

1. EXECUTIVE SUMMARY OF SIYAYA ENERGY CONTRACTS

1.1. Introduction

This investigation was requested by the Office of the Chief Procurement Officer (“**OCPO**”) of National Treasury after it was directed to conduct a forensic investigation by the Office of the Public Protector (“**Public Protector**”). The facts relating to our mandate are set out below:

1.1.1. in August 2015, the Public Protector issued its report titled “*Derailed*”, a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (“**PRASA**”);

1.1.2. in the report, the Public Protector directed the OCPO at the National Treasury to conduct forensic investigations into all of PRASA’s contracts above R10 million from 2012 to date;

1.1.3. National Treasury determined that more than 200 contracts were required to be investigated and appointed various service providers to perform the requisite investigations;

1.1.4. in March 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA’s suppliers for investigation; and

1.1.5. Siyaya Energy (Pty) Ltd, (“**Siyaya Energy**”) was listed as one of PRASA’s suppliers which was awarded contracts with a total value of more than R10 million.

1.2. Methodology

1.2.1. We:

2. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, Siyaya Energy;
3. compiled a list of all individuals and entities related to Siyaya Energy;
4. conducted public database and media searches on the entities and individuals involved;
5. performed an asset search on the known key players associated with the entities involved;
6. validated the services billed for by Siyaya Energy;

7. interviewed PRASA officials involved with the appointment of Siyaya Energy and those responsible for assigning tasks to and validating the services rendered by Siyaya Energy;

8. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).

8.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

8.2. Conclusion

We were requested to investigate the following aspects of the contract awarded to Siyaya Energy:

8.2.1. Investigation relating to the procurement process that was followed to appoint Siyaya Energy as a service provider in the fuel contract

9. It appears that PRASA advertised a tender in order to secure the services of a service provider that would supply it with fuel.

9.1.1. Determine whether the appointment of the identified service providers was done in accordance with the relevant prescripts and whether these were approved by the relevant authorities

10. As stated in section Error: Reference source not found below, we were not provided with the:

(a) technical specifications for this tender;

(b) detailed tender documents relating to this tender;

(c) bid submissions that were received from the bidders;

(d) detailed scores of the individual BEC members;

(e) minutes of the BEC meeting;

(f) bid evaluation report compiled by the BEC;

(g) minutes of the BAC meeting;

(h) the bid adjudication report compiled by the BAC;

(i) Mr Montana's recommendation report that would have been submitted to PRASA's Board for consideration; and

(j) PRASA's Board's awarding of the contract to Siyaya Energy.

11. As a result of the fact that we were not provided with some of the most important documents relating to the procurement process, we are not able to conclude on whether or not the procurement process was ultimately done in accordance with the requirements of the Constitution and the PFMA.
12. We did, however, identify the following potential irregularities:
 - (a) the weightings of the evaluation criteria that were applied in this tender were heavily inconsistent with the technical capability/functionality criteria that should have been applied in a tender of this value and nature. As stated in the report below, Mr Mbatha was of the view that Siyaya Energy was unable to provide the service that PRASA required (see paragraph Error: Reference source not found below);
 - (b) PRASA did not conduct any due diligence or needs analysis before it advertised this tender. This resulted in the need for a variation order and contributed to various difficulties that were experienced during the lifecycle of the contract;
 - (c) despite the fact that Siyaya Energy had not attended the compulsory briefing session, its bid was considered and it was ultimately awarded the contract;
 - (d) the Notice of Appointment issued by Dr Phungula in respect of the Siyaya Energy contract extension on 6 June 2014 was potentially irregular. It appears that PRASA's Board only approved the contract extension on 31 July 2014. Therefore, at the time that Dr Phungula issued the Notice of Appointment, the relevant PRASA accounting authority had not yet approved the contract extension;
 - (e) it appears that PRASA's Board approved the extension of Siyaya Energy's contract for a three year period even though no procurement process was followed; and
 - (f) the extension of Siyaya Energy's contract was approved by PRASA's Board in July 2014. After our interview with Mr Khuzwayo on 18 October 2016, it appears that PRASA has not signed this contract. This may affect the regularity of any payments that PRASA made to Siyaya Energy in respect of this contract. We are not aware

of whether PRASA has made any payments to Siyaya Energy in terms of the extended contract.

- 12.1.1.1. Establish where applicable, whether deviations were carried out in accordance with the relevant prescripts
13. The variation order in respect of Siyaya Energy's contract appears to have been dealt with in accordance with the relevant financial delegations.
14. On 31 July 2014, PRASA's Board approved the extension of Siyaya Energy's contract for a period of three years effective from 1 June 2014 until 31 May 2017. As far as we were able to ascertain, no SCM process was followed in respect of this extension. PRASA's SCM policy is silent on the issue of contract extensions.
- 14.1.1.1. Determine whether payments correspond to the respective bid price and/or contractual agreement
15. Siyaya Energy was awarded a contract to supply PRASA with fuel and the estimated value of the contract was R855 million.
16. PRASA provided us with an extract of payments made to Siyaya Energy in respect of this contract and payments totalling the value of R200,685,952.68 (two hundred million, six hundred and eighty five thousand, nine hundred and fifty two rand and sixty eight cents) were made to Siyaya Energy in respect of this contract. If the extract of payments that we were provided is accurate then the contract value was not exceeded.
17. We are not able to comment on whether or not these payments were made in accordance with the contractual agreement because we were not provided with detailed payment documentation.
- 17.1.1.1. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected
18. PRASA's poor record-keeping severely impacted on our ability to execute our mandate. We, accordingly, recommend that PRASA implements an appropriate document management system.
19. PRASA needs to ensure that it conducts a proper needs analysis before it procures goods and services.

20. The extension of Siyaya Energy's contract was approved by PRASA's Board in July 2014. After our interview with Mr Khuzwayo on 18 October 2016, it appears that PRASA has not signed this contract. This may affect the regularity of any payments that PRASA made to Siyaya Energy in respect of this contract. We are not aware of whether PRASA has made any payments to Siyaya Energy in terms of the extended contract.
21. On 31 July 2014, PRASA's Board approved the extension of Siyaya Energy's contract for a period of three years effective from 1 June 2014 until 31 May 2017. As far as we were able to ascertain, no SCM process was followed in respect of this extension. PRASA's SCM policy is silent on the issue of contract extensions. PRASA's SCM should be extended so that it clearly covers contract extensions.

22. EXECUTIVE SUMMARY OF SIYAYA DB CONSULTING ENGINEER CONTRACTS

22.1. Introduction

This investigation was requested by the Office of the Chief Procurement Officer ("**OCPO**") of National Treasury after it was directed to conduct a forensic investigation by the Office of the Public Protector ("**Public Protector**"). The facts relating to our mandate are set out below:

- 22.1.1. in August 2015, the Public Protector issued its report titled "*Derailed*", a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa ("**PRASA**");
- 22.1.2. in the report, the Public Protector directed the OCPO at the National Treasury to conduct forensic investigations into all of PRASA's contracts above R10 million from 2012 to date;
- 22.1.3. National Treasury determined that more than 200 contracts were required to be investigated and appointed various service providers to perform the requisite investigations;
- 22.1.4. in March 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA's suppliers for investigation; and
- 22.1.5. Siyaya DB Consulting Engineers (Pty) Ltd ("**Siyaya DB**") was listed as one of PRASA's suppliers which was awarded contracts with a total value of more than R10 million.

