TRANSNET BUNDLE 01

EXHIBIT BB 15

GAMA REINSTATEMENT

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: TRANSNET BUNDLE 01

#	Description	Bundle Pages	Exhibit Pages
1.	Exhibit BB 15: Gama Reinstatement	001 to 922	001 to 920

EXHIBIT BB 15

REINSTATEMENT OF GAMA

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

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INDEX: EXHIBIT BB 15

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15. 1	**Explanatory Memo by Clarence Benjamin**	**01**	**003 to 004**	**0001 to 0002**
15.2	**Affidavits and Declarations**	**01**	**005 to 922**	**0003 to 0920**
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	2.2 Affidavit & Declarations	01	009 to 922	0007 to 0920
15.3	**Additional Documents**	**02**	**001 to 292**	**0921 to 1212**
	3.1 Schedule 2 - Index to Additional Documents	02	001 to 002	0921 to 0922
	3.2 Additional Documents	02	003 to 292	0923 to 1212

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

Explanatory Memorandum
(Collation)

1. Following a request for information process, the office of the Chairperson procured a series of 16 affidavits / declarations dealing with the reinstatement of Siyabonga Gama as the chief executive of Transnet Freight Rail in 2011.
2. The affidavits / declarations were sent to me electronically via the researcher in his office. After downloading and printing them, I indexed and paginated the affidavits / declarations as per the index to Schedule 1.
3. In addition, the office of the Chairperson initiated a request for documentation from both Transnet and Norton Rose (previously Deneys Reitz). I also received that documentation electronically via his office. In conjunction with the Transnet stream's legal team, the relevant documentation was selected. After downloading and printing it, I indexed and paginated the documentation as per the index to Schedule 2 (items 1 to 11 and 15).
    a. Items 1 to 5, 8 and 15 were received from Norton Rose. Transnet waived legal privilege in relation to all documents received from Norton Rose.

b. Items 6, 7, 9, 10 and 11 were received from Transnet.

4. In addition, items 12, 13, 14 and 16 were received electronically by me directly from Transnet. I also downloaded and printed, and then indexed and paginated these items.
5. Items 17 and 18 are extracts from the transcripts of the evidence led by Ms Barbara Hogan, former Minister in the Department of Public Enterprises (from 10 May 2009 to 31 October 2010) relating to Mr Gama. Ms Hogan's evidence was led from day 21 (12 November 2018) to day 23 (14 November 2018).
6. I confirm that in undertaking the tasks described above, I did so accurately and without altering the content of the documentation.

Clarence Benjamin

12 October 2020

INDEX FOR SCHEDULE 1

AFFIDAVITS / DECLARATIONS

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	Annexure MPM 1: Commission's request for documents dated 26/05/2010	0017 to 0018	0015 to 0016
	Annexure MPM 2: Commission's request for affidavit / declaration dated 24/06/2020	0019 to 0021	0017 to 0019
	Annexure MPM 3: Minutes of meeting of board of directors held on 09/06/2010	0022 to 0033	0020 to 0031
	Annexure MPM 4: Minutes of in-committee meeting of board of directors held on 16/02/2011	0034 to 0035	0032 to 0033
	Annexure MPM 5: Settlement agreement between Mr Gama and Transnet entered into on 23/02/2011	0036 to 0041	0034 to 0039
	Annexure MPM 6: Meeting pack for board of directors' meeting held on 16/02/2011	0042 to 0064	0040 to 0066
	Annexure MPM 7: Minutes of meeting of Corporate Governance and Nominations Committee held on 03/02/2011	0065 to 0074	0067 to 0072
2	**Affidavit (second) and Annexures of Makwena Pertunia Mohlabi**	**0075 to 0166**	**0073 to 0193**
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Item	Description	Bundle Pages	Exhibit Page
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	Annexure MPM 8: Correspondence (draft) Mr Molefe to DG: DPE dealing with outstanding legal fees	0147 to 0148	0145 to 0146
	Annexure MPM 9: Minutes of meeting of board of directors held on 10/06/2011	0149 to 0166	0147 to 0164
3	**Affidavit of Siyabulela Xhanti Mapoma**	**0167**	**0165**
	Affidavit of Siyabulela Xhanti Mapoma (31/07/2020)	0167	0165
4	**Affidavit (second) of Siyabulela Xhanti Mapoma**	**0168**	**0166**
	Affidavit (second) of Siyabulela Xhanti Mapoma (31/08/2020)	0168	0166
5	**Affidavit of Siyabonga Mahlangu**	0169 to 0174	0167 to 0172
	Affidavit of Siyabonga Mahlangu (25/08/2020)	0169 to 0174	0167 to 0172
6	**Affidavit (supplementary) and Annexures of Siyabonga Mahlangu**	**0175 to 0182**	**0173 to 0180**
	Affidavit (supplementary) of Siyabonga Mahlangu (28/08/2020)	0175 to 0176	0173 to 0175
	Annexure SMA 1: email Mr Mahlangu to (then) Minister Gigaba dated 18/01/2011	0178 to 0180	0176 to 0178
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Item	Description	Bundle Pages	Exhibit Page
7	**Statement and Annexures of Malusi Knowledge Nkanyezi Gigaba**	**0183 to 0195**	**0181 to 0193**
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	Annexure A: Commission's request for affidavit dated 13/08/2020	0189 to 0195	0187 to 0193
8	**Affidavit and Annexures of Christopher Francis Neale Todd**	**0196**	**0194**
	Affidavit of Christopher Francis Neale Todd (14/07/2020)	0196	0194
9	**Affidavit and Annexures of Christopher Neale Todd**	**0197**	**0195**
	Affidavit of Christopher Neale Todd (29/09/2020)	0197	0195
10	**Declaration of Mafika Edmund Mkwanazi**	**0198**	**0196**
	Declaration of Mafika Edmund Mkwanazi (31/08/2020)	0198	0196
11	**Affidavit and Annexures of Nolwazi Gcaba**	**0199 to 0762**	**0197 to 0760**
	Affidavit of Nolwazi Gcaba (29/09/2020)	0199 to 0249	0197 to 0247
	Annexure NG 1: Correspondence Maltatji & Co to Transnet dated 14/08/2020	0250 to 0251	0248 to 0249
	Annexure NG 2: Email MNS Attorneys to Malatji & Co dated 19/08/2020	0250	0250
	Annexure NG 3: Correspondence Maltatji & Co to MNS Attorneys dated 24/08/2020	0253 to 0254	0251 to 0252
	Annexure NG 4: Correspondence Maltatji & Co to MNS Attorneys dated 31/08/2020	0255 to 0258	0253 to 0256
	Annexure NG 5: Schedule of outstanding documents	0259 to 0260	0257 to 0258
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	Annexure NG 7: Minutes of special meeting of board of directors held on 25/01/2011	0532 to 0541	0530 to 0539
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	Annexure NG 9: Memorandum dealing with Mr Gama's long-term incentive scheme arrangements dated 04/04/2011	0554 to 555	0552 to 0553
	Annexure NG 10: Transnet press statement on Mr Gama dated 23/02/2011	0556	0554
	Annexure NG 11: Transnet Board Acquisition and Disposals Committee mandate	0557 to 0560	0555 to 0558
	Annexure NG 12: Transnet Procurement Procedures Manual (PPM) dated 08/2012	0561 to 0762	0559 to 0760
12	**Affidavit and Annexures of Doris Tshepe**	**0763 to 0860**	**0761 to 0858**
	Affidavit of Doris Tshepe (29/09/2020)	0763 to 0810	0761 to 0808
	Annexure DT 1: same as NG 1		
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	Annexure DT 4: same as NG 4		
	Annexure DT 5: same as NG 5		
	Annexure DT 6: same as NG 6		
	Annexure DT 7: KPMG / Nkonki engagement terms and conditions dated 12/01/2011	0811 to 0826	0809 to 0824
	Annexure DT 8: same as NG 7		
	Annexure DT 9: minutes of meeting of Corporate Governance and Nominations Committee held on 03/02/2011	0827 to 0832	0825 to 0830
	Annexure DT 10: transcription of meeting of Corporate Governance and Nominations Committee held on 03/02/2011	0833 to 0860	0831 to 0858
	Annexure DT 11: same as NG 8		
	Annexure DT 12: same as NG 9		

Item	Description	Bundle Pages	Exhibit Page
	Annexure DT 13: same as NG 10		
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13	**Affidavit of Mangalani Peter Malungani**	**0861 to 0872**	**0859 to 0870**
	Affidavit of Mangalani Peter Malungani (16/09/2020)	0861 to 0866	0859 to 0864
	Annexure PM 1: Commission's request for affidavit dated 29/07/2020	0867 to 0872	0865 to 0870
14	**Declaration of Israel Biziwe Skosana**	**0873 to 0890**	**0871 to 0888**
	Declaration of Israel Biziwe Skosana (31/08/2020)	0873 to 0879	0871 to 0877
	Annexure A: Commission's request for affidavit dated 29/07/2020	0880 to 0885	0878 to 0883
	Annexure B: Appointment as non-executive director	0886 to 0888	0884 to 0886
	Annexure C: Rotation / resignation as non-executive director	0889 to 0890	0887 to 0888
15	**Affidavit of Zandile Ellen Tshabalala**	**0891 to 0902**	**0889 to 0900**
	Affidavit of Zandile Ellen Tshabalala (21/09/2020)	0891 to 0902	0889 to 0900
16	**Affidavit of Mthandazo Peter Moyo**	**0903 to 0922**	**0901 to 0920**
	Affidavit of Mthandazo Peter Moyo (03/09/2020)	0903 to 0909	0901 to 0907
	Annexure PM 1: minutes of special meeting of board of directors held on 21/09/2009	0910 to 0915	0908 to 0913
	Annexure PM 2: minutes of special meeting of board of directors held on 01/02/2011	0916 to 0919	0914 to 0917
	Annexure PM 3: minutes of meeting of board of directors held on 16/02/2011	0920 to 0922	0918 to 0920

"D"

IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

AFFIDAVIT

I, the undersigned,

MAKWENA PERTUNIA MOHLABI

do hereby make oath and say:

1

Unless the context indicates the contrary, the facts in this affidavit are, to the best of my knowledge and belief, true and correct.

