



OMBUDSMAN

SINT MAARTEN

Systemic Investigation

regarding the tendering and awarding process of the Solid Waste Collection 2021-2026



JUNE 2022

Content

1. Introduction	3
1.1 Objective and research question	3
1.2 Methodology	3
1.3 Chapter overview	4
2. Legal basis	5
3. Terms of Reference Collection of Solid Waste 2021-2026 (including addendum I & II)	7
4. Evaluation process	12
4.1 Original business license based on the scope of the work tendered	14
4.2 Missing bank statements	17
4.3 Resignation/ departure of committee members	18
4.4 Pricing	19
4.5 Selection of contractors	21
4.6 Indemnification meetings	23
4.7 Post awarding	24
5. Bottlenecks and challenges	27
6. Conclusion	31
7. Recommendations	32
8. Response Minister of VROMI to preliminary findings report (PFR)	33
Postscript	34

1.Introduction

Shortly after the awarding process of the Solid Waste Collection 2021-2026, complaints were filed with the Ombudsman against the Minister of Public Housing, Spatial Planning, Environment, and Infrastructure (VROMI) by multiple bidders¹ that participated in the collection of solid waste tendering process, who expressed concerns regarding the credibility, reliability, and transparency of same. Some bidders² did not file complaints with the Ombudsman, however, via their legal representatives, expressed similar sentiments about the tender process to the Minister of VROMI. This was not an unicum. The collection of solid waste is generally placed on bid every 5 years and it is not unusual that the transparency, reliability, and fairness of the bidding process is brought into question, not only by participating companies but members of parliament³ as well. Complainants letters which were addressed to the minister, were ultimately responded to through the intervention of the Ombudsman. Subsequent follow-up meetings and/or correspondence also took place between the Ombudsman, complainants, and the Ministry of VROMI. The Ombudsman subsequently informed the minister that a proper assessment of the bidding process could not be made without the complete file, which included the tender documents of all twenty-four (24) companies as well as the internal awarding advice and full scoring breakdown/sheet of all bidders. After some initial reluctance the requested documentation was provided by the minister.

1.1 Objective and research question

Considering the complaints/concerns received, as well as the findings in the preliminary research of the tendering process conducted, and the importance of transparency of procurement procedures and policies of government, the Ombudsman informed the Minister on 27 August 2021 that the Bureau Ombudsman had refrained from further investigating the previously submitted complaint(s) and will proceed with a Systemic Investigation into the tendering and awarding process of Solid Waste Collection 2021-2026, in the general interest of the public. The official Notification of Systemic Investigation (NOSI) followed on 17 September 2021, in which the Ombudsman resolved to conduct a systemic investigation regarding: *‘The tendering and awarding process of the solid waste collection 2021-2026; transparency of the pertinent procedures and policies and evaluation by the evaluation committee.’*

1.2 Methodology

For research the tender documents of all the companies that submitted bids and the available evaluation documentation of the evaluation committee were reviewed. The Terms of Reference (ToR) for the Collection of Solid Waste on Sint Maarten 2021-2021,

¹ These bidders were Quality Sweepers & Maintenance B.V. and Vision General Works B.V.

² These bidders were Leonard Enterprise N.V. and All Waste in Place N.V.

³ Questions MP T. Leonard, UV/243/2015-2016.

as well as the administrative procurement documents used by the ministry, the FIDIC⁴ Green Book and the SAAB⁵ 1988 were also examined. Hearings were conducted with the members of the evaluation committee, the Minister & Secretary General (SG) of VROMI and the present interim department head of Infrastructure Management. Meetings were also held with the garbage contractors that have been awarded contracts.

The information gathering process was frustrated by the refusal of the minister, in contravention of article 19 the National ordinance Ombudsman, to provide critical information to the investigation. Based on the hearings with the evaluation committee it became evident that the individual evaluation sheets for the completeness of tender documents, as well as signed copies of the internal finding's reports were not included in the documentation provided by the ministry. Other follow-up information and/or documentation, based on the knowledge attained from the hearings, was requested as well. The minister refused to provide the pertinent information citing that the ministry had concluded that *'the information already provided to the office of the Ombudsman was thorough and complete'* and that *'the question and request goes outside the scope of the investigation'*. The feedback on the synopsis of the hearing with the evaluation committee was also frustrated due to the committee members being informed that communication with the Ombudsman regarding the content of the synopsis could only take place via the secretary general. As a result, some committee members did not respond officially and/or their response to the synopsis, although submitted to the ministry, was allegedly not forwarded to the Ombudsman. It should also be noted that except for the cabinet members, no other committee members were (officially) informed of the hearings to be conducted by the Ombudsman. Members only became aware via a reminder email sent by the Ombudsman to the individual members directly. As per procedure the initial notification of the hearing was only sent to the minister and secretary general, who was responsible for the dissemination of same.

1.3 Chapter overview

Chapter 1 gives a description of the objective and scope of the investigation as well as provides the chapter overview. In chapter 2 the legal basis of public procurement is examined. In chapter 3 the ToR is handled. In chapter 4 the evaluation process is analyzed in detail. The bottlenecks are identified and discussed in chapter 5. The conclusion is presented in chapter 6, followed by the recommendations in chapter 7. The response of the minister to the preliminary findings report (PFR) is provided in chapter 8.

⁴ FIDIC is the French acronym for the International Federation of Consulting Engineers.

⁵ Standard general administrative conditions, for works executed within the framework of the multi-annual plan Netherlands Antilles and other government projects.

2. Legal basis

The legal basis for the public tender of the Collection of Solid Waste on Sint Maarten 2021-2026 is based on the following documentation and or (unwritten) procedures:

National accountability ordinance (*‘Comptabiliteitslandsverordening’*)

Pursuant to article 47 the execution of works and the purchase of goods or services by the public entity Sint Maarten is put out to public tender. In principle all expenditure should take place in public. A public tender is not required if the projected expenditure does not exceed the amount of NAf. 50,000.00 in the case of the purchase of services or goods; or the amount of NAf. 150,000.00 in the case of the execution of works.

The Minister of Finance is authorized to deviate from the public spending rule in certain exceptional cases. These cases are confined to expenditure as a result of a disaster and expenditure for which further delays are counter to the public interest. It should be noted that this expenditure, too, is subject to control after the event, via the approval of the financial statements. Paragraph 6 of article 47 contains the instruction to the government to establish further rules regarding the structure of the tendering procedure, among other things. In this way, government tendering is designed uniformly, which benefits potential suppliers and government. After all, this concerns spending of public funds, which should take place honestly and openly. The further rules not only concern public tenders, but also private ones. These may include rules concerning the tendering method, the requirements set for suppliers and the extent to which specifications can still be adjusted in response to the bids received. Rules may also be imposed with regard to the preparation of the specifications, in which special attention is devoted to certain elements such as the durability of the goods or services to be provided, types of jobs and working conditions. As an important client, the government can start and support trends in society that are consistent with overall government policy via a well-thought-out tendering policy. It is important to note that to date the national decree containing general measures establishing these rules have not been established. Rather the minister has made efforts in that direction by recently establishing a public procurement policy.

National decree awarding of contracts Collection of Solid Waste on Sint Maarten 2021-2026 (LB 10 March 2021, nr. 21/0081)

This decree authorizes the Minister of VROMI to act on behalf of the public entity Sint Maarten to enter into management agreements for the servicing of goods regarding the collection of solid waste with Meadowlands B.V., Garden Boyz B.V., West Indies Landscaping Company N.V (WILCO), All Waste in Place N.V. (AWIP), and the sole proprietor Avyanna CleanUp & Construction (Avyanna) for a period of five (5) years. Starting as of 1 April 2021 to 31 March 2026. The collection of solid waste is regarding seven (7) districts within the territory Sint Maarten. The Minister of VROMI initially incorporated the possibility for the management agreements to be extended for a

maximum period of two (2) years in the event that the process for the start of a new contract is not finalized in time.

However, this is in contravention with the principle that all expenditure should take place in public, in accordance with the ‘*Comptabiliteitslandsverordening*’, and could therefore not be incorporated⁶.

General administrative procurement principles, conditions, and best practices:

The ‘*Fédération Internationale des Ingénieurs-Conseils*’ (FIDIC-1999 Green Book); Contains the format of the tender; Short Form of Contract - General Conditions.

The SAAB English translation 1997: Standard general administrative conditions, for works executed within the framework of the multi-annual plan Netherlands Antilles and other government projects. The Ministry of VROMI, department of Infrastructure Management follows the mentioned general conditions and best practices for the solid waste tenders.

Terms of Reference (ToR) Solid Waste on Sint Maarten, October 2020

Ministry of VROMI, department of Infrastructure Management.

Unwritten procedures (tender process)

At the time of the Solid Waste Tender 2021-2026 process there was no established law/policy/procedure regarding tendering. The department of Infrastructure Management has been following unwritten procedures/practices.

The general (unwritten) tender process is as follows:

1. Preparation of the tender by the Infrastructure Management department;
2. Tendering (call to bid);
3. Evaluation round (completeness check and evaluation);
4. Price calculation;
5. Awarding.