22.2. Methodology

22.2.1. We:

23. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, Siyaya DB;
24. compiled a list of all individuals and entities related to Siyaya DB;
25. conducted public database and media searches on the entities and individuals involved;
26. performed an asset search on the known key players associated with the entities involved;
27. analysed payments made to Siyaya DB;
28. interviewed PRASA officials involved with the appointment of Siyaya DB and those responsible for signing and validating the delivery of the required services by Siyaya DB;
29. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).

29.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

29.2. Conclusions

29.2.1. We received documentation relating to the appointment of Siyaya DB on various projects. The documentation was reviewed and categorised according to the different contract names, namely:

30. HO/PT/(DM)/014/06/2013 Braamfontein and Salt River;
31. HO/PT/(DM/0077/10/2014 Wolmerton;
32. HO/PT/(INFR/017/06/2013 Perway; and
33. HO/PT/INFRA(P0/0076/09/2014 <R10mil contract.

33.1.1. On 16 March 2011, an MOU was signed between PRASA and Siyaya DB. The MOU states, “a *binding commitment with respect to the cooperation and to projects would result only from the execution of definitive cooperation agreements subject to the terms and conditions contained therein*”. The MOU further explains that “*It is understood that (i) the MOU does not constitute an obligation or commitment of the*

Parties to enter into a definitive cooperation agreement or to proceed with or carry out the Projects, and (ii) any obligations or commitments to proceed with, or consummate, the cooperation shall be contained only in the definitive cooperation agreement”.

33.1.2. Subsequent to the conclusion of this MOU, PRASA, however, appointed Siyaya DB as a service provider in the contracts listed above. We were requested to investigate the contracts awarded to Siyaya DB.

33.1.3. During the investigation, we established the following details in respect of the contracts awarded to Siyaya DB:

34. HO/PT/(DM)/014/06/2013 Braamfontein and Salt River

- (a) Siyaya DB was appointed as a service provider in respect of this contract based on the MOU that was signed between PRASA and Siyaya DB in March 2011. From the available information, it appears that no procurement process was followed in securing the services of Siyaya DB for this contract;
- (b) Siyaya DB was engaged to provide technical assistance in respect of the depot modernisation programme that was being undertaken at the Braamfontein and Salt River depots of PRASA;
- (c) it was engaged to complete phases one to four of the project;
- (d) the memorandum motivating its appointment stated that it is for the benefit of PRASA that the work for the technical design for the depot modernisation programme be confined to DBI (Siyaya DB’s partner), as the type of solution required by PRASA needed the expertise and experience of a railway operator and railway consultant. Accordingly, it stated that PRASA was justified in not issuing a tender for the project based on the technical expertise required as well as the budgetary constraints. The memorandum concluded that no private sector company would be able to provide the technical designs and solutions that DBI would provide to PRASA therefore the work should be confined;
- (e) the summary of the cost of the project, excluding VAT, was R85,964,912.00. The full cost of the project was R97,999,999.68 including VAT. The costs were allocated as follows:
 - (1) R45,897,149.80 in respect of the Braamfontein depot;

(2) R40,067,762.25 in respect of the Salt River depot;

The copy of the memorandum requesting the confinement that we were provided with, in respect of this project was not signed by PRASA's GCEO, Mr Montana. We are therefore not sure if Mr Montana did approve the confinement;

- (f) the contract agreement that was signed in respect of this contract was concluded between PRASA and Siyaya DB on 30 July 2013. The contract agreement was signed by the PRASA GCEO, Mr Montana. We noted that it was interesting that the depot modernisation programme costs were kept just below the R100 million mark, as we understand that Mr Montana was not able to approve contracts with a value above R100 million;
- (g) on 24 July 2014, Dr Phungula directed a request for confinement to Mr Montana, in respect of the Braamfontein depot modernisation project to increase the scope and budget associated with the project. Various additional services were required from Siyaya DB and the associated cost of this increase in scope was R24,289,929.45 including VAT;
- (h) on 24 July 2014, the request was recommended by Dr Phungula and approved by the PRASA GCEO, Mr Montana;
- (i) on 24 July 2014, Dr Phungula directed a second request for confinement to Mr Montana, in respect of this contract. This request was in respect of the Salt River depot modernisation project, to increase the contract scope and budget. Various additional services were required from Siyaya DB and the associated cost of this increase in scope was R22,660,044.75 including VAT;
- (j) on 24 July 2014, the request was recommended by Dr Phungula and approved by the PRASA GCEO, Mr Montana;
- (k) it is not clear why Dr Phungula addressed two separate requests for confinement in respect of the depot modernisation programme to Mr Montana on the same day instead of submitting one request for confinement. In the initial contract agreement with Siyaya DB both depot modernisation projects formed part of the same contract agreement;

- (l) we further identified that additional expenses totalling R9,190,492.24 were incurred irregularly on the Braamfontein depot modernisation project. On 27 August 2014, Dr Phungula directed a request for condonation to Mr Montana, in respect of the irregular expenditure incurred. On 29 August 2014, Mr Montana approved the request;
- (m) we further identified that additional expenses totalling R6,779,770.70 were incurred irregularly on the Salt River depot modernisation project. On 27 August 2014, Dr Phungula directed a request for condonation to Mr Montana, in respect of the irregular expenditure incurred. On 29 August 2014, Mr Montana approved the request;
- (n) we were further provided with an undated MOU in respect of PRASA's implementation of its Rail Perway Asset Assessment Rehabilitation project. The agreement states that its effective date was 26 April 2013 and that the contract was to be concluded within 12 months. The total value of the contract was R24,978,000.00 including VAT. The copy of the agreement that we were provided with was not signed;
- (o) in respect of the projects (including variation orders and extensions) set out above, Siyaya DB's project budgets totalled an amount of R185,898,236.82 including VAT;

35. HO/PT/(DM/0077/10/2014 Wolmerton

- (a) we were provided with a recommendation report requesting the confinement of work in respect of the detailed design and construction supervision of the Wolmerton depot to Siyaya DB;
- (b) the cost of the project was stated as R28 million including VAT;
- (c) on 27 August 2014, the confinement was recommended by Dr Phungula and approved by the PRASA GCEO, Mr Montana, on 29 August 2014;
- (d) we were provided with another undated consultancy agreement between PRASA and Siyaya DB in respect of providing detailed design and construction supervision work at the Wolmerton depot. The agreement lists its effective date as 29 September 2014. The cost of the services that would be provided was stated to be R28 million including VAT;

- (e) a variation order was also approved in respect of this contract. The total financial implication was R6,368,185.99 including VAT. On 16 November 2015, the variation was recommended by Mr Rehman and supported by Messrs Gantsho and Gingcana. On 17 November 2015, the Acting PRASA GCEO, Mr Khena, approved the variation order;
- (f) in respect of the Wolmerton depot modernisation project set out above, Siyaya DB's project budget (including the variation order) totalled an amount of R34,368,185.99 including VAT;

36. HO/PT/(INFR/017/06/2013 Perway

- (a) on 27 March 2013, Siyaya DB submitted a technical and financial proposal in respect of this contract;
- (b) the proposal was aimed at both PRASA Rail and PRASA Technical;
- (c) Siyaya DB was proposing that it assists these divisions of PRASA with the implementation of the Perway rehabilitation programme;
- (d) the proposal states that the costs of the services proposed would amount to R 24,978,000.00 including VAT;
- (e) on 13 July 2013, Messrs Sonny and Kumalo issued a Notice to Proceed to Siyaya DB, accepting its proposal;
- (f) it appears that this project's name was later changed to the accelerated infrastructure refurbishment project by PRASA Technical;
- (g) an addendum to this contract dated 13 November 2014, increased the budget and time period related to this project. The addendum extended the initial contract period of 12 months from 26 April 2013 to 31 March 2014 by a further six months from September 2014 to 31 March 2015. Further, the addendum also extended the initial contract value by another R9,956,760.00 including VAT. The scope of work was also extended. The addendum approving the extension of the contract was signed by the Siyaya DB representative on 13 November 2014. The addendum is not signed by a PRASA official;