2

I am an adult female, admitted attorney and the Group Company Secretary of Transnet. I was appointed as the Group Company Secretary of Transnet on 1 May 2020.

3

I hold the following academic qualifications:

(a) B Proc from University of Venda which I obtained in 1997;

(b) LLB from University of Pretoria which I obtained in 1999; and

(c) LLM from University of Pretoria which I obtained in 2003.

(d) I became an admitted Fellow Member of Chartered Secretaries Southern Africa (FCIS) in 2018.

4

My Responsibilities and Functions as Group Company Secretary of Transnet

My responsibilities and functions as Group Company Secretary of Transnet include those set out in section 88 of the Companies Act, 71 of 2008 (the Companies Act). They include:

(a) ensuring effective governance of the Board and its committees;

(b) being the custodian of all statutory minute books, registers and related confidential documentation;

(c) providing the Directors, collectively and individually, with guidance on their duties, responsibilities and powers;

(d) making the Directors aware of any law relevant to or affecting the Company;

(e) reporting to the Board any failure by the Company or any Director to comply with the Memorandum of Incorporation or Rules of the Company or Companies Act;

(f) ensuring that minutes of all Board and committee meetings are properly recorded in accordance with the Companies Act; and

(g) managing Declarations of Interests Registers for the Board.

5

By way of a letter dated 26 May 2020, a copy of which is annexed hereto marked "**MPM1**", the Commission requested me, in my capacity as the Group Company Secretary for Transnet, to furnish it with certain information. I was required to:

(a) state the date when the Board accepted the recommendations of the Chairperson of the disciplinary enquiry, Advocate D M Antrobus SC, of 2010 that Mr Gama be dismissed;

(b) advise what information was before the Board when it made the decision to accept the recommendations of the Chairperson of the disciplinary enquiry relating to Mr Siyabonga Gama in 2010;

(c) furnish any documents that were before the Board when it made the decision to accept the recommendations of the Chairperson of the disciplinary enquiry relating to Mr Gama;

(d) state the date when the Board either authorised or ratified the conclusion of the settlement agreement that Mr Mkwanazi, the Chairperson of the Transnet Board in

February 2011, concluded with Mr Gama and furnish the relevant minutes or resolutions of the relevant meeting or meetings of the Board; and

(e) furnish the relevant documents that were placed before the Board when it made the decision to either authorise, approve or ratify the settlement agreement signed by Mr Mkwanazi with Mr Gama in February 2011.

6

On 24 June 2020 the Commission further requested that I furnish it with an affidavit or affirmed declaration in which I address the issues raised in its letter dated 26 May 2020. A copy of the letter of 24 June 2020 is annexed hereto marked "**MPM2**".

7

I propose to deal with the request for information and documents below. However, before I do so, I wish to state that, as my tenure as the Group Company Secretary for Transnet started on 1 May 2020, I was not the Group Company Secretary of Transnet during the period to which the information requested relates (i.e. 2010 - 2011). I am only able to provide the information and documents requested by the Commission because they fall within my control and custody as Company Secretary of Transnet.

8

I will address each point of the Commission's request for information as set out above. I have personally perused and studied Transnet's records relating to the relevant period before supplying

the Commission with the information and documents requested. My response to the request for information and documents is set out below.

9

The date when the Board accepted the recommendations of the Chairperson of the disciplinary enquiry, Advocate D M Antrobus SC, that Mr Gama be dismissed

It would appear that on 9 June 2010 there was a meeting of the Board of Transnet in which the matter of Mr Gama's disciplinary proceedings was discussed. A copy of the minutes of that meeting is annexed hereto marked "**MPM3**". The minutes reflect, at Item 5.14, that the Acting Chairman gave feedback to the Board on Mr Gama's disciplinary proceedings and there was confirmation that "the judgment was received on 05 June 2010." Item 10.4.1 indicates that the Board noted the update by Mr Wells on Mr Gama's disciplinary process.

10

The information that was placed before the Board on the basis of which they made the decision to accept the recommendations of the Chairperson of the disciplinary enquiry

Despite a diligent search I could not find any record of a formal resolution taken by the Board in respect of Mr Gama's dismissal. It would, therefore, seem that there is no record of the Board having accepted the recommendations of the Chairperson of the disciplinary hearings. The documents prepared for the Board for the meeting on 9 June 2010 do not include a copy of the "judgment" of the Chairperson of the disciplinary enquiry.

The date when the Board authorised or approved or ratified the conclusion of the settlement agreement that Mr Mkwanazi concluded with Mr Gama

11.1 The minutes of the Board In-Committee[1] meeting of 16 February 2011 indicate, at Item 2.1.2, that the Board had extensive deliberations on the matter of Mr Gama's settlement agreement. The discussion points set out include "acknowledgement that Mr Gama was not challenging the finding of guilt against him, but the sanction imposed" and the Board indicated that "Mr Gama's sanction of dismissal was too harsh and the Board will support a sanction of a final written warning valid for a period of 6 months". I note that it was also indicated that there was a minority that was not in support of the reversal of the sanction.

11.2 The Board resolved that it supported the Acting Group Chief Executive in his endeavours to settle Mr Gama's matter and mandated the Company to finalise Mr Gama's settlement agreement. A copy of the minutes dated 16 February 2011 and the signed settlement agreement are annexed hereto marked "**MPM4**" and "**MPM5**" respectively.

11.3 The minutes of the Board In-Committee meeting of 16 February 2011 reflect that the Board mandated the Company to finalise Mr Gama's settlement agreement between Transnet and Mr Gama. They also reflect that a draft settlement agreement was distributed in the meeting. However, the records under my control, which is the meeting pack of the 16th February 2011, do not include the draft settlement agreement. The settlement agreement which I have provided is the signed settlement agreement. The minutes of 16 February 2011 do not indicate that the Board

[1] Denotes a closed session. The Company Secretary was not part of this closed session.

ratified or approved the signed settlement agreement in the terms in which it was signed.

12

The documents that were before the Board when it made the decision to authorise or approve or ratify the settlement agreement between Mr Gama and Transnet

According to the minutes dated 16 February 2011, a document dated 16 February 2011 entitled "Report for Transnet on Disciplinary Process involving Mr S Gama: Prepared 02 February 2011" (the Report) was the only document that was in the meeting pack. Therefore, the said document and the draft Settlement Agreement were tabled for consideration before the Board when the Board authorised the finalisation of Mr Gama's settlement agreement. A copy of this Report is annexed hereto marked "**MPM6**". In this regard I wish to point out that the minutes do not reflect that the actual terms contained in the settlement agreement were all approved or authorised or ratified. However, in terms of the 2011 Board Mandate, clause 8.3 indicates that "*papers for consideration by the Board will be submitted, in the normal course, at least four days before the meeting to enable directors to study the documentation and allow adequate opportunity for formal and informal discussion*". To the extent that there are documents that are circulated at the meeting, but not included in the meeting pack, it is then recorded as such in the minutes.

13

In case this may be of interest to the Commission, I also wish to draw the Commission's attention to the minutes of the Corporate Governance and Nominations Committee meeting of 3 February 2011, a copy of which is annexed hereto marked "**MPM7**". Part of the minutes relates to certain aspects of the settlement agreement relating to Mr Gama as well as the issue of whether Mr

Gama should be included as a candidate for the position of Group Chief Executive Officer for Transnet.

DEPONENT

I hereby certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Lyttelton on this the 10 day of 07 2020 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES: Mocwa Mmaseo

ADDRESS: Lyttelton SAPS Centurion

EX OFFICIO: Warrant Officer

"MPM1"

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,

CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

Date: 26 May 2020

Our reference: Ms Farrhah Khan
Email: farrhahk@commissionsc.org.za
Attention: Ms Makwena Mohlabi

The Company Secretary
Transnet
P.O. Box 72501
Parkview
South Africa
2122

Email: Makwena.Mohlabi@transnet.net

Dear Madam

Request for documents: Mr Siyabonga Gama

1. The investigations of the Commission include investigating circumstances under which some of the senior executives and managers in state-owned entities may have been removed from their positions or appointed to certain positions in certain state-owned entities in order to facilitate state capture and corruption in those state-owned entities.

2. Within the above context, the Commission would like to obtain certain information with regard to Mr Siyabonga Gama who was dismissed as Chief Executive Officer of TFR at the end of June 2010 but was re-instated in terms of a settlement agreement concluded between Transnet, represented by Mr Mkwanazi who was the Chairperson of the Board at the time and Mr Gama dated 23 February 2011.

3. I have been directed by the Chairperson of the Commission to request you to:
(a) state the date when the Board accepted the recommendations of the Chairperson of the disciplinary enquiry, Advocate D M Antrobus SC, that Mr Gama be dismissed;

(b) advise what information was placed before the Board on the basis of which they made the decision to accept the recommendations of the Chairperson of the disciplinary enquiry and

furnish any documents that were before the Board when they made the decision to accept the recommendations;

(c) state the date when the Board either authorised or approved the conclusion of the settlement agreement that Mr Mkwanazi concluded with Mr Gama and furnish the relevant minutes or resolutions of the relevant meeting or meetings of the Board; and

(d) furnish the relevant documents that were placed before the Board when it made the decision to accept the recommendations of the Chairperson of the disciplinary enquiry and when it made the decision to either authorise, approve or ratify the settlement agreement.

4. It would be highly appreciated if you would furnish the abovementioned information and documents on or before Friday, 5 June 2020.