The Infrastructure Management department prepares the ToR. The tender is initiated after approval of the ToR by the CoM. The ToR is made available to the public (the call to bid). There is an information meeting after the call to bid. Minutes of the meeting and all addendums are drafted and form an integral part of the process. The public tender commences. Only bids that are submitted within the allotted timeframe are accepted. Each bid must be submitted in threefold. The bids are secured and the (usually) 3-member committee are assigned a meeting room and the evaluation begins. The first part of the evaluation is the completeness check; the submitted bids are meticulously checked to verify if the required documents as listed, are submitted in the 3 packages of the bidder. The completeness of documents is done in the beginning to determine whether the

⁶ ‘*Notitie*’ of the Director of the Cabinet of the Governor d.d. 9 March 2021.

contractors complied with having all the documents present prior to being evaluated. Each committee member would then sign indicating which contractor complied with this step. In this step, all members of the committee would review each contractor's package to verify if all the requested documents were present. Bidders that do not comply with the requirements are placed in what is called the "disqualified pile". Comments concerning a particular bid are written on the "completeness check" form, e.g., missing bank statement or missing GEBE bill (proof of address) etc. and signed off by all members. The findings including disputes and discrepancies are placed on the form and goes to the department head/SG for review and decision-making. The bids that make it pass the completeness check then go through the part of the process where the documents are then evaluated based on experience and personnel, detailed schedule waste collection and detailed work plan. The points are awarded accordingly. The findings of this part of the evaluation are also compiled and reported to management for review and approval.

The final step of the evaluation process is the awarding of points for the price of the submitted bid. The basis for the calculation of points is the so-called government price. An upward/downscale (threshold) is determined from the government price. This is done prior to the submittal of the bids. In the present situation only the department head and the minister were aware of the established threshold. Together with the chosen formula, the figures of the bids are entered which results in how many points are allotted per bid. The awarding of points for pricing ends the evaluation process. All points are tallied, and the winning contractors are identified. Subsequently, the results are made known to the contractors. The winning contractors sign a statement of indemnification based on which further negotiations on the contract occur. If parties agree a contract is ultimately signed/awarded.

3. Terms of Reference – Collection of Solid Waste on Sint Maarten 2021-2026 (including addendum I & II)

The ToR⁷ is the basis document in which specifications of the contract that is up for (public) bidding are outlined. The ToR contains vital information such as the scope of works, deliverables, requirements of the contractor etc. Based on the ToR (potential) bidders review their eligibility and draw up their bids to take part in the tender. As the main tender document, the ToR, must be clear and transparent. The ToR states that it is "intended to clearly define the scope of works related to the collection of solid waste and cleaning of the main roads within the various defined work districts, in order to secure suitable bids from contractors, through a public tender, for the execution of works". For better management and control of the execution of works it was decided to divide the territory of Sint Maarten into seven (7) work districts instead of eight (8) as in the previous contract. The principal of the public bidding and subsequent contract is the public entity Sint Maarten represented by the Minister of VROMI. The representative of

⁷ Including the changes established by addendum.

the minister tasked with coordination and project management is the head of department of Infrastructure Management.

The scope of works is outlined in the introductory chapter which states that this contract includes the collection of solid waste as well as the cleaning of the public areas and neighborhoods. This includes the following deliverables as outlined in chapter 4: the collection and transport of the mentioned categories of waste 2) main road cleaning 3) maintenance of the collective collection locations and bin management 4) publishing of schedules and reporting. Main road cleaning is described as the following activities on the main roads: sweeping of hard surfaces, removal, and collection of erosion materials such as stones, gravel/sand, and the collection of stray garbage to be disposed at the landfill. A public area is defined as the public space between boundaries of private properties that is frequently used by the public, such as main roads, other roads, streets, drives, alleys, squares, (public) schools, parks, beaches, cemeteries, public parking, parking areas, boardwalk etc.

The ToR names two (2) objectives: 1) to serve as the basis for the formal request for offers and the selection of a contractor for the collection of solid waste on Sint Maarten through a public tender and 2) to indicate the conditions, guidelines, and norms within which the works are to be carried out by the contractor in order to complete a successful execution of works. In chapter three (3) the ToR mentions a main goal: to ensure the collection of waste categories mentioned in the ToR and the transport of this waste to (a) dumpsite(s) and/or collection/processing area is carried out to the satisfaction of the principal and the community at large, for a period of five (5) years, with the possibility of an extension with a maximum of two years.⁸ The second project goal is to curb the excessive waste, curb the rapid increase of the size of the landfill and to protect our environment, creating awareness is also an important part of this program.

Timeframe

The previous garbage collection contract encompassed a period of five (5) years; 1 April 2016 and ending 31 March 2021. The current contract is also for a 5-year period commencing 1 April 2021 and ending 31 March 2026. This gives the minister five (5) years to adapt and prepare the ToR for the next tender. The preparation of the tender is a task for the department of Infrastructure Management. The tender procedure and requirements are outlined in chapter seven (7). An information meeting has to be announced by public notice. All questions must be submitted in writing within 24 hours after the information meeting.⁹ Minutes of the information meeting must be emailed to potential bidders who submitted a request for the ToR electronically. The information meeting did not limit the persons able to attend to those who requested the ToR electronically; it reads as if the information meeting is open to those interested. Yet the minutes of the information meeting according to chapter 7.2 was limited to those that requested the ToR. This should've been clearly stated.

⁸ As previously stated this provision could not be executed.

⁹ By addendum I, it was established (after the fact) that any correspondence sent before the date and time would be null and void. Any questions sent before should be resent before 9 January at midnight.

According to chapter 7.4 alternative bids are not permitted, however it does not explain what is meant by alternative bids. Nor is this described in the list of definitions.

Questions posed by a potential bidder sought to clarify what an alternative bid is, by asking if bidding for more than one parcel is considered an alternative bid.¹⁰ The response was negative but missed the opportunity to clarify such, which leaves what the definition under this bidding up for interpretation.

Chapter 7.7 states that the tender will be submitted in triplicate, failure of which would lead to an automatic disqualification. It further states the closing time of the tender submission and that all participants should be present to submit their bids. The closed envelopes would be opened, and the offers read in the presence of all attendees to the tender.

Rejection of tenders is mentioned in chapter 7.8 and refers to the non-compliance with the requirements in chapter 10 (documents) and (again) not submitting the bids in triplicates resulting in the bids being inadmissible.

Chapter 7.9 describes the evaluation process after the tender session¹¹. An evaluation committee of the Ministry of VROMI (minimum 3 members) will evaluate the received tenders. All accepted tender documents will be evaluated, and contents will be checked prior to the awarding of any scores to the submitted bidder. This process leaves room for interpretation and can be expounded on, to what degree will the documents be evaluated, and contents checked? The point awarding system is also outlined.

7.11 states that the successful contractor will be informed by the principal representative. In the event negotiations need to take place a statement of indemnification will be signed by both parties, prior to any negotiations. This paragraph should be expounded on. What level of negotiating should take place? This also includes indemnification, the definition and purpose are also not clarified.

Chapter 7.12 outlines another key component of the ToR. It states the assignment will not necessarily be granted to the lowest bidder, but to the bidder, whose complete price and services offer is fully and wholly in compliance with the ToR and regarded as the best offer per parcel by the principal (unless a contract is signed). Such a key objective should (also) be outlined under objectives/goals of the ToR. It also refers again to the signing of a statement of indemnification, prior to any negotiations.

According to 7.16 a contingency sum of maximum 10% of the contract sum is for the sole responsibility of the principal. 7.17 provides the contact information regarding the tender procedures or the works. Considering the strict rules for information distribution (see 7.1 ToR) - what information can be requested and will the information shared be conveyed to the rest of the applicants to avoid any (dis)advantageous situations for others - this provision is unclear.

Chapter 8 outlines the requirements for contractors as an organization. According to 8.1 and 8.3 the applicant will be able to prove that he/she has an organization, which is adequate to execute the project, as well as the level of expertise to execute the project within the required criteria. There are no minimum requirements stated in the ToR,

¹⁰ See questions posed by the third potential bidder (page 9 of minutes).

¹¹ It is assumed that this means after the submittal of the bids (tenders).

therefore the adequacy of the organization and the level of expertise required is subject to the interpretation of the committee. A guideline with minimum requirements would assist in being able to award points and reduce too much subjectivity. 8.1 also states, without further elucidation: One parcel can be awarded per family or per household. This is very critical criteria as it limits the number of bids a family can submit. The one parcel per family/household provision will be further discussed in chapter 4.5 of this report.

Chapter 9 references the (tender) requirements for the equipment needed to carry out the collection and transport waste. “Not older than ten (10) years at the date of the tender, in good state of maintenance and suitable for the job, such as garbage trucks with rear loaders and/or trucks with side”. In 9.1 it states all collection vehicles used in the performance of the work shall not exceed ten (10) years at the commencement of contract, including spare collection vehicles shall [not] exceed ten (10) years of age during the term of the contract. One speaks of date of tender and the other commencement of contract; in practice this may be an insignificant timeframe, however for the purpose of the ToR these discrepancies should be eliminated as much as possible. It is not clear if it is meant 10 years from the manufacturing date, leaving room for different interpretations. Additionally, 9.1 states “during the term of the contract”. That is an even heavier criterion.¹² It also states each parcel must have a minimum of two (2) types of garbage trucks. A spreadsheet template with information regarding the equipment, contains a column with the heading ‘ownership’ state who owns the equipment. Without further elucidation it is left to deductive reasoning to come to a clear understanding of what is meant. This chapter should be more clearly expounded on to avoid misunderstanding.

Sometimes words are used interchangeably such as bidder and applicant. Consistent usage can avoid misinterpretation. Regulating a specific topic multiple times often is not done consistently leading to multiple criteria existing parallel which leads to confusion as to which one is prevalent. Regulate and place topics together and refer where necessary. Chapter ten (10) regulates the necessary documents needed to submit to qualify for the tender, failure of which, in accordance with 7.8, will result in submitted bid being inadmissible. Chapter ten (10) lists fifteen (15) documents. Some documents are not clearly outlined which leaves room for interpretation, and therefore room for subjectivity and debate during evaluation. On such a critical point, this chapter should leave little room for interpretation.

