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Report of the Auditor-General to Parliament on an investigation at the Commission for Conciliation, Mediation and Arbitration

June 2010



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REPORT OF THE AUDITOR-GENERAL TO PARLIAMENT ON AN INVESTIGATION AT THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

1. EXECUTIVE SUMMARY

1.1 Background

1.1.1 During a discussion with the Department of Labour on 21 October 2009, the department provided the Auditor-General of South Africa (AGSA) with a list of allegations. After reviewing the allegations, the scope of the investigation as set out in an engagement letter was agreed as follows:

- (a) Allegations that certain service providers were appointed without following the approved procurement process.
- (b) Allegations that the Commission for Conciliation, Mediation and Arbitration (CCMA) incurred fruitless and wasteful expenditure, namely:
 - (i) Subsistence and travelling cost of some commissioners.
 - (ii) Pay-as-you-earn was not paid for part-time commissioners.
 - (iii) Contributions of employees to the Provident Fund were not paid to investors timeously.
- (c) Allegations that the risk manager and human resource manager were appointed without following due process.
- (d) Other allegations that the AGSA received during the investigation.

1.1.2 A letter of engagement in this respect was signed on 29 October 2009 with the director-general (DG) of the Department of Labour on representation that he was doing so on behalf of the Minister of Labour. The engagement letter was further amended on 12 January 2010.

1.1.3 This report accordingly provides the AGSA's conclusions on the allegations investigated.

1.1.4 In line with the Auditor-General's *Policy, standards and guidelines: Investigations* due care was taken to confirm the factual accuracy of the findings in this report. This includes discussions with officials of the CCMA and the governing body of the CCMA, as well as an opportunity for the management of the CCMA to formally respond to the findings in this report.



1.1.5 In order to conduct the investigation as efficiently as possible, every reasonable attempt was made to avoid duplication of work and costs by way of reflecting on other investigations, reviews or audits previously conducted to the extent that they were relevant to the allegations made.

1.2 Findings

1.2.1 The CCMA governing body with the support of the executive management of the CCMA should address the findings in this report decisively. However, corrective actions limited to the specific individual findings alone would most likely address symptoms but not the underlying causes. This approach carries the risk of deficiencies recurring in future. It is therefore imperative that the underlying causes contributing to the deficiencies be properly understood and addressed as part of the corrective actions to be taken in response to this report.

1.2.2 The findings of the investigation cover the period of the 2007-08, 2008-09 and 2009-10 financial years unless indicated otherwise. These findings are summarised below in accordance with the aforementioned underlying focus areas that are most prevalent for each category of allegations.

1.2.3 Supply chain management

1.2.3.1 The findings related to supply chain management deficiencies are predominantly due to non-adherence to policies, directives and delegated authority by senior management of the CCMA. Adequate leadership oversight includes the manner in which leadership monitors performance and compliance and the way in which they promote ethical behaviour. Furthermore, leadership oversight is also about preventing an organisational culture of impunity and acting decisively to correct deficiencies.

1.2.3.2 The following significant findings are indicative of inadequate monitoring and oversight by the leadership in the area of supply chain management:

- (a) Treasury Regulation 16A12.2 states that *If a constitutional institution or **public entity** lacks the capacity to fully comply with these regulations, that constitutional institution or public entity may, until **31 March 2005**, **continue to utilise their existing procurement procedures, provided that their existing procurement procedures are consistent with the contents of Practice Notes issued by the National Treasury.***



- (b) In terms of the above provision of Treasury Regulation 16A12.2, the CCMA was allowed to utilise their old policy (that was updated in January 2002) until 31 March 2005, but the procurement procedures and policies had to be consistent with the contents of Practice Notes issued by the National Treasury by 31 March 2005. From 1 April 2005, the CCMA should have implemented a new policy, which complies with the regulatory framework for supply chain management (Treasury Regulation 16A), and all practice notes issued after 1 April 2005. However, the CCMA only implemented a new procurement policy in May 2008.
- (c) The supply chain management policies of the CCMA are solely for the purpose of implementing the prescripts and requirements of the legislation, including but not limited to:
- section 217 of the Constitution
 - section 38(1)(a), section 51(1)(a)(iii) and section 76(4) of the Public Finance Management Act
 - the Framework for Supply Chain Management as per Treasury Regulation 16A
 - the Preferential Procurement Policy Framework Act and its Regulations (PPPFA).
- (d) As required by section 51(1)(a)(iii) of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA), a procurement policy was approved by the governing body in May 2008. However, during the investigation instances were identified where officials of the CCMA did not always appropriately adhere to the procurement policy. Although the CCMA had introduced a new procurement policy since May 2008, in certain instances such policy did not comply with procurement legislation. In instances where the internal policies of the CCMA are in conflict with prevailing prescripts, the prevailing prescripts must take precedence and be complied with. This view is expressed in the legal opinions obtained from the CCMA and the AGSA. The PFMA and relevant practice notes define irregular expenditure as being expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any legislation applicable to public sector procurement. Furthermore, where procurement legislation is contravened in the procurement of goods and services, the PFMA stipulates that expenditure incurred in this regard should be regarded as irregular expenditure. Where irregular expenditure has been incurred, ex post facto approval may be obtained in terms of section 38 of the PFMA. In appointing service providers the CCMA deviated



from the following prescripts and procurement legislation:

- (i) Bids were not advertised in the Government Tender Bulletin and bids were advertised for a shorter period than 21 days. Reasons for the deviation were not recorded and approved by the governing body of the CCMA or delegated official as stipulated in Treasury Regulation 16A6.3(c).
 - (ii) Bids were not evaluated by the Bid Evaluation Committee (BEC) in accordance with the requirements of the supply chain management circular dated 27 December 2004 and therefore resulted in inconsistent and inaccurate scoring and awarding of points to tenderers during the evaluation process.
 - (iii) The Code of Conduct for Bid Adjudication Committees dated 24 March 2006 and Treasury Regulation 16A6.2 state that all bids must be adjudicated by the Bid Adjudication Committee (BAC). According to the CCMA all bids above R1 million should be adjudicated and approved by the finance sub-committee. Thus, all bids which were not adjudicated by the BAC, but by the finance sub-committee, must be recognised as irregular expenditure as it was incurred in contravention of Treasury Regulations and practice notes issued by the National Treasury.
 - (iv) In some instances, formal contracts were not entered into with the successful bidders after the adjudication and awarding of bids as stipulated in paragraph 2.3 of SCM Practice Note No. 1 of 2003.
- (e) Due to the non-compliance with supply chain management policies and procedures in awarding the tenders, the following payments made to service providers should be regarded as irregular expenditure, as stipulated in section 1 of the PFMA:

Table 1: Irregular expenditure

Service providers	Payments made R	Reference to findings paragraph
Service provider for the supply and maintenance of printing services	4 860 000	8.3.2.1 (f)
Service provider for the supply and maintenance of ICT services	4 100 000	8.4.2.1 (e)
Quantity surveyor and project management services	754 443	8.5.2.1 (g)
Service provider to migrate the CCMA's case management system	4 560 000	8.6.2.1 (c)
Service provider to assist with process system, structure, innovation and design	3 025 380	8.7.2.1 (d)



Service providers	Payments made R	Reference to findings paragraph
Service provider for implementation of accounting and payroll solutions	856 736	8.8.2.1 (h)
Extension of a contract for IT services for maintenance support of server equipment (note)	4 611 092	8.9.2.1 (e)
Service provider to supply portable voice recording devices	839 967	8.10.2.1 (e)
Total	23 607 618	

Note: Due to a lack of information the actual amount of irregular expenditure could not be determined. The amount reflected in the table is the total amount paid to the service provider since inception of services up to 31 December 2009.

- (f) In two instances three price quotations were not obtained from prospective suppliers and the reasons for not obtaining three quotations were not recorded and approved by the governing body. Payments to service providers amounting to R163 735 had been identified in this regard (paragraph 8.11.2.1).
- (g) In two instances the CCMA invited proposals for the delivery of services. However, payments for providing these services were made to two service providers that did not score the highest number of points and were also not recommended by the BEC. Payments amounting to R178 503 and R324 216 were made to the service providers (paragraph 8.11.2.3).
- (h) The CCMA procured goods and services in excess of the R200 000 threshold without inviting competitive bids. The reasons for not inviting competitive bids were not recorded and approved by the governing body or delegated authority. Payments made in this regard amounted to R367 522 (paragraph 8.11.2.4).
- (i) In one instance the CCMA appointed a service provider to render services amounting to R612 760 by inviting quotations. From the payment documentation it was determined that the services rendered were of the same nature and it appears as if the orders were split to avoid inviting competitive bids for transactions over R200 000 (paragraph 8.11.2.5).

1.2.4 Fruitless and wasteful and irregular expenditure

- 1.2.4.1 The lack of leadership oversight is also evident in this category of findings related to alleged fruitless and wasteful and irregular expenditure, as there are contraventions of policies by the executive management of the CCMA



(paragraph 9). The following instances of possible fruitless and wasteful and irregular expenditure were identified:

- (a) The CCMA appointed a corporate services manager and three commissioners at head office although the corporate services manager and the commissioners resided in their hometowns and did not relocate to Johannesburg. The CCMA paid the travel expenses of the corporate services manager and the commissioners. According to the CCMA, the travel expenses paid constituted legitimate business expenses. The total amount of travel expenses paid by the CCMA on behalf of the corporate services manager and the commissioners for the period 1 January 2008 to 31 December 2009 amounted to R1 274 696. The travel expenses were paid in accordance with written agreements with the commissioners which constituted business expenses (paragraph 9.1.2).
- (b) In terms of paragraph 2(1) of the Fourth Schedule to the Income Tax Act, an employer should deduct employees' tax from any remuneration that becomes payable or is paid to an employee and pay the said employees' tax over to the South African Revenue Service (SARS). The CCMA did not subtract Pay-as-you-earn from part-time commissioners' salaries for the 2003-04 to 2005-06 tax years and did not pay it over to SARS. A deed of settlement was signed and concluded between the CCMA and SARS. The CCMA paid the settlement amount of R11 045 339 in two instalments. The fruitless and wasteful expenditure was reported in the annual report of the CCMA for the 2008-09 financial year (paragraph 9.2.2).
- (c) The contribution of R1 631 101 to the Provident Fund for August 2009 was only paid by the CCMA on 17 September 2009, which was done in contradiction with the Pension Fund Act. As a result, the CCMA had to pay interest amounting to R11 257. Section 1 of the PFMA stipulates that this amount should be reported as fruitless and wasteful expenditure (paragraph 9.3.2).

1.2.5 **Appointment of risk manager and human resource manager**

1.2.5.1 The CCMA appointed the successful candidate as a risk manager with effect from 1 July 2009. Based on the information received, the risk manager was appointed in line with the prescribed policy (paragraph 10.1.2).

1.2.5.2 The CCMA appointed a consultant as human resource manager on a "body shop" (labour brokering service) arrangement without following the supply chain procurement processes. The finance sub-committee approved the deviation for not following the supply chain processes in appointing the consultant. Based on



the information obtained, the human resource manager was appointed by deviating from the procurement process for inviting tenders. The reasons for deviation from supply chain management processes were recorded and approved by the finance sub-committee (paragraph 10.2.2).

1.2.6 **Other allegations that the AGSA received during the investigation**

1.2.6.1 The CCMA paid a salary advance to a part-time commissioner in contravention of the CCMA's policy on salary advances (paragraph 11.1.2).

1.2.6.2 The CCMA opened a new bank account without obtaining prior approval from the National Treasury and without following the adjudication process before making a recommendation to the finance sub-committee in contradiction of the Code of Conduct for Bid Adjudication Committees dated 24 March 2006. The CCMA requested ex post facto approval on 3 November 2009 and was granted approval from the National Treasury on 8 December 2009; however, the former account had to be closed within six months. The CCMA's former bank account was still operational as at 21 January 2010 (paragraph 11.2.2).

