concerns regarding the media coverage of the leaked Provisional Report, and the influence it may have on the Public Protector's final conclusions. Although the National Commissioner's concerns in respect of the leaking of a confidential report are shared, the Final Report is based only on the evidence and information obtained during the investigation, and the consideration and application of the relevant legislation and other prescripts. The views of media on the Provisional Report were not considered.

13.2 The response of the Minister of Public Works

13.2.1 In her response to the Provisional Report, dated 23 June 2011, the Minister of Public Works explained that the floor space that was approved by the National Commissioner of the SAPS, in terms of the needs analysis, amounted to 41 431.36m^2. The KAM Division of the DPW however, increased the required

square meterage in the norm document to 45 499.91 m^2 to accommodate for non-assignable areas, such as partitions, passages, toilets and common areas.

13.2.2 This explanation of the Minister is, however, not in line with the needs analysis that was re-submitted by the SAPS to the DPW as approved by the National Commissioner on 1 November 2010, reflecting the total gross area required as 41 772.91m^2. It also does not clarify why the final norm document of the DPW, dated 22 November 2010, reflected the total guideline area as being 41 440.23m^2.

13.2.3 The Minister conceded that there was no urgency in the procurement of alternative accommodation for the SAPS in Durban that would have justified a deviation from the prescribed tender process. She further conceded that the SNBAC erred in approving the procurement strategy on the basis of alleged urgency.

13.2.4 The Minister also conceded that the desktop analysis that that was conducted by the KZN Regional office of the DPW did not justify such deviation. In this regard she stated that: *"We submit that it would have been prudent to test the market by going out on an open tender in a manner envisaged by section 217 of the Constitution, instead of doing a desktop analysis."*

13.2.5 As far as the removal of Ms Irene Nel of the KZN Regional Office from the SAPS portfolio is concerned, the Minister explained that she was not aware thereof and that the matter will be investigated internally.

13.2.6 The Minister further claimed in her response that there was no formal handover or briefing by former Minister Doidge, when she was appointed, on urgent matters that would require her immediate attention. She discovered that official documents had been destroyed prior to her arrival at the office and that information had been erased from computers. It is not clear who was responsible for destroying the documents and which documents were involved. The Minister reported the matter to the President and to the SAPS who are still investigating her complaint.

13.2.7 According to the Minister, she was not welcomed by the Director-General, Mr Dongwana, on her arrival at the DPW. He failed to brief her on the status of the

Department and referred all questions to Deputy-Directors General. She further stated that:

> *"The Minister does not deny that there was unpleasant* (sic) *relationship with the Director-General as time goes on* (sic) *due to the fact that the Director-General did not regard the Minister as his principal whom she* (sic) *obliged to report to, on the business of the Department."*

13.2.8 She further denied that she called Mr Dongwana to inform him of the view of the State Attorney *"as she was only briefed by the Legal Services Unit about the opinion and then later by the Director-General himself by way of the Memo dated 25 November 2011."* She also denied that she had instructed Mr Dongwana to inform Nedbank that the transaction was proceeding.

13.2.9 According to the Minister: *"The Director-General always had an excuse for having signed all the letters to Nedbank without properly applying his mind, and then later resort* (sic) *to blaming other people for his actions."*

13.2.10 She only became aware of the procurement of the lease of the Transnet building when a memorandum was submitted to her in this regard by the Director-General on 25 November 2010.

13.2.11 The above memorandum was first brought to the attention of the Public Protector in the Minister's response, despite the DPW have been requested to provide all relevant documentation pertaining to the procurement of the lease to the Public Protector, upon the commencement of the investigation. The memorandum was addressed to the Minister from the Director-General and appears to have been prepared by the Chief Director: Legal Services.

13.2.12 The memorandum refers to the internal investigation conducted into the lease of the Middestad building and the legal opinions obtained in regard thereto, emphasising that the lease agreements were invalid. In the conclusion of the memorandum, the Minister is requested to note that the Durban lease for the accommodation of the SAPS had been concluded between the department and RPF.

13.2.13 The Minister conceded that Shabangu approached her alleging that he was being treated unfairly by the DPW.

13.2.14 With reference to the interview that was conducted with her by the Public Protector during the investigation, the Minister conceded that she refused to answer questions relating to the procurement of the lease of the Middestad building. According to her, the Public Protector indicated to her during the interview that she did not intend to review her report on the Middestad building and that the Minister therefore held the view that her response to questions relating to the matter would serve no purpose. The Minister's response in this regard, however, does not state that the Public Protector explained to her on several occasions during the interview that her questions relating to the Middestad building were relevant as it pertained to a procurement process that was similar to the one followed in the procurement of the lease of the Transnet building. It also loses sight of the provisions of section 11 of the Public Protector Act, in terms of which it is a criminal offence to refuse to answer questions put to her by the Public Protector, without just cause.

13.2.15 The Minister furthermore raised her concerns about the methodology of the investigation. According to her response, the fact that the Public Protector failed to provide her with the questions that she were expected to answer in advance and that she was not questioned about the "*allegations levelled against her by the Director-General*" was unfair. These concerns were raised despite the fact that it was explained to the Minister during the interview that the Public Protector is not required by law to provide her with a set of questions in advance and that the purpose of providing her with the Provisional Report was also to afford her an opportunity to respond to allegations made against her.

13.2.16 In concluding her response, the Minister denied that she was involved in the procurement process of the lease of the Transnet building or that she put pressure on Mr Dongwana to approve the lease. She maintained that the memorandum that was submitted to her by the Director-General on 25 November 2010 was merely for her information and not for her approval.

13.2.17 As far as the remedial action referred to in the Provisional Report is concerned, the Minister indicated that the DPW intends training all the personnel involved in procurement, particularly on the justification of deviation from prescribed procurement processes.