- Document 3: Copy of entity’s original business license as issued by or on behalf of the Minister of TEATT. With a description of the original business license based on the scope of work tendered. The description of the scope of work should be clear as well as which scope of work is considered relevant. Additionally, it is unclear why the original business license is needed if the adapted business license corresponds with the work the entity is currently executing or is preparing and can show proof of being able to execute.

¹² This requirement of not exceeding ten (10) years during the term of the contract was taken out during the meeting of 8 January, confirmed in the minutes sent on 19 January and in Addendum I to the ToR.

- Document 11: A bank statement indicating financial capacity of the company. It is unclear what the purpose is of this document and in particular what the minimum requirement is to show viability, and where in the process this document will be used and served as admissible.
- Document 13: A guarantee of willingness, by a guarantor registered by Central Bank of the Curaçao and St. Maarten (CBCS) to provide a guarantee of 10% of the bid amount. This criterion should be expounded on.¹³
- By addendum I, a note was added under chapter 10: all names and information on each documents submitted must be identical.

The principal reserves the right to reject a tender for any person or corporation that is in litigation. The term litigation should be expounded on as well as this condition can indirectly create the atmosphere where entities with legitimate concerns/grievances would not want to come forward for fear of being rejected. This condition indirectly cuts into the right of entities to seek legal recourse for legitimate claims against government. Chapter 17 states subcontracting is not allowed, not in part or in full, failure for which will result in direct termination. This chapter leaves much for interpretation in regard to its relation to how long renting of the equipment should be allowed.

Minutes information meeting 8 January 2021

The minutes of the information meeting forms an integral part of the bidding documents, as this is a general meeting where information in the ToR and the procedures are clarified and any deviations to the ToR are established. Although the meeting was held on 8 January, the minutes of the meeting were sent to the interested parties on 19 January. As an integral document for the bidding process, establishing and sending the minutes to participants means that as of that date participants are duly able to make informed decisions on the parcels they are going to bid on (from the date of receiving this document on the 19 January). During the meeting, some information was conveyed that was later rectified due to not being correct or the information changed between the time of the meeting and the minutes being sent. The adapted information was added as part of the minutes; however, it was not clearly distinguishable from the minutes itself. The purpose of the minutes is to establish what was said during the meeting. If information conveyed during the meeting need to be corrected, this should be clearly communicated, e.g., as an attachment to the minutes.

The principal points of concern regarding the minutes relevant to this investigation will be highlighted below:

- In 8.1, one parcel can be awarded per family or per household. If changed this will be a decision of the CoM. This in the meantime has been removed. The first sentence is the requirement as stated in the ToR, which was reiterated in the information meeting on 8 January 2021. The second line, stating this in the meantime has been removed appears in the minutes, as a new adaptation of the ToR, on 19 January 2021. This is a significant limitation for the bidders and was

¹³ By Addendum II dated 26 January, 2021, this requirement was removed from the TOR.

lifted in less than two (2) weeks of the date of the tender. This is a short timeframe for affected bidders to adequately adapt and submit more bids.

- During the meeting it was mentioned that chapter ten (10) of the ToR titled 'documents', requirement 13 will be removed. In the minutes this was stated to be incorrect, requirement 13 is still in the ToR and must be submitted. By Addendum II dated 26 January 2021, this requirement was removed from the ToR. This is another essential requirement, the retraction, subsequent reinstating only to be retracted (again) of this requirement, shows that these key elements were not clear to the ministry which resulted in the subsequent miscommunications to the contractors.
- During the meeting it was mentioned that chapter 16 regarding the performance guarantee was removed from the ToR. The minutes corrected this statement, this requirement will remain in the ToR. Another example of inconsistent conveyance of information regarding the requirements.

4. Evaluation process

The evaluation committee consisted of seven (7) persons¹⁴: four (4) members from the Infrastructure Management department¹⁵, including the (acting) department head¹⁶, two (2) members from the Cabinet¹⁷ of the Minister of VROMI and the VROMI (Financial) Controller. According to the ToR¹⁸, an evaluation committee must consist of at least three (3) members¹⁹. It is not customary that cabinet staffers form part of a tender evaluation committee, however due to a time crunch²⁰ and shortage of staff, within the Infrastructure Department, the department head and the section head Contract Managers requested the Minister of VROMI to make use of his staff. Considering that the ToR mentions a minimum of three (3) members, it is not clear why in the present tender seven (7) persons were required. Some committee members also indicated that they found the committee unusually large compared to previous tenders which did not necessarily expedite the work. Some committee members also indicated that the minister was intensely involved with the entire process. This is evident from the reviewed email communication between the Minister of VROMI and the acting Department head of Infrastructure Management²¹. The task of the committee was to review the bids in accordance with the evaluation process described further in this chapter. The committee subsequently presented its findings to the department head who was responsible for the

¹⁴ Internal Findings Report (IFR) # 1 dated 10 February, 2021 (unsigned).

¹⁵ The Department of Infrastructure Management consist of 3 sections: Projects, Operations and Contract Manager (solid waste, sewerage plant, garbage collection).

¹⁶ The department head was not always present during committee evaluation meetings as he had other responsibilities to attend to (see synopsis minutes S. George).

¹⁷ The two (2) cabinet members had limited (previous) experience with tenders.

¹⁸ The Contract Mangers were initially under the impression that the ToR was not approved by the CoM as they had not received a copy of the 'beslisbad' even though they had requested such. It turns out that the ToR was approved during the CoM meeting of 10 December, 2020.

¹⁹ Chapter 7.9 of the ToR.

²⁰ The tender date was 2 February, 2021, and the new waste management contracts were scheduled to start on 1 April, 2021.

²¹ The email communication (from March to May 2022) details the challenges that the garbage collection bidding process was experiencing.

awarding advice that was presented to the secretary general and ultimately to the minister and the CoM for approval. Considering the role of the department head in the process, the Ombudsman questions the decision for the department head as a member of the evaluation committee. The evaluation/elimination process consisted of two steps. The first step is the review of the completeness and validity of all submitted documents of the participating companies²² in accordance with chapter ten (10) of ToR.

Based on chapter ten (10) of the ToR the following documents²³ had to be submitted along with the tender to qualify:

1. Proof of company's registration with the Chamber of Commerce;
2. Copy of the entity's 2020 extension business license as issued by the Receiver's Office of Sint Maarten;
3. Copy of the entity's original business license as issued by or on behalf of the Minister of TEATT with a description of the original business license based on the scope of the work tendered;
4. Proof of registration with SZV and payment of the social premiums as issued by the Social Insurance Bank (SZV);
5. Copy of a valid passport of the director /owner;
6. Provide CRIB nr. and proof of payment of taxes as issued by the Receiver;
7. Sole proprietor: proof of submittal entire form of the last 2 years (2018 & 2019) of personal income tax stamped by the Tax department;
8. A copy of a GEBE bill (show proof of address of the business);
9. Proof that the company is not bankrupt and that it is not experiencing liquidity or cash flow problems as issued on St. Maarten (Court House);
10. Proof that owner of the sole proprietor is not bankrupt and that it is not experiencing liquidity or cash flow problems as issued on St. Maarten (Court House);
11. A bank statement indicating the financial capacity of the company;
12. A plan of action (work plan) for the execution of the works;
13. A guarantee of willingness, by a guarantor registered by the CBCS to provide a guarantee of ten percent (10%) of the bid amount. The guarantee will also be valid towards the Principal in case of bankruptcy²⁴;
14. A detailed list of proposed personnel;
15. A list of equipment for the execution of the works.

Failure to submit the abovementioned documents during the tender session would result in immediate disqualification²⁵.

The second step of the evaluation process was the application of the evaluation point breakdown/system, as per chapter 7.9 of the ToR, to the companies that qualified in the first step.

²² 24 companies participated in the tender Collection of Solid Waste on Sint Maarten 2021-2026.

²³ The documents had to be no older than six (6) months of the date of the tender.

²⁴ Point 13 was removed from the required list of documents upon the instruction of the Minister of VROMI (see IFR #1).

²⁵ Terms of Reference Collection of Solid Waste on Sint Maarten 2021-2026, page 26.

The evaluation chart²⁶ consists of the following components:

ITEM	MAX POINTS
Completeness of tender documents	10
Experience & key person(s) within the field	20
Detailed schedule waste collection	20
Preliminary Work plan	10
Price ²⁷	40
Maximum points	100

After the bids were submitted on 2 February 2021 (tender date) the first step of the evaluations promptly began on February 2, 3 and 4. For this part of the evaluation a completeness form was filled out and signed by members of the committee.

From the twenty-four (24) companies that submitted bids for the seven (7) parcels, fifteen (15) were initially ‘disqualified’ by the committee for not having the required documents as per chapter ten (10) of the ToR. The reasons for disqualification were not having the original business license based on the scope of the work tendered, not in possession of a bank letter, not having a copy of a valid passport and presenting documents older than six (6) months. At least two of these circumstances resulted in further discussions within the committee.

4.1 Original business license based on the scope of the work tendered

This was a new requirement that was not present in previous garbage tenders²⁸. Six (6) companies that were in possession of a business license for the purpose of other types of cleaning works other than the activity of the collection of or disposal of garbage, as defined in the ToR, were (initially) disqualified.

On 4 February 2021 a meeting took place with top management of the Ministry of VROMI, consisting of the department head of Infrastructure Management, the secretary general, and the minister to discuss the first round of evaluations²⁹. During that meeting it was decided to readmit the six (6) contractors that were previously disqualified, back into the evaluation process for a second analysis. On 9 February 2021 the committee sat together with the legal advisor of the Ministry of VROMI to discuss the descriptions of the business licenses of the companies that were readmitted to the evaluation process.

²⁶ The chart consists of 5 components totaling 100 points. The pricing component represents 40% of the total points. The other four components combined represents 60% of the total points.

