



public works & infrastructure

Department:
Public Works and Infrastructure
REPUBLIC OF SOUTH AFRICA



Emergency Procurement and Implementation of the 40km Borderline Infrastructure Project between the Republic of South Africa and Zimbabwe

18 August 2020

Purpose

To present to the Portfolio Committee on Public works and Infrastructure the findings and recommendations of an investigation conducted into the Emergency Procurement and Implementation of the 40km Borderline Infrastructure Project between the Republic of South Africa and Zimbabwe at Beitbridge Border Post (Border Fence Project)

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Contextual Background and Timeline



Contextual Background and Timeline

State of National Disaster	On the 15 th of March 2020, the President announced a National State of Disaster.
Ministerial Directive	Given the urgency of securing our borders, on Monday the 16 th of March 2020, the Minister issued a directive to the Director-General (DG) of the Department Advocate Sam Vukela, directing him to appoint a service provider using emergency procurement processes in relation to the erection and repair of the borderline fence at the Beitbridge Border Post.
Enabling Provision	<p>The timelines which were included in the directive was received from the DG and the Deputy Director General of Construction. In the Directive the Minister referred to Section 27 (2) of the Disaster Management Act of 2002. According to the Minister she said in her attempt to secure the border to prevent the spread of COVID 19, she inadvertently referred to Section 27 (2) of the Disaster Management Act of 2002 in the directive instead of referring to Section 64 of the PFMA which deals with Executive directives having financial implications.</p> <p>The Investigation found that the disaster regulation, issued on the 18th in term of the Disaster Management Act of 2002 - two days after the ministerial directive, would also have achieved a similar purpose, had it been promulgated on the 16th.</p>

Contextual Background and Timeline

Border Fence Project Cost and Award

The VAT inclusive contracted amount for the Border Fence Project is R40 435 914.98. This is comprised of an amount of R37 176 843.50 (for construction, payable to the Contractor) and R3 259 071.48 (for professional services and project management), payable to a Principal Agent (PA) - calculated at a percentage of the value of the construction project. These Contracts were awarded respectively on the 25th and 26th of March 2020 using a Negotiated Procurement method (sole service provider).

The Minister advised that at all times, the cost of the project communicated to her was in the region of R37million, and that it was only much later that officials informed her of the additional cost for the Principal Agent, which led to the actual total projected spend being R40.4million.

Referral to the Auditor-General

On the 20th of April 2020 the Minister requested the Auditor-General to conduct an independent audit into the Beitbridge Border Fence Project and requested that the external audit cover all aspects of the project process including whether the DPWI received value for money for this contract.

Commissioning an Internal Investigation

On the 25th of April 2020, the Minister also requested the Department's Anti-Corruption Unit to conduct an investigation. They were assisted by two seconded members from the Special Investigations Unit (SIU). The Minister requested that the investigation should cover all aspects of the project process, as well as certain specific areas of concern that broadly included an inquiry into the regularity of the emergency procurement of the services of a construction contractor to build the fence and professional consultants to guide and oversee the proper implementation of the project.

Contextual Background and Timeline

Moratorium on Payments

On the 25th of April 2020, before the investigation formally commenced, the Minister requested the department's Chief Financial Officer and Deputy Director General for Construction, to place a moratorium on all further project payments until further notice to mitigate any further financial risk to the Department.

Investigating Team

The Departmental Investigating Team was assisted by two members from the Special Investigating Unit (SIU) as well as by built environment professionals from the Presidential Infrastructure Coordinating Commission Technical Unit (PICC) who undertook a technical evaluation of the Border Fence installation.

Contextual Background and Timeline

Draft Report	<p>A draft report was sent to the Minister on the 19th of June, who requested that the report be sent to the Auditor-General to assist the Office of the AG with its audit into the Border Fence Project.</p>
Engagement of the SIU	<p>The Minister further requested that the draft report be sent to the SIU to conduct a quality assurance review. The SIU provided feedback in July and the Anti-Corruption investigation team effected the necessary amendments. A Final Report was issued to the Auditor General and the SIU on the 27th of July 2020.</p>
Engagement Auditor-General	<p>On the 31st of July 2020 the Minister engaged the Auditor-General for the purpose of receiving an update on the audit. The Auditor General noted the investigation report and advised that his Office will conduct further audit procedures relating to matters arising from the Investigation Report in the context of the annual regulatory audit of the Department and will also follow up on the implementation of the recommendations of investigation.</p>
Presidential Proclamation	<p>On Thursday the 23rd of July 2020, President Cyril Ramaphosa signed a proclamation mandating the SIU to investigate any unlawful or improper conduct in the procurement of any goods, work and services during or related to the national state of disaster in any institution. This Project is now part of the scope of this proclamation process for further action. We welcome this development and will await the outcome of the proclamation process.</p>

Findings of the Investigation



Findings of the Investigation: General Irregularities

Nature of Irregularities

The investigation as a whole revealed a series of procurement and other irregularities perpetrated during the infrastructure delivery process, as well as possible acts of fraud perpetrated by identified officials of the department, and the Border Fence Project service providers.