13.2.18 She furthermore indicated that a moratorium has been placed on procurements by the DPW for a period of six months to enable the department to improve its processes and controls. The Minister is also *"contemplating formulating a policy, in terms of which the Department would consider constructing buildings to accommodate its client Department instead of leasing,"* which in her view would be more cost efficient.

13.3 The response of the Minister of Finance

13.3.1 The response of the Minister of Finance to the Provisional Report was dated 23 June 2010.

13.3.2 Minister Gordhan stated that the National Treasury would welcome the opportunity to assist the Ministries of Public Works and Police in taking appropriate action against the relevant officials that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in the Provisional Report.

13.3.3 The Minister also confirmed that the National Treasury would have no objection to monitor the procurement of suitable accommodation for the SAPS in Durban, as proposed by the Provisional Report. He further indicated that the National Treasury may in fact be duty bound to do so pursuant to the provisions of the Instruction Note issued by it on 31 May 2011, in terms of which the SAPS and the DPW *"are required to award any contract in excess of R10 million with the concurrence of the relevant treasury."*

13.3.4 The Minister furthermore indicated that the National Treasury would welcome the opportunity to introduce measures to prevent encroachment on the mandate of the DPW in respect of the procurement of leased accommodation where it is possible to do so. He concluded in this regard that: *"However, we would also suggest that the DPW itself also be enjoined to take steps to prevent encroachment on its mandate.*

13.3.5 The remedial action proposed in the Provisional Report included that the DPW and the National Treasury should consider whether RPF should be restricted as a service provider due to its involvement in the unlawful and irregular procurement

by the DPW of the leases of the Middestad and the Transnet buildings. Minister Gordhan responded as follows in this regard:

"The National Treasury would be constrained in restricting RPF in that the circumstances under which a restriction may be imposed are circumscribed by Regulation 15 to the PPPFA (Preferential Procurement Policy Framework Act) which states that:

'15(1) An organ of state must, ***upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract****, act against the person awarded the contract. (emphasis added)*

15(2) An organ of state may, in addition to any remedy it may have against the person contemplated in sub-regulation (1)-

(a)……..;

(b)……..;

(c)……..;

(d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.'

According to the information at our disposal it is unclear whether in this particular case there has been preference obtained on a fraudulent basis or unattained goals in the performance of the contract that warrants restriction. Furthermore, the organ of state contemplated in the aforementioned regulation that may have been competent to impose a restriction is the DPW and not the National Treasury."

13.3.6 After having considered the response of the Minister of Finance and representations made by Shabangu, and as it could not be found from the information obtained during the investigation that RPF obtained a preference on a fraudulent basis, it was decided not to include the remedial action referred to in paragraph 13.3.5 above.

13.4 The response of RPF

13.4.1 RPF was also afforded an opportunity to respond to the contents of the Provisional Report. Gideon Pretorius Inc, attorneys acting on behalf of RPF, responded on 23 June 2011.

13.4.2 In their response, the said attorneys did not refer to the merits of the Provisional Report. Instead, they, in the main, complained about procedure followed during the investigation and stated that:

"*You present our client with a provisional report which contains your findings and recommendation to which you have already applied your mind* ***without*** *allowing our client the opportunity to test any of the evidence you rely on, in cross examination or otherwise, and without giving our client an opportunity to state its case. Our instructions are to* ***remind you that the legal system is accusatory and not inquisitorial.****"* (emphasis added).

13.4.3 The attorneys also requested access to *"the charge sheet"* and the information and evidence obtained during the investigation in terms of the Promotion of Access to Information Act, 2000.

13.4.4 On behalf of RPF, the attorneys concluded their response as follows:

> *"Any prejudice that your report will cause our client in this process will result in a claim for damages."*

13.4.5 As it was obvious from the response of the attorneys that they do not have a proper understanding of the mandate of the Public Protector and the investigation process that is prescribed by law (which in inquisitorial in nature), the Public Protector responded in writing on 20 June 2011, as follows:

> *"Under the circumstances, I think it would be appropriate for us to meet at your earliest convenience to enable you to view the evidence in my possession which I relied on in drafting my report. Further thereto, I believe it will be essential for me to share with you how my office operates, judging by the set of questions posed in your letter under reply."*

13.4.6 The Public Protector met with Shabangu on 13 June 2011 and again with him and the attorneys representing RPF on 13 July 2011.

13.4.7 During the above meetings, Shabangu and the attorneys raised their concern about the remedial action referred to in the Provisional Report with regard to the DPW and the National Treasury considering restricting RPF as a future service provider.

13.4.8 It was explained by the Public Protector that the said remedial action would not be included in the final report on the advice of the National Treasury, as referred to in paragraph 13.3.5 above. The Public Protector also explained her mandate and the investigative process to Shabangu and the attorneys.

13.4.9 Shabangu denied ever having applied undue pressure on DPW officials (including the Director-General), or having improperly influenced them in their consideration and application of procurement process relating to the leases of the Middestad building in Pretoria and Transnet building in Durban.

13.4.10 Shabangu further denied that he ever met with the Minister outside of her office, as indicated by her during the interview with the Public Protector[6].

13.4.11 Shabangu could not shed any light on the sudden change of heart by the DIrrector-General of the DPW regarding the conclusion of the leases. In November 2010 the leases were given the green light in contrast to his original decision, taken in August 2010, to suspend the leases on the basis of legal advice obtained from senior counsel, and an undertaking given to the Public Protector not proceed with the implementation and conclusion of the lease agreements pending finalisation of the investigation[7]. This was also contrary to his letter of 11 and 19 October 2010.

13.4.12 When asked to explain how he became aware of the SAPS's need for alternative accommodation in Durban, Shabangu stated that in the normal course of his business as a property developer had contacted the DPW in Pretoria on a regular basis to enquire on the future accommodation needs of State departments. In the

[6] See Paragraph 11.2.5 above.
[7] See Paragraph 11.2.2 above.

case of Durban Shabangu indicated that he was informed that the SAPS KZN Provincial office lease was due to expire and was provided with a "needs analysis" indicating the extent of the required alternative accommodation. It was because he was aware of the extent of the need for alternative accommodation in Durban, that RPF took the decision to purchase a building the size of the Transnet building.