²⁷ The awarding of the points for pricing was not part of the evaluation committee’s task.

²⁸ In the 2016-2021 tender no garbage collection experience was needed. A business license detailing waste management was not a requirement.

²⁹ Email of 5 February, 2021, from the department head of Infrastructure Management.

During this meeting, *‘the Ministerial Decree³⁰ with the description was discussed as parts of the below description are mentioned in the ToR of the ‘Collection of Solid Waste on Sint Maarten 2021-2026³¹ [sic]’:*

- *‘The exploitation of a cleaning company for the rendering of services such as cleaning, tidying, beautification, care, and maintenance of industrial, commercial, governmental, and private installations, buildings, offices, dwelling houses and grounds’;*
- *‘The cleaning of coverings, rugs, floors, including any type of floor surface, swimming pools, roads, and heavy equipment’.*

Based on the discussions held, the committee decided to include the words ‘cleaning’, ‘maintenance’, and ‘grounds’ to the aforementioned description. According to the Minister of VROMI these discussions also included the Ministry of TEATT and the Minister of TEATT who also agreed that, in terms of the different scopes of work, the revised terminology fell in line with the ToR that was approved by the CoM³². As a result, companies that did not have the words garbage, solid waste, debris, cleaning, and maintenance of grounds in their business license description were permanently disqualified from the tender. This change resulted in four (4) of the six (6) companies being readmitted³³ to the tender. One of the companies that was ultimately disqualified was Leonard Enterprise N.V., which was an existing contractor from the 2016 – 2021 tender.

As mentioned previously, having an ‘original business license based on the scope of the work tendered’ was a new requirement. In the 2016-2021 garbage tender no garbage collection experience was required. Any company in good standing could submit a tender. From the minutes of the information meeting that took place between interested contractors and the department of Infrastructure Management on 8 January 2021, no additional explanation was given regarding this new requirement and the consequence of non-compliance therewith.

Hence, was the decision to disqualify the company in question from the tender proportional? In other words, and more generally, was there a reasonable ratio between the objective (ensuring that contractors are qualified to do the work) and the means (using the description in the original business license as the reason for disqualification) utilized?

It must be established that the objective (or the intention of) this new requirement was a positive development and an improvement. Waste collection is much more than simply the collection of garbage.

³⁰ It is not clear which/what ministerial decree is being referred to here.

³¹ IFR # 4 dated 11 February, 2021 (unsigned).

³² Synopsis of hearing Minister of VROMI held on 7 October, 2021.

³³ Three (3) of the four (4) companies that were readmitted had no previous experience with the collection of solid waste.

The proper management of waste is important for building a sustainable and livable island. This decision coincides with the primary goal of the waste tender 2021-2026³⁴. What better way to ensure that the garbage is collected properly than ensuring that the contractor has the necessary experience, or at the minimum is operating an (established) company that collects and disposes of waste. However, a company's initial scope of work may not have been waste management and in time that could have changed, meaning while their work is relevant for the current bid, their original business license would not reflect such. This illustration easily shows the inability of the requirement to capture the intention/objective behind it. On the other hand, there may be a company that doesn't have waste management in their business license, however is/has been operating in the field of waste management e.g. Leonard Enterprise N.V.

While it is the responsibility of a company to ensure that they are compliant with the requirements of the ToR (and other legal requirements) and the consequences of not complying with same, considering the relatively short time span³⁵ between the call to bid and the information session/minutes (in which the latest changes/addendums were established) and the tender date (respectively less than 2 months and 3 weeks), companies would not have had sufficient time to amend/update the business license.

It must also be taken into consideration that unlike other (potential) 'garbage' contractors who had no experience in garbage collection prior to the submittal of their bids for the 2021-2026 tender, this was not the case for this particular contractor. Although their original business license, which dates back to November 2000, makes no mention of waste management, a quick Google search of the company or a review of their Facebook page will result in the confirmation that waste management currently belongs to their core business. As a matter of fact, the company has been involved in the collection of solid waste and the cleaning of public areas and neighborhoods since 2009.

To surmise, this contractor was an established, experienced, and current garbage contractor for the waste tender 2016-2021. Their level of experience and expertise can be confirmed from the quality of their bid(s)³⁶. Granted they did not fulfill the new requirement; however, this was not adequately communicated by the Ministry of VROMI. Even if it was, the limited time provided to make the change was insufficient³⁷. The ministry realized, based on the number of contractors that were initially disqualified from the tender, the deficiencies of the new requirement and implemented changes that resulted in disqualified contractors being returned to the tender. Considering the foregoing, the decision to disqualify the contractor, based on the justification provided,

³⁴ The primary goal was to ensure that the collection of waste and the transport of said waste to dumpsite and/or collection /processing area(s) is carried to the satisfaction of the Principal and the community at large (page 8 ToR).

³⁵ The tender was published on 15 December 15, 2020, followed by the information session on 8 January, 2021, and the tender date on 2 February, 2021.

³⁶ Leonard Enterprise N.V submitted bids for all 7 parcels. For step 2 of the evaluation process, they received 52 from a total of 60 points. The highest amongst all bidders.

³⁷ According to the Department of Contract Managers other contractors were able to make the change within the allotted time frame. The Ombudsman was not able to confirm this. Upon inquiry by the department of Economic Licenses they indicated that a change to a business license could take - at the minimum - anywhere between 4 - 12 weeks.

was not proportional. The measure imposed (disqualification) was not in proportion to the ‘error’ that was committed. Furthermore, by excluding an experienced and qualified contractor the primary goal of ensuring that garbage is collected and processed to the satisfaction of the principal was in theory jeopardized. A more appropriate measure would have been giving the contractor a reasonable timeframe to correct the oversight and accepting their business license ‘as is’ in the interim. This requirement should be one more conducive to what the ministry is trying to achieve.

4.2 Missing bank statement(s)

Another facet of the evaluation that caused discussions within the committee was missing bank statements. Based on the hearing(s) conducted with the evaluation committee, two (2) contractors were initially disqualified for not having the required bank letters³⁸ (bank statement indicating the financial capacity of the company³⁹). These companies were Garden Boyz and Avyanna. Contractors are required to submit the tender in triplicate⁴⁰. It appears that both companies did not comply with this requirement in one or more parcels, specifically pertaining to the bank letter⁴¹. It is unclear how Garden Boyz missing bank statement was further addressed (by the committee). Based on documentation reviewed there were no further discussions on the topic, however Avyanna’s missing bank letter resulted in heated discourse within the committee.

Apparently, Avyanna’s bank statement ‘*appeared out of the blue*’ while it was not present at the time the members of the committee were conducting the evaluation of the documents/completeness check. After the completeness check process was completed, a cabinet member of the committee appeared with a document stating that it was overlooked⁴². Other members of the committee, not being cabinet members, indicated that this was not the case and reiterated that the company in question did not have the triplicate documents at the start of the process as required. A discussion ensued between two members of the committee regarding where the document originated from as the document verification form was signed by seven (7) persons. During the hearings, when questioned about a document being overlooked, the cabinet members struggled to explain the incident coherently. One cabinet member stated that a document was overlooked. Another said one of the boxes was not evaluated and/or one of the parcels was not evaluated. As a result, they had to be redone (“*we had to go back and finish and complete the evaluation*”). Upon further questioning the clarification was given that one bid was overlooked, the entire bid from Avyanna. The other cabinet staffer indicated that the box that had Avyanna’s documents was overlooked. As the department was responsible for the securing of the documents the cabinet members were not aware of the specific

³⁸ Because the Minister of VROMI has refused to provide the individual evaluation sheets for the completeness of tender documents signed by the evaluation committee members, the Ombudsman was unable to verify these statements.

³⁹ The definition of a ‘bank statement’ is apparently not clear, based on tenders reviewed some contractors submitted abbreviated bank statements which were also accepted by the committee.

⁴⁰ Chapter 7.7 of the ToR.

⁴¹ Garden Boyz submitted bids for four (4) parcels and won one (1), parcel two (2). Avyanna submitted bids for two (2) parcels and also won one (1), parcel five (5).

⁴² This is documented in IFR # 3 (unsigned) dated 11 February, 2021. Only three (3) members of the Evaluation Committee (two cabinet staffers and the department head) are represented.

circumstances, other than the box/bid was overlooked. The Minister of VROMI requested the department head to investigate these allegations and to report his findings via memo of 19 March, 2021. Based on the documentation reviewed the issue regarding Avyanna's 'missing' bank letter was not investigated any further by the ministry.

It has also been observed that the requirement of 'a bank statement indicating the financial capacity of the company' has little to no value in the further evaluation process. Seemingly, once the letter has been provided not much attention is paid to the content of the letter itself, i.e., the financial capacity of the company. For example: a company that competed successfully for a garbage contract, with a value of approximately Naf. 5 mln., had a single figure balance on its account, according to the bank statement (letter).