Irregular Emergency Procurement and Payment processes

These irregularities relate to the irregular application of emergency procurement and payment processes by the DPWI with respect to both the appointment and payments made to the Contractor and Principal Agent respectively.

Irregular Expenditure

The investigation found that as a result of the irregular application of the emergency procurement process, the resultant awards are invalid and payments made against the contract would be irregular.

Effecting Irregular Advance Payments

The investigation also found that the effecting of an advance payment R21, 8 million to the Contractor and R1.8million to the Principal Agent within days of their respective appointments, was wrong as no material was delivered and construction had not commenced.

Findings of the Investigation: Procurement Mal-Practice

Failed Market Evaluation and Procurement Processes	It is also apparent that the Department failed to test the market in this regard to at least determine the reasonableness of the Contractors pricing. The procurement framework of bid specification, evaluation and adjudication was not properly followed.
Flawed Bid Adjudication processes	Both National Bid Adjudication Committees' (NBAC) who adjudicated on the appointment of the PA and Contractor, failed to ensure that proper SCM processes were followed.
Irregular Emergency Procurement Process	The remaining contractors were unable to participate and compete in a fairly constructed procurement process as the appointment of the Contractor was predetermined.
Non Compliance with the Regulatory Framework for Procurement	The aforementioned process failed to achieve the objectives of a competitive, transparent, reasonable and fair procurement process, making it irregular in terms of Section 217 of the Constitution as well as Treasury and departmental regulations in this regard.

Findings of the Investigation: Technical Deviations

Misalignment of Technical Specifications

Furthermore, an assessment conducted by the Professional Review Team, of the items in the Bill of Quantities (BOQ), Drawings, and Specifications and the work 'as built' indicated that they were not aligned. The assessment also found that the fence is not in compliance with the Drawings and the Specifications.

Anomalies in the Value for Money Assessment

The Value for Money Assessment conducted by the PICC technical task team indicated significant anomalies. The total project cost, which includes both construction and engineering fees, for the Contract was R40.4million.

Anomalies with 2016 Contracted Prices

Although the contracted amount was ostensibly calculated at 2016 prices based on an earlier contract, the evaluation indicated that some of the items quoted were in fact not based on these 2016 prices. This includes site establishment costs exceeding R1 million, which should not have been charged, and excessive units rates for specific items. Using the 2016 Contract rates – at which this project was contracted, the assessment found that the overall total project cost should have amounted to R26.1 million was therefore overpriced by R14.3million.

Findings of the Investigation: Technical Deviations

Anomalies with Current Market Values

A further assessment using market related prices for materials actually used on site and revised fees for engineering services provides for a total project cost of R23 388 023.97. This indicates that project cost was exceeded by an amount of R17 047 891.01. It is therefore apparent that a proper review of the BOQ's was not conducted by the DPWI, and consequently resulted in the contract price being inflated. This also reflects the real risk to the DPWI of having failed to test the market. The 2020 market comparison also indicates that the 2016 rates were inflated at the time.

Findings of the Investigation: Lack of Fitness to Mitigate Border Threats

Poor Construction Practices	The investigation also revealed that poor construction practices compromised the effectiveness of the fence as a deterrent for crossing the South African border with Zimbabwe. The barbed wire coils were stretched beyond its recommended effective limit, also making it easier to scale the fence. These factors undermined the effectiveness of the fence to mitigate border threats.
Non Compliance with Design Specifications	The Technical Assessment also found that significant elements of the Border Fence Project were not implemented at all. For example, the design of the fence had a final height of 2.2m and the final actual height of the fence reached no more than 1.8m on either side of the border, making it more easily scalable.
Breaches of the Fence and Non Compliance with Site Clearance Certificate	During our site visit on the 4 th and the 5 th of May 2020 we recorded at least 115 breaches of the fence which may have resulted in an untold number of unlawful crossings between South Africa and Zimbabwe. The construction of the fence is also in material breach of the conditions of the Provisional Site Clearance Certificate (PSCC) including breaches of Environmental Regulations, as well deviations from the approved line of construction.
Possible Fruitless Expenditure	Given the non-compliance with aspects of the design specification and poor construction practices, as well as the absence of a combined strategy to prevent unlawful crossings within the range of the existing project, in our considered opinion the fence is not fit for purpose and current payments in this regard may already be regarded as Fruitless and Wasteful Expenditure.