13.4.13 Shabangu's above explanation is inconsistent with the documentary evidence obtained during the investigation, in terms of which it was found that the first needs analysis, reflecting the extent of the SAPS's need for alternative accommodation, was only submitted to the DPW on 23 June 2010. However, the sale agreement for the Transnet building was concluded with Shabangu on behalf of RPF on 19 March 2010, i.e. three months earlier.

13.4.13 Mr Shabangu and his lawyers insisted that he did nothing wrong.

13.5 Response of the Director-General of the DPW

13.5.1 In his response to the Provisional Report the Director-General indicated that he was abroad with the previous Minister, Mr Geoff Doidge, at the time of the Cabinet re-shuffle, in terms of which the current Minister was appointed with effect from 1 November 2010. He met the Minister and her team of advisors on 2 November 2010 and briefed her on a number of issues relating to the DPW, including the investigation by the SIU and the Public Protector pertaining to the SAPS leases in Pretoria and Durban.

13.5.2 According to a document entitled, *"Director-General's Summary Report"* which was presented to the Minister during the above meeting, she was further informed that the SAPS leases in Pretoria and Durban had been suspended pending the outcome of the investigations.

13.5.3 The Director-General also provided the Minister with a copy of the final report of the independent investigation into the Middestad building lease (Cliffe Dekker Report) during the week of 8 November 2010.

13.5.4 The Director-General re-emphasised that he was not aware of the approach of the special advisors of the Minister to the State Attorney on or about 11 November 2010. He was also not part of the delegation of the Ministry that met with the

Public Protector in connection with the opinion of the State Attorney on 15 November 2010.

13.5.5 In his response, the Director-General placed emphasis on his qualified approval of the lease subject to certain conditions being complied with.[8] *"It is common within the department that when approval has been given subject to specific conditions, the Regional Office is expected to appraise the SNBAC once the conditions have been implemented for 'final' confirmation and approval of the procurement contract. The fact that the lease agreement was concluded on 26 November 2010, the date following my qualified approval, makes it highly unlikely that any of these conditions would have been implemented at the time."*

13.5.6 As far as the memorandum, dated 25 November 2010 is concerned[9], the Director-General explained that he instructed the Head of the Legal Unit to provide a detailed memorandum on all the issues leading to the conclusion of the two leases, including the basis for the departure of the Legal Unit and the Office of the State Attorney from the opinions of senior counsel.

13.5.7 According to the Director-General: *"The intention of the memorandum was to put on record the outcome of a number of interactions over the past few weeks between the department, the office of the minister, the Office State Attorney and the Office of the Public Protector. In addition, I wanted the legal unit to place on record the so-called 'practical considerations' in support of the lease."* The Director-General, however, never received and feedback from the Minister on the memorandum and its contents.

13.5.8 With regard to the Minister's refusal to comment on the Pretoria Middestad lease, her denial of having been briefed of the decision to suspend the procurement of the leases in Pretoria and Durban was refuted by the Director-General in his response. He further stated that *".....in addition, the comments attributed to her*

[8] See Paragraph 9.32.4 above.
[9] See Paragraph 13.2.12 above.

(the Minister) *in the media and certain of the charges levelled against me in my suspension letter; together suggest that I omitted to appraise her on key issues pertaining to the department in general and, specifically, to these two leases on her assumption of office. This insinuation, in light of the significance of the two leases to the department at the time of her appointment, the wide-spread media attention thereon and the related investigations scrutinising the process, is practically inconceivable."*(emphasis added)

13.6 The response of the complainants

13.6.1 The responses received from Adv P Hoffman SC and Mr P Groenewald were merely acknowledgements of the investigation that was conducted.

14 GENERAL FINDINGS

14.1 Similarities identified in the procurement of the Middestad building lease and the Transnet building lease

14.1.1 The complaint lodged with the Public Protector related to both the Middestad and Transnet building leases. During the course of the investigation into the procurement of these leases a number of similarities were identified in the procurement processes and the role-players involved. Such similarities included:

14.1.1.1 According to the documentation provided both buildings were identified by the SAPS (National Commissioner);

14.1.1.2 The SAPS engaged the owners of the buildings prior to the DPW becoming involved in the procurement process, as was required;

14.1.1.3 The total lettable area of the respective buildings had a direct influence on the demand management requirements of the SAPS, as both buildings had been identified prior to the formal demand management process being initiated;

14.1.1.4 In both instances there was no legitimate urgency that justified a deviation from the prescribed open tender process;

14.1.1.5 RPF signed purchase agreements for both buildings shortly before the SAPS identified the buildings as alternative accommodation;

14.1.1.6 In both instances the procurement strategy adopted by the DPW resulted in negotiations with RPF exclusively;

14.1.1.7 The procurement of both leases was not reflected in the User Asset Management Plan; and

14.1.1.8 In both instances, funds had to be reprioritised due to insufficient funds being available in the SAPS leasing budget.

14.1.2 In both instances, the deviation from the prescribed tender process was not recorded or reported to the National Treasury and the Auditor General of South Africa, as required by Treasury prescripts.

14.1.3 In both in instances, the service provider (RPF) made contact with officials at the SAPS and the DPW and is alleged to have put pressure on them in regard to the finalisation of the procurement process.

14.1.4 In both cases the buildings leased were of a Grade C standard and required major refurbishment at the cost of the State and were leased at a rental much higher than the market rate for such buildings.

14.1.5 As a result of the above similarities a number of the findings made in respect of the procurement of the lease of the Middestad building are also applicable to the Transnet building lease.

14.2 Findings relating to the procurement process

Finding 1: The need was not reflected in the SAPS Immovable Asset Management Plan and not budgeted for

14.2.1 The SCM guide requires that as part of the strategic plan of a department, the resources required for the fulfilment of its obligations should be clearly analysed. This includes a detailed needs analysis of the goods, works and services required.