- (h) we were provided with a memorandum seeking that the PRASA Technical CEO, Mr Zamxaka, signs the contract for the accelerated infrastructure refurbishment project in line with the MOU that was signed between PRASA and Siyaya DB in March 2011. On 4 December 2013, the memorandum was approved by Mr Zamxaka. The contract was signed by him on the same day;
- (i) in respect of the Perway project set out above, Siyaya DB's project budget (including the extension) totalled an amount of R34,934,760.00 including VAT;

37. HO/PT/INFRA(P0/0076/09/2014 <R10mil contract

- (a) we received a letter drafted by PRASA Technical sent to Siyaya DB dated 29 September 2014, titled Notice to Proceed. The letter states that PRASA approved Siyaya DB's offer dated 18 June 2014 of R2,890,014.00 in respect of delivering the turnkey RFP to complete works for the 120 Km/h – Germiston to Pretoria test section tender. This was the only document that we were provided with in respect of this contract; the project budget totalled an amount of R2,890,014.00 including VAT.

37.1. Investigation related to the procurement process that was followed to appoint Siyaya DB as a service provider in the following contracts

37.1.1. HO/PT/(DM)/014/06/2013 Braamfontein and Salt River

- 38. Siyaya DB was appointed as a service provider in respect of this contract based on the MOU that was signed between PRASA and Siyaya DB in March 2011. From the available information, it appears that no procurement process was followed in securing the services of Siyaya DB for this contract. The memorandum motivating its appointment stated that it was for the benefit of PRASA that the work for the technical design for the depot modernisation programme be confined to DBI (Siyaya DB's partner), as the type of solution required by PRASA needed the expertise and experience of a railway operator and railway consultant. Accordingly, it stated that PRASA was justified in not issuing a tender for the project based on the technical expertise required as well as the budgetary constraints. The memorandum concluded that no private sector company would be able to provide the technical designs and solutions that DBI would provide to PRASA therefore the work should be confined.

39. The summary of the cost of the project, excluding VAT, was R85,964,912.00. The full cost of the project was R97,999,999.68 including VAT. The copy of the memorandum requesting the confinement that we were provided with, in respect of this project was not signed by PRASA's GCEO, Mr Montana. We are therefore not sure if Mr Montana did approve the confinement. He did, however, sign the contract agreement. We noted that it was interesting that the depot modernisation programme costs were kept just below the R100 million mark, as we understand that Mr Montana was not able to approve contracts with a value above R100million.
40. On 24 July 2014, Dr Phungula directed a request for confinement to Mr Montana, in respect of the Braamfontein depot modernisation project to increase the scope and budget associated with the project. The associated cost of this increase in scope was R24,289,929.45 including VAT. The request was approved by Mr Montana.
41. On 24 July 2014, Dr Phungula directed a second request for confinement to Mr Montana, in respect of this contract. This request was in respect of the Salt River depot modernisation project, to increase the contract scope and budget. The associated cost of this increase in scope was R22,660,044.75 including VAT. The request was approved by the PRASA GCEO, Mr Montana.
42. Additional expenses totalling R9,190,492.24 were incurred irregularly on the Braamfontein depot modernisation project. Dr Phungula directed a request for condonation to Mr Montana, in respect of the irregular expenditure incurred and on 29 August 2014, Mr Montana condoned the irregular expenditure.
43. Additional expenses totalling R6,779,770.70 were incurred irregularly on the Salt River depot modernisation project. Dr Phungula directed a request for condonation to Mr Montana, which he approved on 29 August 2014.
44. We were further provided with an undated MOU in respect of PRASA's implementation of its Rail Perway Asset Assessment Rehabilitation project. The agreement states that its effective date was 26 April 2013 and that the contract was to be concluded within 12 months. The total value of the contract was R24,978,000.00 including VAT.
45. We were not able to interview Mr Montana and other senior officials that were involved in authorising the confinements and extensions in respect of the above contracts. We are therefore not able to definitively conclude

on whether the confinements were regular or irregular. It should, however, be noted that even though the services that were procured from Siyaya DB were specialist services, it is highly unlikely that it was the only service provider capable of providing this type of service. From the interviews that we conducted and the documents that we reviewed, there does not appear to have been an emergency, which could potentially have explained the procurement method that was used to engage Siyaya DB on these contract agreements. Given the value of the contract and the eventual expenditure in terms of this contract, we would have expected that PRASA would have engaged in some form of procurement process. The witnesses that we interviewed were of the view that the MOU signed between PRASA and Siyaya DB was the basis on which the contracts with the company were concluded.

45.1.1. HO/PT/(DM/0077/10/2014 Wolmerton

46. Siyaya DB services in respect of this contract were procured based on a request to confine the work to Siyaya DB. The cost of the project was stated as R28million including VAT. On 29 August 2014, Mr Montana approved the confinement.
47. A variation order was also approved in respect of this contract. The total financial implication was R6,368,185.99 including VAT. On 17 November 2015, the Acting PRASA GCEO, Mr Khena, approved the variation order.
48. We were not able to interview Mr Montana and other senior officials that were involved in authorising the confinement in respect of the above contract and its extension. We are therefore not able to definitively conclude on whether the confinement was regular or irregular. It should, however, be noted that even though the services that were procured from Siyaya DB were specialist services, it is highly unlikely that it was the only service provider capable of providing this type of service. From the interviews that we conducted and the documents that we reviewed, there does not appear to have been an emergency, which could potentially have explained the procurement method that was used to engage Siyaya DB on this contract and its extension. Given the value of the contract and the eventual expenditure in terms of this contract, we would have expected that PRASA would have engaged in some form of procurement process.
49. The witnesses that we interviewed were of the view that the MOU signed between PRASA and Siyaya DB was the basis on which the contracts with the company were concluded.

49.1.1. HO/PT/(INFR/017/06/2013 Perway

50. On 27 March 2013, Siyaya DB submitted a technical and financial proposal in respect of this contract. Siyaya DB was proposing that it assists PRASA Rail and PRASA Technical with the implementation of the Perway rehabilitation programme. The costs of the services proposed would amount to R 24,978,000.00 including VAT. No procurement process appears to have been followed in procuring the services of Siyaya DB in respect of this contract. We were not provided with any recommendation report requesting the confinement of this contract to Siyaya DB. We were therefore not able to establish who approved the confinement. The eventual contract agreement in respect of this project was signed by Mr Zamxaka on 4 December 2013. The memorandum requesting Mr Zamxaka to sign the contract agreement states that the contract was concluded with Siyaya DB based on the MOU signed with the company in March 2011.
51. An addendum to this contract dated 13 November 2014, increased the budget, time period and scope related to this project. The extended scope resulted in an additional request for funds totalling R9,956,760.00 including VAT.
52. We were not able to interview Mr Zamxaka and other senior officials that were involved in authorising the confinements in respect of the above contract and its extension. We are therefore not able to definitively conclude on whether the confinement was regular or irregular. It should, however, be noted that even though the services that were procured from Siyaya DB were specialist services it is highly unlikely that it was the only service provider capable of providing this type of service. From the interviews that we conducted and the documents that we reviewed, there does not appear to have been an emergency, which would potentially have explained the procurement method that was used to engage Siyaya DB for this project. Given the value of the contract and the eventual expenditure in terms of this contract, we would have expected that PRASA would have engaged in some form of procurement process.
53. The witnesses that we interviewed were of the view that the MOU signed between PRASA and Siyaya DB was the basis on which the contracts with the company were concluded.