Recommendations



Recommendations

Disciplinary Charges

Disciplinary charges have been recommended against fourteen (14) senior officials of the DPWI as a result of a range of alleged acts of misconduct perpetrated mainly during the procurement and construction phases of the Beitbridge Border Fence Project. The Deputy Director-General Corporate Services has been instructed to facilitate processes in this regard which is in progress.

Civil Recommendations

It is recommended that the Beitbridge Border Fence Project should be processed in terms of the Presidential proclamation mandating the SIU to investigate COVID-19 related projects and bring the matter before the SIU Tribunal to declare both contracts invalid on account of irregular procurement processes and request the Tribunal to make a Just and Equitable Order based on the evidence submitted.

Criminal Charges

It is recommended that the department should register a criminal case for fraud against the Principal Agent, Main Contractor and designated officials for misrepresenting to the DPWI that project progress was achieved, and consequently material delivered was on site on the 25th of March to justify a progress payment, when this was not the case, and for financial misconduct where appropriate. The Department will soon refer this matter to the SAPS upon the conclusion of the Proclamation by the SIU.

Recommendations

<p>Restriction from doing business with government</p>	<p>The Principal Agent and the Main contractor must be restricted from doing business with government subject to the application of the relevant due process and National Treasury concurrence, pursuant to the examination of the findings of the investigation that they acted in an irregular manner in their respective engagements with the DPWI. The matter will serve before the Restriction Committee before the end of August 2020.</p>
<p>Referral to Department of Environment, Forestry and Fisheries (“DEFF”)</p>	<p>As the constructed fence deviates from the approved border fence line and is in material non-compliance with Environmental laws, it is recommended that the DPWI should report these to and consult with the Department of Environment, Forestry and Fisheries (“DEFF”) so as to correct non-compliance in this regard.</p>
<p>Report to the Council for the Built Environment and Engineering Council of South Africa</p>	<p>The Principal Agent failed to act in the interests of the Department and accordingly breached their fiduciary duties towards the DPWI. This is evident in their initiating and certifying a progress payment when no progress was achieved on the project, and overseeing the development of an overstated Bill of Quantities that placed the department at risk of financial abuse and exploitation. It is therefore recommended that their conduct accordingly be referred to the CBE and the Engineering Council of South Africa (ECSA) for further investigation.</p>

Recommendations

Systemic Recommendations

- Training and Awareness
- Quality Control

It is recommended that the DPWI must ensure that appropriate training is conducted and awareness created that the systems of Governance that regulates the activities of the Department has not been suspended as a result of Covid-19 related emergencies. It is also recommended that Supply Chain Management should use the appointed Service Provider to conduct Due Diligence on Tender Processes.

Systemic Recommendations

- Integrated Border Man
- Maintenance Strategy

Any further border fence initiatives should be located in the context of this programme in terms of an Integrated National Strategy, Best Practice and Border Management Master Plan, duly aligned to and noting the recently signed the Border Management Authority Act of 2020.

Natural Justice and Due Process



Natural Justice and Due Process

Natural Justice

The Principles of natural justice demand that officials who have been implicated in misconduct be given an opportunity to give their side of the story against allegations leveled against them.

Confidentiality and Administrative Fairness

This right will be severely compromised where details of the as yet untested allegations against them is circulated in the public domain, and they are unfairly vilified as a result. This will also compromise the requirements for administrative fairness in terms of the provisions of the Labor Relations Act.

Prejudice to Disciplinary Processes

Failure to observe due process in this regard as enshrined in the Constitution and the Promotion of Administrative Justice Act (PAJA) will both compromise these rights and prejudice the cases of the implicated officials.

Ongoing Engagements with the Portfolio Committee



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Oversight Processes of the Portfolio Committee

After the conclusion of the relevant processes to give effect to the recommendations of the Investigation Report, including the relevant SIU proclamation processes, criminal investigations and related consequence management and disciplinary processes, the Department will share the Outcomes thereof with the Committee.

Oversight Processes of the Auditor-General

The Auditor-General has indicted that the majority of their planned audit procedures were already covered as part of this investigation. The Office will accordingly consider the impact of investigation Outcomes as part of the Regularity Audit of the Department and will follow up on the implementation of the recommendations arising from this investigation.

Presidential Proclamation on Covid 19: Inclusion of the Beitbridge Border Fence Project

The Beitbridge Border Fence Project is being processed in terms of the Presidential proclamation mandating the SIU to investigate COVID-19 related projects and bring these before the SIU Tribunal. The State will seek to set aside the awards of the Construction and Engineering contracts which are found to have been irregularly awarded based on the evidence submitted.

Recommendations



Recommendations

It is recommended that the Portfolio Committee

- Notes the findings and recommendations arising from an investigation into the Border Fence Project
- Notes the processes to effect these recommendations as well as planned future engagements with the Committee in this regard after the process is concluded.

Thank You



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