14.2.2 In his response to the Provisional Report of the Public Protector, the National Commissioner of the SAPS contended that the SCM guide should not be regarded as obligatory. However, the guide remains a directive of the National Treasury that has to be complied with by accounting officers and cannot be ignored.

14.2.3 The SCM Guide further emphasises first determining the full nature and extent of the need required prior to initiating the procurement process. The specifications of goods required must be determined through a comprehensive needs analysis, taking into account aspects such as budget and the strategic objectives of the institution concerned. The determination of the need itself must not be influenced by the specifications of specific goods and services available at the time of the compilation of the needs analysis.

14.2.4 The SAPS Strategic Plan 2010 to 2014 provided as follows:

> *"The need for the* ***improving of infrastructure*** *through a structured capital works programme within the SAPS, with specific reference to police stations* ***and other office and specialized accommodation in the SAPS****, is substantial. Budgetary constraints, however, impact on what can realistically be achieved. The building of new police stations, the renovation (refurbishing) of existing ones* ***and the provision of accommodation in accordance with the determined need, will be prioritized*** *in line with the operational priorities and objectives of the SAPS. It will, however, be important that the improvement of infrastructure is conducted in a coordinated fashion, that available budgets are fully utilized and that contracting and subsequent service delivery are done in accordance with relevant legislation. <u>The management of existing assets will be guided by the development of an Immovable Asset Management Plan to comply with the Government Immovable Asset Management Act, 2007</u>"* (emphasis added)

14.2.5 The fact that the procurement of the lease of the Transnet building was not budgeted for and not included in the Immovable Asset Management Plan of the SAPS, constituted maladministration.

Finding 2: The involvement of the SAPS proceeded beyond the demand management phase of the SCM process

14.2.6 As indicated above, the procurement of leased accommodation on behalf of the SAPS falls within the purview of the DPW. In keeping with its mandate the DPW procurement processes are initiated from the stage that a need is identified and communicated to it by one of its client departments. This process therefore

requires that once the element of demand management has been satisfied by the client department, i.e. the need identified and the specifications properly determined, the DPW then becomes responsible for the procurement process, without interference from the client department.

14.2.7 The warnings and advice from the DPW pertaining to the identification by the SAPS of a particular building and negotiating with a single service provider were regarded by the SAPS as interference in its affairs.

14.2.8 In the case of the Transnet building, however, the SAPS, by engaging a prospective bidder(RPF) prior to the DPW's involvement in the matter clearly went beyond the demand management phase of the procurement process, thereby infringing on the functional area of the DPW, i.e. the acquisition phase. This was further conceded by the National Commissioner in his response to the Provisional Report.

14.2.9 It is clear that the SAPS were fully aware that the procurement of leased accommodation was a DPW function, as was evidenced in a number of internal documents and correspondence. Therefore by negotiating with a single service provider, to exclusion of the DPW and other potential service providers, the procurement process was compromised and the constitutional requirement of competitiveness was thus not complied with. Such conduct constituted maladministration.

Finding 3: The Transnet building was identified prior to the determination the specific nature and extent of the need for alternative accommodation

14.2.10 It is not disputed that the needs analysis is a true reflection of the accommodation needs of the SAPS in Durban.

14.2.11 The preponderance of evidence indicates that the inclusion of operational units, such as the FCS units was a direct result of the total lettable floor space available in the Transnet building, which was identified as alternative accommodation prior to the commencement of the demand management process. The National Commissioner contested this evidence on the basis of the structure of the FCS

units, in terms of which only management staff would be accommodated at the Provincial Head Office.

14.2.12 However, as indicated in the Table below, the needs analyses compiled by the SAPS, clearly reflects all the staff of the FCS and Crime Intelligence (CI) Units and the accommodation requirements were therefore not restricted to Management Staff.

Table : Accommodation requirements as per SAPS needs analyses (FCS and CI)

Unit	Operational Staff	Management Staff	Total	No of offices to be occupied	Total Sqm Per Unit
FCS Durban	15	2	17	Not Reflected	210
FC Phoenix	17	2	19	8	226
FCS B/ Beach	14	2	16	7	202
FCS Umlazi	28	6	34	18	370
FCS Inanda	29	6	35	18	378
FCS Chatsworth	19	3	22	9	258
FCS Pinetown	18	3	21	9	250
CI Inanda	101	17	118	66	1094
CI Phoenix	62	7	69	37	654
CI Durban Central	106	15	121	66	1106
Total	**409**	**63**	**472**	**238**	**4748**

14.2.13 The above was therefore contrary to the principals of demand management, in terms of which the determination of the need, and the full extent thereof, precedes the identification of possible alternative accommodation.

14.2.14 If the demand management process in respect of the FCS units was properly applied, prior to the identification of the Transnet building, the likelihood of the DPW securing alternative accommodation closer to the respective clusters, in accordance with the vision of the National Commissioner, cannot be excluded.

Cost Effectiveness

Finding 4: The procurement of the lease was not in accordance with a system that is cost effective

14.2.15 It is important to note that even in those instances where a situation does not warrant the use of tender procedures, it does not mean that an organ of state may do away with a competitive procurement process altogether. Organs of state are still required in order to ensure compliance with the principles of competitiveness and cost effectiveness in section 217(1) of the Constitution, to procure goods or services on the best possible terms.

14.2.16 The full extent of the need for alternative accommodation was only determined by the SAPS, as reflected in the needs analysis, subsequent to the Transnet building being identified and the total lettable floor space of the building being made known to the SAPS.

14.2.17 According to the National Commissioner, the accommodation of FCS units at police stations is problematic. It is, however, not clear from the evidence whether the cost effectiveness of accommodating the operational staff of these units in the CBD (as reflected in the needs analyses) as opposed to the areas in which they serve was properly considered. There is further no indication that the DPW was ever approached by the SAPS to procure alternative accommodation for the FCS units closer to the communities they serve.