53.1.1. HO/PT/INFRA(P0/0076/09/2014 <R10mil contract

54. We received a letter drafted by PRASA Technical sent to Siyaya DB dated 29 September 2014, titled Notice to Proceed. The letter states that

PRASA approved Siyaya DB's offer dated 18 June 2014 of R2,890,014.00 in respect of delivering the turnkey RFP to complete works for the 120 Km/h – Germiston to Pretoria test section tender. This was the only document that we were provided with in respect of this contract.

55. From the available document it does not appear that a procurement process was followed in respect of engaging the services of Siyaya DB. We were not able to identify the PRASA officials that were involved in engaging Siyaya DB's services in respect of this contract. We were therefore not able to interview these officials.

55.1. Determine whether the appointment of the identified service providers was in-line with relevant prescripts and if these were approved by relevant authorities

55.1.1. In March 2011, Siyaya DB and PRASA entered into a MOU in terms of which they agreed that they would work together on strategic projects. From the documentation reviewed and interviews that we conducted, it appears that this MOU was used as a basis on which to confine services to Siyaya DB in these contracts.

55.1.2. We investigated four contracts that were awarded to Siyaya DB. There were various extensions and variations in respect of some of these contracts. From the available documentation and the interviews that we conducted, it appears that all of these contracts were awarded based on confinements.

55.1.3. The services that were procured from Siyaya DB were specialist services. However, we are of the view that it is highly unlikely that they were the only service provider capable of providing this type of service. Further, based on the information at our disposal at this stage, no emergency situation appeared to exist, which could potentially have explained PRASA using the confinement method as a method of procuring the services of Siyaya DB in respect of these contracts.

55.1.4. We are however not able to conclude that the above procurements were clearly irregular because of deficiencies in the documentation that we received from PRASA. Further, we were not able to interview the key PRASA officials that were involved in approving these contracts.

55.2. Establish where applicable, whether deviations were in-line with relevant prescripts

For the reasons set out in sections Error: Reference source not found, Error: Reference source not found and Error: Reference source not found, we are not able to conclude on whether the deviations were in-line with relevant prescripts.

55.3. Determine whether payments correspond to the respective bid price and/or contractual agreement

For the reasons set out in section Error: Reference source not found, we are not able to conclude on whether or not payments made to Siyaya DB correspond to the respective bid price and/or contractual agreements.

55.4. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected

55.4.1. For the reasons set out throughout this report we are not able to definitively conclude on whether or not there was improper conduct on the part of any PRASA official. We are therefore not in a position to advise on any remedial actions that could be taken in respect of PRASA officials.

55.4.2. PRASA's record-keeping severely impacted on our ability to execute our mandate. We therefore recommend that PRASA implements an appropriate document management system.

55.4.3. PRASA needs to ensure that it conducts a proper needs analysis and market research before it procures goods and services.

56. EXECUTIVE SUMMARY OF MATHOPO MOSHIMANE CONTRACTS

56.1. Introduction

This investigation was requested by the Office of the Chief Procurement Officer (“**OCPO**”) of National Treasury after it was directed to conduct a forensic investigation by the Office of the Public Protector (“**Public Protector**”). The facts relating to our mandate are set out below:

56.1.1. in August 2015, the Public Protector issued its report titled “*Derailed*”, a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (“**PRASA**”);

56.1.2. in the report, the Public Protector directed the OCPO at the National Treasury to conduct forensic investigations into all of PRASA's contracts above R10 million from 2012 to date;

56.1.3. National Treasury determined that more than 200 contracts were required to be investigated and it appointed various service providers to perform the requisite investigations;

56.1.4. In March 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA's suppliers for investigation; and

56.1.5. Mathopo Moshimane Mulangaphuma Incorporated, trading as DM5 Incorporated (“DM5”) was listed as one of PRASA’s suppliers which was awarded contracts with a total value of more than R10 million.

56.2. Methodology

56.2.1. We:

57. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, DM5;
58. compiled a list of all individuals and entities related to DM5;
59. conducted public database and media searches on the entities and individuals involved;
60. performed an asset search on the known key players associated with the entities involved;
61. validated the services billed for by DM5;
62. interviewed PRASA officials involved with the appointment of DM5 and those responsible for signing and validating the required services to DM5 to ensure that the services were delivered;
63. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).

63.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

63.2. Conclusion

We were requested to investigate the following aspects of the contract (and its five extensions) awarded to Mathopo Moshimane

63.2.1. Investigation related to the procurement process that was followed to appoint Mathopo Moshimane as a service provider

64. The first contract awarded to Mathopo Moshimane was awarded on the basis of a confinement request directed by Mr Mbatha to Mr Montana on 25 November 2011. Mr Montana approved the confinement on the same day. During our interview with Mr Mbatha he conceded that confinements can only be used in two circumstances, firstly, in the case of an emergency and secondly, where the service provider was a sole provider. He further

conceded that it was not appropriate to appoint Mathopo Moshimane on the basis of a confinement. The initial contract value was R4,800,000.00 excluding VAT.

65. The first extension of Mathopo Moshimane's contract was for the period 1 June 2012 to 13 July 2012. The contract value was R1,600,000.00 excluding VAT. The addendum was signed by Mr Mbatha on 7 June 2012. He, according to PRASA's financial delegations, was only authorised to approve procurement up to the value of R1million. We were not able to interview Mr Montana and therefore we are not able to ascertain whether or not he approved this extension. On the available information, it therefore appears that Mr Mbatha irregularly extended this contract because he exceeded his financial delegation and he did not follow any procurement process.
66. The second extension of Mathopo Moshimane's contract was for the period 1 August 2012 to 30 July 2013. The contract value was R4,800,000.00 excluding VAT. The addendum was signed by Mr Mbatha but it is undated. He, according to PRASA's financial delegations, was only authorised to approve procurement up to the value of R1million. We were not able to interview Mr Montana and therefore we are not able to ascertain whether or not he approved this extension. On the available information, it therefore appears that Mr Mbatha irregularly extended this contract because he exceeded his financial delegation and he did not follow any procurement process.
67. The third extension of Mathopo Moshimane's contract was for the period 1 August 2013 to 31 January 2014. The addendum states that the services provided by Mathopo Moshimane were extended and that new payment terms were agreed to; we were, however, not provided with the relevant documents. The addendum was signed by Mr Mbatha and Ms Mathopo but it is undated. We were not able to interview Mr Montana and therefore we are not able to ascertain whether or not he approved this extension. On the available information, it therefore appears that Mr Mbatha irregularly extended this contract because he exceeded his financial delegation and he did not follow any procurement process.
68. The fourth extension of Mathopo Moshimane's contract related to it providing transaction advisory services to PRASA Technical in the Railway Digital Radio Project. It submitted a proposal to PRASA indicating that the fee for providing the services would be R4,800,000.00 excluding VAT. The

proposal is undated and provides no reference to a time period during which the services would be rendered. The proposal appears to have been signed by Mr Mbatha. We were not provided with any internal documentation related to the approval of this contract. However, as a result of interviews that we conducted with Messrs Baltac and Edwards, we have reason to believe that Mathopo Moshimane was appointed on the basis of a confinement. Both witnesses indicated that they were under the impression that Mr Mbatha had approved the appointment. On the available documentation it appears that Mathopo Moshimane was irregularly appointed. We were not able to interview Mr Montana and therefore we are not able to ascertain whether or not he approved this extension.

