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INDEPENDENT COMPLAINTS DIRECTORATE OFFICE ACCOMODATION LEASE MATTER

1. BACKGROUND

In respect of the ICD lease the following has been reported[1]:

- Mr Roux Shabangu and the Department of Public Works Property Management Director Vusi Mashiane signed a 10-year lease for the building in Vermeulen Street in April 2009. The lease did not specify which department would occupy the building and the ICD only moved in in September 2010. It is not clear whether any department had occupied the building in the intervening months or which department paid the lease during that time.
- According to the lease, the government was liable to pay R8.8-million rent in the first year, which would escalate by 10% each year.
- Assuming the ICD was liable for the second year's rental of R9.6-million from April 2010 -- the year that its total lease bill mushroomed – this lease deal would account for 85% of the increase in the ICD's total rent bill.
- It has been previously reported that the Directorate had applied to the Department of Public Works for 3 668m2 of office space and set aside R6.2-million for the first year of the lease. But the ICD was assigned Mr Shabangu's building with its 7 614m2 -- more than twice the space needed and exceeding the budget by more than 40%.
- In a previous police Portfolio Committee meeting ICD executive director François Beukman was asked to explain how the directorate's rental bill had jumped from R4.2-million to R15.6-million in a year. (The rental bill has increased almost four-fold, a percentage increase of 270%.)
- ICD spokesperson Moses Dlamini said the directorate welcomed an investigation of the lease. "[The ICD] never identified any of the 17 buildings that it occupies, nor did it enter into any agreement with the landlords. The ICD merely occupied the buildings that were procured for it by the Department of Public Works." Dlamini said the directorate had only

[1] As reflected in various news articles; Probe into ICD lease deal mooted http://www.timeslive.co.za/politics/2011/11/02/probe-into-icd-lease-deal-mooted; Roux Shabangu: Lord of pricey leases http://mg.co.za/article/2011-11-04-roux-shabangu-lord-of-pricey-leases.

paid for the Vermeulen Street lease after it had occupied the building.

2. PROCUREMENT LEGISLATION

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

Thus the issue for the Accounting Officer of the ICD is his involvement in the procurement process.[2] The ICD must comply with section 217 of the Constitution, the relevant provisions of the Public Finance Management Act, Treasury regulations and supply chain management rules and policies. In order to ensure goods/services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Failure to do so may amount to an offence in terms of sections 38 and 86 of the PFMA and section 21 of the Government Immovable Asset Management Act, 2007 (GIAMA).

The following legislation has relevance:

2.1 Section 217 of the Constitution

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

> **Procurement**
> 217. (1) When an organ of state in the National, provincial or local sphere of government or any other institution identified in national legislation contracts for goods or services, **it must do so in accordance with a system which is fair, equitable,**

[2] See annexure A

transparent, competitive and cost –effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preferences in the allocation of contracts; and

(b) the protection or advancement of persons' or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referrd to in subsection (2) may be implemented.

The national legislation contemplated in section 217 (3) of the Constitution was adopted in the form of **the Preferential Procurement Policy Framework Act (PPPFA), Act No 5 of 2000**. The preferential procurement policy is aimed at giving Historically Disadvantaged Individuals (HDI's) according to a preferential points system, an advantage above other bidders, to redress historical imbalances and increase opportunities for those previously prevented from participating in the country's mainstream economy.

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

Question

- In line with the regulations issued in terms of the Preferential Procurement Policy Framework Act, 2000 did the ICD prior to making an invitation for tenders properly plan for, and, as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders was to be made?

2.2 Treasury regulations

In terms of section 76(4)(c) of the Public Finance Management Act (PFMA) 1 of 1999, the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning, inter alia, the determination of a framework for an appropriate procurement and provisioning system which is in keeping with the dictates of Section 217(1) of the Constitution (supply chain management (SCM) framework).

The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all departments in national and provincial governments. The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A.3.2 which reads as follows:

> *16A 3.2 A supply chain management system referred to in paragraph 16A.3.1 must –*
> ***(a) be fair, equitable, transparent, competitive <u>and cost effective</u>;***
> *(b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
> *(c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*
> *(d) provide for at least the following: –*
> *(i) demand management;*
> *(ii) acquisition management;*
> *(iii) logistics management;*
> *(iv) disposal management;*
> *(v) risk management; and*
> *(vi) regular assessment of supply chain performance."*

While the legislative mandate of the DPW makes it the responsibility of the department to procure leased accommodation (acquisition management component), **the demand management component (<u>establishing the need</u>) is the prerogative of the end user, in this case the ICD**.

In February 2004, the National Treasury, issued a document entitled "*Supply Chain Management: A Guide for Accounting Officers/Authorities*" **(SCM Guide)**. The purpose of the SCM Guide was to give guidance to Accounting Officers in fulfilling their role within the SCM framework. This document is applicable to all accounting officers and contains the following principles:

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

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

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

d) The need should be linked to the budget.