14.2.18 The option analysis report of the DPW, dated 1 October 2010, stated that the market rental rate for a Grade C building, such as the Transnet building was until the third quarter of 2009, R40.00 per square metre. The Transnet building further required significant refurbishment (a cost borne by the SAPS) that would take at least 20 months to complete.

14.2.19 The lease agreement signed between RPF and the DPW reflects the rental rate at R102.50 per square metre, with an additional R22.80 per square metre charged for operational costs. The total cost per square metre, excluding parking bays amounted to R125.30 per square metre. The procurement of the lease at the above rate was therefore clearly not cost effective.

14.2.20 The failure on the part of the KZN Regional Office to comply with the conditions of the SNBAC, which required that the reference to market related rental in the option analysis report be reconciled with the rental rate offered by RPF, further contributed to a lack of cost effectiveness, which amounted to maladministration.

14.2.21 The Minister of Public Works, in her response to the Provisional Report, conceded that the procurement process did not comply with the provisions of section 217 of the Constitution.

Competitiveness and Urgency

Finding 5: There was no legitimate justification for a deviation from the prescribed tender process

14.2.22 Organs of state should, where urgency dictates a deviation from procurement procedures, carefully consider the value and lengths of contracts concluded in order to address only the immediate urgency. In this way ongoing needs and requirements must as far as possible and where appropriate, be met by way of public tender procedures.

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

14.2.24 The only reference to urgency during the investigation related to the fact that the current lease of the Provincial Head Office (Servamus building) expired on 31 August 2010. It was, however, conceded that expiry of the lease in itself did not justify a deviation from the prescribed tender process.

14.2.25 The explanation provided by the KZN Regional Office that the Procurement Instruction from DPW Head Office was interpreted as a direct instruction to proceed with procurement of the Transnet building is in stark contrast with the relevant SCM prescripts and DPW policies and as such, cannot be accepted.

14.2.26 The DPW also attempted to justify the deviation from the prescribed tender process on the basis of a desktop analysis conducted by the KZN Regional Office

during July 2010 that found that the Transnet building was the only building in the Durban CBD suitable for the accommodation requirements of the SAPS. However, this contention is clearly refuted by the fact that the advertisement inviting tenders for the accommodation requirements of the SAPS on 1 April 2011 resulted in six substantive bids being submitted for consideration.

14.2.27 In her response to the Provisional Report, the Minister of Public Works conceded that the deviation from the prescribed tender process was not justified. This unjustified deviation from SCM prescripts amounted to maladministration.

Finding 6: The DPW did not record and report the reasons for deviating from a competitive process as required by prescripts

14.2.28 In addition to the above, National Treasury Practice Note No 8 of 2007/08, which came into effect on 1 December 2007 prescribes the following in paragraph 3.4 regarding any transaction which exceeds R500000. (VAT included):

> *"3.4.3 Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4.* ***The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his / her delegate. Accounting officers /authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4.*** *The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process."* (emphasis added)

14.2.29 From the available evidence, including an interview conducted with the CFO of the DPW, it is apparent that the DPW did not properly record the deviation from the bid process, nor did it meet its reporting obligations, as required above, which constituted maladministration.

14.2.30 The purpose of the reporting requirement is clearly to provide the National Treasury, as the custodian of public funds, with an opportunity to note, evaluate and, if necessary, intervene in the procurement process. The failure to report the deviation therefore accordingly deprived the National Treasury of the intended opportunity.

Finding 7: The procurement process did not comply with the requirement of fairness, equitability and transparency

14.2.31 In opting for the negotiated process there is no indication in the available evidence that the impact on fairness, equitability and transparency, as well as the prescribed requirements for legitimate deviation from and open tender process were properly considered at any time during the procurement process by the DPW. Any deviation from the prescribed tender process must be met with strict adherence to the above SCM prescripts in order to mitigate the risks such deviation may have on the validity of the entire procurement process.

14.2.32 It appears from the very nature of the process followed, namely, by entering into a negotiated contract instead of a competitive bidding process, the constitutional requirements of fairness, equitability and transparency were also not complied with. The situation was exacerbated by the fact that the contractor had already been involved in the process right from the beginning, even before the total extent of the need was established.

14.2.33 From the interviews conducted with the CFO of the DPW it emerged that the DPW have in the past not regarded the negotiated process as a deviation from the Treasury prescripts. Such instances were therefore not reported to the National Treasury or the Auditor General of South Africa, as required by the Treasury prescripts.

14.2.34 The evidence therefore indicates that some of the officials at the DPW has in the past not regarded the negotiated process as the “least desirable” process, as contemplated by their own policy documents. There were, however, those officials, such as Ms Nel of the DPW and Col Ngema of the SAPS, who legitimately raised their concerns about the non-compliance with SCM prescripts.

14.2.35 The failure of the DPW to ensure that the procurement process complied with the Constitutional requirements of fairness, equitability and transparency was unlawful and amounted to maladministration.

Discrepancies between the norm documents compiled by the DPW and the offer of acceptance made RPF on 26 November 2010

Finding 8: The floor space leased from RPF exceeded the total guideline area determined by the DPW

14.2.36 In terms of the needs analysis approved by the National Commissioner on 23 June 2010, the total gross area required by the SAPS amounted to 41 431.36m^2. The total guideline area compiled by the DPW from the needs analysis was reflected in the DPW norm document, dated 25 June 2010, as 45 499.91m^2.

14.2.37 The needs analysis re-submitted by the SAPS, at the request of the DPW, dated 1 November 2010, reflected the total gross area required by the SAPS as 41 772.91m^2. According to the DPW's final norm document, dated 22 November 2010, which was based on the re-submitted needs analysis of the SAPS, the total guideline area amounted to 41 440.23m^2.