5. Your kind co-operation and assistance will be highly appreciated.

Yours sincerely

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations
of State Capture, Corruption and Fraud in the Public Sector including Organs of State

"MPM2"

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

Date: 24 June 2020
Our reference: Ms Farrhah Khan
Email: farrhahk@commissionsc.org.za

The Company Secretary
Transnet
P.O. Box 72501
Parkview
South Africa
2122
Email: Makwena.Mohlabi@transnet.net

Attention: Ms Makwena Mohlabi

Dear Madam

Request for Affidavit or Affirmed Declaration

1. I refer to our letter dated 26 May 2020 in which we requested certain information relating to Mr Siyabonga Gama. I am aware of your email dated 27 May 2020 which requested that future correspondence be directed to Ms Sandra Coetzee, the Group Chief Legal Officer. However, it is necessary that this letter be addressed to you as the Company Secretary of Transnet.

2. In response to my letter dated 26 May 2020 Ms Kgaugelo Makhura furnished the Commission with certain information, a certain report and minutes of certain meetings of the Board of Directors of Transnet for which the Commission is grateful.

3. I have now been directed by the Chairperson of the Commission to ask you, in your capacity as Company Secretary of Transnet, to furnish the Commission on or before 2 July 2020 with an affidavit or affirmed declaration in which you deal with the matters raised in my letter to you dated 26 May 2020 and attach such documents to the affidavit as may be contemplated in my letter dated 26 May 2020. This may mean that you will be providing us with the same information that Ms Makhura has already provided but the difference now is that the information will have evidential value before the Commission and will be furnished by you in your capacity as Company Secretary. It is important that the affidavit to be sent to the Commission be deposed to by the Company Secretary and nobody else.

4. If you require assistance in the preparation of your affidavit or your affirmed declaration, the Commission will be able to assist you to prepare the affidavit or affirmed declaration and you will not be charged any fees or costs for that assistance. Should you need such assistance from the Commission, please let me know. You are also free to make use of your own lawyer or you may prepare the affidavit or affirmed declaration on your own. If, however, you choose to use your own lawyer, the Commission will not be liable for the payment of your lawyer's fees or costs.

5. You are requested to advise the Commission within 3 calendar days of receipt of this letter whether you undertake to furnish the Commission with the affidavit or affirmed declaration within the stipulated time. If you do not advise the

Commission that you will furnish it with the affidavit or affirmed declaration within that time, the Commission will take it that you do not intend to furnish it with the required affidavit or affirmed declaration.

6. Your kind co-operation and assistance will be highly appreciated.

Yours sincerely

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

54

CONFIDENTIAL "MPM3"

MINUTES OF MEETING NO 10/4 OF THE BOARD OF DIRECTORS OF TRANSNET LIMITED HELD ON 9 JUNE 2010 AT 09:00 IN BOARDROOM 4901, CARLTON CENTRE, 150 COMMISSIONER STREET, JOHANNESBURG

Resolution No/ For Attention

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER**

The Acting Chairman welcomed all members and attendees present and having noted that there was a quorum, he declared the meeting duly constituted.

1.1 **Present**

Prof GK Everingham	Acting Chairman
Ms NBP Gcaba	Non-Executive Director
Dr ND Haste	Non-Executive Director
Mr MJ Hankinson	Non-Executive Director
Mr PG Joubert	Non-Executive Director
Ms NNA Matyumza	Non-Executive Director
Mr MP Moyo	Non-Executive Director
Ms NR Ntshingila	Non-Executive Director
Ms KC Ramon	Non-Executive Director
Mr CF Wells	Acting Group Chief Executive
Mr A Singh	Acting Chief Financial Officer

1.2 **In attendance**

Mr VD Kahla	Group Executive: Office of the Group Chief Executive
Ms ANC Ceba	Group Company Secretary
Ms K Moodley	Deputy Group Company Secretary

1.3 **Apologies**

None

1.4 **Adoption of Agenda**

The agenda was adopted as tabled.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The Acting Chairman took the Board through the safety briefing and evacuation procedures for the 49th floor as contained in the pack.

3 **DIRECTORS' DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature. Mr Hankinson informed the Committee that he has resigned as a director of Sovereign Foods, the effective date is 15 June 2010.

4 **APPROVAL OF THE MINUTES OF THE MEETINGS HELD ON 22 APRIL 2010 AND 20 MAY RESPECTIVELY**

4.1 The minutes of the Board meetings held on 22 April 2010 and 20 May 2010 were corrected and approved with amendments in respect of the following portions thereof:

Item 5.1.1	Replace the word "*proposed*" with the word "estimated" in the last sentence.
Item 5.3.1	The sentence should read "*Mr Kahla clarified that while the Company may have appeared slow in removing the vessel,* ***this was due to restrictions*** *placed by the insurers of the vessel that delayed the process.*"
Item 5.6.2 (iii)	Delete all words after the word "businesses".
Item 5.7.3	Insert the words "**despite originating in the Group Risk Committee**" at the end of the first sentence.
Item 7.3.3	Replace the words "*an attractive*" with the words "**a significant**".
Item 8.1.1	Delete the words "***the Company was under the impression that***" in

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the third sentence.

Item 81.4.1 (a) Replace the words "*due to the sensitivity of the markets*" with the words "**costs compared to the prior year**".

(b) Replace the word "*derailments*" with the words "**feasibility costs**".

Item 9.3.2 The sentence should read "*Mr Joubert advised the Board of other reputable auctioneers that could be utilised for the assignment, namely Strauss and Co (Stefan Welz and his senior team) and Bonhams in London.*"

Item 10.5.3 The sentence should read "*Mr Wells advised the Board that the Company's key initiative is to have copper classified as "**precious metal**". He also indicated that the Company is investigating the introduction of x-ray scanners and **weigh bridges** at the ports and is further considering the re-introduction of railway police.*"

Item 11.2.1 Insert the word "**to**" after the word "over" in the second line.

Item 12.4.4 The resolution should read "*The Board noted the presentation and **RESOLVED** that it approves the revised wage mandate **to 11.25%.***"

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Item 3.3.4 Replace the words "*take a strain*" with the words "**have difficulty**".

5 **MATTERS ARISING**

5.1 **Update on the legal action against ThyssenKrupp (Shiploaders in Saldanha)**

5.1.1 Mr Wells reported that there is an agreement with representatives from ThyssenKrupp on a R60 million settlement to the Company and repairs to the faulty shiploader and tripper car to specification. Mr Wells stated that if agreement is not reached, the court date is scheduled for the fourth quarter of the year. — Mr Wells (Matter arising)

Ms Matyumza and Mr Moyo joined the meeting.

5.1.2 Dr Haste stated that the Company must ensure that vigorous quality assurance tests are conducted on the acquired infrastructure and its designs. Consideration should be given to appointing external resources to assist with examining the quality of the infrastructure.

5.1.3 Mr Wells informed the Board that ThyssenKrupp was requested by the then management to reduce the cost in the project, and hence the challenges experienced with the equipment. He indicated that the governance processes have significantly changed since the establishment of Transnet Capital Projects, and that the Company has implemented strict processes for the acquisition of equipment going forward.

The Board noted the update.

5.2 **Submission of a plan to take over the additional domestic coal tonnages that would be coming on stream from Eskom**

5.2.1 Mr Wells reported that the Company has formed a working committee with Eskom and a forward-looking plan will be submitted to the Board at the next meeting. — Mr Wells (Matter arising)

5.2.2 Mr Wells stated that the Transnet Internal Audit Findings on the NMPP governance process will be tabled at the next Board meeting. — Mr Wells (Matter arising)

5.3 **The Reputation Management Strategy**

Mr Kahla stated that the advertising campaign will be presented to the Board at the next meeting. — Mr Kahla (Matter arising)

5.4 **Update on the Rovos Rail incident**

Mr Wells stated that the Board of Inquiry Report is still outstanding. He, however, advised the Board that the internal investigation concluded that the Company had acted

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	appropriately at the time of the incident. He further stated that the lessons learnt from the incident have already been implemented within the Company.	Mr Wells (Matter Arising)
5.5	**Group Chief Executive's Report**	
	Mr Wells confirmed that the Company had issued a press release on the proposed 81mt for export coal in response to an article in the Business Report.	
5.6	**Manganese Capacity**	
5.6.1	Mr Wells informed the Board that industry is unanimous that manganese should be exported through the Port of Saldanha. He indicated that the Company's preference is to have a dedicated line through the Port of Saldanha. He stated that a business case in this regard is being developed.	Mr Wells (Matter arising)
5.7	**PRASA dispute**	
5.7.1	Mr Singh reported that payment of R130 million was received from PRASA subsequent to the previous Board meeting, and that the balance of R400 million is payable by 30 June 2010. Mr Singh stated that PRASA has defaulted on the 30 day payment plan that was agreed upon between the Company and PRASA in March 2010.	
5.7.2	Mr Wells informed the Board that the Company has taken a decision not to release any of the PRASA coaches without an acknowledgement of debt duly signed by the Chief Executive Officer of PRASA. Ms Gcaba stated that the Company should acquire a guarantee from PRASA for services to be rendered or discontinue its service to PRASA.	
5.7.3	Ms Ramon raised a concern on the matter, stating that R130 million of debt was written off the Company's financial statements for the year ended 31 March 2010 and that a further R200 million is provided for against the pricing dispute issues.	
5..7.4	Mr Singh reported that it was intended that a letter would be sent to the Shareholder Minister requesting her intervention to increase the allocation to Transnet Rail Engineering. He indicated that the Company is still awaiting a response from the Shareholder Minister.	Mr Singh
5.8	**PRASA's reduced allocation**	
5.8.1	The matter was dealt with under item 5.7.4.	
5.9	**Financial Overview**	
5.9.1	Mr Singh stated that the capital expenditure matter is explained in the press release and that the matter has been finalised.	
5.9.2	Mr Singh reported that an exercise was conducted on the KPIs for Transnet Pipelines after the adverse determination of the petroleum tariff application for the 2010/11 financial year. He indicated that there is significant impact on the gearing and cash interest cover ratio for Transnet Pipelines. He stated that the KPIs would need to be amended accordingly. Mr Moyo requested that the revised KPIs be circulated to the Board for approval.	Mr Singh (Matter arising)
5.9.3	Mr Kahla stated that the Company has submitted its proposed amendments on the Petroleum Pipelines Regulations to the Department of Public Enterprises in an effort to clarify the rules.	
5.10	**Annual General Meeting arrangements and statutory authorisation applicable to some of the proposed agenda items**	
5.10.1	Ms Ceba confirmed that the draft Annual General Meeting motions have been amended to provide for individual re-appointment of the Non-Executive Directors.	
5.10.1.1	Mr Moyo stated that the Company has to secure confirmation from the Shareholder	

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Minister regarding the re-appointment of the Non-Executive Directors at the forthcoming Annual General Meeting. The Acting Chairman stated that he has had numerous discussions with the Shareholder Minister on the matter, but there has been no firm commitment from the Shareholder Minister.