4.3 Resignation/ departure of committee members

From the inception of the evaluation process (completeness and validity of documents check), there were many discussions⁴³ regarding the application and interpretation of the ToR. According to the committee members, during the completeness check there were personal opinions on how the ToR should be interpreted, which frustrated the process. Irregular activity was observed by some committee members, such as cabinet members requesting the key to enter the room where the documents were safely stored without the other committee members being present, and copies being made. It must be noted that senior management of the ministry, including the minister, has refuted this claim⁴⁴. As a result of the aforementioned, members resigned from the committee due to concerns in the evaluation of the document process and not adhering to the (unwritten) tendering policy guidelines nor to the requirements in the ToR. The first to resign was the Controller. A member from the Contract management team was subsequently pulled (out) from the committee, after the first round, by the department head to focus on the price calculations, which is the final step in the evaluation process. The resignations of three (3)⁴⁵ other members from the Contract management team followed. The remaining members on the committee were the two (2) cabinet staffers and the department head, who also admitted to not having any previous experience in the process⁴⁶, and was not continuously present during committee meetings as he had other responsibilities. From the scoring sheets of the evaluation points breakdown (step 2 of the evaluation) we have observed that 50% of the scoring sheets have only three (3) signatures⁴⁷ of the committee members affixed. This brings into doubt the validity of the scoring sheets. One could argue that considering that the evaluation committee consisted of seven (7) members, a minimum of four (4) signatures (half plus one) would be required to validate the scoring

⁴³ An example of one of those discussions was the document requesting the financial status of the company. If a company is a sole proprietorship, the document does not have to mention the company name, neither is that a requirement of the ToR, but there was a discussion that that the document should have the company's name.

⁴⁴ Letter from Minister VROMI to the Ombudsman dated 29 December, 2021.

⁴⁵ The member who was pulled out to work on the price calculations also resigned later.

⁴⁶ Memo from act. Department head Infrastructure Management to Minister VROMI dated 29 March, 2021.

⁴⁷ In a majority of the cases the signatures were from the 2 cabinet members and 1 additional member.

sheets. The resignation of the majority of the committee members was addressed via a memo exchange between the department head and the minister.

In response to the minister regarding the resignations the department head indicated that⁴⁸: ‘*The reasons why I think that the staff distanced themselves has a lot to do with abovementioned fact(s)⁴⁹ and the way that we did this tender was different from how it was done in the past, but within the legal frame*’. It must also be noted that there were tensions within the committee regarding allegations of leaking of information to outside sources. This was addressed by the minister in a response⁵⁰ to the department head, referencing articles in the Daily Herald⁵¹, suggesting inter alia that ‘*there was as a confidentiality breach whereby information from within the ministry was disclosed to third parties*’. The minister questioned if members of the VROMI staff had ulterior motives that allegedly resulted in sharing the information prematurely.

4.4 Pricing

The final step of the evaluation process is the awarding of points for the submitted price/bid.

The system for determining points for pricing was as follows. The Department of Infrastructure calculated an internal or government price estimating⁵² how much it will cost for works to be executed per parcel.

This computation is based on the expertise of the staff, requirements of garbage collection in the different districts (frequency and size), and previous experiences with the collection of garbage from the previous tender. Once the final internal reference price was concluded, a compliancy range⁵³ of what would be feasible for government to account/pay for was determined, prior to the tender.

To further elucidate, the example below will be used:

Internal Reference Price/Government Price for Parcel A = 100 USD

Price range acceptance (compliancy range) = Upward 5% of \$100 » (\$100 to \$105)
Downward 8% of \$100 » (\$92 to \$100)

⁴⁸ Memo dated 7 March, 2021, re. complaint made pertaining to the garbage collection bidding process.

⁴⁹ These facts were: discussions regarding how many parcels one company can win based on a previous CoM decision, an altercation between a contract manager and a cabinet staffer, and not following the requirements in the ToR.

⁵⁰ Memo dated 19 March, 2021.

⁵¹ Articles d.d. 22 February, 2021 (‘complaints cast shadow over garbage collection process’) and 8 March, 2021 (‘Chris asks if civil servants sought personal legal advice on garbage bidding procedures’).

⁵² This appears to be a very challenging exercise as there’s no data available on how much garbage collection actually costs; how much garbage is picked up in what areas, how much garbage is transported to the landfill and how many persons live in a certain area. The scale to weigh the garbage has also been broken for some time.

⁵³ For the Collection of Solid Waste Tender 2021-2026, a compliancy range of upward (+) 4% and downward (-) 7% was used.

Based on the above mentioned data, submitted prices from the contractor which falls between \$92 and \$105 would be awarded points against the weighed value of 40 points as reflected in the ToR. If a contractor's submitted cost was \$100 for Parcel A, then they would automatically get 40 points for their price calculation.

Alternatively, prices that fell below the determined compliancy range (threshold) would then be considered non-favorable as this could more than likely lead to poor execution of the works⁵⁴. Prices that fell above the determined compliancy range would then be considered as too expensive and outside the budget of government. Consequently, if contractors submitted bids below \$92 or above \$105 they would automatically receive 0 points for pricing.

For example: If a contractor submitted a price of \$96.50:

$[\$96.5 / \$100.00 \text{ (Gov. Price)}] = 0.965$

$0.965 * 40 = 38.6 \text{ points}$

The 38.6 points would then be added to the administrative points from the evaluation for pricing.

For the Collection of Solid Waste Tender 2021-2026, (only) 20% of qualified contractors received points for pricing. For parcel 1: 1 out of 5 bidders received points, parcel 2: 1 out of 7, parcel 3: 0 out of 6, parcel 4: 3 out of 6, parcel 5: 1 out of 7, parcel 6: 2 out of 7 and parcel 7: 1 out of 6. Even though the ToR determines that the assignment will not necessarily be granted to the lowest bidder, but to the bidder, whose complete price and services offer is fully and wholly in compliance with the terms of reference and regarded as the best offer per parcel by the principal,⁵⁵ it has been observed that ultimately the pricing in general was the determining factor in which company won a bid, not the overall quality of the submitted bid. In this regard the requirement of chapter 8.1 and 8.3 of the ToR, regarding the contractor's ability to prove that he/she has an organization, which is adequate to execute the project, as well as the level of expertise to execute the project within the required criteria, was irrelevant. In fact, not only did the company with the lowest bid not win a single parcel, in 70%⁵⁶ of the cases the contractor with the highest score based on step 1 and 2 of the evaluation process, ultimately lost the parcel because they failed to secure points for pricing, i.e., their bids (price) fell out of the compliancy range.

This part of the process is too heavily adjoined to the estimating of the government price. Generally, the contractor that came closest to the government price won the bid, regardless of the overall quality of the bid submitted or the points secured in the first and second round of the evaluations. During the hearings it was pointed out for example that two (2) contractors incorrectly included the contingency sum⁵⁷ in their tender, which

⁵⁴ According to the department, in the past contractors underbid for the collection of garbage, which led to poor execution of works. In turn, the island's environment was very hazardous and led to a chaotic situation with management of garbage collection.

⁵⁵ Chapter 7.12 ToR.

⁵⁶ IFR # 5 (unsigned).

⁵⁷ Chapter 7.16 of the ToR.

contributed to them winning the bid. The downscale/ upscale formula allegedly also resulted at first in one company initially winning six (6) parcels before changing to a so-called compliance calculation. This is refuted by the minister, who indicated that the way the formula was interpreted by the department, and the information inserted in said formula, was erroneous. The minister has indicated that the department lacks expertise to execute certain price calculations⁵⁸. It was stated that the price calculations were based on a company starting off new, so with a high investment need. This was to ensure that all bidders receive an equal opportunity. Considering the aforementioned, one could argue that the downward scale should have at least been two times higher (about 15%⁵⁹). The established downward scale of 7% placed especially current or experienced contractors in a disadvantaged position, as their bids would have been lower since they were in possession of equipment already. As a result, their (initial) investment needs would be less, which contributed to them receiving 0 points for pricing.

The inefficiency of the scoring system for pricing can be further highlighted using the results of parcel 3 as an example. In parcel 3, none of the contractors received points for pricing. Based on the scores received during steps one and two of the evaluation, Meadowlands had the most points (42) and should have won the parcel, however their price exceeded government's price in excess of NAF. 1.8 million. As a result, AWIP which had 39 points⁶⁰ was awarded the parcel. Via memo dated 8 March, 2021, from the department head, the divergent selection process of this parcel was explained to the minister. The department head indicated that considering the experience of AWIP and their price being under the government price⁶¹, as well as making decisions in the best interest of Sint Maarten the choice was made to select the aforementioned company. Granted this decision was in the best interest of Sint Maarten, in terms of cost, however if the downward compliancy range was even slightly higher, AWIP would have won the parcel outright and there would be no need for finding a solution for the awarding of the parcel, outside of the scope of the ToR. It is also remarkable, and confirms the inconsistency of the process, that the identical issue can result in a company losing a parcel in one situation, while winning in another⁶².

4.5 Selection of contractors

At the end of the evaluation process the following companies were selected:

- Meadowlands B.V.: parcels 1, 4 and 7;
- Garden Boyz B.V.: parcel 2;
- AWIP N.V.: parcel 3;
- Avyanna (sole proprietorship): parcel 5;
- WILCO N.V.: parcel 6.

⁵⁸ Letter to the Ombudsman dated 29 December, 2021.

⁵⁹ This recommendation was allegedly made to the department head.

⁶⁰ AWIP's price was also outside of the compliancy range, and therefore received zero points for pricing.

⁶¹ AWIP's price was NAF. 470,236.98 lower than the government price.

⁶² AWIP lost parcels, 2, 5 and 6 as a result of being under the required compliancy range and therefore receiving zero points for pricing.

As can be observed, Meadowlands won three (3) of the seven (7) parcels, all other successful bidders won a parcel each. In this regard it is important to discuss chapter 8.1 of the ToR, which establishes that: *'The applicant will be able to prove that he/ she has an organization which is adequate to execute the project. Further, the applicant will be able to prove that he/ she has the necessary level of expertise which he/ she will be able to carry out the project within the required criteria. **One (1) parcel can be awarded per family or per household**'*.

The clause that refers to one parcel per household/family originated from previous experiences whereby multiple persons under the same household, with sole proprietorships, won several parcels for another project, in particular the District Cleaning tender. Internally, within the department of Infrastructure Management, it was felt that this created an unfair advantage for that one household. A similar clause was part of that same ToR which tried to limit two parcels per person. The clause was therefore introduced, in the Collection of Solid Waste 2021-2026, with the aim of leveling the playing field for all participants, legal entities (*'rechtspersonen'*) as well as sole proprietorships (*'eenmanszaken'*).