69. The fifth extension of Mathopo Moshimane's contract related to it providing legal and procurement support in respect of various projects being undertaken by PRASA Rail. On 13 May 2014, Dr Phungula submitted a memorandum requesting the extension of Mathopo Moshimane's contract for a further twenty-four (24) months. He stated that the financial implications of the extension was R26,000,000.00. On 16 May 2014, Mr Montana approved the contract extension. We were not able to interview Dr Phungula and Mr Montana and can therefore not fully comment on the procurement process that was followed in extending this contract.

69.1.1. Determine whether the appointment of the identified service providers was in-line with relevant prescripts and if these were approved by relevant authorities

70. The service provider was awarded one contract on the basis of a confinement. There appears to have been no basis to appoint the service provider on the basis of a confinement. The contract was extended on five occasions. The extensions also appear to be irregular. We are however not able to conclude that the awards were irregular because we were not able to interview Dr Phungula and Mr Montana.

70.1.1. Establish where applicable, whether deviations were in-line with relevant prescripts

71. See our comments above in sections 63.2.1 and 69.1.1 above.

71.1.1. Determine whether payments correspond to the respective bid price and/or contractual agreement

72. The payments made to Mathopo Moshimane appear to be in line with the contractual agreements.

73. The description of the services rendered, on the invoices submitted, broadly correspond to the general scope of works contained in the contractual agreements with PRASA Corporate.

74. Complete records detailing tangible deliverables received from Mathopo Moshimane were not maintained by PRASA Corporate. We were therefore not able to establish whether all of the approved payments were due or not.

74.1.1. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected

75. As a result of the fact that we were not able to interview Mr Montana in respect of the contracts awarded to Mathopo Moshimane by PRASA Corporate, we are not able to conclusively establish whether or not Mr Mbatha irregularly extended the initial contract with Mathopo Moshimane. We are therefore not able to recommend disciplinary action against Mr Mbatha.

76. PRASA's record-keeping severely impacted on our ability to execute our mandate. We therefore recommend that PRASA implements an appropriate document management system.

77. The PRASA supply chain management policy should be extended so that it clearly covers contract extensions.

78. EXECUTIVE SUMMARY ON ISPHIKELELI SENYONI CONTRACTS

78.1. Introduction

This investigation was requested by the Office of the Chief Procurement Officer (“**OCPO**”) of National Treasury after it was directed to conduct a forensic investigation by the Office of the Public Protector (“**Public Protector**”). The facts relating to our mandate are set out below:

78.1.1. in August 2015, the Public Protector issued its report titled “*Derailed*”, a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (“**PRASA**”);

- 78.1.2. in the report, the Public Protector directed the OCPO at the National Treasury to conduct forensic investigations into all of PRASA's contracts above R10 million from 2012 to date;
- 78.1.3. National Treasury determined that more than 200 contracts were required to be investigated and appointed various service providers to perform the requisite investigations;
- 78.1.4. in March 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA's suppliers for investigation; and
- 78.1.5. Isphikeleli Senyoni (Pty) Ltd, ("**Isphikeleli Senyoni**") was listed as one of PRASA's suppliers which was awarded contracts with a total value of more than R10 million.

78.2. Methodology

78.2.1. We:

79. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, Isphikeleli Senyoni;
80. compiled a list of all individuals and entities related to Isphikeleli Senyoni;
81. conducted public database and media searches on the entities and individuals involved;
82. performed an asset search on the known key players associated with the entities involved;
83. analysed payments made to Isphikeleli Senyoni;
84. interviewed PRASA officials involved with the appointment of Isphikeleli Senyoni and those responsible for assigning and validating the required services to Isphikeleli Senyoni;
85. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).

- 85.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

85.2. Conclusions

85.2.1. Investigation related to the procurement process that was followed to appoint Isphikeleli Senyoni as a service provider in the following contracts

86. The service provider was appointed in respect of one contract. They were appointed based on a confinement that was requested by Dr Mtimkulu and approved by Mr Montana on 11 December 2012. No tender process was followed in procuring the services of Isphikeleli Senyoni. From the confinement request it appears that Dr Mtimkulu was alleging that there was an urgent need for the appointment of service providers to assist with the general overhaul of its rolling stock.

87. We were not able to interview the key PRASA officials that were involved in:

(a) requesting the confinement;

(b) approving the confinement;

(c) awarding the contract to Isphikeleli Senyoni; and

(d) the determination of the contract terms, scope of works and value.

88. It should further be noted, that Isphikeleli Senyoni was registered as a company on 28 August 2012 and it was appointed on confinement by PRASA on 11 December 2012.

89. We are therefore not able to comment on the procurement process followed in securing the services of Isphikeleli Senyoni, save to indicate that we are of the view that PRASA would have struggled to convincingly argue that there was an emergency, which entitled it to deviate from procurement processes completely. Even the PRASA supply chain management policy is clear on the limited circumstances in which confinements could be used. Indicating either that an emergency situation needed to exist, alternatively, the service provider needed to be a sole provider. While it may have been urgent to obtain the services of service providers to assist with the general overhaul of rolling stock, this would not qualify as an emergency. The fact that 17 service providers were appointed as a result of this confinement is further evidence that none of the service providers were sole providers of the services that they rendered.

89.1.1. Determine whether the appointment of the identified service provider was in-line with relevant prescripts and if these were approved by relevant authorities

90. As set out above, we are not able to conclusively state that the appointment of Isphikeleli Senyoni was not in-line with relevant prescripts. However, we are of the *prima facie* view that there was non-compliance with the relevant prescripts, based on the documentation that we have reviewed and the interviews that we have conducted.

90.1.1. Establish where applicable, whether deviations were in-line with relevant prescripts

91. Please see our comments under sections 85.2.1 and 89.1.1 above.

91.1.1. Determine whether payments correspond to the respective bid price and/or contractual agreement

92. A total of sixty-three (63) payments were made to Isphikeleli Senyoni between 30 August 2013 and 31 March 2016, the total value of the payments made is R125,725,342.41 (one hundred and twenty-five million, seven hundred and twenty-five thousand, three hundred and forty-two rand and forty-one cents) including VAT. In the absence of the payment documentation especially the invoices, certificates of work, approvals etc., we were not able to verify if the payments were made against agreed milestones set out in the contract agreement.

92.1.1. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected

93. In our view, on the limited information with which we were provided, it appears that Isphikeleli Senyoni was appointed irregularly. However, we are not able to make any remedial action recommendations in respect of PRASA officials because the key role players involved in this contract have left the employ of PRASA.

94. PRASA's poor record-keeping severely impacted on our ability to execute our mandate. We, accordingly, recommend that PRASA implements an appropriate document management system.