5.10.1.2 It was **agreed** that a draft Annual General Meeting pack will be submitted to the Shareholder Minister for consideration before the actual submission of the Annual General Meeting Notice. The Acting Chairman stated that he will discuss the draft pack with the Shareholder Minister on 14 June 2010. — Ms Ceba (Matter arising)

5.10.1.3 Ms Ramon indicated that the re-appointment of the auditors must also be dealt with prior to the Annual General Meeting.

5.10.2 Ms Ceba confirmed that the fee table for Non-Executive Directors has been inserted in the draft Annual General Meeting pack.

5.10.3 The Remuneration Survey Report was dealt with under Item 8.7 below.

5.11 **Transnet Second Defined Benefit Fund : 2010 Transnet *ex-gratia* payment**

Mr Wells stated that the exercise on the proposed amendments to the Fund Rules is work in progress, and these would be submitted to the Board for consideration when finalised. — Mr Wells (Matter arising)

5.12 **Draft Sustainability Report for the 2009/10 financial year**

Mr Kahla confirmed that the matter has been finalised.

5.13 **Company's compliance with the new Companies Act and King III requirements**

Mr Kahla indicated that the Company is awaiting the Shareholder Minister's approval with regard to the proposed amendments to the constitutive documents. — Mr Kahla (Matter arising)

5.14 **Disciplinary proceedings**

The Acting Chairman gave feedback to the Board on Mr Gama's disciplinary proceedings. The judgment was received on 05 June 2010.

5.15 **Potential candidates for the board succession**

The Acting Chairman confirmed that he had circulated the names of the potential Board appointees to all members.

5.16 **Impact of the strike**

The matter was dealt with under Item 6.3 below.

5.17 **Wage negotiations**

Mr Wells reported that the Company will review its organisational structure post the strike.

5.18 **Recovery period post the strike**

Mr Wells stated that although the Company did not widely communicate the matter regarding the Argentinean World Cup communication equipment, the Local Organising Committee and the Shareholder Representative were informed of the matter. He confirmed that the equipment had arrived in the country.

5.19 **Cable theft**

5.19.1 Mr Kahla informed the Board that the Acting Chairman had written a letter to the Shareholder Minister proposing certain amendments to the precious metal legislation. He stated that the Company is also communicating with the Departments of Energy and the Transport on the implementation of the proposed amendments. He undertook to follow up with the Department of Public Enterprises on the feedback received from the — Mr Kahla

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other departments.

5.19.2 Mr Wells informed the Board that a meeting is scheduled with Eskom representatives on 10 June 2010 to discuss cable theft. He stated that the Company is exploring a multi-disciplinary approach to deal with cable theft through the proposed amendments to the precious metal legislation and forensic intelligence. (Matter arising)

5.20 **Claim for damages to the Company's property during the strike**

The matter was discussed under Item 6.3.1 below.

6 **GROUP CHIEF EXECUTIVE'S REPORT**

Mr Wells took the Board through the report as contained in the pack. He further circulated and took the Board through a report on the impact of the strike. Mr Joubert requested that a report on productivity be submitted to the Board for consideration. Mr Wells (Matter arising)

6.1 **Impact of the strike on volumes and latest estimates**

GFB volumes were approximately 25% below budget during the 3-week strike and weekly throughput improved after the strike ended. Volume lost amounted to approximately 1.2mt with revenue losses in the region of R200m

EXPORT COAL

Export coal has a 10 day planned maintenance shutdown which was brought forward by one week as a result of the strike, hence there was no impact during the 1st week of the strike. However, the strike heavily impacted the following weeks as the maintenance schedule went beyond the 10day shutdown period, with 93.7% and 90% budget variances in the 2nd and 3rd week of the strike respectively. The shutdown lasted for 20days compared to the usual 10day period, primarily due to the key people involved in the maintenance being on strike. The extended shut down was planned with the coal industry. It is however important to note that every ship was loaded so no exports were lost, as available stock piles were utilised.

EXPORT IRON ORE

The strike had limited impact on the export iron ore line during the 2nd and 3rd week. The 1st week performance was mainly due to operational issues, which was not directly related to the strike and no shipment was lost so effectively the iron ore ran according to schedule in all material respects.

CONTAINERS

Transnet made arrangements to operate critical commodities on rail, but the majority of workers at the container terminals are SATAWU (80% at DCT) have shown the strongest response to the strike call at DCT, leaving Transnet extremely vulnerable at the container terminals.

During the 1st week volumes were 80% below budgeted volume. By the 3rd week the mitigating strategies have shown a positive impact, coupled with one of the two unions returning to work. Gross crane moves did however increase to 30 at DCT during the strike period compared to the pre-strike average of 21 as operations were easier due to no trucking activities.

COST

Significant cost-savings were recorded on energy and personnel cost (no work no pay). Transnet lost revenue of R680m over the strike period, which will be recovered during the backlog catch up to some extent. The impact of the strike is approximately R483m. Transnet however estimated significant additional cost, comprising overtime and other costs to address backlogs. The costs of damages to assets are estimated at R53m, partially recoverable by insurance. The net loss due to the strike is estimated in the region of R400m, depending on the volume recovery over the remaining months of the year.

6.1.1 Mr Wells reported that the Company's legal team is considering charges against

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	SATAWU for damages to Company assets and properties, estimated at R52 million. He stated that the legal team still need to establish the facts and that the Board will be updated on the matter.	Mr Wells (Matter arising)
6.1.2	Mr Wells stated that the Company was using experienced rail consultants to support Transnet Freight Rail and is in the process of compiling a human resource plan to address operational requirements. Mr Moyo suggested that the Company develop a succession plan for its executives.	Mr Wells
6.1.3	Mr Wells stated that the South African Association of Ship Owners is demanding increased productivity at the ports, and Transnet Port Terminals has agreed on a target of 26 crane gross moves per hour.	
6.1.4	In response to a question by Ms Ntshingila on how much the strike has cost the country, Mr Wells stated that that the Company is in the process of compiling the estimated impact of the strike. He informed the Board that there was no deterioration in any of the refrigerated containers at the Ports. He further stated that the Company intends to have the Ports categorised as strategic and essential operations.	Mr Wells
6.3	**Environmental Management – Port of Port Elizabeth**	
	Mr Wells reported that the Company received a new directive on 26 May 2010 from the Department of Environmental Affairs with regard to the Port of Port Elizabeth. He stated that the Company has responded to the directive, but management is of the opinion that it was not appropriate for the Department of Environmental Affairs to issue the directive as the Company has already instituted a programme, which was shared with the Department of Environmental Affairs, to address majority of the issues raised in the directive.	
6.4	**Pipeline incident at NASREC**	
6.4.1.	The Acting Chairman advised the Board of the pipeline incident at NASREC. He stated that the pipeline incident will negatively impact on deliveries to Langlaagte, Tarlton and Rustenburg depots until physical repairs on the pipelines have been completed.	
6.4.2	Mr Wells stated that the pipeline is currently operational but the polluted area has not yet been de-contaminated. He added that the Company will institute a legal process to have City Power held liable for the incident.	Mr Wells (Matter arising)
6.5	**Interactions with the Portfolio Committees on Public Enterprises and Transport**	
	The Acting Chairman stated that it is imperative for the Company to understand the relationship between Transnet and the Portfolio Committee on Public Enterprises. Mr Wells also advised the Board that he is uncomfortable with the treatment that the Company receives from the parliamentary committees.	
6.7	**Draft Annual Report for the 2009/10 financial year**	
6.7.1	Mr Hankinson sought clarity on the statement dealing with the corporatisation of Transnet Pipelines. Mr Wells responded that the Company has been advised by the Department of Public Enterprises that the corporatisation of Transnet Pipelines is a condition precedent in the granting of the petroleum pipeline levy. Mr Kahla reminded the Board that the Deputy Minister of Public Enterprises had dismissed the statement as untrue at the October 2009 Board Strategic Session.	Mr Wells (Matter Arising)
6.7.2	Mr Wells stated that the Group's rolling DIFR of 0.90 (weighted average) is slightly above the March 2010 achievement and 5.9% above the annual target of 0.85 as per the 2010/11 Shareholder Compact. He added that of the 53 disabling injuries reported during the month, 41 relate to human factors and non-adherence to standard operating procedures. Mr Moyo raised a concerned around the DIFR figures.	
6.7.3	Mr Wells reported that the Company has launched a safety programme and that there	

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are initiatives in place to ensure that the Company is adhering to the Standard Operating Procedures. Mr Joubert informed the Board that the Group Remuneration Committee recommended that DIFR should be substituted with adherence to Standard Operating Procedures as a modifier to the short term incentive scheme.

The Board noted the update.

Mr Kahla was excused from the meeting.