14.2.38 The letter of acceptance from the DPW to RPF, dated 26 November 2010, indicates that an offer of 45 499.10m^2 was approved. The discrepancy between the approved offer and the final norm document could not be explained by the SAPS or the DPW.

14.2.39 The difference between the approved offer and the final norm document equates to 4058.87m^2. The table below illustrates the financial impact of the additional floor space leased from RPF in terms of the lease agreement signed on 26 November 2010, calculated at a rental rate of R102.50/m^2 with an annual escalation rate of 9.5%.

Table: Financial Impact of Additional Floor Space			
Letter of Acceptance	**DPW Norm Document**	**Difference**	**Additional Costs Over Lease Period Due To Difference**
45499.10 m^2	41440.23 m^2	4058.87 m^2	Year 1: R4 992 410.10
			Year 2: R5 466 689.06
			Year 3: R5 986 024.52
			Year 4: R6 554 696.85
			Year 5: R7 177 393.05
			Year 6: R7 859 245.39
			Year 7: R8 605 873.70
			Year 8: R9 423 431.70
			Year 9: R10 318 657.72
			Year 10: R11 298 930.20
			Total: R77 683 352.29

14.2.40 As is evident from the above table, the additional expenditure resulting from the discrepancy in question amounts R77 683 352.29, excluding operational costs, over the entire lease period (9 years 11months).This additional expenditure, resultant from maladministration on the part of the DPW, could further have led to fruitless and wasteful expenditure as contemplated by section 1 of the PFMA.

Validity of the lease

Finding 9: The lease agreement entered into by the DPW and the RPF is invalid

14.2.41 The procurement of the lease was done in a manner that did not comply with the requirements of the Constitution, the PFMA and the Treasury Regulations and instructions for procurement by organs of state.

14.2.42 Section 2 of the Constitution provides that conduct that is inconsistent with it is invalid and that the obligations imposed by it must be fulfilled.

14.2.43 The conclusion of the lease agreements under the circumstances referred to above was therefore invalid.

14.2.44 The agreement of sale between RPF and Transnet lapsed due to RPF's failure to issue guarantees within in the required period. This resulted in the lease agreement being cancelled by the DPW as ownership of the Transnet building did not pass within three months of the date of the signing of the agreement to RPF, as was agreed upon. The cancellation of the lease was accepted by RPF.

Finding 10: The conduct of SAPS and DPW officials involved in the procurement of the lease was improper and unlawful

The SAPS

14.2.43 The accountability for budgetary control and the procurement of goods and services within all government departments lies with the accounting officer, who at all material times were the National Commissioner of the SAPS and the DG of the DPW, or the person who acted in that capacity.

14.2.44 The National Commissioner, as the accounting officer of the SAPS acted in breach of those duties and obligations incumbent upon him in terms of the Constitution and the PFMA. Section 217 of the Constitution, read with the provisions of the PFMA and the Treasury Regulations require from an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

14.2.45 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently.

14.2.46 All conduct that is inconsistent with the Constitution is, in terms of section2 thereof invalid.

14.2.47 The National Commissioner withdrew all delegations in respect of procurement of goods and services over an amount of R500 000 with effect from 30 September 2009. He was therefore ultimately responsible to ensure that the procurement of the lease, for as far as the involvement of the SAPS was concerned, complied with the said legal prescripts. The defence of the National Commissioner that he was reliant upon the advice and decisions of senior SCM officials within the SAPS (whose delegated powers he had withdrawn on the basis suspicious practices) for his approval of the procurement of a lease amounting to R1.1 billion, cannot be

accepted. The withdrawal the delegations of senior SAPS officials on the basis of "*certain suspicious and questionable practices in the procurement environment"* required of the National Commissioner to be more vigilant in the consideration and approval of the procurement of goods and services.

14.2.47 The above is further evident from the fact the National Commissioner approved the expenditure prior to the CFO advising him of the full budgetary implications and his concerns relating to the reprioritisation of funds in order to meet the financial obligations of the lease.

14.2.48 The National Commissioner further conceded that as the accounting officer he took full responsibility for the procurement of the lease, irrespective of the involvement of other officials.

14.2.49 The failure of the National Commissioner to ensure that the procurement process complied with the said legal requirements and prescripts, as indicated in the findings above resulted in the invalid conclusion of a lease agreement, to the detriment of the State, and therefore constituted maladministration.

The DPW

14.2.50 The original procurement instruction was issued on 1 July 2010, the same day on which the Director General of the DPW took office. When the Director-General became aware of allegations with regard to the procurement process, he gave instructions in August 2010 to suspend the procurement process subject to an internal investigation that was being conducted.

14.2.51 After the new Minister instructed the Director-General to continue with the Middestad lease, despite legal advice to the contrary, he on 17 November 2010 also requested the KZN Regional Manager to proceed with the process to procure the accommodation for the SAPS in Durban and to make the necessary submissions to the SNBAC.

14.2.52 The SNBAC approved the lease of the Transnet building in terms of DPW Circular 10 of 2010. When the approval was brought to the attention of the Director-General, he added certain conditions in respect of the lease agreement. These conditions were, however, not complied with by the KZN Regional Office prior to or subsequent to the signing of the lease agreement with RPF the following day.

14.2.53 The Director-General was suspended on unrelated charges shortly after the signing of the lease agreement, which he was not even aware of.

14.2.54 Although the ultimate accountability in terms of the PFMA for the procurement of the lease remains that of the Director-General, as the accounting officer, the evidence shows that the process in respect of the procurement of the Transnet building had already progressed to an advanced stage at the time when he took office, on 1 July 2010.

14.2.55 His agreement to the negotiated procurement strategy was further based on the decision of the SNBAC, which was flawed, as conceded by the Minister. The decision of the SNBAC was taken after the Director-General reluctantly, and because of the pressures which he perceived to have been put on him by the Minister and Shabangu, gave an instruction that the process should continue. The majority of the evidence in this regard indicates that his perception at the time was not unreasonable.