95. EXECUTIVE SUMMARY ON MODETECH CONTRACTS

95.1. Introduction

This investigation was requested by the Office of the Chief Procurement Officer (“**OCPO**”) of National Treasury after it was directed to conduct a forensic investigation by the Office of the Public Protector (“**Public Protector**”). The facts relating to our mandate are set out below:

- 95.1.1. in August 2015, the Public Protector issued its report titled “*Derailed*”, a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (“**PRASA**”);
- 95.1.2. in the report, the Public Protector directed the OCPO at the National Treasury to conduct forensic investigations into all of PRASA’s contracts above R10 million from 2012 to date;
- 95.1.3. National Treasury determined that more than 200 contracts were required to be investigated and appointed various service providers to perform the requisite investigations;
- 95.1.4. in March 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA’s suppliers for investigation; and
- 95.1.5. Modetech Services (Pty) Ltd, (“**Modetech**”) was listed as one of PRASA’s suppliers which was awarded contracts with a total value of more than R10 million.

95.2. Methodology

- 95.2.1. We:
 - 96. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, Modetech;
 - 97. compiled a list of all individuals and entities related to Modetech;
 - 98. conducted public database and media searches on the entities and individuals involved;
 - 99. performed an asset search on the known key players associated with the entities involved;
 - 100. analysed payments made to Modetech;
 - 101. interviewed PRASA officials involved with the appointment of Modetech and those responsible for assigning and validating the required services to Modetech;
 - 102. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).

102.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

102.2. Conclusion

102.2.1. Investigation related to the procurement process that was followed to appoint Modetech as a service provider in the following contract

103. The service provider was appointed in respect of one contract. They were appointed based on a confinement that was requested by Dr Phungula and approved by Ms Nyoge on 11 December 2012. No tender process was followed in procuring the services of Modetech. From the confinement request it appears that Dr Phungula was justifying the request for confinement based on improving transformation in the Perway sector to allow BBBEE companies to play a significant role in the Perway sector; thus creating competition and addressing the undesirable challenges related to monopoly and lack of competition in the sector.

104. We were not able to interview the key PRASA officials that were involved in:

(a) requesting the confinement;

(b) approving the confinement;

(c) awarding the contract to Modetech; and

(d) the determination of the contract terms, scope of works and value;

because the officials had left the employ of PRASA.

105. It should further be noted, that Modetech was registered as a company on 17 July 2014 and it was appointed on confinement by PRASA on 9 January 2015.

106. We are therefore not able to comment on the procurement process followed in securing the services of Modetech, save to indicate that we are of the view that PRASA would have struggled to convincingly argue that there was any justification, which entitled it to deviate from procurement processes. Even the PRASA supply chain management policy is clear on the limited circumstances in which confinements could be used. It indicates that either an emergency situation needed to exist, alternatively, the service provider needed to be a sole provider. There is no indication in the motivation for confinement that an emergency situation existed. The

fact that 26 service providers were appointed as a result of this confinement is further evidence that none of the service providers were sole providers of the services that they rendered.

- 106.1.1. Determine whether the appointment of the identified service provider was in-line with relevant prescripts and if these were approved by relevant authorities
107. As set out above, we are not able to conclusively state that the appointment of Modetech was not in-line with relevant prescripts. However, we are of the *prima facie* view that there was non-compliance with the relevant prescripts, based on the documentation that we have reviewed and the interviews that we have conducted.
- 107.1.1. Establish where applicable, whether deviations were in-line with relevant prescripts
108. Please see our comments under sections 102.2.1 and 106.1.1 above.
- 108.1.1. Determine whether payments correspond to the respective bid price and/or contractual agreement
109. Only one (1) payment was made to Modetech on 08 June 2015, to the value of the R3,704,573.41 (three million, seven hundred and four thousand, five hundred and seventy-three rand and forty-one cents) including VAT. In the absence of the payment documentation especially the invoices, certificates of work, approvals etc., we were not able to verify if the payment was made against agreed milestones set out in the contract agreements.
- 109.1.1. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected
110. In our view, on the limited information with which we were provided, it appears that Modetech was appointed irregularly. However, we are not able to make any remedial action recommendations in respect of PRASA officials because the key role players involved in this contract have left the employ of PRASA.
111. PRASA's poor record-keeping severely impacted on our ability to execute our mandate. We, accordingly, recommend that PRASA implements an appropriate document management system.

112. EXECUTIVE SUMMARY ON ARMCOIL CONTRACTS

112.1. Introduction

This report has been commissioned by the National Treasury upon a directive issued by the Office of the Public Protector (“**the Public Protector**”) to the Office of the Chief Procurement Officer (“**OCPO**”) of National Treasury. The facts relating to our mandate are set out below:

- 112.1.1. in August 2015, the Public Protector issued its report titled “*Derailed*”, a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (“**PRASA**”);
- 112.1.2. in the report, the Public Protector directed the OCPO at the National Treasury to conduct forensic investigations in respect of all PRASA contracts above R10 million from 2012 to date;
- 112.1.3. National Treasury determined that more than 200 contracts were required to be verified and appointed various service providers to perform the requisite investigations;
- 112.1.4. on 29 February 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA’s suppliers for investigation; and
- 112.1.5. Armcoil Afrika (Pty) Ltd, (“**Armcoil**”) was listed as one of PRASA’s suppliers which was awarded contracts with a total value of more than R10 million.

112.2. Methodology

112.2.1. We:

- 113. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, Armcoil;
- 114. compiled a list of all individuals and entities related to Armcoil;
- 115. conducted public database and media searches on the entities and individuals involved;
- 116. performed an asset search on the known key players associated with the entities involved;
- 117. validated the services billed for by Armcoil;

118. interviewed PRASA officials involved with the appointment of Armcoil and those responsible for assigning and validating the required services to Armcoil; and

119. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).

119.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

119.2. Conclusions

We were requested to investigate the following aspects of the contract awarded to Armcoil

119.2.1. Investigation related to the procurement process that was followed to appoint Armcoil as a service provider in this contract

120. The wording and presentation of the tender document appears to indicate that PRASA intended to appoint only one supplier.

121. The tender document does not contain any reference that PRASA intended splitting the required services amongst those contractors who met the functionality threshold and PRASA's B-BBEE targets.

122. Only an evaluation of the bidders' functionality and their respective B-BBEE status was performed, and the result was utilised merely to compile a list of contractors who were, as a result of the functionality evaluation, found to be technically capable of performing the required services.

123. No evaluation of the pricing of the 17 bidders who passed the functionality evaluation, was performed. None of the bidders were assessed in terms of the 90/10 principle stipulated by the PPPFA. Considering the value of the tender, which was estimated to be in the vicinity of R300million, the 90/10 principle should have been applied in this tender. Non-compliance with this principle rendered this tender process irregular.

124. At the date of issuing this report, we were not provided with the minutes of the CTPC meeting held on 9 December 2014. Therefore, we cannot confirm whether the recommendation to appoint the 17 contractors was in fact tabled at, and approved by, the CTPC as required.

125. The GCEO rejected the recommendation that the allocation of services are to be divided amongst the 17 listed contractors on a rotational basis.

Instead, the GCEO instructed that the allocation of services should follow a quotation process and through a competitive process as prescribed by PRASA's SCM policy.