1.2.7 **Recommendations**

1.2.7.1 The governing body of the CCMA should evaluate the following with regard to the appointment of service providers:

- (a) The reasons why service providers were appointed without following the supply chain management policies of the CCMA, stipulations of the PFMA and practice notes and regulations issued by the National Treasury.
- (b) Action against employees, in terms of the PFMA, who appointed service providers in contravention of the stipulations of the procurement policy, the PFMA and practice notes and regulations issued by the National Treasury.
- (c) Whether expenditure incurred constitutes irregular expenditure as defined in the PFMA and, if so, report the irregular expenditure in terms of the PFMA.
- (d) Taking effective and appropriate steps to prevent irregular expenditure through not complying with the supply chain management policies of the CCMA.



- 1.2.7.2 The governing body of the CCMA should continue to attempt to recover taxes of the CCMA not declared and paid to SARS by part-time commissioners. The governing body should make a settlement arrangement with SARS regarding the non-compliance with the Income Tax Act for the 2007-08 tax year.
- 1.2.7.3 According to section 1 of the PFMA, fruitless and wasteful expenditure is defined as *expenditure which was made in vain and would have been avoided had reasonable care been exercised*. The interest amounting to R11 257 paid to the Provident Fund should therefore be regarded as fruitless and wasteful expenditure. The governing body of the CCMA should report the fruitless and wasteful expenditure in terms of section 55(h)(i) of the PFMA.
- 1.2.7.4 The payment of the salary advance to the part-time commissioner of the Western Cape should be regarded as irregular expenditure as defined in section 1 of the PFMA. Furthermore, the gross salary paid for April and May 2009 was not in accordance with the agreement signed on 17 March 2009. The governing body of the CCMA should determine the overpayments made to the part-time commissioner for April and May 2009 and recover the overpayments.
- 1.2.7.5 The governing body of the CCMA should take effective steps to close the CCMA's former bank account as soon as possible to comply with the National Treasury's requirements.

2. INTRODUCTION

- 2.1 The functions of the AGSA in supporting constitutional democracy in South Africa are described in section 188 of the Constitution of the Republic of South Africa, 1996, as well as the Public Audit Act, 2004 (Act No. 25 of 2004). Section 5(1)(d) of the PAA specifically gives the AGSA the authority to carry out an appropriate investigation if the AGSA considers it to be in the public interest or upon the receipt of a complaint or request. In this context, the AGSA investigates allegations in order to facilitate public accountability by reporting the findings emanating from the investigation to management and those charged with governance. Ultimately, the findings and recommendations in this report are intended to enable management and those charged with governance to implement measures that will ensure effective governance.
- 2.2 On 21 October 2009, the AGSA was requested by the Minister and the DG of the Department of Labour to conduct an investigation into allegations made by some employees of the CCMA. In line with its mandate, the AGSA decided to investigate the allegations made and an engagement letter was signed on 29 October 2009 with the DG of the Department of Labour on representation that



he was doing so on behalf of the Minister of Labour. The engagement letter was further amended on 12 January 2010 and sets out the terms of the investigation.

3. RESPONSIBILITIES OF MANAGEMENT AND THOSE CHARGED WITH GOVERNANCE

3.1 Within the context of the public service and state-owned entities the primary responsibility for the prevention and detection of fraud and error rests with management of the entity and those charged with governance. Management needs to set the proper tone, create and maintain a culture of honesty and a high standard of professional ethics. Furthermore, management must establish a control environment and maintain policies and procedures to assist in achieving the objective of ensuring the orderly and efficient conduct of the entity's business.

3.2 On the other hand, those charged with the governance of an entity must ensure, through the oversight of management, the integrity of an entity's accounting and financial reporting systems and that appropriate controls are in place, including those for monitoring risk, financial control and compliance with the law.

3.3 The CCMA is a dispute resolution body established in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995).

3.4 The CCMA's compulsory statutory functions are to:

- conciliate workplace disputes
- arbitrate certain categories of disputes that remain unresolved after conciliation
- establish picketing rules
- facilitate the establishment of workplace forums and statutory councils
- compile and publish information and statistics about the CCMA's activities
- consider applications for accreditation and subsidy by bargaining councils and private agencies
- provide support to the Essential Services Committee.

3.5 The CCMA is a schedule 3A public entity in terms of the PFMA and therefore has to comply with the PFMA to the extent indicated in the act, including any regulations and instructions in terms of sections 69, 76, 85 or 91 of the act (refer to paragraphs 8.2.1 to 8.2.4).

3.6 In the CCMA context, the governing body of the CCMA is the accounting authority of the CCMA. The governing body consists of a chairperson and nine other members appointed by the Minister of Labour.



3.7 Three sub-committees, namely the human resources, finance and accreditation subsidy sub-committees assist the governing body. The sub-committees are appointed by the governing body of the CCMA and comprise at least one duly nominated member from each of the three stakeholder groups within the CCMA.

3.8 The governing body of the CCMA appoints an independent audit committee comprising representatives of government, organised labour and organised business to assist it in its work. The audit committee's primary role is to review the effectiveness of the internal control systems and the internal audit function of the CCMA.

3.9 It is intended that the findings and recommendations in this report will enable management and the governing body of the CCMA to implement the necessary measures and steps to ensure effective accounting and internal control systems. In this regard, during the regularity audit for the 2008-09 financial year conducted by the AGSA, a high-level review of the allegations made by some employees of the CCMA was conducted. This high-level review identified instances of irregular and fruitless and wasteful expenditure, and these were reported in the 2008-09 annual report of the CCMA. However, at the commencement of this investigation in November 2009, it was apparent that the CCMA management had not dealt adequately with some of the issues highlighted in the report mentioned above.

4. SCOPE OF THE ASSIGNMENT

4.1 The scope of the investigation, as defined in the letter of engagement with the DG of the Department of Labour, was as follows:

- (a) Allegations that certain service providers were appointed without following the approved procurement process.
- (b) Allegations that the CCMA incurred fruitless and wasteful expenditure, namely:
 - (i) subsistence and travelling cost of some commissioners
 - (ii) pay-as-you-earn (PAYE) was not paid for part-time commissioners
 - (iii) contributions of employees to the Provident Fund were not paid to investors timeously.
- (c) Allegations that the risk manager and human resource manager were appointed without following due process.
- (d) Other allegations that the AGSA received during the investigation.



4.2 The investigation covered the 2007-08, 2008-09 and 2009-10 financial years, unless indicated otherwise.

5. PURPOSE, OBJECTIVES AND APPROACH OF THE INVESTIGATION

5.1 The purpose of the investigation is to verify and pronounce on the veracity of the allegations made. The report with findings and recommendations is aimed at enabling the management and the governing body of the CCMA to implement measures to strengthen governance and prevent further occurrences of irregular, fruitless and wasteful expenditure.

5.2 The investigation was performed in terms of the Auditor-General's *Policy, standards and guidelines: Investigations*.

5.3 The AGSA conducted interviews with some of the employees of the CCMA in order to obtain clarity on the allegations. Once this was done, a meeting was held with the CCMA management to explain the *modus operandi* to be followed during the investigation. The investigation commenced with the collation of relevant documentation from the CCMA. In this regard, the CCMA was provided with a list of documentation and information required by the AGSA on 17 November 2009 and 11 December 2009, respectively. Further documentation was subsequently also received in the week of 2 to 5 February 2010. The documentation received was scrutinised and compared against the prevailing prescripts and policies mentioned herein.

5.4 Once the scrutiny and analysis of documentation was done, interviews were conducted with the relevant CCMA officials and management. The execution of the investigation on site at the CCMA offices ended on 5 February 2010. This was followed by a review of the conclusions and the finalisation of the draft management report. Conclusions are therefore based on documentation and information provided up to March 2010.

5.5 A management report on the outcome of the investigation was issued to the director of the CCMA on 22 February 2010 for comments. A copy of the management report was also submitted to the DG of Labour. A response was received from the director of the CCMA on 23 March 2010. The response is included in this report.



6. REGULATORY FRAMEWORK

6.1 The documentation collated was compared to the prevailing prescripts such as:

- Constitution of the Republic of South Africa
- Public Finance Management Act
- Preferential Procurement Policy Framework Act and its associated regulations
- Broad-based Black Economic Empowerment Act
- Competition Act
- The Supply Chain Management Framework published in *Government Gazette 25767 dated 5 December 2003* as part of the Treasury Regulations in terms of 76(4) of the PFMA
- National Treasury Guidelines for accounting officers/authorities
- CCMA Supply Chain Management Policy

The above list of the relevant prescripts is, however, by no means exhaustive.

7. LIMITATIONS OF THE REPORT

7.1 Although the work performed incorporates our understanding of the relevant prescripts and the law as it stands, we do not express an opinion on the legal effect of the facts or the guilt or innocence of any person(s) or party, but merely state the facts as they have come to our attention. In the case of disciplinary hearings or civil and criminal litigation, this report may only be used as a reference document.

7.2 The report is based on the facts established from documentation and information provided and/or obtained during the course of the investigation. Should further documentation or information be obtained, this may influence the findings and conclusions made.

7.3 The validity or authenticity of the relevant records and information subjected to analysis was not verified. This information was accepted at face value unless stated otherwise.

7.4 The procedures applied were designed to enable the identification of irregular and unlawful acts, but the AGSA cannot provide assurance that the procedures applied have detected all such acts, if any.



7.5 The investigation focused on compliance with acts, regulations and prescripts during the procurement process and not on activities of fraud and corruption. However, during the investigation no indication of possible fraud or corruption was identified. Furthermore, the economical procurement and efficient and effective utilisation of goods and services (value for money) was not probed.

8. DETAILED FINDINGS, RESPONSES AND RECOMMENDATIONS

8.1 Allegations

8.1.1 Allegations that some of the service providers were appointed without following the approved procurement processes were discussed with some of the CCMA employees. Following these discussions, the AGSA decided to probe the appointment of the following service providers:

- (a) Service provider for the supply and maintenance of printing services.
- (b) Service provider for the supply and maintenance of information, communication and technology (ICT) services.
- (c) Quantity surveyor and project management services.
- (d) Service provider to migrate the CCMA's case management system.
- (e) Service provider to assist with process system, structure, innovation and design.
- (f) Service provider for implementation of accounting and payroll solutions.
- (g) Extension of a contract for IT services for maintenance support of server equipment.
- (h) Service provider to supply portable voice recording devices.

8.2 General findings identified during the investigation

8.2.1 Treasury Regulation 16A12.2 states that *If a constitutional institution or **public entity** lacks the capacity to fully comply with these regulations, that constitutional institution or public entity may, until **31 March 2005, continue to utilise their existing procurement procedures, provided that their existing procurement procedures are consistent with the contents of Practice Notes issued by the National Treasury.***

8.2.2 In terms of the above provision of Treasury Regulation 16A12.2, the CCMA was allowed to utilise their old policy (that was updated on January 2002) until 31 March 2005, but the procurement procedures and policies had to be consistent with the contents of practice notes issued by the National Treasury by 31 March 2005. From 1 April 2005, the CCMA should have implemented a new policy, which complied with the regulatory framework for supply chain



management (Treasury Regulation 16A) and all practice notes issued after 1 April 2005. However, the CCMA only implemented a new procurement policy in May 2008.

8.2.3 The supply chain management policies of the CCMA are solely for the purpose of implementing the prescripts and requirements of the legislation, including but not limited to:

- section 217 of the Constitution
- section 38(1)(a), section 51(1)(a)(iii) and section 76((4) of the Public Finance Management Act (PFMA)
- the Framework for Supply Chain Management as per Treasury Regulation 16A
- the Preferential Procurement Policy Framework Act and its Regulations (PPPFA).