After internal deliberations it became evident that this clause did not serve its intended purpose because the terms 'households/families' are not measurable by objective standards.

Furthermore, 'household or family' was not defined in the ToR. The fact that there is no control over what the actual and/or current situation within a household is at any given time also caused the provision to be reconsidered. That is, changing one's address (in terms of where one is registered) is easily effectuated via one transaction at the Public Service Center. By changing the address, a sole proprietor could escape the reach of chapter 8.1 as it would no longer be applicable, in the event that sole proprietorship(s) would no longer be registered at the same 'household/family' address.

While the clause was conceived to remove abuse and/or an unintended upper hand by said persons, it became evident that that very same clause besides being unmeasurable, was also discriminatory, according to the minister. When quantifying a household/family to applicants who would participate in the public tender, it would only be deemed applicable to sole proprietorships. In other words, why should a household/family, (read sole proprietor), be limited to only one parcel being awarded when an NV or BV could be awarded more than one parcel if they met the criteria?

The purpose of the public tender process is intended to generate competing offers to meet the specific requirements outlined in the ToR chapter 8.1. The provision would then be restricting potential qualifying bids instead of promoting them. Chapter 8.1 was part of the ToR that was initially sent out to the contractors, however during the information session it was explained by the department that it was removed. Based on the FIDIC Green Book, the minutes of the meeting are part of the addendum to the ToR and forms

an integral part of the contract should it be awarded to the qualified bidders⁶³. After this was mentioned, no further queries were posed/received regarding the clause by the participants present at the information session. Ultimately, the department decided to remove the clause and rely on the objective criteria as outlined in the ToR to fairly and adequately determine the winners of the public tender.

The removal of the clause actually broadened the field of potential applicants to said tender process according to the department.

The thought process behind chapter 8.1 is an understandable and a rational one. While private sector procurement is profit centric, public sector procurement is focused primarily on a social benefit. The clause attempted to facilitate that larger established companies, which could potentially execute all parcels, would be limited in the number of parcels that they could have won, thereby giving smaller, up and coming companies, an opportunity to win a contract. However, the manner in which the clause was formulated was indeed inept and could have resulted in legal challenges.

The decision therefore to remove it was logical, as it was not properly defined and as such not measurable and could be easily circumvented.

Nevertheless, it must be acknowledged that there are distinct differences between legal entities and sole proprietorships. To delve into the differences between the two will fall outside the purview of this report, however the simple fact that a sole proprietorship does not offer liability protection, but a legal entity does, confirms the pertinent differences. The lack of liability protection brings considerable risks⁶⁴ to government as well as the contractors. Consequently, the participation of sole proprietorships in contracts of such magnitude should at least be limited, if not reconsidered. The present interim department head is of the opinion that sole proprietorships should not be awarded (garbage) contracts of this scale, for the aforementioned reasons, and plans to employ this vision moving forward⁶⁵.

4.6 Indemnification meetings

After the contractors are selected, the next part of the process is the indemnification meetings. This is where the contractors are invited to meet individually with ministry representatives⁶⁶. The objective of the meetings is to strive, in accordance with the principles of good faith, towards the conclusion of an agreement. If after the negotiations parties have not come to an agreement, the contractor may not hold government liable for damages, providing government has lived up to its obligations in accordance with the statement of indemnification, which is signed by both parties.

⁶³ This decision was later ratified by the CoM, in its approval with the awarding of the contracts to the qualified bidders, on 23 March, 2021.

⁶⁴ See example provided of a sole proprietor competing successfully for an Naf. 5 mln. garbage contract, with a single figure balance on its account.

⁶⁵ This opinion is not shared among the Contract Managers.

⁶⁶ The minutes of the meetings are drawn up and signed by both parties.

The indemnification meetings⁶⁷ were held on 9 & 10 February 2021, less than two months before the start of the garbage contracts. During the meetings the contractors were reminded that the garbage contract(s) would be starting on 1 April 2021. They were further queried if they have the required two (2) garbage trucks per parcel⁶⁸ and if they would be ready to execute the contract on the given date. Meadowlands⁶⁹ indicated that they had seven (7) trucks and two (2) on order, which would arrive prior to the start date of the tender. AWIP also indicated that they had the available two (2) trucks and would be ready to start. Garden Boyz also answered affirmatively. Avyanna, indicated as well that they would be ready, however they were awaiting confirmation if they would be awarded the contract. Apparently the garbage trucks were not ordered/purchased as yet as Avyanna's representative queried what size of garbage truck is recommended for garbage collection, to which the department head and secretary general responded by referring him to the ToR. WILCO clearly indicated that they would only be purchasing the trucks once the contract is signed. They also indicated that if the trucks do not arrive on time they do not have any objections, with the approval of government, to subcontract the work in the interim.

Alarming here is that less than two (2) months before the start of the contract, two of the winning contractors did not have the required two (2) garbage trucks and would not have the trucks by 1 April 2021. Even more concerning is that one of the contractors was not aware of the size of garbage truck required. Furthermore, one contractor explicitly stated that they would be, in contravention of the ToR, and with approval of government, willing to subcontract⁷⁰ the works until their vehicles arrive. Based on the minutes of the meeting, the ministry did not object to WILCO's suggestion to temporarily subcontract the work. The Ombudsman questions why, considering these early warning signs, a decision was not made to reconsider the selection, and move over to the next contractor(s) in line. It should also be noted that, as far as we were able to ascertain, there were no onsite visits by the department to confirm if the contractors, who indicated such, indeed did have the required garbage trucks pursuant to requirements in the ToR. Based on the indemnification meetings the ministry proceeded to finalize the contracts with the five (5) nominated contractors.

4.7 Post awarding

Six (6) months since the start of the garbage contracts a couple of issues has been identified⁷¹. These are, the lack of the required two (2) garbage trucks per parcel and the inability of some or most contractors to provide a performance guarantee⁷².

⁶⁷ Senior management were present in the meetings, including the minister, department head and SG.

⁶⁸ See chapter 9 of the ToR. As per chapter 9.1, collection truck(s) neither spare collection truck(s) are to exceed ten (10) years of age at the commencement of the contract.

⁶⁹ Having won 3 parcels, Meadowlands required six (6) garbage trucks.

⁷⁰Chapter 17.1 and 17.2 of the ToR states that: subcontracting is not allowed, not in part or in full and that failure to comply with such will result in direct termination.

⁷¹ This is based on information received from members of the evaluation committee during hearings with the Ombudsman in October 2021.

⁷² Chapter 16 of the ToR establishes that thirty (30) days after the awarding of the contract the contractor will submit a performance guarantee issued by a guarantor registered by the Central Bank of Curaçao and Sint Maarten, representing 10% of the contract price. Under a performance

Per October 2021, only AWIP had the required two (2) garbage trucks. WILCO had one (1) truck. Garden Boyz had only one (1) truck that exceeded the maximum ten (10) year term. Even though Meadowlands indicated during the indemnification meetings that they had seven (7) trucks and two (2) on order that would arrive on time, six (6) months in, they had zero (0) trucks. All of Meadowlands trucks exceeded the ten (10) years maximum. Avyanna also had no trucks. Contractors that had no trucks were renting, which is only allowed for a short period of time in case of equipment failure⁷³. The Ombudsman notes that the above-mentioned situation could have been avoided if keen attention had been paid during the indemnification stage. According to the contract manager's notifications were made up in accordance with chapter 14.2 of the ToR, however not sent out. The reason for this, according to the new department head, is that the notifications were not properly substantiated. With reference to the performance guarantee, only AWIP and WILCO were able to comply with this requirement. Grace periods were given to provide the guarantee. Contractors that were not able to comply received penalties. Ten percent (10%) of the total value of the contract was to be withheld as a deposit⁷⁴. The inability to comply was not due to not trying on the part of the contractors. At this stage, all contractors had submitted the required documents to the bank. The guarantees were being delayed due to the bank's procedures and processes. There have been situations for example whereby banks have submitted a bank guarantee to government on behalf of their client, however the guarantee was not acceptable to government based on the conditions/stipulations under when and what circumstances payment would be made⁷⁵. The department is currently reviewing if the 30-day term to provide the performance guarantee is sufficient/reasonable.

Pre- and post-awarding challenges have also been acknowledged by the contractors⁷⁶. The first challenge is that the tender process was not started on time. There were fourteen (14) weeks, just over three (3) months, between the tender publication and the start of the contracts. According to the contractors and the ministry, including management, the time frame is insufficient, not only for the preparation of the bids and the necessary paperwork that is required, but also the limited period does not allow for sufficient time to purchase and have the required equipment, garbage trucks, in particular, to be delivered to the island. The current effects of this were explained previously. Another issue is the age of the trucks. The contractors consider the 10-year maximum too short. According to industry standards the life of a truck can be up to fifteen (15) years with proper maintenance. The contractors are of the opinion that the maximum age of the vehicle should be increased, and more emphasis placed on proper maintenance. This is also tied to the cost⁷⁷ of the trucks and the ability to acquire financing to purchase them. Acquiring local bank financing to purchase trucks is seemingly quite challenging due to the limited

guarantee, compensation of money will be made by the financial institution, usually a bank, when there is a delay in delivering the performance or operation.

⁷³ See note under chapter 17.2 ToR.

⁷⁴ The Ombudsman was unable to verify if the penalties were applied.

⁷⁵ Such a stipulation was for example that payment would only be made if all parties agree.

⁷⁶ The Ombudsman conducted meetings with the selected contractors in December 2021 and January 2022.