126. Despite the GCEO's abovementioned rejection and instruction, Dr Mtimkulu appears to have subjectively decided to award certain components of the services required to certain contractors. The methods that Dr Mtimkulu applied in deciding which components to award to which contractors, and at which contract prices, is unknown.
127. The pricing of the services does not appear to have been negotiated with Armcoil before Armcoil signed the contractual agreement, since there are no details contained in, or annexed to, the contract stating the exact service components for which Armcoil must provide services and the relevant agreed amounts attached to each of these service components.
128. However, as a result of the fact that we were not able to interview the PRASA officials listed in paragraph Error: Reference source not found below, we are not able to state the above conclusions as a matter of fact. We are merely commenting on what the documents *prima facie* appear to indicate.
- 128.1.1. Determine whether the appointment of the identified service providers was in-line with relevant prescripts and if these were approved by relevant authorities
129. Section 3(1) of the PPPFA, read in conjunction with paragraph 6 of the regulations issued in terms of the PPPFA, stipulates that public entities must apply the prescribed 90/10 scoring formula on price and B-BBEE respectively, in all instances of contractual awards exceeding R1million:
- (a) PRASA Rail did not comply with this prescript since no evaluation and comparison of the prices quoted by the 17 bidders who passed the functionality threshold, was performed; and
 - (b) instead, PRASA Rail compared the individual contractor's quoted prices to PRASA's own "prescribed price handbook".
130. PRASA's non-compliance with this provision of the PPPFA rendered the procurement process irregular. Further, the apparent subjective and potentially arbitrary manner in which Dr Mthimkulu awarded work to the various service providers, appears to be another potential irregularity.

130.1.1. Establish where applicable, whether deviations were in-line with relevant prescripts

131. The deviations that we identified as set out above in sections Error: Reference source not found and Error: Reference source not found were not regular and in-line with relevant prescripts.

131.1.1. Determine whether payments correspond to the respective bid price and/or contractual agreement

132. We were not provided with the detailed payment documentation in respect of payments made to Armcoil for this contract. We are therefore not in a position to conclude on whether or not payments made to Armcoil correspond to the respective bid price and/or the contractual agreement.

132.1.1. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected

133. We are not able to make recommendations in respect of remedial action against any of the PRASA officials involved in this tender process because of the constraints experienced during this investigation, these are:

(c) the lack of documentation provided; and

(d) the fact that we were not able to interview the key role-players in this tender process.

134. PRASA's poor record-keeping severely impacted on our ability to execute our mandate. We, accordingly, recommend that PRASA implements an appropriate document management system.

135. EXECUTIVE SUMMARY ON MAZIYA CONTRACTS

135.1. Introduction

This investigation was requested by the Office of the Chief Procurement Officer (“**OCPO**”) of National Treasury after it was directed to conduct a forensic investigation by the Office of the Public Protector (“**Public Protector**”). The facts relating to our mandate are set out below:

135.1.1. in August 2015, the Public Protector issued its report titled “*Derailed*”, a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (“**PRASA**”);

- 135.1.2. in the report, the Public Protector directed the OCPO at the National Treasury to conduct forensic investigations into all of PRASA's contracts above R10 million from 2012 to date;
- 135.1.3. National Treasury determined that more than 200 contracts were required to be investigated and appointed various service providers to perform the requisite investigations;
- 135.1.4. in March 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA's suppliers for investigation; and
- 135.1.5. Maziya General Service Close Corporation, ("**Maziya**") was listed as one of PRASA's suppliers which was awarded contracts with a total value of more than R10 million.

135.2. Methodology

- 135.2.1. We:
 - 136. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, Maziya;
 - 137. compiled a list of all individuals and entities related to Maziya;
 - 138. conducted public database and media searches on the entities and individuals involved;
 - 139. performed an asset search on the known key players associated with the entities involved;
 - 140. analysed payments made to Maziya;
 - 141. interviewed PRASA officials involved with the appointment of Maziya and those responsible for assigning and validating the required services to Maziya;
 - 142. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).
- 142.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

142.2. Conclusions

- 142.2.1. Investigation related to the procurement process that was followed to appoint Maziya as a service provider in the following contract

143. The service provider was appointed in respect of one contract. They were appointed based on a confinement that was requested by Dr Phungula and approved by Ms Nyoge on 11 December 2012. No tender process was followed in procuring the services of Maziya. From the confinement request it appears that Dr Phungula was justifying the request for confinement based on improving transformation in the Perway sector to allow BBBEE companies to play a significant role in the Perway sector; thus creating competition and addressing the undesirable challenges related to monopoly and lack of competition in the sector.

144. We were not able to interview the key PRASA officials that were involved in:

- (a) requesting the confinement;
 - (b) approving the confinement;
 - (c) awarding the contract to Maziya; and
 - (d) the determination of the contract terms, scope of works and value
- because they had left the employ of PRASA.

145. We are therefore not able to comment on the procurement process followed in securing the services of Maziya, save to indicate that we are of the view that PRASA would have struggled to convincingly argue that there was any justification, which entitled it to deviate from procurement processes. Even the PRASA supply chain management policy is clear on the limited circumstances in which confinements could be used. It indicates that either an emergency situation needed to exist, alternatively, the service provider needed to be a sole provider. There is no indication in the motivation for confinement that an emergency situation existed. The fact that 26 service providers were appointed as a result of this confinement is further evidence that none of the service providers were sole providers of the services that they rendered.

145.1.1. Determine whether the appointment of the identified service provider was in-line with relevant prescripts and if these were approved by relevant authorities

146. As set out above, we are not able to conclusively state that the appointment of Maziya was not in-line with relevant prescripts. However, we are of the *prima facie* view that there was non-compliance with the

relevant prescripts, based on the documentation that we have reviewed and the interviews that we have conducted.

146.1.1. Establish where applicable, whether deviations were in-line with relevant prescripts

147. Please see our comments under sections 142.2.1 and 145.1.1 above.

147.1.1. Determine whether payments correspond to the respective bid price and/or contractual agreement

148. A total of twelve (12) payments were made to Maziya between 31 August 2015 and 15 April 2016, the total value of the payments made is R43,885,560.79 (forty three million, eight hundred and eighty five thousand, five hundred and sixty rand and seventy-nine cents) including VAT. In the absence of the payment documentation especially the invoices, certificates of work, approvals etc., we were not able to verify if the payments were made against agreed milestones set out in the contract agreements.

148.1.1. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected

149. In our view, on the limited information with which we were provided, it appears that Maziya was appointed irregularly. However, we are not able to make any remedial action recommendations in respect of PRASA officials because the key role players involved in this contract have left the employ of PRASA.

150. PRASA's poor record-keeping severely impacted on our ability to execute our mandate. We, accordingly, recommend that PRASA implements an appropriate document management system.

151. EXECUTIVE SUMMARY ON TYRE CORPORATION CONTRACTS

151.1. Introduction

This report has been commissioned by National Treasury (“**National Treasury**”) upon receiving a directive issued by the Office of the Public Protector (“**the Public Protector**”) to the Office of the Chief Procurement Officer (“**OCPO**”) of National Treasury. The facts relating to our mandate are set out below:

- 151.1.1. in August 2015, the Public Protector issued its report titled “*Derailed*”, a report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (“**PRASA**”);
- 151.1.2. in the report, the Public Protector directed the OCPO to conduct forensic investigations into all PRASA contracts above R10 million from 2012 to date;
- 151.1.3. National Treasury determined that more than 200 contracts were required to be verified and appointed various service providers to perform the requisite investigations;
- 151.1.4. in March 2016, we were allocated twenty-three (23) contracts relating to nine (9) of PRASA’s suppliers for investigation; and
- 151.1.5. Tyre Corporation Midrand Office (Pty) Ltd (“**Tyre Corporation**”) was listed as one of PRASA’s suppliers to which a contract with a total value of more than R10 million was awarded.