8.2.4 In instances where the internal policies of the CCMA are in conflict with prevailing prescripts, the prevailing prescripts must be complied with. This view is expressed in the legal opinion of counsel that was provided by the CCMA. In terms of the opinion, *regulation 16A12 deals with interim arrangements, until a specified date, public entities could continue to apply their existing procurement processes if they lacked the capacity to comply with the new regime. The date in question was 31 March 2005. This would suggest, in our view that from the date in question compliance was necessary.* In order to conclude whether expenditure incurred between 1 April 2005 and May 2008 is irregular, the expenditure should be tested against the requirements of the Treasury Regulations and Preferential Procurement Act and its regulations. Where it is found that they did not comply with the regulations, such expenditure should be regarded as irregular expenditure.

8.2.5 During the investigation it was found that the CCMA did not comply with the following Treasury Regulations and practice notes issued by the National Treasury:

8.2.5.1 Bids were not advertised in the Government Tender Bulletin and bids were advertised for a period shorter than 21 days. Reasons for the deviation were not recorded and approved by the governing body or delegated official as stipulated in Treasury Regulation 16A6.3(c).

8.2.5.2 Bids were not evaluated by the BEC in accordance with the requirements of the supply chain management circular dated 27 December 2004 and therefore

resulted in the inconsistent and inaccurate scoring and awarding of points to tenderers during the evaluation process.

8.2.5.3 Not all bids were adjudicated by the BAC in terms of the Code of Conduct for Bid Adjudication Committees dated 24 March 2006 and Treasury Regulation 16A6.2: According to the CCMA all bids above R1 million should be adjudicated and approved by the finance sub-committee. The CCMA is a schedule 3A public entity and is duty bound to comply with Treasury Regulations and practice notes issued by the National Treasury. Thus for all bids which were not adjudicated by the BAC, but only by the finance sub-committee, such expenditure must be recognised as irregular expenditure as it was incurred in contravention of Treasury Regulations and practice notes issued by the National Treasury.

8.2.6 **Response from the CCMA**

8.2.6.1 The management of the CCMA will recommend to the governing body of the CCMA that the supply chain management policy on governance structures be changed to have the BAC adjudicating all bids above the National Treasury threshold of three competitive quotes. The recommendations will be forwarded to the finance and risk sub-committee for approval and to the governing body of the CCMA for noting. The code of conduct from the National Treasury will in its entirety be incorporated into the supply chain management policy of the CCMA to replace the current policy provisions on the decision making processes.

8.3 **Appointment of a service provider for the supply and maintenance of printing services**

8.3.1 **Context**

8.3.1.1 The allegations made in relation to the appointment of a service provider for the supply and maintenance of printing services were that the awarding of the tender was irregular and that the contract entered into with the service provider exceeded the amount approved by the finance sub-committee.

8.3.1.2 The CCMA invited tenders for the pre-qualification for the supply and maintenance of printing and ICT services (two-stage bidding process). The advertisement for this tender was published in the *Sowetan* of 6 May 2008 with a closing date of 13 May 2008. The CCMA invited 14 companies who responded to the pre-qualification by the closing date of 13 May 2008 for a compulsory briefing session for purposes of submitting tenders. Six companies submitted formal tenders by 13 June 2008. While the invitation for tenders related to both the (i) supply and maintenance of printers and (ii) ICT, the evaluation of tenders was



subsequently done separately. The one evaluation was for the supply of printers and maintenance while the other one was for ICT services.

- 8.3.1.3 Once the six tenders were received, the BEC did not evaluate the tenders, because the CCMA did not have a fully constituted BEC. However, a private company was appointed to evaluate the tenders. The CCMA submitted an evaluation report to the AGSA relating to the evaluation of the bid proposals for the supply and maintenance of printing services as compiled by the private company.
- 8.3.1.4 According to the minutes of the BAC meeting held on 8 August 2008, the BAC noted the submission to the finance sub-committee for awarding the tender to the successful bidder.
- 8.3.1.5 In an undated and unsigned submission by the director of the CCMA to the finance sub-committee, the director recommended that the finance sub-committee approve the appointment of the successful bidder as the service provider for the supply and maintenance of printers. Attached to the submission was a master service agreement between the CCMA and the service provider for a monthly rental cost of R277 034 which was higher than the monthly rental cost of R250 000 stated in the bid proposal. The final draft finance sub-committee minutes of 31 July 2008 indicate that the finance sub-committee approved the appointment of the successful bidder as service provider for a printing solution.
- 8.3.1.6 On 2 October 2008, the director of the CCMA signed a master service agreement between the CCMA and the successful bidder for a monthly rental amount of R277 034.
- 8.3.1.7 The AGSA reported an apparent misrepresentation by the successful bidder to the CCMA in a management report of August 2009 as part of the regularity audit. According to the proposal submitted by the successful bidder, the directors of the company were two black males and one white male, and the address of the company as stated in the proposal was in Alberton. However, a CIPRO search conducted by the AGSA on 25 November 2009 indicated that the successful bidder has only one white male director and the registered address is in Polokwane. It would appear that there was no basis for the allocation of points for black economic empowerment (BEE) or local content to the successful bidder. The CCMA investigated the alleged misrepresentation and cancelled the contract with effect from 29 December 2009. The CCMA had to continue with the printing services. The governing body approved the ongoing service provided by the subcontractor on a month-to-month basis for a maximum period of six months until a new contractor was properly appointed.



8.3.2 Findings

8.3.2.1 The service provider for the supply and maintenance of printing services was appointed in contravention of the following Treasury Regulations and practice notes issued by the National Treasury:

- (a) The advertisement of the pre-qualification bid for the supply and maintenance of printing services was not placed in the Government Tender Bulletin for a minimum period of 21 days, which was in contravention of Treasury Regulation 16A6.3(c). Furthermore, no evidence could be found that the governing body of the CCMA or delegate approved that the bid could be advertised for a shorter period due to the urgency thereof.
- (b) The evaluation of this bid was conducted by a private company and not in accordance with the supply chain management circular dated 27 December 2004, which provides that *all bids should be evaluated by the evaluation committee and the evaluation committee should submit a report and recommendations regarding the awarding of the bids to the Bid Adjudication Committee.*
- (c) Scrutiny of the evaluation report prepared by the private company revealed the following inconsistencies:
 - (i) Scores allocated by the private company for the technical evaluation of the bids were not consistent and there was no technical justification for the scores allocated.
 - (ii) In some instances, although the bidders complied with the technical specifications, no points were awarded for such compliance.
 - (iii) The awarding of points for pricing was done in contravention of paragraph 4(1) of the PPPFA Regulations, as the lowest acceptable price was not allocated maximum points.
- (d) A risk exists that due to these inconsistencies in the awarding of the points for technical and pricing criteria, the contract could have been awarded to a supplier that should not have scored the highest points and be awarded the contract. The successful bidder with a contract amount of R15 million scored total points of 82,9 and the second highest bidder with a contract of R10,5 million scored total points of 82.



- (e) There is no evidence to indicate that the BAC considered the recommendations made in the evaluation report of the private company, or that the scoring and calculations in the report were adjudicated as required by the Code of Conduct for Bid Adjudication Committees dated 24 March 2006. This code of conduct states that the *Bid Adjudication Committee should consider the recommendations made in the evaluation report and ensure that the scoring during the evaluation has been consistent and correctly calculated and applied and make a recommendation to the accounting authority or delegated officials.*

- (f) Based on the above instances of non-compliance with the prevailing procurement prescripts, the AGSA finds that the allegation that the bid for the supply and maintenance of printing services was awarded to the service provider in contravention of prevailing procurement legislation is founded. In this regard, the PFMA and relevant practice notes define irregular expenditure as being expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any legislation applicable to public sector procurement. This renders all payments made to the successful bidder, amounting to R4,86 million as at 31 December 2009, irregular.

8.3.3 Response from the CCMA

- 8.3.3.1 The CCMA accepts that the first bidding stage was not advertised in the Government Tender Bulletin. The CCMA is of the view that the intention of Treasury Regulation 16A6.3(c) is to ensure wide publication and a fair and transparent process, and the advertisement in the *Sowetan* of the first-stage bidding process complied with that principle.

- 8.3.3.2 At the time when the bids were received, the CCMA did not have a fully constituted BEC, although the CCMA had in May 2008 approved an extensive supply chain management policy, which included the facility for the co-option of experts onto a BEC for such purposes. Due to the nature of the services sought, the CCMA did not have the technical and specialist skills or the required competencies to evaluate the tenders. Currently, a fully constituted permanent BEC is operational in terms of the CCMA supply chain management policy. In terms of that policy, the BEC applies the same process for the evaluation of bids and the co-option of experts where necessary.

- 8.3.3.3 The private company, in terms of the applicable process, was appointed to assist with the evaluation of the tenders and compiled an evaluation report. The CCMA was accordingly not obliged to comply with the provisions of paragraph 4.1(b) of



the supply chain management circular dated 27 February 2004 in these circumstances because it complied with the CCMA supply chain management policy.

- 8.3.3.4 The requirement of the Code of Conduct for Bid Adjudication Committees regarding the adjudication of tenders is not applicable to this issue. The applicable policy is the CCMA supply chain management policy. The CCMA supply chain management policy indicates the thresholds in respect of the decision-making structures within the CCMA. The thresholds clearly indicate that bids over R1 million fall within the jurisdiction of the finance sub-committee and not the BAC, as contended.
- 8.3.3.5 In terms of the legal opinion of counsel, it is clear that where procurement was done by means of a bidding process the supply chain management system must provide for bids to be adjudicated by a BAC and the approval of bid evaluation and/or adjudication committee recommendations.

8.3.4 **Response from AGSA**

- 8.3.4.1 It was confirmed with the National Treasury on 23 March 2010 that for pre-qualification and the two-stage bidding process the advertisement requirement of 21 days should be applied. In terms of Treasury Regulation 16A6.3(c), an accounting authority is required to ensure that bids are advertised in at least the Government Tender Bulletin for 21 days. Failure to advertise bids in the Government Tender Bulletin is in violation of a Treasury Regulation.
- 8.3.4.2 According to Treasury Regulation 16A12.2, the CCMA was allowed to utilise their old policy until 31 March 2005 provided that their existing procurement procedures were consistent with the contents of practice notes issued by the National Treasury. From 1 April 2005, the CCMA was duty bound to implement a new procurement policy, which should comply with the regulatory framework for supply chain management in terms of Treasury Regulation 16A. Therefore, the CCMA had to comply with Treasury Regulation 16A regarding the advertising, evaluation and adjudication of bids.
- 8.3.4.3 The finance sub-committee had the delegation to approve bids over R1 million; however, the finance sub-committee should only decide on the appointment of a service provider once the BAC made a firm recommendation on the appointment of the successful bidder. Furthermore, even if experts were used for the evaluation of bids, the BAC should properly consider the experts' report and make a recommendation thereon before the appointment of the service provider.



8.4 **Appointment of a service provider for the supply and maintenance of ICT services**

8.4.1 **Context**

8.4.1.1 The allegations made in relation to the appointment of a service provider for the supply and maintenance of ICT services were that the awarding of the tender was irregular and that the contract entered into with the service provider exceeded the amount approved by the finance sub-committee.

8.4.1.2 The CCMA had previously invited tenders for the pre-qualification for the supply and maintenance of printing and ICT services as discussed in paragraph 8.3.1 above. Following the evaluation conducted by the private company as discussed above, the CCMA entered into a contract with a service provider. The cost of this contract is R4 million per annum. The contract was signed on 12 December 2008.

8.4.1.3 According to the minutes of the BAC meeting held on 8 August 2008, the BAC noted the submission to the finance sub-committee for the awarding of the tender to the successful bidder.

8.4.1.4 In an unsigned and undated submission by the director of the CCMA to the finance sub-committee, the director recommended that the finance sub-committee approve the appointment of the successful bidder as the service provider for the networking and communication services. Attached to the submission was a master service agreement between the CCMA and the service provider for a monthly cost of R400 000 which was higher than the monthly cost of R337 336 stated in the bid proposal.