14.2.56 The evidence further indicates that the Director-General took additional steps to ensure that the procurement of the lease was cost effective by commissioning the option analysis report and conditionally agreeing to the procurement of the lease.

14.2.57 The conduct of the KZN Regional Office of the DPW, by merely accepting that only the Transnet building could be procured and by advising the SNBAC, accordingly amounted to maladministration.

14.2.58 The failure of the SNBAC to properly interrogate the recommended procurement strategy also amounted to maladministration.

14.2.59 The failure of the KZN Regional Office to comply with the conditions imposed by the SNBAC and the Director-General was improper and amounted to maladministration.

14.2.60 The acceptance of the offer of RPF by the KZN Regional Office for lettable floor space that significantly exceeded the authorised total guideline area, as determined by the norm document, constituted maladministration and potential fruitless and wasteful expenditure.

14.2.61 A schematic illustration is provided below comparing the above findings against the relevant phases of the procurement process, as it pertains to leased accommodation.

Schematic: Findings is respect of the procurement process of the Transnet building

	INVESTIGATION FINDING	AREA OF RESPONSIBILITY
Preparation & Demand Management	**INCEPTION/ NEEDS ANALYSIS**	
	1. In Feb 2010 SAPS KZN Provincial office indicated the preferred option for accommodation is the construction of a new facility	**SAPS**
	2 19 March Transnet building is sold to Bon View Trading (RPF)	
	3. SAPS identified the Transnet building in March 2010 as alternative accommodation – approx 45000m^2 space available – DPW not consulted	**DPW**
	4. 1st SAPS needs analysis for KZN Provincial office finalised on 29 April 2011 – after building was already identified	
	5. Need has increased from 13000m^2 to 45 499m^2- includes additional components	
	FINANCIAL PLANNING	
	1. Need was not reflected in the SAPS Immovable Asset Plan	**SAPS**
	2. The existing lease budget was under severe pressure and the new lease was not planned for	**SAPS**
	3. Funds had to be reprioritised from elsewhere in the SAPS budget the new lease – Total cost R1.166 billion	**SAPS** in order to fund
Acquisition management	**PROCUREMENT PROCESS**	
	1. The SAPS proceeded beyond the demand management phase of the SCM process and engaged with service provider to exclusion of DPW	**DPW**
	Procurement Strategy	
	2. The DPW Regional Office (KZN) interpreted PI as an instruction to procure the Transnet building, to the exclusion of other potential service providers	**DPW**
	3. KZN Regional BSC recommends to SNBAC that a negotiated process with RPF implemented – SNBAC approves the negotiated strategy	be
	4. The reasons for deviating from a competitive process were not recorded and reported as required by SCM prescripts	**DPW**
Evaluatio	**EVALUATION PROCESS**	
	1. The procurement process did not comply with the requirement of fairness, equitability and transparency, and the deviation from a competitive bid process was improper	**SAPS &DPW**
Award	**AWARD AND CONTRACT MANAGEMENT**	
	1. The decision to proceed with a negotiated process was improper and should have gone out on tender	**DPW**
	2. The lease agreement entered in by DPW and RPF was invalid	**DPW**
	3. The cost implications of the lease indicate that the process was not market related and therefore not cost effective	**DPW**

15 SPECIFIC FINDINGS

15.1 The Public Protector's specific findings in relation to the conduct of the SAPS are that:

15.1.1 The lease agreement in respect of the Transnet building was signed between RPF and the DPW and not by the National Commissioner of the SAPS, as was alleged. However, the National Commissioner signed both the initial and re-submitted needs analyses and a memorandum, dated 28 June 2010, authorising funding for the Transnet building lease.

15.1.2 Although the SAPS did not sign the lease agreement, its involvement in the procurement process was improper, as it proceeded beyond the demand management phase and it further failed to implement proper controls, as required by the PFMA and relevant procurement prescripts.

15.1.3 The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to unlawful, improper conduct and maladministration.

15.1.4 The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.

15.1.5 On the evidence available it could not be found that an improper relationship between the preferred service provider (RPF) and the SAPS motivated the deviation from required tender procedures.

15.1.6 The inclusion of the operational staff of the FCS units in the needs analyses does not fully reconcile with the vision of the Minister of Police and the National Commissioner of bringing the police closer to the communities that they serve. The National Commissioner's contention that the operational staff of the FCS units

would remain at their cluster stations, is not supported by the evidence in respect of the accommodation requirements of the SAPS, as contained in the needs analyses.

15.2 The Public Protector's specific findings in relation to the conduct of the DPW are that:

15.2.1 The procurement by the DPW of the lease was not in accordance with a system that is cost effective and competitive, as is required by section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.

15.2.2 The reckless manner in which the DPW dealt with public funds in this case, particularly by not following the prescribed tender process without justification and not ensuring that the State received value for money, ignoring the risk containment process that was already in place, fell short of the requirements of good governance and administration.

15.2.3 The conduct of the DPW KZN Regional Office and that of the SNBAC was in breach of those duties and obligations incumbent upon them in terms of section 217 of the Constitution, the PFMA and the relevant Treasury Regulations. These provisions require that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.

15.2.4 The process that led to the conclusion by the DPW of a lease agreement with RPF was fatally flawed in various respects, including non-compliance with prescribed procurement procedures and conditions imposed by the SNBAC and the accounting officer. This rendered the process unlawful and further constituted improper conduct and maladministration.

15.2.5 The lease agreement should not have been entered into as it did not comply with the validity requirements of the Constitution, applicable legislation, prescripts and the instructions of the accounting officer. The lease agreement entered into by the DPW and RPF was therefore invalid.

15.2.6 The initiation of a new procurement process in April 2011, contrary to the undertaking given to the Public Protector by the DPW for the process to be held in abeyance pending the finalisation of this investigation and a pronouncement on the propriety of the procurement process followed, was improper and undermines public confidence in organs of state.