⁷⁷ A new rear-loader garbage trucks cost approximately \$200.000 - \$400.000.

purpose of a garbage truck, the 5-year contract provided by government as well as some of the provisions⁷⁸ in said agreement.

Another challenge is that the onus for the proper disposal of garbage is seemingly placed entirely on the contractors. There are no significant government programs in place for educating the public regarding responsible solid waste disposal or waste management in general. Oftentimes (some) members of the public refuse to follow established, common sense requirements much to the chagrin of the contractors. For example, concrete rubble, LPG (cooking gas) cylinders and hazardous chemicals are callously placed amongst household waste for collection. The frequent infractions of the public usually go unpunished; however, inspectors immediately target the haulers with warnings and penalties. They point out that creating awareness⁷⁹ is according to the ministry an important part of the program, but the emphasis on the side of government to execute these goals⁸⁰ is practically nonexistent. Contractors also indicated that while subcontracting is not allowed (in part or full) and will lead to immediate termination, this practice is commonplace⁸¹.

Another aspect of the post awarding that requires attention is the transparency of the process, particularly for the contractors that were not selected and/or disqualified. From documentation reviewed⁸² the ministry denied AWIP's request for an evaluation report (from the evaluation committee) containing the bids of all contenders. This request was denied based on articles 11, 12 and 13 of the National ordinance open government (*'Landsverordening openbaarheid van bestuur'*). It is unclear why this request was denied. The Ombudsman found no reason for refusal based on the absolute nor relative grounds listed in article 11. The grounds used for refusal based on article 12 and 13 ('internal consultations') were also insufficiently motivated. Transparency in public procurement is pivotal. Information on the public procurement process must be made available to all public procurement stakeholders: contractors, suppliers, service providers, and the public at large. Based on the principle of fairness, suppliers, contractors or service providers in general should have the right to challenge the procurement process whenever they feel they were unfairly treated or that the procuring entity failed to carry out the procurement process in accordance with the public procurement rules. Such

⁷⁸ A clause in the contract establishes that government can terminate the agreement if a contractor receives three (3) warning letters.

⁷⁹ With creating awareness is meant: to incite awareness on garbage disposal and collection, recycling of waste, reducing waste, reusing of goods and respect for the environment (chapter 3 ToR).

⁸⁰ The general police law (*'algemene politekeur'*, AB 2013 GT. No. 42) banning the use of single use plastic was unanimously passed by parliament on November 3, 2020. Until present the law has not gone into effect.

Surrounding islands like Anguilla, Saba and Statia have already implemented their bans, Anguilla since 2019 and Saba and Statia in 2021.

⁸¹ The Ombudsman could not verify if the department is aware of this. The department has indicated that while on site controls take place, the department is presently understaffed.

⁸² Letter from VROMI to the BZSE Attorneys at Law (without date), DIV nr. 9254/21, which was in response to their letter of 11 May, 2021, on behalf of their client AWIP. Similar requests of other contractors, i.e., Quality Sweepers and Leonard Enterprises, were unsuccessfully made to the ministry.

challenges must be based on the solicitation documents and/or the public procurement rules, which should be transparent and certainly accessible to all stakeholders.

5. Bottlenecks and challenges

Bottlenecks and challenges have been identified in the ToR preparation, evaluation and selection as well as the post awarding phase of this procurement process. The majority of the challenges however finds their origin in the preparation of the ToR. Some post awarding issues could have been avoided with proper preparation.

Lack of a comprehensive Tender Procurement policy

There is no comprehensive Tender Procurement policy. The Ministry of VROMI has recently published a Tender Procurement Policy⁸³. This newly established policy can only be considered as a modest begin and does not fulfill the obligation of government pursuant to article 47, paragraph 6 of the National accountability ordinance (*'comptabiliteitslandsverordening'*), which requires government to establish further rules regarding the way in which a tender is organized and executed by national decree, containing general measures (Lbham). A quick scan of the policy reveals that while some timeframes are given, no timeline is provided for what should be the period between tender publishing and start of the new contract(s). A reasonable timeframe is required to ensure that the new contracts can start without complications. In the present waste management tender, there was a mere seven (7) weeks between the indemnification meetings and the start of the contract. As evidenced in this investigation, this timeframe was too short. In addition to clear timelines, a script (*'draaiboek'*) clearly detailing the steps of the evaluation process must be established.

The new policy also establishes that an evaluation committee should consist of three (3) to five (5) members, and that the members should not all be from the same department. The Ombudsman notes that members should preferably also not be from the same ministry. The Ombudsman further notes that article 2 of the *Landsverordening inrichting en organisatie landsoverheid* (Liol) should be observed as well.

The cabinet is charged with supporting the minister and dealing with politically sensitive matters as well as providing political advice. Participating in evaluation committees is not one of these activities. The policy also establishes that a Non-Disclosure -Agreement (NDA) should be signed by all persons involved in the process. The Ombudsman questions if this is necessary considering the confidentiality obligation in article 61 of the *landsverordening materieel ambtenarenrecht* (LMA).

Terms of Reference poorly prepared/late start of preparations for tendering

The ToR had many deficiencies. Many topics were not properly defined or were open to multiple interpretations. As an important document upon which the bidders were to make and prepare extensive and clear bids, the ToR itself lacked details. Some items lacked (clear) definitions. Other critical items e.g., the required documentation also lacked clear explanation leaving too much space for subjective interpretation. Having a clear understanding of the purpose of certain requirements would aid in the establishment of the requirement. Despite having been vetted with the ministry, legal affairs and the CoM,

⁸³ The policy was published in the National Gazette of 24 December, 2021, and is currently in effect.

the ToR contained much area for improvement. This was largely acknowledged within the evaluation committee and the management of the ministry. Time constraints was also mentioned as a contributing factor to the discrepancies. The aforementioned script (*'draaiboek'*) should serve as a guide for the ministry to learn from their experiences during the process and updated to aid for future bids.

The minutes of the meeting were sent two (2) weeks before the tender date and important information was retracted or reinstated, which contained many corrections to what was stated during the information meeting. Interested parties submitted a total of 86 questions after the information meeting, asking a range of clarifying questions. The general response to the questions were very succinct and rarely motivated, whereas most questions were posed to seek more clarity not gained from the ToR. Some answers referred to the ToR and did not answer the questions. Some questions were deemed not relevant to the ToR, while the relevance is clear. Some answers referred the bidders to another ministry whereas cooperation would have suited the approach to give the bidders all the information needed to make an informed bid. Some questions were deemed not clear, however no explanation on opportunity to clarify the questions were provided. In the new policy it is mentioned that the ToR must be legally vetted. As far as we have been informed the current ToR was legally vetted by the department of JZ&W. So, it is unclear how it was approved with so many deficiencies.

The principal shortcomings in the ToR will now be highlighted. The intention and objective behind the requirement of having a business license based on the scope of work tendered is one that should be continued in the future. The requirement itself and the way how it was applied disproportionately affected some contractors, was arbitrary and unreasonable. In the first place, the new requirement was not communicated properly. The objective of the condition is obvious. It is to ensure that companies applying for the tender are in the least in the actual business of waste management and at best proficient and experienced in the discipline of waste management, in this case the collection and disposal of solid waste. This is not unusual. However, to exclude companies that have verifiable experience in the collection of solid waste due to a technicality (that was not properly communicated in the first place), while at the same time finding contentious ways of including other companies without that comparable experience, is neither reasonable nor proportionate.

Apart from the missing bank statement(s) which are quite disconcerting on its own, we have observed that what was recognized and accepted as 'a bank statement indicating the financial capacity of the company' was not consistent. Although many companies submitted a bank letter describing their relationship with said bank, including the existence and extent of credit facilities etc., others submitted a bank statement simply listing their current account balances, which is only a snapshot of a company's finances at a specific point in time. Both documents were accepted. It should be clearly defined in the ToR what is understood by a bank statement indicating the financial capacity of the company. Additionally, the financial capacity of the company should be weighed (more heavily) in the evaluation process.

As addressed above, the composition of the evaluation committee is important. The integrity of the committee members is paramount. The minister established in the new policy that the committee should not all be from the same department. The fact that cabinet members were part of the evaluation committee was identified as an impediment by a majority of the department during the hearings conducted by the Ombudsman. This should be reconsidered moving forward. It must also be noted that the minister is responsible for the functioning of the members of his cabinet, not a department head or secretary general⁸⁴.

The chosen method for the scoring of pricing is inadequate and should be thoroughly reviewed⁸⁵. The fact that only 20% of qualified contractors received points for pricing should have raised the necessary alarm bells. Considering that the determination of the government price is in itself a challenge, due to the lack of data and purported expertise of staff, this subject matter must be separately tackled as well.

Serious consideration should be given to limiting the number of parcels per contractor or having a real verification of the capacity of the company to execute the works. The way how this was attempted to be handled in this tender, and ultimately could not be, should not be deterrent for the future. The objective is an understandable and rational one. Besides it is currently being proven that a contractor handling more than two (2) parcels is quite a challenge. Serious consideration should also be given to the decision to allow sole proprietorships to participate in the collection of solid waste tenders considering the risk that this poses for government. The present garbage contracts value from Naf. 4 million to 10 million for the five (5) year term. Exposing government to such considerable risk cannot be considered good governance.

Terms of Reference not being followed /enforced

Certain provisions of the ToR are being ignored by contractors and not being enforced by the department, partly due to understaffing, these include but are not limited to the ten (10) year maximum age of trucks, the requirement of having two (2) trucks per parcel and the prohibition of subcontracting, being the major requirements. A perhaps less significant requirement that is being flouted, but equally important, is the obligation of the contractor to provide satisfactory uniforms, including a hard hat, safety glasses, safety vests and safety shoes, to the personnel⁸⁶.