8.4.1.5 According to the final draft finance committee minutes of 31 July 2008, the finance sub-committee approved the appointment of the successful bidder for the networking and communications service. The director of the CCMA subsequently signed a master service agreement with the successful bidder on 12 December 2008 for an amount of R24 million (R400 000 per month).

8.4.2 **Findings**

8.4.2.1 The service provider for the supply and maintenance of ICT services was appointed in contravention of the following Treasury Regulations and practice notes issued by the National Treasury:



- (a) The findings contained in paragraph 8.3.2.1(a) and (b) herein are relevant and hold true in respect of the service provider.
- (b) Scrutiny of the evaluation report prepared by the private company, revealed the following inconsistencies:
 - (i) Scores allocated by the private company for the technical evaluation of the bids were not consistent and there was no technical justification for the scores allocated.
 - (ii) In some instances, although the bidders complied with the technical specifications, no points were awarded for such compliance.
 - (iii) The awarding of points for pricing was done in contravention of paragraph 4(1) of the PPPFA Regulations, as the lowest acceptable price was not allocated maximum points.
- (c) A risk exists that due to these inconsistencies in the awarding of the points for technical and pricing criteria, the contract could have been awarded to a supplier that should not have scored the highest points.
- (d) There is no evidence to indicate that the BAC considered the recommendations made in the evaluation report of the private company, or that the scoring and calculations in the report were adjudicated as required by the Code of Conduct for Bid Adjudication Committees dated 24 March 2006.
- (e) Based on the above instances of non-compliance with the prevailing procurement prescripts, the AGSA finds that the allegation that the tender for the rendering of ICT services was awarded to the supplier in contravention of prevailing procurement legislation is founded. In this regard, the PFMA and the relevant practice notes define irregular expenditure as being expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any legislation applicable to public sector procurement. This renders all payments made to the successful bidder, amounting to R4,1 million as at 31 December 2009, irregular.

8.4.3 **Response from the CCMA**

- 8.4.3.1 After perusing the evaluation report of the private firm, the CCMA admits that there were errors in the capturing of data in the report. According to the CCMA, the reasons that were captured in relation to the allocation of points to a bidder



should have appeared as reasons in respect of allocation of points to the successful bidder.

8.4.3.2 The CCMA also agrees that the allocation of points for price was done incorrectly.

8.4.3.3 On 31 July 2008, the finance sub-committee resolved that the successful bidder be appointed as the service provider and a broad mandate for the management and conclusion of a service level agreement was provided to the management of the CCMA.

8.4.3.4 Subsequent to the mandate from the finance sub-committee, the successful bidder provided further designs and specifications for the creation and establishment of the virtual private network, which was subjected to further debate and amendment to serve the needs of the CCMA and the matter was concluded on a slightly increased contract price than the original proposal.

8.5 **Appointment of a service provider for quantity surveyor and project management services**

8.5.1 **Context**

8.5.1.1 It was alleged that the procurement of services for the appointment of a service provider for office renovations was done without adhering to the proper procurement processes. It was further alleged that the work done by the successful bidder was of poor quality. However, the CFO approved that the full amount for the work done should be paid and no retention amount was withheld.

8.5.1.2 The advertisement to invite suitable service providers to express an interest to render quantity surveyor and project management services was published in the *Sowetan* dated 6 May 2008 with a closing date of 13 May 2008.

8.5.1.3 There is no documentation to indicate that the BEC evaluated the bid. Minutes of the BAC meeting, dated 8 August 2008, indicate that the BAC approved the appointment of five service providers for project manager and quantity surveyor services, on a rotational basis.

8.5.1.4 The contract between the CCMA and the successful bidder which was submitted was signed on 1 August 2008.

8.5.1.5 The AGSA received a submission signed by the CFO on 3 August 2009, which was addressed to the finance and risk sub-committee. This submission was for



the finance and risk sub-committee to condone and approve *management actions in continuing with the project before the BAC approved it*. Subsequently, the governing body of the CCMA approved the deviation on 27 August 2009.

8.5.2 Findings

8.5.2.1 The service provider for quantity surveyor and project management services was appointed in contravention of the following Treasury Regulations and practice notes issued by the National Treasury:

- (a) The advertisement to invite suitable service providers to express an interest to render quantity surveyor and project management services was published in the *Sowetan* dated 6 May 2008 with a closing date of 13 May 2008. The advertisement was not placed in the Government Tender Bulletin for a minimum period of 21 days which was in contravention of Treasury Regulation 16A 6.3(c). Furthermore, no evidence could be found that the governing body or delegate approved that the bid could be advertised for a shorter period due to the urgency thereof.
- (b) The expression of interest document indicated in paragraph 6 that the following information should be provided by the service provider and that the information would be taken into account in the evaluation and selection of service providers who would be invited to submit tenders:
 - (i) Procurement from small and medium enterprises (SME) or BEE suppliers
 - (ii) Technical
 - (iii) Financial
 - (iv) Commercial.
- (c) There is no evidence to indicate that bid proposals for the expression of interest in the repair and alteration of a portion of the CCMA offices was evaluated by the BEC. The CCMA failed to comply with paragraph 4.1(b) of the National Treasury Circular dated 27 December 2004, which provides that *all bids should be evaluated by the bid evaluation committee*. Furthermore, according to paragraph 2.1 of the CCMA Supply Chain Management Policy Volume 3, *before placement on the supplier database, all applicants should undergo an evaluation exercise aimed at assessing their ability to supply the products or services for which they have applied to be registered for*. Evidence that the bids were not evaluated is that, for example the bid proposal of the successful



bidder did not contain the audited financial statements for the previous financial year as required in paragraph 3 of the pre-qualification questionnaire, and therefore the bid proposal should have been disqualified. On request, the CCMA submitted the financial statements of the successful bidder, which were faxed by the successful bidder on 23 March 2010 and which is proof that it was not part of the bid proposal of the successful bidder.

- (d) The BAC approved the appointment of five service providers on 8 August 2008. This was done without ensuring that bid proposals had been evaluated for compliance. The conduct of the BAC members contravenes the Code of Conduct for Bid Adjudication Committees dated 24 March 2006 which provides that *all bids should be evaluated by the evaluation committee and the evaluation committee should submit a report and recommendations regarding the awarding of the bids to the Bid Adjudication Committee*. Furthermore, the service providers were appointed to render services on a rotational basis, which is not in line with the advertised requirements set out in the expression of interest document. According to paragraph 7 of the said document, the CCMA would request pre-qualified service providers to submit bid proposals when services were required.

- (e) The successful bidder provided services for the renovations of the CCMA offices in contravention of SCM Practice Note 8 of 2007/08, paragraph 3.4.1 which states that *accounting officers / authorities should invite competitive bids for all procurement above R500 000*. Furthermore, paragraph 3.4.3 of the Practice Note states that *should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services, in accordance with Treasury Regulation 16A6.4 by other means, such as price quotations or negotiations. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate*. The finance sub-committee condoned the deviation from the procurement process and not having a signed contract on 13 August 2009. It was subsequently also approved by the governing body of the CCMA on 27 August 2009.

- (f) Based on the above instances of non-compliance with the prevailing procurement prescripts, the AGSA finds that the allegation that the tender for the rendering of quantity surveyor and project management services was awarded to the supplier in contravention of prevailing



procurement legislation is founded. In this regard, the PFMA and relevant practice notes define irregular expenditure as expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any legislation applicable to public sector procurement. This renders all payments made to the successful bidder, amounting to R754 443, irregular.

8.5.3 **Response from the CCMA**

8.5.3.1 The finding that the CCMA failed to comply with paragraph 4.1(b) of the National Treasury Circular dated 27 September 2004 is not only inappropriate, but also misplaced. The process for the advertisement for expressions of interest, the receipt of such expressions and their evaluation is a completely separate process and precedes any request for final proposals in respect of a particular service.

8.5.3.2 According to the CCMA, the director signed the agreement on 3 September 2009 and did not realise that the date inserted just above the signature was reflected as 1 August 2008 on the contract which was submitted to the AGSA.

8.5.3.3 The allegation that the CFO approved payment to be made to the service provider for work done is factually incorrect. The contract was managed by the administration department, which supervised the alterations and conducted project meetings. The CFO was not involved in this project.

8.5.4 **Response from the AGSA**

8.5.4.1 According to paragraph 2.1 of the CCMA Supply Chain Management Policy Volume 3, *before placement on the supplier database, all applicants should undergo an evaluation exercise aimed at assessing their ability to supply the products or services for which they have applied to be registered for.*

8.5.4.2 The CFO did not manage the project; however, the CFO was involved during the payment process by signing either the invoices, the payment remittance advice or the cheque requisitions.



8.6 Appointment of a service provider to migrate the CCMA's case management system

8.6.1 Context

8.6.1.1 It was alleged that a contract was unofficially awarded to a service provider to re-design the CCMA's internet web page. The contract was allegedly awarded without following proper procurement processes and the contract was not tabled at the BAC for approval before being tabled in the finance sub-committee.

8.6.1.2 According to the minutes dated 12 September 2007, the governing body approved the limited bid process. The invitation to tender for the migration of the CCMA's Case Management System to a web-enabled solution was issued on 1 October 2007 and closed on 19 October 2007.

8.6.1.3 Two bids were received and were evaluated by the BEC on 15 November 2007. The BEC recommended that the contract be awarded to the bidder that scored the highest points. The recommendation was tabled before the finance sub-committee for approval and was subsequently approved according to the minutes dated 26 November 2007.

8.6.1.4 A contract was signed between the director of the CCMA and the successful bidder on 25 March 2008 for an amount of R3 648 000. In terms of the contract signed by the CCMA and successful bidder, the CCMA was supposed to pay the successful bidder a guarantee of R1,5 million. This guarantee of R1,5 million was never paid by the CCMA.

8.6.1.5 According to the minutes of the finance sub-committee meeting held on 6 May 2008, the finance sub-committee considered and approved a submission for the increase in the threshold relating to costs for the implementation of the project web enabling. The approval obtained was for an additional cost of R912 000 and thus the total amount approved and paid amounted to R4 560 000 (R3 648 000 + R912 000).

8.6.1.6 A guarantee of R1,5 million was requested by the successful bidder. According to a letter from the bank, the bank issued a guarantee for the sum of R1,5 million on behalf of the CCMA. The guarantee expired on 31 July 2008. Section 66(3)(c) of the PFMA states that public entities may only through the Minister of Finance borrow money, or issue a guarantee, indemnity or security or enter into any other transaction that binds or may bind the public entity to any future financial commitment. According to National Treasury circular dated

20 September 2005, paragraph 5 states that the view of the National Treasury is that the ministers' concurrence would not be required where:

- 5.1 *The indemnity, limitation or liability or warranty is integral or incidental to expenditure that has already been approved by the relevant legislature or executive authority in the annual budget of the department/constitution or public entity.*
- 5.2 *Such indemnity, limitation of liability or warranty is necessitated by the day-to-day operational requirements of the department, constitutional institution or public entity, which include the acquisition of equipment such as photocopiers, PABX boards and computer hardware, the procurement of professional services and the hosting of events.*

Therefore, the CCMA could issue a guarantee without approval from the Minister of Finance. The finance sub-committee approved the guarantee. The acting national registrar and the CFO signed the guarantee.

8.6.2 Findings

8.6.2.1 The service provider for the migration of the case management system of the CCMA was appointed in contravention of the following Treasury Regulations and practice notes issued by the National Treasury:

- (a) No evidence was provided to indicate that the evaluation report was submitted to the BAC for adjudication of the bid process. This is in contradiction of the Code of Conduct for Bid Adjudication Committees dated 24 March 2006, which provides that the BAC should consider the recommendations made in the evaluation report and ensure that the scoring during the evaluation has been consistent and correctly calculated and applied, and make a recommendation to the accounting authority or delegated officials. Furthermore, no evidence was provided to indicate that the BAC made a recommendation to the finance sub-committee before the sub-committee approved the appointment of the successful bidder.
- (b) Instead, in contradiction with the Code of Conduct for Bid Adjudication Committees dated 24 March 2006, the director of the CCMA made a submission to the finance sub-committee to obtain approval for the appointment of the successful bidder as service provider. The submission was undated and unsigned.