7 **FINANCIAL REPORT**

7.1 Mr Singh took the Board through the submission as contained in the pack. The submission was taken as read. He highlighted, amongst others, the following :

(i) The Group revenue for the month of April 2010 is R55 million below budget (R3 186 million vs. R3 242 million: -1.7%).
(ii) The Operating Costs are R311 million below budget for the month of April (R2 011 million vs. R2 322 million: 13.4%).
(iii) As a result of the above, EBITDA is R256 million better than budget for the month (R1 175 million vs. R920 million: 27.8%).
(iv) Cash on hand is R6 billion.

7.2 Mr Singh stated that the cash inflow on Working Capital for the Group is R74 million for the month of April 2010. He informed the Board that high level attention is being given to improve working capital management in order to support the cash flow requirements.

7.3 Mr Singh advised the Board that the Company had successfully conducted road shows in Europe and in the United States of America during April 2010, and these will be followed by issuance under the GMTN programme subject to market conditions. Mr Wells informed the Board that the Company will take advantage of the markets as soon as financial conditions improve.

7.4 On the Internal Audit Report, Mr Singh highlighted that the Order To Execute audit focussed on key operational controls pertaining to the process. He informed the Board that these operational controls are aimed at enhancing the organisational performance.

7.5 Mr Singh stated that the Supply Chain audit focus in procurement has been extended beyond CFRCs to include business critical activities across the supply chain. He stated that a combination of "control testing" and "maturity assessment" approach has been implemented.

7.6 Mr Singh stated that the key objective of the capital process review was to assess the effectiveness of operational controls in capital projects. He further stated that there was improvement in the capital project controls.

The Board noted the update.

8 **MATTERS FOR DISCUSSION/APPROVAL**

8.1 **Going concern assertion – Transnet Limited and Group**

Ms Ramon took the Board through the submission as contained in the pack. The submission was taken as read.

The Board of Directors **RESOLVED** that it approves the Going Concern Assertion for Transnet Limited and the Group as contained in the pack. 10/4/1

8.2 **Management Representation Letter**

Ms Ramon took the Board through the submission as contained in the pack. She highlighted the reportable irregularity that was recorded by the auditors and the outstanding PRASA debt.

The Board of Directors **RESOLVED** that it approves the Management Representation

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Letter. 10/4/2

8.3 **Director's Report**

8.3.1 Ms Ramon took the Board through the Directors' Report as contained the Annual Report. The Directors' Report was taken as read.

8.3.2 Mr Wells stated that the Shareholder Representative is currently in the process of identifying suitable candidates to fill the vacant positions on the Board and it is expected that these members will be appointed at the next Annual General Meeting.

8.3.3 Mr Wells further confirmed that the Acting Chairman sent a letter to the Shareholder Minister requesting confirmation on the corporatisation of Transnet Pipelines.

8.3.4 It was **agreed** that a sub-committee comprising the Acting Chairman, Messrs Wells and Singh and Ms Ramon be granted authority to finalise the Annual Report after receipt of confirmation on the proposed corporatisation of Transnet Pipelines from the Shareholder Minister.

The Board **RESOLVED** that it approves the Directors' Report in the Annual Financial Statements. 10/4/3

8.4 **Directors valuation of unlisted investment**

Ms Ramon took the Board through the Directors valuation of unlisted investments as contained in the draft Annual Report. She stated that the amounts are not material to Transnet overall.

The Board **RESOLVED** that it approves the Directors Valuation of Unlisted Investments as contained in the Annual Report. 10/4/4

8.5 **Press Release**

8.5.1 Mr Singh took the Board through the press release that was circulated in the meeting. He highlighted, amongst others that the gearing increased from 36% to 38% as well as the impact of economic regulation on the Company.

8.5.2 Mr Wells informed the Board that the audit of the KPIs was signed-off by the Auditors except for one matter that relates to ship delays at the Port of Durban as the information was not correctly captured. He informed the Board that the Company will engage with the Auditors on the best manner to resolve the matter.
The Board of Directors **RESOLVED** that it approves the Press Release. 10/4/5

8.6 **Annual Financial Statements – 31 March 2010**

8.6.1 Ms Ramon took the Board through the Annual Financial Statements for the period ended 31 March 2010 as contained in the draft Annual Report. She stated that the Group Audit Committee was satisfied with the Annual Financial Statements.

8.6.2 The Board conveyed its appreciation to Management for its effort in compiling the draft Annual Report within three months.

The Board **RESOLVED** that it approves the Annual Financial Statements for the period ended 31 March 2010. 10/4/6

8.7 **Remuneration survey results**

8.7.1 Mr Wells took the Board through the submission as contained in the pack.

8.7.2 Dr Haste stated that a benchmarking survey was conducted to review whether the remuneration and fee structure of the Transnet Non-Executive Directors was in line with current market norms. He added that the members of the Group Remuneration Committee were unanimous that the current fees of the Transnet Non-Executive Directors should not be increased.

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8.7.3 Mr Hankinson advised the Board that the fees for Transnet Non-Executive Directors were within the current market norms, however, the premium for the Group Audit Committee and the committee membership fees was lower than the market.

8.7.4 Mr Joubert stated that the Transnet Non-Executive Directors' fees were comparable in general, if not slightly higher.

The Board **RESOLVED** that it approves that the Transnet Non-Executive Directors' fees remain unchanged as set out below.

Fees	Current Emolument	Comments
Chairperson of the Board	1 000 000	Paid monthly
Non-Executive Directors	300 000	Paid quarterly
Add-on for Committee Chairmanship	150 000	Paid quarterly
Add-on for Committee Membership	75 000	Paid quarterly

10/4/7

8.8 **Proposal for the Outeniqua Choo-Tjoe**

8.8.1 Mr Wells took the Board through the submission as contained in the pack.

8.8.2 In response to a question raised by Mr Joubert regarding the Outeniqua Choo-Tjoe property, Mr Wells stated that majority of the property will be donated to a deserving organisation alternatively the Company will consider the best use for the property.

The Board **RESOLVED** that it approves the restructuring of the Outeniqua Choo-Tjoe Steam Train Service subject to the following :

(a) That the Outeniqua Choo-Tjoe service be closed down and that retrenchment packages be offered to all qualifying staff;

(b) That the Outeniqua Choo-Tjoe rolling stock (locomotives and coaches) be moved to the Outeniqua Transport Museum in George for safe storage and display;

(c) That a revised application be submitted to the Minister of Public Enterprises requesting approval for the closure of the service in terms of the Public Finance Management Act; and

(d) That the Acting Group Chief Executive, or his delegate, be authorised to, on behalf of Transnet Limited, sign and execute any documents necessary to give effect to the winding-down and closure of the Outeniqua Choo-Tjoe business. 10/4/8

8.9 **Treasury Counter Party Limits**

8.9.1 Mr Singh took the Board through the submission as contained in the pack. He highlighted that Group Treasury is requesting the Board to consider increasing the overall limit to R6 billion, as reflected in Annexure "B" with a maximum of R2.5 billion per fund and to waive the 33% restriction of available cash that may be invested per single fund as money market funds are diversified in nature.

8.9.2 Mr Joubert stated that there should be more vigilance on the ratings as some of the European banks are currently exposed.

8.9.3 Ms Ramon questioned why there was a huge limit increase in Citibank, Deutsche Bank and JP Morgan Chase Bank. She stated that the Board would be satisfied with the proposal if it took the market exposure into consideration. Mr Wells explained that the Company was spreading its risk exposure to a number of banks that have been identified.

The Board **RESOLVED** that it approves the Treasury Counter Party Limits subject to the following :

(a) The limits as reflected in Annexure "A" (attached to these minutes) in the

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"recommended limit" column totalling R43.6 billion;

(b) The increase in the money market fund limits to R6 billion as depicted on Annexure "A"; and

(c) An amendment to the FRM to allow Treasury to invest up to 50% of cash available with a single money market fund, instead of the current 33% as money market funds are already diversified.

10/4/9

9 **NOTING OF MINUTES FROM COMMITTEES OF THE TRANSNET BOARD**

9.1 **Group Audit Committee**

9.1.1 Ms Ramon took the Board through the draft set of minutes of the Group Audit Committee meeting held on 3 June 2010. She highlighted, amongst others, the following matters :

a. The restructuring of the pension surplus funds is in progress and that the Company is awaiting confirmation of a workshop with the Shareholder Minister to inform her of the Company's proposal.

b. The auditors have issued a modified audit opinion on the annual financial statements. She stated that the modification relates to the reportable irregularity on the locomotives contract.

c. On environmental provisions, she stated that management has continued to record provisions for environmental exposures and the total decommissioning and rehabilitation provisions recorded is R1 087 million (2009 : R906 million).

d. On fair valuation of investment property, she stated that there will be changes in the classification of investment property.

9.1.2 Ms Ramon highlighted amongst others the following from the Closed Session that was held with the auditors and management, respectively, on 3 June 2010 :

a. There are concerns regarding the prior period errors e.g. on Transnet Property leases and borrowing costs.

b. The Company approved the new Ernst and Young Contract Rate, which was compared to the Auditor-General's rate as well as the market.

c. The Group Audit Committee is in support of the retention of Deloitte as the Company's auditors as audit firms are normally rotated after 10 years of service and there will be a forced rotation in 2013.

The Board noted the update.

9.2 **Group Remuneration Committee**

9.2.1 Dr Haste took the Board through the draft set of minutes of the Group Remuneration Committee meeting held on 8 June 2010. He highlighted, amongst others, the following matters from the meeting:

9.2.1.1 Short-term Incentive Payment 2009/10: The overall performance as well as the performance of the Operating Divisions has been capped to a maximum equal to stretch (105%) level as the operational efficiencies of the Company are not on the targeted level in all areas. The capping of the businesses resulted in a reduction of the bonus pool by approximately R170 million.

9.2.1.2 He informed the Board that the Company had recommended that Return on Total Average Assets (ROTA) (excluding capital work in progress) be used as the Group Long-Term Incentive modifier for the 2010/11 financial year.