It is also not certain if penalties for the violations are being applied and collected. Although the contractors are not in agreement with the truck age requirement, it is still part of the existing ToR and should not be disregarded. Most of the contractors that are currently executing the garbage contracts have acknowledged that some of their active vehicles are not compliant with the ten (10) year age maximum, neither with the two (2) trucks per parcel. Most have confirmed as well that subcontracting is common.

⁸⁴ Article 2, paragraph 3 Liol.

⁸⁵ The new policy establishes that penalties will be applied for falling outside of the established price range.

⁸⁶ Chapter 9.7 ToR.

Lack of a comprehensive waste management plan

A comprehensive vision for waste management does not exist. The management of waste is primarily the responsibility of government which regulate and manage waste in accordance with their respective legislation, policies, and programs. Much of this responsibility is presently passed on to the contractor with little to no responsibility for the community e.g. proper information provision and enforcement for violations. This creates an imbalance in duties and hinders realization of an effective waste management plan. There are very few meaningful policies and programs in place. The Dispose in A Bin campaign (D.A.B), launched by the Ministry of VROMI in January 2021, which sought to increase awareness of responsible garbage disposal was a start, but much more is required. It is unclear if the campaign is still active.

Transparency of the post awarding process

There is limited transparency in the post awarding process, particularly for the unsuccessful contractors. Although all contractors received an official overview of the awarded points per parcel, further clarification on the awarded points was difficult to receive and requests to receive an evaluation report were denied, which is in contravention with fundamental procurement principles.

6. Conclusion

The main question that the Ombudsman sought to answer with this investigation is: Was the tendering and awarding process of the solid waste collection 2021-2026, as well as the pertinent procedures and policies followed by the evaluation committee, fair and transparent? The preparations for the tender process for the solid waste collection did not start in a timely manner. This contributed to the deficient quality of the ToR. In this regard, the adage 'haste makes waste' rings true, which means that rushing things leads to mistakes or poor results. The department of Infrastructure Management acknowledged that they were under enormous pressure to complete the tender on time. That resulted in the approval of an insufficiently vetted ToR and quickly putting an evaluation committee together. The committee was instantly met with challenges in terms of the interpretation and execution of certain critical provisions in the ToR, which led to arbitrary decision-making, infighting and ultimately resignations, whereby four (4) of the seven (7) committee members distanced themselves from the results of the tender. The Ombudsman concludes based on the findings that the tendering and awarding process was neither fair nor sufficiently transparent. The application of certain provisions in the ToR, particularly the requirement of the original business license based on the scope of the work tendered, and the pricing component disproportionately affected some contractors, while at the same time advantaged others. Even when it became clear that certain contractors could not live up to the requirements of the ToR, after the nomination but prior to the signing of the contracts, this was neglected by the ministry. The end result is that the bidding process was mismanaged whereby some contractors are now unable to live up to the requirements in the ToR/contract, resulting in poor execution of the works.

The minister refused to provide critical information (signed individual evaluation sheets for the completeness of tender documents and signed internal findings reports). The Ombudsman was therefore unable to make a complete assessment and determination regarding the transparency of the tendering and awarding process, as such the Ombudsman concludes that the process was not sufficiently transparent. As contractors could not compare the final results of their respective bids with their competitors, due to the ministries refusal to provide an evaluation report when queried, the Ombudsman therefore concludes that, based on fundamental procurement principles, the procedures and policies followed by the evaluation committee were also not sufficiently transparent.

7. Recommendations

Based on the findings in the report, the Ombudsman proposes the following recommendations.

Creation of a comprehensive tender procurement policy/enactment of *Lbham* containing general measures

The Ombudsman reiterates the recommendation provided to government in the Systemic Investigation Procurement process/Procurement Management Policy PJIAE N.V.⁸⁷, whereby the government was advised to improve the legal framework for (semi) public procurement by enacting legislation, including the required *Lbham*, as well as establish standardized procurement guidelines/policies that require civil or social control mechanisms (for example tender boards) to monitor the processes of public contracting. And the aforementioned script ('*draaiboek*').

Timely and accurate preparation of tender/ToR

Preparation for the tender must start on time. A tender procurement policy should also include critical deadlines of the different phases, from start (tender/ advertisement publication) to finish (awarding of contracts). This way the ToR can be properly vetted to ensure that all requirements are judicious, reasonable, and enforceable.

Increase staff of department and provide training

The staff of the department of Infrastructure Management should be increased to be able to properly execute its tasks. The department is currently understaffed. The staff must also be provided with training, *inter alia* in the discipline of procurement and price calculations.

Creation of a public tender evaluation report

To ensure transparency, the evaluation committee must be required to compile a (summary of) evaluation report which must be made available to all interested parties. This report should contain for example name of the awarded bidder, names of the evaluated bids as well as the disqualified bidders. The report should also contain bid prices as well as points scored for the winning and the evaluated bids. The reasons for disqualifications must also be included in the report.

Creation of comprehensive waste management plan

A comprehensive plan for waste management should be established. One that encompasses proper and responsible waste disposal and collection, recycling of waste, reduction of waste, reusing of goods and respect for the environment.

⁸⁷ Case nr. 2018/00399 (investigation was concluded in April 2019).

8. Response Minister of VROMI

In his letter of June 6, 2022, the minister writes to the Ombudsman:

Dear Madame Ombudsman,

Thank you for your preliminary findings report and the afforded opportunity to provide feedback.

The Ministry has taken note that your preliminary findings report does not include, mention or comment on the many (additional) documentation, including internal communication, that the Ministry has provided from the onset of your investigation. The Ministry also sent an additional letter of concerns which was also signed by the acting Secretary-General and the acting Department head of Infrastructure Management which were also not followed up on by your office nor does it appear to have been included in the drafting of the preliminary findings report. This is unfortunate as the Ministry feels that said information could have contributed to a more balanced preliminary findings report.

As such, the Ministry considers the investigation to be incomplete. A necessary consequence of this reflection is that the findings in the report are therefore also unbalanced. Similarly, the Ministry wishes to highlight that the findings regarding the current (alleged) functioning of the contractors, while incorrect, also falls outside of the scope of the 'systemic investigation' as you indicated the investigation was to focus on the bidding process and not the period thereafter.

It is incorrect to use alleged findings about the current work of the contractors to substantiate the findings of the report. For example, on page 27 of your report under the heading "Terms of Reference not being followed/enforced", you inaccurately mention alleged current situations with the collection of garbage. The sentence: "Certain provisions of the ToR are being ignored by contractors and not being enforced by the department, partly due to understaffing, these include but are not limited to the ten (10) year maximum age of trucks, the requirement of having two (2) trucks per parcel and the prohibition o/subcontracting, being major requirements." lacks connectivity to the scope of the investigation that was being carried out by your office. The Ombudsman initiated the investigation regarding the — Tendering and awarding process of the solid waste collection 2021-2026; transparency of the pertinent procedures and policies and evaluation by the evaluation committee.

The Ministry wishes to reiterate its ongoing goal of improving the departments and the service(s) provided to the people of Sint Maarten. The Ministry has since implemented a tender procurement procedure within the Ministry of VROMI seeing that there has been little to no documentation on how tenders have been carried out in the past. These improvements allow the Ministry to further outline the overarching principles and standards used to set clear direction and structure going forward.

I trust to have informed you sufficiently and I look forward to receiving the final report which should also include the feedback brought forward from the Ministry in previous letters and communications sent to your office.

Postscript

The explanatory notes of the National ordinance Ombudsman describe the role of the institution as an organization for persons to report complaints regarding the behavior of or treatment by administrative bodies or officials, with an independent body. The memorandum further explains that a legal provision for such a complaints procedure is a generally recognized complement of the legal protection that is due to the persons in a constitutional state. As the voice and protector of the people the Ombudsman, together with the General Audit Chamber and the Council of Advice, also supports parliament in their supervisory role vis-à-vis the government (Council of Ministers). The ministers are accountable to parliament and parliament in turn represents the entire population of Sint Maarten. In order to execute its task, the Ombudsman is dependent on having the necessary information at its disposal. The national ordinance therefore confers an information right on the Ombudsman and imposes an information obligation on administrative bodies. On government lies the obligation to provide information to the Ombudsman. In other words, refusing to provide the Ombudsman information or concluding that the information already provided is ‘thorough and complete’, while multiple persons have confirmed the existence of the information, is unacceptable. By declining to provide information, the Minister of VROMI was therefore handling in contravention of the law, thereby effectively undermining the role of the institution, a high council of state, which has been anchored in the constitution.

If the institution is expected to provide the legal protection due to its citizens and fulfill its constitutional role as the voice and protector of the people, the actions of the minister cannot be tolerated. Accountability requires transparency.

Pursuant to procedures, the minister was provided with the preliminary findings report (PFR) on 11 April, 2022 with the request to respond to the findings and recommendations. After requesting and receiving two extensions, the minister responded on 6 June, 2022. The text of the terse response has been included in chapter 8 of the report. In reaction to the claim of the minister that the report is unbalanced and/or incomplete, the Ombudsman notes that in the preparation of the PFR and the final report all documentation and relevant information provided by the ministry was included. In the response the minister states that some findings in the report are incorrect, without providing verification or counter-arguments for such. The minister also states that some findings ‘fall outside of the scope’ of the investigation. The Ombudsman notes in this regard that in addition to the statement being incorrect, it is ultimately the prerogative of her office to determine the definitive scope of the investigation. The findings regarding the post awarding process are part of the ToR (chapter 14: ‘Default’) and as such coincides with the awarding process, and therefore fall within the general scope of the main question.

...



OMBUDSMAN

SINT MAARTEN