- (c) Based on the above instances of non-compliance with the prevailing procurement prescripts, the AGSA finds that the allegation that the tender for the migrating of the CCMA's case management system was awarded to the service provider in contravention of prevailing procurement legislation is founded. In this regard, the PFMA and relevant practice notes define irregular expenditure as being expenditure, other than unauthorised expenditure, incurred in contravention of, or that is not in accordance with, a requirement of any legislation applicable to public sector procurement. This renders all payments made to the successful bidder, amounting to R4 560 000 as at 31 December 2009, irregular.

8.6.3 **Response from the CCMA**

8.6.3.1 The finance sub-committee is mandated by the governing body of the CCMA to adjudicate all tenders with a value of above R1 000 000. Given that the value of this bid was above R1 000 000, the bids were submitted to the finance sub-committee for adjudication and not to the BAC. Based on the evaluation report, management recommended that the successful bidder be awarded the tender.

8.6.3.2 For governance purposes any bid relating to the operational work of the chairperson of the BAC is submitted to the finance sub-committee for approval.

8.6.4 **Response from the AGSA**

The CCMA Supply Chain Management Policy paragraph 7 refers to approvals where all tenders above R1 million must be approved by the finance sub-committee. Clause 8.4 of the of the CCMA Supply Chain Management Policy addressed processes of adjudication and the roles and responsibilities of the BAC, which indicated that all bids must be adjudicated by the BAC. Treasury Regulation 16A stipulates that all bids must be adjudicated by the BAC. In instances where the internal policies of the CCMA are in conflict with prevailing prescripts, the prevailing prescripts must be complied with. If not, such expenditure must be recognised as irregular expenditure as it was incurred in contravention of Treasury Regulations 16A2. The legal opinion obtained by the CCMA is to the effect that where there is fatal non-compliance with requirements of the Treasury Regulations, the transactions would be *ultra vires*, and the CCMA would be obliged to repudiate the contracts concerned.



8.7 Appointment of a service provider to assist the CCMA with process, system and structure innovation and design

8.7.1 Context

8.7.1.1 It was alleged that a contract was awarded to a service provider in 2008 to re-design the CCMA's process, while there was no need for such a service. Payments amounting to R3,5 million have allegedly been made to this company; however, there were no significant changes to the CCMA's process or operations.

8.7.1.2 The advertisement for the bid for the appointment of consultants to assist the CCMA with process, system and structure innovation and design was placed in the Government Tender Bulletin of 2 March 2007. The bid closed on 23 March 2007.

8.7.1.3 Once the tenders were received, the BEC evaluated the bid proposals received on 19 June 2007. The BEC recommended that the successful bidder should be appointed as the preferred service provider at a total cost of R1 421 993.

8.7.1.4 A submission by the BEC was made to the governing body on 4 September 2007 for the approval of the appointment of the successful service provider. As indicated in the minutes dated 12 September 2007, the governing body subsequently approved the appointment of the successful bidder.

8.7.1.5 On 19 September 2007, a contract was signed between the successful bidder and the director of the CCMA for an amount of R1 887 840 (including 15% disbursements and VAT) (R943 920 each for phase 1 and 2).

8.7.2 Findings

8.7.2.1 The service provider was appointed to assist the CCMA with process, system and structure innovation and design in contravention of the following Treasury Regulations and practice notes issued by the National Treasury:

- (a) The evaluation of bid was conducted on 19 June 2007 by the BEC which recommended that the successful bidder be appointed at a total cost of R1 421 993. There is no evidence to indicate that the BAC considered the recommendation made by the BEC, or that it made a recommendation to the governing body of the CCMA or delegated official to make the final recommendation. The failure of the BAC to recommend the successful

bidder for appointment is in contravention of the Code of Conduct for Bid Adjudication Committees dated 24 March 2006, which provides that the BAC should consider the recommendations made in the evaluation reports and ensure that the scoring during the evaluation has been consistent and correctly calculated and applied and make a recommendation to the accounting authority or delegated authority.

- (b) A submission was made to the finance sub-committee to seek approval to increase the cost for phase 2 from R943 920 to R1 704 300 (including 15% disbursements and VAT). The finance sub-committee approved the cost increase on 6 May 2008. Therefore, the total amount approved by the finance sub-committee was R2 648 220 (phase 1 R943 920 + phase 2 R1 704 300).
- (c) The CCMA paid the service provider an amount of R3 025 380, which is R377 160 more than the approved amount of R2 648 220. No evidence could be submitted that the additional amount was approved by the finance sub-committee or that the amount was recovered from the service provider.
- (d) Based on the above instances of non-compliance with the prevailing procurement prescripts, the AGSA finds that the allegation that the tender to assist the CCMA with process, system and structure innovation and design was awarded to the service provider in contravention of prevailing procurement legislation is founded. In this regard, the PFMA and the relevant practice notes define irregular expenditure as being expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any legislation applicable to public sector procurement. This renders all payments made to the successful bidder, amounting to R3 025 380, irregular.

8.7.3 **Response from the CCMA**

8.7.3.1 The Code of Conduct for Bid Adjudication Committees dated 24 March 2006 was never approved as policy by the governing body of the CCMA. It was a management document to hold the management representatives serving on the BAC accountable to adjudicate bids that are within their threshold.

8.7.3.2 The CCMA is in discussions with the service provider to recover the overpayment of R377 160. The service provider has orally acknowledged its indebtedness for the overpayment and it is anticipated that it would be resolved amicably in the near future. Should this not happen appropriate legal action will be pursued.



8.7.4 **Response from the AGSA**

The CCMA had to comply with the Code of Conduct for Bid Adjudication Committees dated 24 March 2006 (refer paragraph 8.2.4).

8.8 **Appointment of a service provider for implementation of accounting and payroll solutions**

8.8.1 **Context**

8.8.1.1 It was alleged that the CCMA procured a finance system when there was no need to replace the current financial system, which operated well with minor problems. It was further alleged that the procurement process for the new finance system was not done in compliance with prevailing prescripts. Payments made to the service provider were allegedly in excess of the approved amount, resulting in an overexpenditure.

8.8.1.2 In a submission dated 19 November 2007, the CFO sought approval of the governing body of the CCMA to change the accounting and payroll system of the CCMA. The submission included a cost analysis performed by the CFO and indicated that the cost implications of the upgrading of the system would amount to R5 530 631. However, the tender for the accounting and payroll solution had already been advertised on 12 November 2007, and proposals were received from the bidders on 23 November 2007. The governing body of the CCMA subsequently approved the discontinuation of the existing system on 6 December 2007. The AGSA did not investigate the allegation regarding the need to replace the accounting system.

8.8.1.3 It is unclear how the decision to appoint the successful bidder was arrived at, as there is no documentation to indicate that the BAC considered and recommended the appointment of the service provider. Despite this, on 31 January 2008, a letter was sent from the director of the CCMA to the successful bidder to inform the company that their bid for the accounting and payroll solution had been successful. It was also mentioned that the CFO would be in contact regarding the signing of the contract and the fulfilling of the conditions of the contract.

8.8.1.4 According to the minutes of the finance sub-committee dated 22 February 2008, the committee approved the appointment of the successful bidder for R1 863 919 as well as the proposal of the successful bidder for the asset verification to the value of R293 644 (including VAT). Therefore, the total value of the two proposals amounted to R2 157 563 (including VAT).



8.8.2 Findings

8.8.2.1 The service provider for the implementation of accounting and payroll solutions was appointed in contravention of the following Treasury Regulations and practice notes issued by the National Treasury:

- (a) The tender was not advertised in line with the requirements of Treasury Regulation 16A6.3(c), which provides that *bids should be advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure except in urgent cases when bids may be advertised for a shorter period as the accounting officer/authority may determine.*
- (b) According to the technical evaluation report, the tender for the accounting and payroll solution had already been advertised on 12 November 2007 and proposals were received from the bidders on 23 November 2007. The governing body of the CCMA only approved the discontinuation of the previous accounting system on 6 December 2007, after the bid proposals for the new system had already been received.
- (c) There is no evidence to indicate that the recommendation made in the technical evaluation report was submitted to the BAC to adjudicate the bid process and to make a recommendation to the finance sub-committee. This is in contravention of the Code of Conduct for Bid Adjudication Committees dated 24 March 2006, which provides that the BAC should consider the recommendations made in the evaluation report and ensure that the scoring during the evaluation has been consistent and correctly calculated and applied, and then make a recommendation to the accounting authority or delegated official.
- (d) According to SCM Practice Note No. 1 of 2003, the formal contract document (SBD7.1 to SBD 7.3) should not form part of the bidding documents submitted to the prospective bidder, but should be made applicable only to the successful bidder after adjudication and award of the bid. There is no evidence to indicate that a contract was signed between the CCMA and the successful bidder. A service level agreement was signed between the CCMA and the successful bidder on 18 February 2010 to govern the period for post-implementation period and processes.
- (e) During the regularity audit done by the AGSA on the allegations received, overexpenditure relating to the implementation of the accounting and payroll system was identified. Subsequent to these findings, a submission was



made to the finance sub-committee for condonation of the over-expenditure amounting to R1 077 107.

- (f) The governing body of the CCMA approved the condonation of the amount on 27 August 2009. The amount of R1 077 107 was reported in the annual report of the CCMA for the 2008-09 financial year as irregular expenditure.
- (g) However, during the current investigation, the AGSA verified the correctness of the calculations of the irregular expenditure reported. The CCMA calculated the overpayment on a total payment of R5 252 214. However, according to the payment systems of the CCMA, a total amount of R6 108 950 had been paid to the successful supplier as at 31 December 2009. Therefore payments totalling R856 736 were not taken into account by the CCMA during the calculation of the irregular expenditure to be condoned and were not duly reported.
- (h) Based on the above instances of non-compliance with the prevailing procurement prescripts, the AGSA finds that the allegation that the tender for the implementation of the accounting and payroll solution was awarded to the service provider in contravention of prevailing procurement legislation is founded. In this regard, the PFMA and relevant practice notes define irregular expenditure as being expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any legislation applicable to public sector procurement. This renders payments made to the successful bidder, amounting to R856 736 (still to be condoned), as irregular.

8.8.3 **Response from the CCMA**

The acceptance of the bid document and proposal comprised a contractual relationship. The service level agreement between the parties governed the period post implementation of the system and its processes. The service level agreement was approved by the BAC and was subsequently signed.

8.8.4 **Response from the AGSA**

In terms of paragraph 2.3 of SCM Practice Note No. 1 of 2003, a formal contract document should be entered into with the successful bidder after adjudication and awarding of the bid.



8.9 Extension of a contract for IT services for maintenance support of server equipment

8.9.1 Context

8.9.1.1 The contract was allegedly awarded to the service provider without following proper procurement processes. Payments amounting to R400 000 without following the proper approval process had allegedly been paid to the service provider, while there was no need for such services.

8.9.1.2 Information submitted by the CCMA indicated that the contract with the service provider had been extended on various occasions covering a period up to 30 September 2010.

8.9.1.3 An initial service agreement between the service provider and the CCMA was signed on 1 August 2001 and expired on 31 July 2003. The signing of the contract did not form part of the scope of the investigation and therefore the procurement process for the awarding of the contract to the successful bidder was not investigated. However, the AGSA considered this service level agreement signed on 1 August 2001 and the extensions of this contract, as the last extension from 1 October 2009 until 30 September 2010 is relevant to the period that the AGSA investigated.