9.2.1.3 There were proposed changes to the Ground Rules for the Long-Term Incentive Scheme.

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9.2.2 Dr Haste stated that the Group Remuneration Committee approved the following :

(a) That the remuneration of the Group Executive Committee members be adjusted by 6% and that the increases be processed for payment in the June 2010 payroll month, retrospectively implemented from 1 April 2010.

(b) The initiative to reshape the workforce over a period of time through exploring the opportunity for space creation in respect of semi-skilled employees and growing the skilled workforce on First Line Management.

(c) The payment of monthly ex-gratia acting allowances to Messrs Morwe, Socikwa and Gregg-MacDonald for the duration of their acting period.

9.2.2.1 Ms Matyumza stated that the differences in the recent annual salary increases for management and the bargaining unit employees reflects the Company's attempt to continue to close the gap between management and bargaining unit employees and should be communicated where appropriate.

The Board noted the update.

10 **GENERAL**

10.1 **Impact of the strike**

The matter was discussed under Item 6.2 above.

10.2 **Interactions with the Portfolio Committees on Public Enterprises and Transport**

The matter was discussed under Item 6.5 above.

10.3 **Durban International Airport**

10.3.1 Mr Wells informed the Board members that the acquisition of the Durban International Airport was approved by the Board 18 months ago prior to the recession period. He stated that although the decision was reversed during the recession period, it was indicated that the land is strategic for future port developments.

10.3.2 He indicated that a dug-out port might be required quicker than the Company had initially anticipated. He informed the Board that ACSA is going through a process of inviting bids for the acquisition of the property, and the Company is requesting approval to enter into negotiations with ACSA.

10.3.3 He stated that a business case is in the process of being drafted. Mr Wells

10.3.4 In response to a question raised by Mr Moyo if the Company can afford the project now, Mr Wells stated that ACSA urgently needs cash, and the Company will strive to negotiate a good deal. He added that the land will be positioned as a future specialist port.

The Board **RESOLVED** that it authorises the Acting Group Chief Executive, or his delegate, to implement the necessary steps and enter into negotiations with ACSA to acquire the Durban International Airport. 10/4/10

10.4 **Judgement on Mr Gama's matter**

10.4.1 The Board noted the updated by Mr Wells on Mr Gama's disciplinary process.

10.4.2 The Acting Chairman thanked the Board and management for working together during a difficult year. He expressed his appreciation to all members for their involvement in Board activities. Mr Joubert thanked the Acting Chairman for his leadership.

10.5 **Transnet Board Mandate**

The Board noted the Mandate as contained in the pack.

11 **CLOSE**

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The Acting Chairman thanked the Board for their participation. There being no further business to conduct, he declared the meeting closed.

ACTING CHAIRMAN
DATE: 5.11.2010

GROUP COMPANY SECRETARY
DATE: 05 NOVEMBER 2010

PRIVILEGED AND CONFIDENTIAL "MPM4"

IN-COMMITTEE MINUTES OF MEETING NO. 11/4 OF THE BOARD OF DIRECTORS OF TRANSNET LIMITED HELD ON 16 FEBRUARY 2011 AT 12:30 IN THE ROYAL ELEPHANT CONFERENCE CENTRE, CENTURION, PRETORIA

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1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER**

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted.

1.1 **Present**

Mr ME Mkwanazi	Chairman
Mr MA Fanucchi	Non-Executive Director
Mr HD Gazendam	Non-Executive Director
Ms NBP Gcaba	Non-Executive Director
Mr MP Malungani	Non-Executive Director
Mr BD Mkhwanazi	Non-Executive Director
Ms T Mnyaka	Non-Executive Director
Mr MP Moyo	Non-Executive Director
Mr IM Sharma	Non-Executive Director
Ms E Tshabalala	Non-Executive Director
Ms DLJ Tshepe	Non-Executive Director
Mr IB Skosana	Non-Executive Director

2 **MATTER FOR DISCUSSION/APPROVAL**

2.1 **Proposal for Mr Gama's Settlement Agreement**

2.1.1 The Chairman took the Board through the draft Settlement Agreement that was distributed in the meeting. He indicated that the Company intended to finalise Mr Gama's Settlement Agreement in the first two weeks of March 2011. He further informed the Board that there are human resources issues that will be referred back to the Group Remuneration Committee for consideration.

2.1.2 The Board had extensive deliberations on the matter. The following issues were highlighted in the deliberations:

- Acknowledgement that Mr Gama was not challenging the finding of guilt against him, but the sanction imposed;
- Mr Gama's sanction of dismissal was too harsh and the Board will support a sanction of a final written warning valid for a period of six months;
- Appreciation that Mr Gama can still add value in the Company;
- There was a minority not in support of the reversal of Mr Gama's sanction;
- The Company was mandated to finalise Mr Gama's Settlement Agreement; and
- The condonation process is a norm within Transnet, and to this effect, the Chairman was requested to draft a memorandum to the employees requesting that such conduct should cease.

Chairman

2.1.3 The Board was of the view that under normal circumstances, a final written warning would have been given.

2.1.4 The Board requested the Company to ensure that the matter is sensitively communicated to Management. Further, the Board requested that a team building exercise be organised for the Group Exco.

Chairman/Ms Ceba

The Board **RESOLVED** that it approves the following:

- It supports the acting GCE in his endeavours to settle Mr Gama's matter and mandates the Company to finalise Mr Gama's Settlement Agreement.

PRIVILEGED AND CONFIDENTIAL

Resolution No/
For Attention

3 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed.

CHAIRMAN
DATE: 21/04/2011

"MPM5"

DRAFT

IN THE TRANSNET BARGAINING COUNCIL

In the matter between:

SIYABONGA GAMA	APPLICANT
and	
TRANSNET LIMITED	RESPONDENT

AGREEMENT OF SETTLEMENT

IT IS AGREED:-

1. DEFINITIONS

1.1. In this agreement, the following words shall have the meanings assigned to them hereunder, unless the context indicates otherwise:-

1.1.1. "Mr. Gama" means: Mr Siyabonga Gama;

1.1.2 "Transnet" means: Transnet Limited, registration number 1990/000900/06;

1.1.3. "the parties" means: both Siyabonga Gama and Transnet Limited;

1.1.4. "TFR" means: Transnet Freight Rail;

2. PREAMBLE:-

2.1. An unfair dismissal dispute has arisen between the parties following the dismissal of Mr Gama as Chief Executive Officer (CEO) of TFR on 29 June 2010.

2.2. Mr Gama has referred an unfair dismissal dispute to the Transnet Bargaining Council. It is in respect of such unfair dismissal dispute that the parties have engaged in settlement discussions.

2.3 The parties have agreed to settle the dispute between them amicably without the need to resort to further litigation.

2.4 The agreement reached between the parties is on the terms and conditions set out hereunder.

3. NOW THEREFORE IT IS AGREED THAT:-

3.1. Mr. Gama return to Transnet, with effect from 23 February 2011 and he is to resume duties as CEO of TFR on 1 April 2011.

3.2. Any employment benefits that were due to him for the intervening period of 30 June 2010 to 23 February 2011 in terms of his employment contract shall be deemed to be fully restored.

3.2.1 The full restoration of benefits entails the following:

3.2.1.1. payment of Mr Gama's short term benefits which were due to him in the intervening period of 29 June 2010 to 23 February 2011, and payment thereof to be made by no later than 31 March 2011.

3.2.1.2. payment of Mr. Gama's long term benefits which were due to him in the intervening period of 29 June 2010 to 23 February 2011, and payment

thereof to be made by no later than 31 March 2011

3.2.1.3. restoration of Mr Gama's salary for the intervening period of 29 June 2010 to 23 February 2011, and payment thereof to be made by no later than 31 March 2011.

3.2.1.4 The aforesaid payments shall be made into the following bank account:-

S Gama
Standard Bank
Briardene Branch
Account number : 250 768 585
Branch code: 043626

3.3. Mr Gama is deemed to have served the six months Final Written Warning. The Final Written Warning will be deemed to have been effective from 29 June 2010 to 29 December 2010.

3.5. Transnet will make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council.

3.6. Transnet undertakes that such contribution towards the legal costs incurred by Gama will be made within a period of 14 days after submission by Gama of the relevant supporting documents.

3.7 The parties have agreed to formulate and present a common statement to the media in regard to the resolution of this matter.

3.8 Upon signature of this agreement, by both parties, it shall be deemed that all the respective consents required and authority needed to sign this agreement had been duly

obtained and exercised.

4. CONFIDENTIALITY

4.1 The parties to this agreement shall keep the terms of the agreement confidential and shall not disclose such terms to any third party, other than with the express written authority of the other party, save where such disclosure is required by law or in order to enforce the provisions of the agreement.

5. FULL AND FINAL SETTLEMENT

5.1 All the payments made and received herein are in full and final settlement of all and any claims Mr Gama may have against Transnet, whether such claims arise out of the termination of the contract of employment or employment relationship, or whether such claims arise in contract, delict, in terms of any statutory enactment, due to the award of any tribunal or body or otherwise, irrespective of whether any such claim would ordinarily arise in terms of the law of the Republic of South Africa or elsewhere.

5.2 Mr Gama agrees that Transnet has, subject to the discharge of its obligations in terms of this agreement, discharged all and any legal obligations that it may have towards him as a result of his employment relationship with the Company, its termination and/or any subsequent award, and that he has no other claim against Transnet arising out of the employment contract.

5.3 Nothing in this agreement shall be construed as constituting any admission by Transnet of any liability whatsoever to Mr Gama other than specifically contained in this agreement.

6. GENERAL

6.1 This agreement constitutes the entire agreement between the parties.

6.2 No party is bound by any representation, warranty, promise or the like not recorded herein.

6.3 No addition, variation, amendment or alteration or this agreement will be of any force or effect unless reduced to writing and signed for by or on behalf of the parties.

6.4 The parties agree that the terms of this Settlement agreement are in final settlement of any claims and disputes, which each party to the agreement may have against the other in respect of Mr Gama's employment as CEO of TFR.