Planning therefore plays an integral part in supply chain management. The above principles are legislatively enshrined in the **Government Immovable Asset Management Act, 2007 (GIAMA)**.[3]

Question

- Was a needs analysis done for the accommodation requirements of the ICD?
- Was the new lease planned and accordingly budgeted for?

2.3 Government Immovable Asset Management Act, 2007 (GIAMA).

The purpose of this Act is to provide a framework for the management of immovable assets held by a national or provincial department and to provide minimum standards in respect of immovable asset management. **In terms of GIAMA immovable assets acquired in terms of a lease are deemed to be subject to the dictates of this Act**. Section 5 of the Act sets out the principles of asset management and reads as follows:

> **Principles of Immovable Asset Management:** 5(1) the following are principles of immovable asset management:
>
> (a) **An immovable asset must be used efficiently and becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level**;
>
> (b) To minimise the demand for immovable assets, alternative service delivery methods that do not require immovable assets must be identified and

[3] The Act was introduced to assist the Department of Public Works in the effective and efficient execution of its stated mandate that is derived from the Constitution of the Republic of South Africa, 1996 and other relevant legislation.

considered;

(c) In relation to an acquisition,-

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

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

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

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

(e) when an immovable asset is acquired or disposed of best value for money[4] must be realised;

Section 5 above of the Act is of importance as it sets out the manner in which an immovable asset should be managed. It also outlines the reasons for an immovable assets acquisition, as well as disposal. **The primary focus is on its effective use, which includes ensuring that this it remains cost-effective and continues to provide the necessary service delivery required. The effect of GIAMA is, *inter alia,* to enforce optimal use of immovable property.**

GIAMA, through section 21, **creates a criminal offence should an accounting officer wilfully or negligently contravene or fail to comply with any provision of this Act**. In terms of section 21of the Act:

> **'An accounting officer is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years if that accounting officer wilfully or negligently contravenes or fails to comply with any provision of this Act.'**

The above provision is also contained in section 86 of the PFMA and outlines the proceedings to be followed in the event of an accounting officer being found guilty of an

[4] **"best value for money" means the optimisation of the return on investment in respect of an immovable asset in relation to function, financial, economic and social return, wherever possible;**

offence.[5] Sections 38, 39 and 42 of the PFMA relate to the responsibilities of accounting officers.[6] These sections are referred to later in the paper. In addition, Section 5 of GIAMA outlines instances that may be construed as offences if contravened. These include **issues of efficient use of the immovable asset, cost effectiveness of the immovable asset in terms of operational and maintenance costs throughout its life cycle, and realising best value for money when the assets is acquired or disposed of**.

In terms of GIAMA, the DPW must annually prepare a custodian asset management plan (C-AMP). A comprehensive C-AMP will include an acquisition plan, refurbishment plan, maintenance & repairs, and disposal plan. In the interim, the needs for built environment, professional services, construction, building and contracting services, land, buildings and facilities will have to be estimated based on the annual budget and the business plan of the units involved in the acquisition of construction related services.

Question

- Subject to GIAMA and as part of its strategic planning process contemplated in the Public Services Regulations, 2001, the accounting officer must- prepare an immovable asset management plan. Was the need for office accommodation contained in the ICD's Immovable Asset Plan?

2.4 Public Finance Management Act (the responsibilities of accounting officers in respect of supply chain management)

Section 38(1)(a)(iii) of the PFMA prescribes that the accounting officer for a department must ensure and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

[5] Public Finance Management Act (1999), p. 42.
[6] Public Finance Management Act (1999), pp. 23 to 26.

Responsibilities of Accounting Officers

38. General responsibilities of accounting officers.—(1) The accounting officer for a department, trading entity or constitutional institution—

(*a*) must ensure that that department, trading entity or constitutional institution has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(*b*) **is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution**;

(*c*) must take effective and appropriate steps to—

(i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(*d*) is responsible for the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

(*e*) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;

(*f*) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;

(*g*) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

[Para. (*g*) substituted by s. 19 of Act No. 29 of 1999.]

(*h*) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(*i*) when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with;

(*j*) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(*k*) must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(*l*) must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(*m*) must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(*n*) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

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

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

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

Section 86 of the PFMA: Criminal Proceedings

86. Offences and penalties.—(1) An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.
(2) An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.
(3) Any person, other than a person mentioned in section 66 (2) or (3), who purports to borrow money or to issue a guarantee, indemnity or security for or on behalf of a department, public entity or constitutional institution, or who enters into any other contract which purports to bind a department, public entity or constitutional institution to any future financial commitment, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

2.4.1 Assignment/delegation of powers and duties by an accounting officer

An accounting officer (in terms of section 4 of the PFMA) may in writing delegate any of the powers entrusted to him or her to an official, however, in terms of section 44(2)(d) of the PFMA, a delegation to an official does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or performance of the assigned duty.

Questions

- Was the procurement in accordance with a system that is cost effective as required by the Constitution?
- Was there compliance with prescribed supply chain management and procurement procedures?
- Was a competitive bidding process adhered too in order that the constitutional requirements of fairness, equitability and transparency were complied with?
- Did the Accounting officer ensure proper controls were in place and were adhered to?