8.9.1.4 Payments were made for the following periods and in some instances no evidence that the contract was extended could be submitted. According to information received the contract was extended for the following periods:

- (a) 1 August 2003 to 31 July 2004 (No evidence could be submitted that the extension was approved, although payments amounting to R795 418 were made during this period.)
- (b) 1 August 2004 to 28 February 2005 (Extension was approved by the tender committee for seven months to the value of R120 561; however, payments amounting to R430 622 were made during this period.)
- (c) 1 April 2005 to 31 March 2006 (Extension was approved by the tender committee for the period to the value of R565 125; however, payments amounting to R836 436 were made during this period.)
- (d) 1 April 2006 to 31 March 2007 (No evidence could be submitted that the extension was approved, although payments amounting to R626 843 were made during this period.)
- (e) 1 April 2007 to 31 March 2008 (No evidence could be submitted that the extension was approved, although payments amounting to R406 775 were made during this period.)



- (f) 1 April 2008 to 31 March 2009 (No evidence could be submitted that the extension of the contract was approved, although payments amounting to R510 082 were made during this period.)
- (g) 1 April 2009 to 30 September 2009 (No evidence could be submitted that the contract extension was approved, although payments amounting to R227 479 were made to the service provider during this period.)
- (h) 1 October 2009 until 30 September 2010 (Extension was approved by the BAC and payments amounting to R248 844 were made to the service provider up to 31 December 2009.)

8.9.2 Findings

8.9.2.1 The contract for IT services for maintenance support of server equipment was extended in contravention of the following Treasury Regulations issued by the National Treasury:

- (a) Information submitted by the CCMA indicated that the contract was extended on various occasions until 30 September 2010. Furthermore, no evidence could be submitted that an extension was approved or that a contract existed for certain periods, although payments were made to the service provider.
- (b) An unsigned proposal from the service provider, dated May 2007, was submitted to the AGSA. The services rendered were maintenance support covering all server equipment. The cost stipulated in the proposal was R406 296 for the duration of 12 months (starting date and expiry date not mentioned in the proposal). Quarterly payments of R101 574 were required to be paid in advance. However, no evidence could be submitted that the governing body of the CCMA or delegated authority approved the proposal dated May 2007 as an extension/new contract. Furthermore, as payments exceeded the R200 000 threshold for invitation of bids, no evidence could be submitted that the reasons for deviation from inviting competitive bids were recorded and approved by the accounting officer/authority or delegate as stipulated in Treasury Regulation 16A 6.4.
- (c) According to the CCMA's accounting system, quarterly payments of R101 574 were made to the service provider for the period May 2008 to September 2009 without an approved contract. Payments to the value of R737 561 were made to the service provider during the period.



- (d) The BAC approved the extension of the existing contract with the service provider on 17 September 2009, for the period 1 October 2009 until 30 September 2010.
- (e) The total payments made to the service provider for the period 29 August 2001 to 31 December 2009, according to the CCMA's accounting systems, amounted to R4 611 092. However, due to a lack of information, the amount that should be regarded as irregular expenditure could not accurately be determined.

8.9.3 **Response from the CCMA**

8.9.3.1 The CCMA submits that there is a lack of documentation of this contract with the only copy of a signed contract being the one signed by the then director of the CCMA and the service provider in August 2001. Since the signing of the initial contract in 2001 there have been several extensions and the information at our disposal is that only a letter of extension served as an addendum to the contract. The lack of documentation is a deficiency, which had been picked up by the previous audits, and management has taken steps to centralise contract management in the supply chain management unit. When this was picked up during the process of establishing a centralised contract management, supply chain management made a submission to have the contract extended to the end of March 2010. In any event, the parties (CCMA and the service provider) have by their conduct manifested their mutual intentions to renew the contract and honour their respective obligations.

8.9.3.2 The CCMA submits that due to the lack of documentation it could not be said with certainty that all the extensions from August 2001 were approved by the BAC or accounting officer.

8.10 **Appointment of a service provider for the supply and delivery of portable voice recording devices**

8.10.1 **Context**

8.10.1.1 It was alleged that that the procurement process in awarding the contract to the service provider for the supply and delivery of portable voice recording devices was not done in compliance with prevailing prescripts. Payments made to the service provider were allegedly made without following the proper approval process.



- 8.10.1.2 The advertisement for the supply and delivery of portable voice recording devices was placed in the *Sowetan* on 15 February 2008 and the tender closed on 22 February 2008.
- 8.10.1.3 The BAC approved the appointment of the successful bidder for the supply and delivery of portable voice recording devices on 11 April 2008. The chairperson of the BAC issued an appointment letter to the successful bidder on 11 April 2008.
- 8.10.1.4 A payment agreement was signed on 29 April 2008 between the CFO on behalf of the CCMA, the successful bidder and the subcontractor, whereby the CCMA would pay an amount of R629 850 to the distributor upon receipt of all 442 portable voice recorders and the successful bidder would receive R210 118 as their profit margin.

8.10.2 Findings

- 8.10.2.1 The service provider for the supply and delivery of portable voice recording devices was appointed in contravention of the following Treasury Regulations and practice notes issued by the National Treasury:
- (a) The advertisement of the bid for the supply and delivery of portable voice recording devices was not placed in the Government Tender Bulletin for a minimum period of 21 days, which was in contravention with Treasury Regulation 16A 6.3(c). Furthermore, no evidence could be found that the governing body of the CCMA or delegate approved that the bid could be advertised for a shorter period due to the urgency thereof.
 - (b) According to a memo dated 11 April 2008, the BAC indicated that the appointment of the successful bidder had been approved. However, the BAC approved the appointment on condition that the evaluation document had to be completed and reasons should be supplied why the BEC did not comply with the evaluation requirements. The BAC approved that the bid be awarded to the successful bidder, although the evaluation document had not been completed and submitted to the BAC. The BAC therefore did not comply with the specifications as stipulated in the Code of Conduct for Bid Adjudication Committees issued 24 March 2006, which states that *the Bid Adjudication Committee should ensure that disqualifications are justified and that valid and accountable reasons/motivations were furnished for passing over bids and that the scoring has been fair, consistent and correctly calculated and applied.*



- (c) The chairperson of the BAC sent an appointment letter to the successful bidder on 11 April 2008. However, no evidence exists that a contract was signed between the CCMA and the successful bidder. According to paragraph 2.3 of SCM Practice Note No. 1 of 2003, a formal contract document should be entered into with the successful bidder after the adjudication and awarding of the bid.
- (d) The successful bidder issued a request to the CCMA on 17 April 2008 indicating that the service provider was unable to get credit facilities from the distributor and requesting that the CCMA pay the distributor directly and then pay the profit margin over to the successful bidder. A payment agreement was signed on 29 April 2008 between the CFO on behalf of the CCMA, the successful bidder and the distributor. In terms of the agreement, the CCMA would pay an amount of R629 850 to the distributor upon receipt of all 442 portable voice recorders. The successful bidder received R210 118 as their profit margin according to the agreement. However, based on the payment documentation received, an initial amount of R169 575 was paid to the distributor on 6 May 2008 upon receipt of 119 portable voice recorders and another payment amounting to R460 275 was made to the distributor on 29 May 2008 upon receipt of the remaining 323 portable voice recorders. Therefore, payments were not made in terms of the agreement.
- (e) Based on the above instances of non-compliance with the prevailing procurement prescripts, the AGSA finds that the allegation that portable voice recording devices were supplied and delivered in contravention of prevailing procurement legislation is founded. The PFMA and the relevant practice notes define irregular expenditure as being expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any legislation applicable to public sector procurement. This renders all payments made to the successful bidder, amounting to R839 967, irregular.

8.10.3 Response from the CCMA

The BAC ensured that the evaluation process was fair and adequate; however, they advised that all members of the BEC should sign the evaluation documents. That did not mean that the process was flawed.



8.10.4 **Response from the AGSA**

The BAC approved the awarding of the bid although the BEC did not comply with the evaluation requirements. The BAC therefore did not comply with the Code of Conduct for Bid Adjudication Committees.

8.11 **Other payments**

8.11.1 **Context**

8.11.1.1 It was alleged that 15 service providers to the value of R2 865 000 were appointed in contravention of supply chain management processes.

8.11.2 **Findings**

8.11.2.1 SCM Practice Note No. 8 of 2007-08, paragraph 3.3.3 states that *if it is not possible to obtain at least three (3) written price quotations, the reasons should be recorded and approved by the accounting officer/authority or his/her delegate*. Two instances have been identified where two sole providers were appointed for the rendering of services to the value of R110 595 and R53 140, respectively, without obtaining three quotes. No evidence could be found that the accounting authority or delegated authority approved the deviation as stated in paragraph 3.3.3 of SCM Practice Note No. 8 of 2007-08.

8.11.2.2 The CCMA appointed a recruitment agency; however, only one recruitment agency was considered. Three potential contractors from the same recruitment agency were evaluated and the CCMA did not obtain three quotes from three different recruitment agencies. The finance sub-committee subsequently approved and condoned the deviation by not inviting three quotations and the related expenditure incurred in August 2008. The expenditure incurred for the services rendered amounted to R607 299.

8.11.2.3 The CCMA invited proposals for the delivery of IT services. However, payments were made to two service providers for providing these services that did not score the highest number of points and were also not recommended by the evaluation committee. Payments amounting to R178 503 and R324 216 were made to the service providers, respectively.

8.11.2.4 Paragraph 4.1 of SCM Practice Note No. 2 of 2005 states that *the accounting officer should invite competitive bids for all procurement above R200 000*. Furthermore, paragraph 4.4 states that *should it be impractical to invite*



competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services, in accordance with Treasury Regulation 16A6.4 by other means, such as price quotations or negotiations. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. One instance was identified where the CCMA invited three quotations for digital signage. The CCMA appointed a service provider to the value of R367 522 without inviting competitive bids. The reasons for not inviting competitive bids were not recorded and approved by the accounting officer/authority or his/her delegate, as stipulated in Treasury Regulation 16A6.4.

8.11.2.5 The CCMA appointed a service provider to render advertising services amounting to R612 760, by inviting quotations. From the payment documentation, it was determined that the services rendered were of the same nature and it appears as if the orders were split to avoid inviting competitive bids for transactions over R200 000. This is in contradiction with SCM Practice Note No. 8 of 2007-08, paragraph 3.5, which states that *goods, works or services may not deliberately be split into parts or items of lesser value merely to avoid complying with the requirements of the prescribed thresholds.*

8.12 **Recommendations**

8.12.1 The governing body of the CCMA should evaluate the following with regard to the appointment of service providers:

- (a) The reasons why service providers were appointed without following the supply chain management policies of the CCMA and stipulations of the PFMA and practice notes and regulations issued by the National Treasury.
- (b) Possible actions against employees, in terms of the PFMA, who appointed service providers in contravention of the stipulations of the procurement policy, the PFMA and practice notes and regulations issued by the National Treasury.
- (c) Whether expenditure incurred constitutes irregular expenditure as defined in the PFMA and, if so, report the irregular expenditure in terms of the PFMA.
- (d) Taking effective and appropriate steps to prevent irregular expenditure caused by not complying with the supply chain management policies of the CCMA.



9. Allegations that the CCMA incurred fruitless and wasteful expenditure

9.1 Subsistence and travelling costs

9.1.1 Context

9.1.1.1 Allegations in relation to the appointment of the corporate services manager and three commissioners at head office were that the corporate services manager and the commissioners did not relocate to Johannesburg but continued to reside in their hometowns. The total cost incurred to date was more than R1,5 million. The CCMA paid and still pays for the following:

- Flights to head office on a weekly basis
- Car hire on a weekly basis
- Hotel accommodation
- Breakfast and supper

9.1.2 Findings

9.1.2.1 Corporate services manager (Cape Town)

- (a) The appointment of the corporate services manager was approved by the governing body of the CCMA as indicated in the minutes of the meeting held on 12 September 2007. The director of the CCMA and the corporate services manager signed the contract on 28 November 2007.
- (b) The corporate services manager was appointed on a fixed-term contractual basis for two years. The contract started on 1 December 2007 and ended on 30 November 2009. The corporate services manager was appointed at the national CCMA office, but continued to stay in Cape Town for the duration of the contract.
- (c) The terms of the contract stipulated that the CCMA would, inter alia, pay the following cost:
 - Flight costs
 - Accommodation, car and subsistence costs (relocation costs) for the duration of the contract
 - It was estimated that the above costs over the two-year period would amount to approximately R185 920.