6.5. This agreement shall be deemed to have the full force and effect in a manner that is equal to any order made by a court of law. This agreement shall be presented to the arbitrator to be made a final award between the parties.

THUS DONE AND SIGNED AT Johannesburg on this the 23 day of February 2011

AS WITNESSES:

1. .....

2. .....

For: SIYABONGA GAMA

THUS DONE AND SIGNED AT JOHANNESBURG on this the 22nd day of FEBRUARY 2011

AS WITNESSES:

1. .....

2. .....

FOR: TRANSNET LIMITED
Chairman, Duly Authorised

TRANSNET

"MPM6"

CONFIDENTIAL

Board of Directors' Meeting

Date : 16 February 2011

Time : 12:30 – 17:00

Venue : Royal Elephant Conference Centre
Centurion
PRETORIA

09/02/11

TRANSNET-01-042

BB15-GAMA-0040

REPORT FOR TRANSNET ON DISCIPLINARY PROCESS INVOLVING MR S GAMA: PREPARED ON 2 FEBRUARY 2011

The investigations that preceded disciplinary action

1. The investigations that preceded disciplinary action against Mr Gama related to two separate procurement contracts. The first was the acquisition of 50 "like-new" locomotives from a joint venture known as the Electro-Motive Sibanye Joint Venture (EMS joint venture). The second was the procurement of security services from an entity known as General Nyanda Security Risk Advisory Services (Pty) Ltd ("GNS").

2. In a letter dated 31 January 2008, the then Minister of Public Enterprises (Minister Erwin) requested the Transnet Board to investigate allegations of corruption and procurement irregularities relating to the procurement of locomotives. That letter followed a "tip-off" directed to the Public Service Commission relating to both the acquisition of the 50 "like-new" locomotives and a separate procurement process for the acquisition of 212 locomotives.

3. A lengthy and detailed investigation was conducted by Ernst & Young (E&Y), performing Transnet's internal audit function. The investigation of these matters commenced during the first half of March 2008. The initial stage of the investigation focussed on irregularities in the tender processes relating to the procurement of 212 locomotives and problems identified with the 50 "like-new" procurement process, and resulted in disciplinary action being instituted, during May 2008, against the person primarily responsible for these procurement processes, the then General Manager: Engineering in TFR.

4. One of the key problems identified in the course of this investigation was the fact that Mr Gama had concluded the relevant agreement (with a value of more than R800 million rand) on the authority of a specific Board resolution but without complying with the single and important condition set by the Board in that resolution. Further investigations on this issue were delayed by various disputes with the joint venture when the tender process for 212 locomotives was cancelled and Transnet took various steps to correct the non-

compliance with the Board resolution. The EMS joint venture brought a High Court challenge against Transnet which was successfully defended by Transnet in early 2009.

5. The investigation concerning Gama's own conduct in relation to this issue resumed in the latter part of 2008 and concluded in early 2009.

6. Unrelated to the locomotive acquisition, on 18 September 2008 an anonymous letter was received by Maria Ramos, then Group Chief Executive. The letter contained *inter alia* allegations of irregularities regarding the conclusion of the GNS contract. It mentioned the name Mr Gama and suggested that he be interviewed.

7. Ramos asked Mr Wells and Mr Kahla, then Group CFO and Executive in the Office of the CEO respectively, to look into the issue in terms of the usual processes. Wells requested the head of internal audit to investigate, and the matter was handed to the responsible partner at E&Y.

8. On 1 December 2008 a separate complaint was referred to Transnet Internal Audit (TIA) through the fraud hotline Tip-Offs Anonymous, which is an independent organisation contracted to Transnet to receive on a confidential basis any complaints in relation to Transnet. Complaints received via this hotline and involving fraud or corruption or very sensitive matters were typically referred to TIA.

9. Members of the investigation team met with Gama on 10 December and informed him in broad terms of the matters being investigated.

10. By the end of December 2008 the investigators had examined the contract with GNS. They had established that on its own terms the contract (for some R18 million) exceeded Mr Gama's delegated authority of R10 million for contracts awarded on confinement (without a tender process). It was also clear that there had been significant unlawful extensions to the contract, and that there were serious irregularities in the procurement process leading to the approval of the contract by Mr Gama.

11. In about January 2009 internal audit communicated to Ramos its concerns about the signatories to the GNS contract.

12. Ramos was at that time the executive responsible for bringing these issues to a conclusion and deciding whether or not to implement disciplinary steps against Mr

Gama. Ramos had, however, by that stage announced her resignation from Transnet, to be effective at the end of February 2009.

13. At Ramos' request, internal audit reports on both of the issues that involved Mr Gama were provided to her on 12 February 2009, the day before what was to be her last meeting of the Transnet Board.

14. In the course of this "hand-over" meeting, on 13 February 2009, Ramos handed the matter of both investigations over to the Board.

15. On 19 February 2009 the then Transnet Chairman, Mr. Phaswana, called a meeting with the responsible internal audit official, together with a number of other senior members of the Board (Professor Geoff Everingham the Chairman of the Audit Committee, Mr. Joubert of the Risk Committee and Mr. Hastings of the Remuneration Committee). The purpose of this meeting was to discuss what should be done about the matter. The Board members were taken through key aspects of the internal audit reports. The Chairman and Board members present decided to obtain a legal opinion from attorneys Edward Nathan Sonnenberg (ENS).

16. In March 2009 ENS was asked to advise on whether the conduct of Mr Gama justified disciplinary action. ENS provided a legal opinion on 26 March 2009. The ENS opinion concluded, in essence, that the allegations on the face of them constituted serious misconduct, and recommended that Mr Gama's response to the issues should be obtained before a further decision was taken on disciplinary steps.

17. On 8 April 2009 Mr Gama was interviewed in relation to each of the separate issues, and his response was given.

18. On 23 April 2009 a further meeting was called by the Transnet Chairman, Phaswana, together with the chairs of all Board sub-committees and ENS. It was decided in light of the legal opinion from ENS to pass the investigations on to Wells, then in his capacity as Acting Group CEO.

19. In discussion with ENS and other executives, Wells decided to seek his own independent legal advice as to whether to proceed with disciplinary action against Gama. Bowman Gilfillan attorneys were then instructed in early May 2009.

20. On 11 May 2009 Wells met with Gama, told him that he was the subject of a formal investigation, and asked for his co-operation. Wells offered a collegial approach to discussing and resolving the issue.

21. Bowman Gilfillan attorneys provided a legal opinion dated 29 May 2009. The legal advice confirmed the earlier advice of ENS, and was to the effect that the issues were serious, and needed to be dealt with through an appropriate disciplinary process which would give Gama an opportunity to respond to the concerns raised.

22. Thereafter, and in an attempt to deal with the issues in a collegial and non-confrontational way, Wells set out the basis of the disciplinary allegations, in detail and with all supporting documentation attached, in a letter dated 18 June 2009. Wells met with Gama to discuss the issues and gave him a copy of the letter. The letter invited Gama to respond to the concerns about his conduct raised in it.

23. Gama requested additional time to answer and ultimately provided a written response a month later, 20 July 2009. In that response, Gama denied any form of misconduct, and alleged in strong terms that he was the victim of a conspiracy against him lead by Wells. He refused to take any responsibility for any of the concerns raised with him in writing.

24. After considering Gama's written response a decision was taken during August 2009 to charge Gama with misconduct. Formal charges were drawn up and handed to Gama on 24 August 2009.

Initial attempts to convene the disciplinary process

25. Transnet's disciplinary code and Gama's contract of employment gave Transnet a choice between holding an internal disciplinary hearing or an external arbitration process with an independently appointed arbitrator (appointed by Tokiso or another suitable dispute resolution agency). Transnet indicated its intention to conduct an arbitration process.

26. The notice of disciplinary enquiry scheduled an initial pre-hearing meeting between Transnet, Gama and their respective legal representatives on 27 August 2009. At that meeting Transnet acknowledged that the situation was difficult for Gama, and expressed its wish to hold a quick, fair and independent arbitration process that would resolve the misconduct allegations as quickly as possible in the interests of all concerned.

Transnet's representatives made it clear that it was Transnet's wish to deal with the matter speedily but fairly, and as far as reasonably possible on a consensual basis.

27. Gama's representative agreed that, subject to a query as to whether there was valid delegated authority to issue the disciplinary notice, the matter could be scheduled during approximately mid-September 2009. This was subsequently recorded in writing in a letter from Transnet's attorneys (Bowman Gilfillan or BG) to Gama's attorney (Themba Langa) on 3 September 2009.

Gama's High Court application to interdict the enquiry

28. Instead of pursuing the approach proposed by Transnet, and rather than seeking to explain his conduct in an independent arbitration process, Gama chose to institute High Court proceedings to challenge the decision to institute a disciplinary process, and tried to interdict that process.

29. The High Court proceedings were instituted on 10 September 2009. Gama cited each member of the then Board as respondents in the proceedings in their individual capacities. Gama, the Board, and Transnet were all represented by senior counsel.

30. Gama's complaint in the High Court was in essence that the decision to take disciplinary action was unlawful and was part of an orchestrated campaign to prevent his becoming the new Group CE. This allegation was strongly refuted by the Board, and in particular those members of the Board who had been involved in the process of recommending to the then Minister a candidate for appointment to the position of Group CE.

31. In a detailed affidavit, the Board set out the reasons why the Board considered Gama to be unsuitable for the position. These reasons were unrelated to the charges in the disciplinary process.