3. BUDGETING FOR LEASES

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

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

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

3.1 Regulation 5.1 of the Treasury Regulations

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

Regulation 5.2.2 requires that the strategic plan include the following: The strategic plan must –

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

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

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

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

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

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

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

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

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

The Medium Term Expenditure Frame Work (MTEF) issued by the National Treasury in 2007, emphasises this point:

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

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

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

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

Section 39 of the PFMA:

39. Accounting officers' responsibilities relating to budgetary control.—(1) The accounting officer for a department is responsible for ensuring that—
(*a*) expenditure of that department is in accordance with the vote of the department and the main divisions within the vote; and
(*b*) effective and appropriate steps are taken to prevent unauthorised expenditure.
(2) An accounting officer, for the purposes of subsection (1), must—
(*a*)take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote;
(*b*) report to the executive authority and the relevant treasury any impending—
(i) under collection of revenue due;
(ii) shortfalls in budgeted revenue; and
(iii) overspending of the department's vote or a main division within the vote; and
[Para. (*b*) amended by s. 20 (*a*) of Act No. 29 of 1999.]
(*c*) comply with any remedial measures imposed by the relevant treasury in terms of this Act to prevent overspending of the vote or a main division within the vote.
[Para. (*c*) substituted by s. 20 (*b*) of Act No. 29 of 1999.]

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

1. The first option deals with a situation where no funding has been appropriated, but due to an emergency, funds are required for the purposes of procurement. Section 16 of the PFMA allows the Minister of Finance to authorise the use of funds from the National Revenue Fund to defray expenditure provided that:
    a) the expenditure is of an exceptional nature;
    b) expenditure is not currently provided for; and
    c) the expenditure cannot be postponed to a future appropriation cycle without serious prejudice to the public interest.
2. The second option is in the form of section 43 of the PFMA which allows an accounting officer to utilise a saving in an amount appropriated under a main division within a vote towards the defrayment of excess expenditure under another main division within the same vote. This virement of funds is, however, limited to 8% of the amount appropriated under that main division and a report concerning the utilisation of the savings must be presented to the Executive Authority (Minister) and the relevant treasury.
3. The third option open to departments is to request further funds from the National Treasury. This is, however, limited in its application and would only be applicable to situations where:

a) a department inherited new functions; or

b) where due to policy decisions new needs arise.

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

Question

- How has the ICD accommodated in its budget the significantly increased expenditure in respect of leases over the MTEF? Will further funds need to be requested from Treasury?
- Was there any irregular or fruitless and wasteful expenditure incurred by the ICD?

Sources:

Government Immovable Asset Management Act (No. 19 of 2007), Republic of South Africa, [Internet]. Available from: <http://www.info.gov.za/view/DownloadFileAction?id=88619>, Accessed [19 August 2010].

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Annexure A

Schematic: Procurement steps and areas of responsibility in respect of leased accommodation.		
	Procurement Steps	**Responsible department**
Preparation and demand Management	**INCEPTION/ NEEDS ANALYSIS** **1.Identify need for accommodation** **2. Compile needs assessment based on actual requirements** **3. Determine nature and extent of the accommodation required** **4. Ensure that all current departmental accommodation is adequately utilised in terms of GIAMA**	Relevant SCM division within ICD

	FINANCIAL PLANNING 1.Ensure need / requirements are linked to budget plans Relevant SCM and Finance divisions within 2. Determine if need is in line with the strategic SAPS Objectives of the department 3. Confirm availability of funding	Relevant SCM and Finance Division in ICD
Acquisition Management	PROCUREMENT PROCESS 1. Fully assess client's need, including nature and extent Key Account Management division (KAM) of accommodation required 2. Determine urgency and other factors based on client Department's submissions 3. Assess the relevant supply industry and conduct market research	DPW (Key Account Management Division)
	PROCUREMENT STRATEGY 1. Obtain approval of suitable procurement strategy: Special National Bid Adjudication 1.1 Bid process – open tender Committee (SNBAC) 1.2 Negotiated process – single service provider 2. Issue procurement instruction (PI) and initiate procurement Key Account Management division (KAM) Process	DPW (Special National Bid Adjudication Committee (SNBAC) Key Account Management Division
Evaluation	EVALUATION OF BIDS 1. Evaluation of Bids • Method - Price and Preference • Method - Price, Functionality and Preference 2. Recommend preferred bid or single service provider	DPW Bid Evaluation Committee (BEC)
Award	AWARD AND CONTRACT MANAGEMENT 1. Adjudication and/ or award SNBAC (All leases with net value above R5m) 2. Draft and sign contract with successful bidder in terms of the exact specifications of the bid 3. Monitor and evaluate performance in respect of the terms and conditions of the contract	DPW (SNBAC) all leases above the value of R5 million must be approved by SNBAC and not the DG. DPW Project Manager