- It was also indicated that the corporate services manager would be working full time in Johannesburg for the first six months.
- (d) It was confirmed by the CCMA human resource department that the corporate services manager had resigned from the CCMA during February 2009.
- (e) According to the following payslips, the corporate services manager claimed for flights on a monthly basis, as per contract dated 20 November 2007. As all payslips were not provided the total amount claimed for flight costs could not be determined.

Table 2: Corporate services manager

Payslip	Description	Total value
April 2008	Travel costs – Flights	12 842.00
June 2008	Travel costs – Flights	16 145.00
July 2008	Travel costs – Flights	14 014.70
September 2008	Travel costs – Flights	10 705.00
November 2008	Travel costs – Flights	8 736.00
January 2009	Travel costs – Flights	2 756.48
February 2009	Leave payout and flights	31 558.30
Total payments to the commissioner based on information submitted to the AGSA		96 757.48

- (f) The corporate services manager also received the following payments each month:

Table 3: Corporate services manager

Description	Monthly cost R	Total cost for duration of contract R
Accommodation, car and subsistence cost, fixed amount per month (no monthly amount was stipulated in the contract)	3 448.00	82 752.00
Entertainment (not stipulated in contract)	208.33	4 999.92



Description	Monthly cost R	Total cost for duration of contract R
Cellphone (as agreed in contract)	833.33	19 999.92

9.1.2.2 Commissioner one (Durban)

- (a) The governing body of the CCMA approved the commissioner's appointment on 6 March 2008 as national senior commissioner. On 27 March 2008 an offer was made to the commissioner for appointment as a full-time national senior commissioner of the CCMA at the national office. The commissioner was required to relocate to Johannesburg; however, it was agreed that the CCMA would continue to meet the commissioner's travel expenses for the remainder of 2008 and would assist with relocation to Johannesburg. The contract commenced on 1 April 2008 and will continue for six years.
- (b) The acceptance of offer letter was signed by the director of the CCMA on 4 April 2008 and by the commissioner on 11 April 2008. However, the copy of the formal contract was not provided to the AGSA. Therefore, the terms and conditions of the contract could not be confirmed.
- (c) The following table sets out the travel expenses paid by the CCMA on behalf of the commissioner from 1 April 2008 to 31 December 2009:

Table 4: Commissioner one

Period	Description	Total value R
1 April 2008 to 31 December 2008	Flights, accommodation and car rentals	366 779
1 January 2009 to 31 December 2009	Flights, accommodation and car rentals	114 572
Total		481 351

- (d) Based on the conditions set out in the acceptance of offer letter signed on 4 April 2008, it was stipulated that the CCMA would continue to pay the travel expenses of the commissioner up to December 2008. The commissioner relocated to Johannesburg. According to the CCMA the travel expenses paid for the period January 2009 to December 2009 constitute business expenses.



9.1.2.3 Commissioner two (Cape Town)

- (a) The only document submitted to the AGSA with regard to the appointment of the commissioner was a letter from the director sent to the commissioner on 10 December 2007, which indicated that the commissioner was appointed as a full-time senior commissioner. The contract was effective from 1 January 2008. The position was in the CCMA national office. It was stipulated in the letter that the commissioner would be required to regularly attend meetings in Johannesburg and that the CCMA would pay the flights. The commissioner would continue to stay with his family.
- (b) The governing body approved the appointment of the commissioner as a part-time senior commissioner in the Western Cape on 19 March 2009 with effect from 1 April 2009.
- (c) The following table sets out the travel expenses paid by the CCMA on behalf of the commissioner as per the agreement from 1 January 2008 to 31 March 2009:

Table 5: Commissioner two

Period	Description	Total value R
1 January 2008 to 31 March 2009	Flights, accommodation and car rentals	183 471
1 April 2009 to 31 December 2009	Flights, accommodation and car rentals	31 757
Total		215 228

- (d) The travel expenses paid by the CCMA for the period 1 April 2009 to 31 December 2009 were not part of the agreement, but according to the CCMA constitute business expenses.

9.1.2.4 Commissioner three (Cape Town)

- (a) According to the offer of appointment letter dated 27 March 2008, the commissioner would be appointed as a full-time general manager: operations in the CCMA national office. It was indicated that the commissioner would still perform the role in the Western Cape office, but would be required to travel to the national office regularly for meetings and the CCMA would pay for the expenses incurred by the commissioner.



- (b) The contract commenced on 1 April 2008 and would be for a period of six years. The acceptance letter was signed by the director of the CCMA and the commissioner on 9 April 2008. The governing body approved the appointment of the commissioner on 6 March 2008.
- (c) The following table sets out the travel expenses paid by the CCMA on behalf of the commissioner from 1 April 2008 to 31 December 2009 according to the agreement reached on 27 March 2008:

Table 6: Commissioner three

Period	Description	Total value R
1 April 2008 to 31 December 2008	Flights, accommodation and car rentals or shuttle services	155 688
1 January 2009 to 31 December 2009	Flights, accommodation and car rentals or shuttle services	325 672
Total		481 360

9.1.3 Response from the CCMA

- 9.1.3.1 The CCMA confirmed that in striving to attract and retain superior talent, the CCMA agreed with the commissioners that the CCMA would cover the accommodation and travel expenses when they were required to attend meetings or other business engagements at the National Office. The governing body of the CCMA approved the appointment of the commissioners. The travel and accommodation expenses constitute business expenses, which were incurred in the normal running of the CCMA operations and as agreed with the commissioners. The expenses incurred in respect of the commissioners are accordingly neither fruitless nor wasteful expenditure.

9.2 Payment to South African Revenue Service

9.2.1 Context

- 9.2.1.1 It was alleged that the CCMA has in the past not collected and paid over PAYE from part-time commissioners to the South African Revenue Service (SARS) and therefore had to pay penalties and interest to SARS. SARS demands that the CCMA should take responsibility for this and pay penalties. A survey conducted by an audit firm has shown that part-time commissioners were indeed not paying

tax and as a result the CCMA paid the debt caused by part-timers to the value of R17,6 million by 31 March 2009.

9.2.1.2 An employees' tax assessment for the 2003-04 to 2005-06 tax years was issued to the CCMA by SARS on 30 March 2009. In terms of paragraph 2(1) of the Fourth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), an employer should withhold employees' tax from any remuneration that becomes payable or paid to an employee and pay the said employees' tax over to SARS. The CCMA did not subtract PAYE from part-time commissioners' salaries for the 2003-04 to 2005-06 tax years and pay it over to SARS.

9.2.2 Findings

9.2.2.1 While the tax period relating to the allegations made falls beyond the scope of the AGSA's investigation, the matter was considered, as the decision to pay SARS, as well as the payment made, occurred during the period under review.

9.2.2.2 The CCMA contracted an audit firm to determine the outstanding amount of PAYE for part-time commissioners that received remuneration for the 2003-04 to 2005-06 tax years. The following PAYE, penalties and interest had to be paid to SARS for not complying with paragraph 2(1) of the Fourth Schedule of the Income Tax Act in not deducting PAYE from part-time commissioners that received remuneration from the CCMA.

Table 7: SARS PAYE assessment

Tax year	PAYE not paid to SARS	Penalties	Interest	Total
03/04	2 833 360.40	283 336.04	1 772 293.68	4 888 990.12
04/05	3 566 783.33	356 678.33	1 831 746.52	5 755 208.18
05/06	4 645 195.43	464 519.54	1 897 827.11	7 007 542.08
Total	11 045 339.16	1 104 533.91	5 501 867.31	17 651 740.38

9.2.2.3 A deed of settlement was signed and concluded between the CCMA and SARS on 2 April 2009. The CCMA was of the view that no penalty and interest should be imposed by SARS as a result of its voluntary disclosure to SARS. This was accepted by SARS and it was agreed that the CCMA had to pay R11 045 339.

9.2.2.4 The CCMA agreed to pay the settlement amount of R11 045 339 in two instalments as follows:

(a) R6 000 000 on or before 31 March 2009



(b) The balance of R5 045 339 on or before 30 April 2009

9.2.2.5 The CCMA made the following payments to SARS:

Table 8: SARS PAYE payment

Date	Payment made to	Amount R
31/03/2009	SARS PAYE	6 000 000
04/05/2009	SARS PAYE	5 045 339
Total		11 045 339

9.2.2.6 The fruitless and wasteful expenditure was reported in the annual report of the CCMA for the 2008-09 financial year. According to note 23 of the annual report, for the remaining tax year of 2007, the CCMA is issuing the IT3a for submission to SARS by 15 August 2009 and after that submission the CCMA will be fully compliant. As a result of the late submission there might be some liabilities; however, it could not be quantified. During a discussion with the CFO, he indicated that the IT3a for the 2007 year was submitted to SARS on 4 February 2010. The CCMA has not yet received an assessment from SARS. SARS confirmed on 21 January 2010 that there was no settlement agreement with the CCMA regarding the 2007 tax year assessment.

9.2.2.7 The CCMA has complied (for the tax years of 2008 and 2009) with paragraph 2(1) of the Fourth Schedule of the Income Tax Act by deducting PAYE from commissioners' remuneration and issued the IT3a and IRP5 certificates to part-time commissioners.

9.2.3 **Response from the CCMA**

9.2.3.1 During the CCMA's external audit process for the financial year 2006/07, the CCMA sought to confirm their approach to the tax treatment of the independent contractors. As a result thereof, the CCMA applied for a non-binding private opinion from SARS with regard to the CCMA's interpretation of the income tax legislation and the tax treatment of part-time commissioners.

9.2.3.2 On 22 August 2007, SARS responded with a non-binding private opinion in which they advised the CCMA that the part-time commissioners should be viewed as part-time employees and that they should be taxed at a rate of 25%. Upon receipt of this opinion, the CCMA immediately commenced deducting 25% as tax from payments made to all part-time commissioners.



9.2.3.3 It is also the CCMA's view that, in the light of the steps taken to approach SARS and resolve, this issue must be seen in the context of the advice received by the CCMA, the historical treatment of such part-time commissioners and legislative amendments. In the circumstances it is the CCMA's view that the matter did not warrant disciplinary action against employees.

9.2.4 **Recommendations**

9.2.4.1 The governing body should continue to attempt to recover taxes not declared and paid to SARS by part-time commissioners.

9.2.4.2 The governing body should make a settlement arrangement with SARS regarding the non-compliance with the Income Tax Act for the 2007-08 tax year.

9.3 **Provident Fund**

9.3.1 **Context**

9.3.1.1 It was alleged that the payments to the Provident Fund were not paid to the provident fund administrator timeously and therefore the CCMA incurred interest and penalty fees with regard to the late payment.

9.3.1.2 A letter issued to the principal officer of the CCMA Provident Fund on 16 September 2009 from the provident fund administrator indicated that the Pension Fund Act, 1956 (Act No. 24 of 1956) (Pension Fund Act) places, inter alia, the following obligations on the employer, in so far as the payment of contributions is concerned:

- (a) *In the event that the contributions are not paid to the fund within seven days of the end of the month, the employer shall be responsible for paying interest on the outstanding contributions.*
- (b) *According to legislation the interest rate will be 20 percent for outstanding amounts less than R10 000 and 17 percent for amounts of R10 000 and more.*
- (c) *The interest rate shall be compounded daily and shall be calculated from the first day following the period for which the contribution was payable.*

9.3.1.3 During a discussion with the former principal officer of the CCMA Provident Fund, it was indicated that the August 2009 payment towards the Provident Fund was delayed. The contributions of 18,25 % had been deducted from the salaries on 25 August 2009. The schedules were submitted to the fund administrator on 25 August 2009 and the electronic funds transfer was processed for



authorisation. On request of the CFO, the payment to the Provident Fund was withheld. During a discussion with the CFO on 19 January 2010 he indicated that the reason for the delay in the August payment of the contributions for the provident fund was due to the fact that the CCMA experienced cash-flow constraints.