151.2. Methodology

151.2.1. We:

152. analysed records documenting the procurement processes followed in the appointment of, and subsequent contract management of, Tyre Corporation;
153. compiled a list of all individuals and entities related to Tyre Corporation;
154. conducted public database and media searches on the entities and individuals involved;
155. performed an asset search on the known key players associated with the entities involved;
156. validated the services which were billed for by Tyre Corporation;
157. interviewed PRASA officials involved with the procurement processes resulting in the appointment of Tyre Corporation as well as those responsible for assigning and validating the required services to Tyre Corporation; and
158. compiled a comprehensive list of the services that we provided (which is set out in section Error: Reference source not found of this report).

158.1.1. A full list of documents perused for purposes of this investigation is set out in **Annexure A** to this report.

158.2. Conclusion

We were requested to investigate the following aspects of the contract awarded to Tyre Corporation

158.2.1. Investigation related to the procurement process that was followed to appoint Tyre Corporation as a service provider

159. The major concern that we identified during our review of this tender process was that the functionality threshold was changed from 65% to 70%, either, during the course of the BEC meeting, or, after the BEC had met but before the BEC Recommendation Report was signed by Mr Khumalo.

160. The changing of the functionality threshold had a significant impact on the tender in that the increase in the functionality threshold rendered Tirepoint non-compliant. Therefore, Tyre Corporation was the only bidder to meet the functionality threshold and as a result it was awarded the contract.

161. If Tirepoint had passed the functionality threshold, its price and equity rating would potentially have resulted in it being awarded the contract, instead of Tyre Corporation. Pricing and equity rating were better than Tyre Corporations.

162. We investigated the issue of how the functionality threshold was changed and the results of the investigation are set out below. Mr Khumalo, the BEC chairperson, stated that the functionality threshold was knowingly and intentionally increased from 65% to 70%. He stated that he particularly remembered this point because it was a contentious point of discussion at the commencement of the BEC meeting. He further stated that he was informed by Mr Magoro and particularly Ms Molelekoa-Morunyana that the BEC was allowed to change the functionality threshold. Mr Khumalo's recollections are contradicted by the following statements made by other BEC members interviewed:

(a) Mr Magoro contradicts Mr Khumalo's statement by stating that the increase must have been an error;

(b) neither Ms Beeslaar, nor Ms Moremi or Mr Mukwevhu, could confirm Mr Khumalo's statement;

- (c) both Ms Beeslaar and Ms Moremi specifically recalled that an evaluation of Tirepoint and Tyre Corporation's prices and B-BBEE were performed. If the functionality threshold had been changed at the beginning of the bid evaluation session then Tirepoint would have been excluded because it had not met the required functionality threshold and therefore it would not have proceeded to be considered further in respect of pricing and equity status;
 - (d) Mr Mukwevhu, as a general manager at PRASA corporate supply chain management, was very clear in stating that amendments of functionality thresholds is strictly prohibited;
 - (e) we were not provided with any records where the bidders were advised that the functionality threshold had changed;
 - (f) further, the BEC recommendation report that was submitted to the BAC does not mention that the BEC had changed the functionality threshold from 65% to 70%;
 - (g) Messrs Khumalo and Magoro did not, according to the BAC meeting minutes, inform the BAC that the BEC had changed the functionality threshold. Further, it should be noted that the chair of the BAC had raised concerns that Tirepoint was so close to achieving the functionality threshold but was excluded. From the minutes it does not appear that the chair of the BAC was advised that according to the tender document's functionality threshold Tirepoint had met the functionality requirement; and
 - (h) in the BAC meeting's minutes, it is recorded that Mr Khumalo himself responded to the BAC that they, as a BEC, were not allowed to lower the functionality threshold in order to accommodate more bidders, as that would be "tantamount to floundering of their own procedures" [sic], thereby contradicting his own statement that at the BEC they were/would have been allowed to amend the functionality threshold.
163. Based on the reasoning set out above, we are of the view that it is improbable that Mr Khumalo's statement, that the functionality threshold was knowingly and intentionally changed at the commencement of the BEC meeting, is correct.
164. According to Mr Khumalo and Mr Magoro, Tirepoint and Tyre Corporation's price and B-BBEE status were not evaluated since Tyre Corporation was

the only bidder who passed the functionality threshold (of 70%). Mr Magoro was not able to provide us with a copy of the BEC meeting minutes or the recording of the meeting. Therefore, we were not able to definitively conclude on when, why and by whom the functionality threshold was changed. Two of the BEC members that were interviewed remember that both Tyre Corporation and Tirepoint's bids were found functionally compliant. They further remember that the price and equity rating of both bidders were considered. They were, however, not involved in drafting the recommendation report that was submitted by the BEC to the BAC. The BEC recommendation report does not mention that Tirepoint was initially found functionally compliant and that it was assessed in terms of pricing and equity rating. These two BEC members (Ms Beeslaar and Ms Moremi) were also not part of presenting the BEC recommendation report to the BAC. The BEC recommendation report was presented to the BAC by Messrs Khumalo and Magoro.

165. We are not able to definitively conclude on this issue but we suspect that it is possible that either Mr Khumalo and/or Mr Magoro manipulated the BEC recommendation report.

165.1.1. Determine whether the appointment of the identified service providers was in-line with relevant prescripts and if these were approved by relevant authorities

As stated below in section Error: Reference source not found there appears to potentially have been a manipulation of the bid evaluation process, however, we were not able to identify which officials were responsible for the irregularity identified.

165.1.2. Establish where applicable, whether deviations were in-line with relevant prescripts

166. This contract, which was operative from 1 May 2013 to 30 April 2014, was extended as follows:

- (a) a one-year extension for the period 1 May 2014 to 30 April 2015;
- (b) thereafter it was extended for a two month period from 1 May 2015 to 30 June 2015; and
- (c) thereafter it was extended for a period of four months from 1 July 2015 to 31 October 2015.

167. We are not able to conclude that the extensions were irregular because the extension of contracts were not covered by PRASA's SCM policy.
- 167.1.1. Determine whether payments correspond to the respective bid price and/or contractual agreement
168. Tyre Corporation was awarded a contract to deliver, supply and maintain tyres on behalf of Autopax. They were awarded a one-year contract with a capped value of R24 million. This contract was extended as set out below in Error: Reference source not found.
169. Autopax provided us with an extract of payments made to Tyre Corporation in respect of this contract (and its extensions) and eighty-six (86) payments totalling the value of R55,627,504.75 (fifty-five million, six hundred and twenty-seven thousand, five hundred and four rand and seventy-five cents) were made to Tyre Corporation in respect of this contract.
170. We are not able to comment on whether or not these payments were in-line with the contractual agreement because we were not provided with detailed payment documentation.
- 170.1.1. Advise on the remedial actions which must be taken in instances of maladministration and/or where improper conduct has been detected
171. Mr Magoro represented the SCM department in this tender and he was the scribe in respect of the BEC meeting. He stated that he did not keep minutes of the BEC meeting and he was not able to produce a copy of the recording of the BEC meeting, which he indicated that he had made. This had a significant impact on the investigation because we were not able to determine who was responsible for increasing the functionality threshold in this tender, which ultimately resulted in Tirepoint not meeting the functionality threshold. The act of changing the functionality threshold potentially changed the outcome of this tender as Tirepoint would have scored higher points because its price was lower and its equity rating was better than that of Tyre Corporation.
172. However, PRASA's SCM policy does not require the SCM department to keep records relating to the procurement process. Under section 9.11.8 of PRASA's SCM policy it states under the Contract Administration section that, "Keeping all financial and procurement related records of contracts in safe custody to prevent damage, destruction or unauthorised use or

removal.” The policy, however, does not cover who is responsible for maintaining all of these records.