15.2.7 The conduct of the Minister of Public Works in relation to the procurement by the DPW for the SAPS referred to in this report and in respect of the investigation by the Public Protector failed to meet the requisite stewardship expected from her, including the use of public resources as envisaged by sections 195 and 217 of the Constitution and the *Batho Pele Principles,* and her obligation to cooperate with the investigation in terms of the Public Protector Act, and accordingly constituted improper conduct as envisaged by sections 181(3) and 182(1) of the Constitution.

16 IMPACT OF THE NON-COMPLIANCE BY THE SAPS AND DPW WITH THE PRESCRIBED SCM PROCESS

16.1 The non-compliance by the SAPS and DPW with the prescribed SCM process in the procurement of the Transnet building lease had the following impact:

16.1.1 Due to the fact that the procurement was not cost effective it resulted in a significant potential monetary loss to the state and prejudice to the South African tax payers;

16.1.2 Loss of public confidence in the SAPS, DPW and organs of state in general in open and transparent procurement of goods and services;

16.1.3 The perception of potential service providers that they cannot expect fair and equal treatment from organs of state;

16.1.4 A delay in improving the accommodation and working conditions of SAPS officials, which has a direct bearing on their level of service delivery;

16.1.5 The perception created by the SAPS needs analyses that vulnerable members of the community, i.e. women and children will have limited access to units of the SAPS established specifically to deal with family violence, child protection and sexual offences related matters.

16.1.6 As was the case in the Middestad investigation referred to above, it was evident throughout this investigation that a number of the officials interviewed had the perception that the SAPS could irregularly influence the procurement process. These perceptions were reinforced by the fact that when these officials raised serious concerns with the process followed by the SAPS and the DPW to procure the lease in writing, they were sidelined and/or deliberately removed from the procurement process.

16.1.7 By entering into long term lease agreements of substantial amounts (R1.1 billion in this instance), which includes operational costs aimed at upgrading buildings significantly, the DPW is essentially footing the bill for the improvement of properties owned by private entities. The expenditure incurred for such a lease could be better utilised for the construction of client specific accommodation and/or the purchasing of suitable property to accommodate client departments. It was noted from the response of the Minister of Public Works to the Provisional Report that she intends formulating a policy in terms of which the DPW will in future consider favouring the construction of buildings over leased accommodation.

16.1.8 The total space requirement as reflected in the needs analysis in terms of which the PI of 17 March 2011 was issued by the DPW is exactly the same as was offered by and leased from RPF in terms of the lease agreement that lapsed. It was therefore clearly tailored to suit the previous offer made by RPF. The validity of this needs analysis is therefore highly questionable and should not have been accepted by the DPW at face value.

17 REMEDIAL ACTION

17.1 The remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution is the following:

17.1.1 The President to consider taking action against the Minister of Public Works for her actions referred to in this report and the Report of the Public Protector on the procurement of the lease of the Middestad building (Report no 33 of 2010/11), issued on 22 February 2011.

17.1.2 The Minister of Public Works to:

17.1.2.1 Report to the Cabinet on her actions in relation to the procurement of the leases of the Middestad and the Transnet buildings by the DPW and her failure to fully cooperate with the Public Protector in connection with the investigation thereof, within 60 days of the date of the issuing of this report.

17.1.2.2 With the assistance of the National Treasury and the Department of Public Service and Administration, take urgent steps to ensure that the appropriate action is instituted against the relevant DPW officials that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.

17.3 The SAPS should engage the DPW with a view to identifying alternative accommodation for the operational staff of the FCS units referred to in this report in closer proximity to the communities which they serve.

17.4 The needs the analysis of the SAPS should be reviewed and possibly amended in accordance with the outcome of the process referred to above.

17.5 The DPW should assist the SAPS to find suitable accommodation for the said operational staff of the FCS units and the Provincial Head Office, in accordance with a system that complies with section 217 of the Constitution.

17.6 The National Treasury should closely monitor the process referred to in paragraph 15.4, including the revisiting of the needs analysis.

17.7 The DPW must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts and the encroachment by its clients departments on its mandate. In addition, the DPW must implement measures to ensure the verification of the floor space offered by service providers, prior to any lease agreement being concluded.

17.8 The Acting Director General of the DPW must ensure that any steps taken against Ms Irene Nel from the KZN Regional Office, as a result of her raising concerns in connection with the procurement of the Transnet building, are reversed and that she is reinstated in the position she occupied on 1 July 2010, should she so wish.

17.9 The Minister of Police should, with the assistance of the National Treasury, take urgent steps to ensure that the appropriate action is instituted against all the relevant officials of the SAPS that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.

17.10 The SAPS must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.

17.11 The National Treasury should develop and introduce measures that will prevent a recurrence of a situation where client departments infringe on the functional areas of the DPW in respect of the procurement of leased accommodation.

17.12 The DPW should expedite the formulation of a policy to implement its announcement regarding moving towards the building of accommodation for client departments above the procurement of long term leases of lower grade buildings.

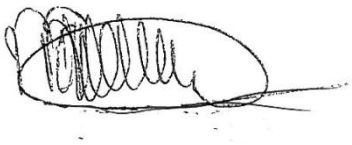
18 MONITORING

18.1 The National Treasury, the DPW and the SAPS are to submit action plans in respect of the implementation of the remedial action referred to in paragraph 17 above to the Public Protector within 30 days of the date of this report.

18.2 The National Treasury, the Minister of Public Works, the Minister of Police, the Minister of Public Service and Administration, the SAPS and the DPW are to submit quarterly reports, as of the date of this report, to the Public Protector on the progress made with the implementation of the remedial action referred to in paragraph 17 above.

19 ACKNOWLEDGEMENTS

19.1 The Public Protector would like to thank the Head and members of the SIU for its assistance in the investigation of this matter. The Public Protector is further grateful to organs of State involved, particularly the National Treasury for their cooperation which made it possible to conclude the report expeditiously.



ADV T N MADONSELA

PUBLIC PROTECTOR OF THE

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