9.3.2 Findings

9.3.2.1 The contribution of R1 631 101 for August 2009 to the Provident Fund was only paid on 17 September 2009, which was done in contradiction with the Pension Fund Act. Therefore the CCMA had to pay interest amounting to R11 257. The interest was paid over to the Provident Fund on 29 October 2009.

9.3.2.2 The provident fund administrator confirmed that during the period 1 March 2008 to January 2010, the CCMA only paid the August 2009 contributions later than what the Pension Fund Act stipulates.

9.3.2.3 Based on the above instance of non-compliance with the Pension Fund Act, the AGSA finds that the allegation regarding the late payment to the Provident Fund is founded. This renders the payment for interest incurred due to late payment, amounting to R11 257, fruitless and wasteful expenditure. The PFMA and relevant practice notes define fruitless and wasteful expenditure as being expenditure which was made in vain and would have been avoided had reasonable care been exercised.

9.3.3 Response from the CCMA

9.3.3.1 Prior to August 2009 the CCMA submitted a cash flow projection to the Department of Labour in which it demonstrated that it would have a shortfall of R65 million. The CCMA also submitted a request for an early draw-down of the confirmed funds in August 2009 to ensure that the cash flow requirements of the CCMA were met while the Department of Labour was considering the additional request of funds.

9.3.3.2 The CCMA was promised that the funds would be in the CCMA's account by 4 September 2009 and at that time the only outstanding payments were the employee contributions in respect of the Provident Fund contribution. The payment to the Provident Fund was only effected on 17 September 2009 upon receipt of the funds from the Department of Labour.

9.3.3.3 This matter was clearly out of the control of the CCMA and was dependent on funding received or to be received from the Department of Labour.



9.3.4 **Response from the AGSA**

Although the CCMA indicated that the reason for the late payment to the Provident Fund was the dependency on the funding from the Department of Labour, the payment to the Provident Fund was processed before the CCMA received the funds from the Department of Labour.

9.3.5 **Recommendations**

According to section 1 of the PFMA, fruitless and wasteful expenditure is defined as *expenditure which was made in vain and would have been avoided had reasonable care been exercised*. The interest amounting to R11 257 paid to the Provident Fund should therefore be regarded as fruitless and wasteful expenditure. The governing body of the CCMA should report the fruitless and wasteful expenditure in terms of section 55(h)(i) of the PFMA.

10. Allegations that the risk manager and human resource manager were appointed without following due process

10.1 Appointment of a risk manager

10.1.1 Context

10.1.1.1 It was alleged that the process followed in the appointment of the risk manager was not in line with the prescribed legislation and regulations.

10.1.1.2 The position for the risk manager at the CCMA head office was advertised on 17 April 2009 and the closing date was 30 April 2009. The CCMA received 13 applications for the position.

10.1.1.3 The requirements were as follows:

- Five-year post-matric qualification (B Com, CIA, CCSA, MBA advantageous)
- Five years' risk management experience and a minimum of two years' experience in a senior management position
- Proven facilitation and report writing skills and ability to interact with all levels of management
- Relevant working experience in risk, internal and forensic auditing
- Knowledge of PFMA and Labour Relations Act frameworks
- Public sector experience would be advantageous
- Advanced computer literacy, including Pro Audit/Risk Management software



- Valid Code 08 driver's licence and the ability to travel

10.1.1.4 A shortlist was compiled and five candidates were invited for an interview on 22 May 2009.

10.1.2 Findings

10.1.2.1 The interview panel prepared a submission with regard to the interview process and the panel's recommendation. The submission was not signed by the panel.

10.1.2.2 The successful candidate's CV indicated that he had the required qualifications, B Com degree, Certified Internal Auditor (CIA) and had a Certificate in Control Self-Assessment (CCSA) and was also a member of the Institute of Risk Management South Africa. He also had the necessary work experience as he had been employed for seven years, and had five years' risk management experience, which also included two years' experience in a senior management position.

10.1.2.3 The CCMA appointed the successful candidate as a risk manager with effect from 1 July 2009. The director and the successful candidate, however, only signed the contract on 14 October 2009. The contract was also not signed by any witnesses.

10.1.2.4 Based on the information received, the risk manager was appointed in line with the prescribed policy.

10.2 Appointment of a human resource manager

10.2.1 Context

10.2.1.1 It was alleged that the process followed in the appointment of the human resource manager was not in line with the prescribed legislation and regulations.

10.2.1.2 A meeting was held between the CCMA director, GM: Operations, CFO and Acting GM: Corporate Services on 12 May 2009, and an agreement was reached with a consultant that they would provide a dedicated resource to the CCMA for a fixed-term contract of six months, to the value of R500 000, to act as human resource manager and to implement the human resource proposals. It was also agreed that the consultant would second a resource on a full-time basis through a "body shop" (labour brokering service) arrangement. The tender contract still applies and monthly invoices will be paid to the CCMA by to the consultant to cover the body shop agreement.



10.2.2 Findings

10.2.2.1 The CCMA appointed a consultant on a “body shop” arrangement, without following the supply chain procurement processes. The reasons for the appointment of the consultant were because the consultants assisted the CCMA with the re-organisation of business process re-engineering which was completed in phase 1 and 2 and phase 3 should be initialised. However, the finance sub-committee approved the deviation for not following the supply chain processes in appointing the consultant on a body shop arrangement for a six-month period, on 18 May 2009.

10.2.2.2 After the expiry of the contract with the consultants, the CCMA appointed one of the consultants on a fixed-term service contract. The director of the CCMA signed the contract on 11 January 2010. The duration of the agreement was for three months from 1 January 2010 to 31 March 2010.

10.2.2.3 Based on the information obtained, the human resource manager was appointed by deviating from the procurement process for inviting tenders. The reasons for deviation from supply chain management processes were recorded and approved by the finance sub-committee.

11. Other allegations that the AGSA received during the investigation

11.1 Salary advance to a part-time commissioner

11.1.1 Context

11.1.1.1 It was alleged that during January 2009, the CFO and the general manager: Operations authorised a salary advance to a part-time commissioner.

11.1.1.2 The governing body of the CCMA approved the appointment of a part-time commissioner of the Western Cape region. The contract with the part-time commissioner was not provided to the investigating team. The offer of appointment letter was signed by the part-time commissioner on 7 April 2008. The contract was effective from 1 May 2008 for a period of three years. The appointment letter stipulated that he would be paid a daily fee of R1 050 and up to R750 for awards issued.

11.1.1.3 A fixed-term service contract between the CCMA and the part-time commissioner and the director of the CCMA was signed on 17 March 2009. The duration of the agreement was for seven months from 1 April 2009 to 31 October 2009. It was



stipulated in the contract that a fixed amount of R22 862 per month, less any lawful deductions, would be paid on the 25th of each month. The director of the CCMA extended the contract from 1 November 2009 to 31 March 2010 based on the same conditions as agreed upon in the contract of 30 October 2009. There is no evidence that the appointment and the extension of the contract were approved by the governing body of the CCMA.

11.1.1.4 The part-time commissioner signed an acknowledgement of debt on 2 February 2009 for the amount of R73 664. The terms of repayment of the salary advance was not stipulated in the agreement.

11.1.2 Findings

11.1.2.1 According to the cash book an amount of R73 664 was paid to the part-time commissioner on 10 February 2009. No evidence could be obtained as to who approved the advance.

11.1.2.2 The salary advance was not granted and recovered in accordance with the approved policy with regard to salary advances, dated November 2000.

11.1.2.3 According to the policy, a salary advance can only be granted to a maximum amount of 75% of the employee's previous month's net salary. The part-time commissioner's net salary for January 2009 was R4 641, but a salary advance of R73 664 was paid on 10 February 2009. Furthermore, the policy stated that the salary advance should be recovered from the employee's salary in two equal amounts and the first instalment should be recovered at the end of the month in which the advance was granted. The salary advance was recovered from February 2009 to November 2009 according to the part-time commissioner's payslips.

11.1.2.4 The salary advance to the part-time commissioner of the Western Cape was paid in contravention of the CCMA policy on salary advances.

11.1.2.5 A fixed-term service contract between the CCMA and the part-time commissioner was signed on 17 March 2009. According to the contract the commissioner would be paid a gross salary of R22 862 per month. However, according to his payslips for April 2009 and May 2009 he received a gross salary of R45 362 and R26 237 respectively.

11.1.3 **Response from the CCMA**

11.1.3.1 The CCMA concedes that the salary advance to the part-time commissioner was not in accordance with the policy. As a result of the conduct of the individuals concerned, in authorising the payment of R73 664, the CCMA verbally reprimanded the individuals concerned and ensured that steps were taken to retrieve the money. In addition the full amount has been recovered from the part-time commissioner.

11.1.4 **Recommendations**

11.1.4.1 As the salary advance was paid in contravention of the CCMA policy on salary advances, the governing body of the CCMA should determine if the payment should be regarded as irregular or unauthorised expenditure and if so, regularise accordingly.

11.1.4.2 The gross salary paid for April and May 2009 was not in accordance with the agreement signed on 17 March 2009. The governing body of the CCMA should determine the overpayments made to the part-time commissioner for April and May 2009 and recover the overpayments.

11.2 **Bank account**

11.2.1 **Context**

11.2.1.1 It was alleged that the CFO changed the CCMA's bank account. It was also alleged that the CCMA's national office is responsible for all payments and is based in Johannesburg; however, the new branch of the new bank is in Polokwane. Two current accounts are being used for payments.

11.2.1.2 According to the minutes of the finance sub-committee of 6 May 2008, the CFO indicated that the CCMA invited four major financial institutions to submit proposals to become the transactional bankers for the CCMA. The CFO indicated that competitive pricing was looked into as the CCMA was paying excessive bank charges. The finance sub-committee approved one of the four major financial institutions as the preferred banker according to the minutes of 6 May 2008.

11.2.2 Findings

- 11.2.2.1 There is no evidence that the recommendation made in the evaluation report to appoint the preferred banker was submitted to the BAC to adjudicate the bid process and to make a recommendation to the finance sub-committee. This was in contradiction with the Code of Conduct for Bid Adjudication Committees dated 24 March 2006, which states that the *Bid Adjudication Committee should consider the recommendations made in the evaluation reports and ensure that the scoring during the evaluation has been consistent and correctly calculated and applied and make a recommendation to the accounting authority or delegated official.*
- 11.2.2.2 The CCMA requested ex post facto approval from the National Treasury on 3 November 2009 to open a new bank account. The National Treasury approved the opening of the new bank account on 8 December 2009; however, it was approved based on the condition that the CCMA's previous account had to be closed within a maximum period of six months after the new bank account became operational. The new account was opened during October 2008 at a branch in Johannesburg and not in Polokwane as alleged.
- 11.2.2.3 The investigating team confirmed on 21 January 2010 that the CCMA's former bank account is still operational. Five call deposit accounts are also still in operation and 11 current accounts were closed on 27 January 2009.

11.2.3 Response from the CCMA

- 11.2.3.1 The CCMA's former bank account could not be closed before confirmation from the National Treasury was obtained in respect of the closure. Such approval was obtained on 8 December 2009, and therefore the 6-month period only expires in June 2010. The transfer of the drawdown could only be made into the new bank account once loaded on the Government Payment System. This process has, however, not been completed to date.

11.2.4 Recommendations

- 11.2.4.1 The governing body should take effective steps to close the CCMA's former bank account as soon as possible to comply with the National Treasury requirements.



12. APPRECIATION

The assistance rendered during the investigation by the officials of the CCMA is appreciated.

Auditor-General

Pretoria

June 2010



**AUDITOR - GENERAL
SOUTH AFRICA**

Auditing to build public confidence