31.1 The affidavits set out the Board's recommendation to the then Minister (Minister Mabandla), in a letter dated 13 February 2009 from Mr Phaswana, the then Chairman. The Board's recommendation was that Mr Gama was not suitable for current appointment as Group Chief Executive: "*Mr Siyabonga Gama was thoroughly considered but there are important gaps, relative to the requirements for this position. He currently requires greater cognitive development to handle the complexity of this position.*"

31.2 After the initial candidate that was recommended by the Board (Mr Gordhan, now Minister of Finance) withdrew from the process, the Minister requested the Board to provide an assessment of the other candidates who had been shortlisted. Mr Phaswana responded on 9 March 2009. In his response, Mr Phaswana explained the Board's reasons for not recommending any one of the other four shortlisted candidates. In respect of Mr Gama, Mr Phaswana stated that he "*did not in fact demonstrate the required level of skill in the management of the complexities for the position of the Group Chief Executive. Further, the results of the competency-based assessment reports indicated worrying concerns in relation to the exercise of personal judgment.*" Mr Phaswana went on to state that the Board had, since its letter of 13 February 2009, "*received documentation and reports, including but not limited to a recent forensic report from Transnet's internal auditors, which detail serious allegations of misconduct on the part of Mr Gama that require the company to conduct investigations....*"

32. Judgement in the High Court proceedings was handed down in favour of the Board and Transnet on 7 October 2009. The High Court rejected all of Gama's arguments, and dismissed the application with costs.

33. Gama was publically reported as stating that the Court had clarified that there was no ulterior purpose and that the disciplinary proceedings had been instituted on proper authority. He was reported as stating that he now looked forward to an opportunity to deal with the merits of the charges in the disciplinary process. He did, however, still apply for leave to appeal against the High Court judgment. That application was also dismissed with costs. He did not attempt to appeal further, to the Supreme Court of Appeal.

Attempts to schedule a disciplinary enquiry by arbitration through Tokiso

34. On 9 October 2009 Transnet's attorneys (BG) wrote to Gama's attorney (Langa) advising of Transnet's intention to request Tokiso to appoint a suitably qualified arbitrator to deal with the disciplinary matter. Langa was invited to indicate any additional requirements that he believed should be communicated to Tokiso. Tokiso is the dispute resolution agency provided for in terms the contract of employment of all members of senior management of Transnet, including Gama.

35. Tokiso subsequently appointed Adv. John Myburgh SC as arbitrator. Myburgh is the most senior Tokiso panellist, and is a former High Court Judge and former Judge President of the Labour Appeal Court.

36. Langa responded to this by recording in an email dated 26 October 2009 that there was no objection to the arbitrator.

37. On 2 November 2009, Langa was reported in the media as stating that Adv. Myburgh SC had been appointed as arbitrator. As at that date, Gama and his team had clearly accepted the appointment of Adv. Myburgh SC as arbitrator.

Gama's subsequent objection to Adv. Myburgh SC and proposal of alternative arbitrators

38. On 5 November 2009, and without explanation, Langa wrote a letter to BG advising that "we still have to agree on the arbitrator", and proposing one of 7 alternative arbitrators, subject to Transnet's consent.

39. Subsequently, also on 5 November 2009, Gama's counsel informed Transnet's counsel that Gama's team was considering bringing an application for the recusal of Adv. Myburgh SC as arbitrator on the grounds that he had allegedly worked closely with Maria Ramos during the Banking Commission of Enquiry of 2002.

40. The parties' attorneys and counsel agreed to meet during the morning of 6 November 2009 prior to the scheduled 14h00 start of the arbitration process before Myburgh.

41. At that meeting Gama's counsel repeated that his legal team was "considering" bringing an application for the recusal of Myburgh on the grounds mentioned above. They proposed that to avoid any delay and dispute about the identity of the arbitrator, Transnet should agree to one of the 7 alternative arbitrators proposed in Langa's letter of 5 November 2009. They specifically confirmed that Transnet could select any one of the arbitrators proposed in that list.

42. The first of the seven alternative arbitrators on the list proposed by Gama's legal team was Adv. Antrobus SC. Transnet established his availability to conduct the arbitration, and then communicated that it would agree to the appointment of Adv. Antrobus SC instead of Adv. Myburgh SC.

Gama's refusal to accept the appointment of Adv. Antrobus SC

43. Subsequently, in the course of further correspondence over the following days, Gama (through his attorney) attempted to repudiate the appointment of Adv. Antrobus SC as well, and to secure agreement to first one then another alternative arbitrator. It was, however, at all times made clear in this correspondence that Gama raised no question or issue about the independence or integrity of Adv. Antrobus SC.

44. In an effort to avoid controversy on the issue of the chosen arbitrator, a meeting was held with Gama's counsel on Monday 16 November 2009. At that meeting, which Langa did not attend, Gama's counsel confirmed having made it clear at the 6 November meeting between the parties' legal representatives that Transnet could select any one of the 7 alternative arbitrators that had been proposed on Gama's behalf. They further made it clear that Transnet was entitled to insist on Adv. Antrobus SC as the agreed and appointed arbitrator. They suggested, however, that Transnet should nevertheless consider the consequences of proceeding with an arbitrator who was now apparently no longer acceptable to Gama.

45. Langa then advised, in a letter of 23 November 2009, that if the "issue of the identity of the arbitrator" was not resolved on that day Gama would "approach the Shareholder to intervene" and that "the allegations/ charges against Mr Gama arise from issues which are within the ambit and capability of the shareholder".

46. Transnet was not willing to make a further change to arbitrators in this way, for the following reasons:

46.1 Antrobus was proposed as arbitrator by Gama, and was accepted by Transnet.

46.2 Gama's representative had confirmed that there was no objection whatsoever to Antrobus as arbitrator.

46.3 There had been no rational or valid explanation for the "dispute" that allegedly existed as to the identity of the arbitrator.

46.4 There appeared to have been no factual basis for the earlier objection to Adv Myburgh SC either, who had been initially appointed as arbitrator (and accepted by Gama).

46.5 It could not reasonably be expected of Transnet to accept the appointment of another arbitrator in the circumstances.

46.6 Gama's approach on the issue appeared to be consistent with an ongoing attempt to delay having to deal with the merits of the allegations against him, or to disrupt the process established to do so.

46.7 It was unlikely that another arbitrator acceptable to both parties would be available on the dates agreed in January 2010, and there was no guarantee that another similar "dispute" would not be created in relation to any new arbitrator.

46.8 There was in fact no objection to Antrobus himself, who was proposed by Gama, and there now appeared to be a pattern of creating "issues" or "disputes" for no apparent purpose.

47. In those circumstances, Transnet decided to hold Gama to the appointment of Antrobus. Gama nevertheless continued, through his attorneys, to oppose attempts to convene the arbitration before Antrobus.

48. Transnet then put Gama on terms to accept that the arbitrator had been agreed. Langa reiterated Gama's stance that no arbitrator had been agreed.

Decision to proceed by way of disciplinary enquiry instead of arbitration

49. Ultimately, because of the risk of ongoing disputes about the identity of the arbitrator and the inevitability that this would simply delay the process further, Transnet elected to treat Gama's conduct as a repudiation of the arbitration agreement. It gave notice of its intention to proceed, instead, by way of a disciplinary enquiry that would not have the status of a final and binding arbitration process. The enquiry would be chaired by Adv Antrobus SC as an independent and impartial external enquiry chairperson.

50. Gama's attorney first threatened a further attempt to interdict the enquiry, but subsequently indicated that he would agree (with reservation of rights) to participate.

The disciplinary enquiry and its outcome

presented to him was a document for the approval of a contract on confinement. Gama says that he placed reliance on Beattie as a trusted General Manager who informed him at the time that there had been an open tender process. In the circumstances where the document which he was being shown reflected something quite different, namely a confinement process this information from Beattie should have raised warning bells."

....

"It is apparent that Gama failed to read and properly consider the documents placed before him by Beattie. .... Gama's explanation for his failure to properly read the document was that he trusted Beattie's explanation. This may of course be a false explanation in that Gama may well have known at the time that what he was approving was a service contract on confinement, that the value of the contract exceeded his delegated authority and that the contract was being awarded to GNS a company owned and controlled by a person with whom he was personally associated General Nyanda. These are all facts which a careful and non-negligent CEO should have known and could have ensured that he was aware of by the simple precaution of reading the documents placed before him for signature and properly ventilating with Beattie and with regard to the other supporting documents why it was that the documentation clearly reflected the process as one of confinement and not as an open tender.

Gama's explanation about what occurred on 5 December 2007 in the meeting with Beattie may be a false explanation. In this regard it is relevant to consider that Gama was not open about his relationship with General Nyanda. He initially down played and denied the fact that he was more than merely an acquaintance of General Nyanda. Gama put up a false contention during the hearing that he knew General Nyanda only as any other member of the public would. He later admitted, after the cellphone records had been produced, that he was more than an acquaintance of Nyanda – though he would not describe him as a friend. I describe this relationship as more than an acquaintance in that their relationship was such that they had played golf together, they clearly had each other's cellphone numbers and Nyanda called Gama to express his

51. The disciplinary enquiry took place over 14 days between 13 January and 25 February 2010. Gama was represented by advocates G. Pretorius SC and V. Ngalwana. Transnet was represented by Advocate P. Pretorius SC.

52. Prior to presentation of closing argument, Gama's counsel initiated an attempt to negotiate an agreed termination of employment. An agreement on terms acceptable to Transnet was reached in principle between legal representatives, but Gama subsequently withdrew from this attempt to settle the matter.

53. The findings were ultimately delivered on Saturday, 5 June 2010. The delay was explained to the parties by the enquiry chairman as being a combination of the volume of evidence lead in the matter and pressures from other matters in his practice.

54. The findings ran to 200 pages. The conclusion was that Gama was guilty of all three charges presented in the enquiry (misconduct in relation to the GNS contract; misconduct in relation to the 50 "like-new" contract; and making statements critical of the motives, conduct and integrity of senior executives and members of the board which were unjustified and unreasonable, and calculated to cause harm).

Summary of key findings

55. The findings set out a very detailed analysis of the facts relating to each charge before setting out the conclusions on each. The key findings were as follows:

55.1 The chairperson dismissed a number of preliminary and technical points raised by Mr Gama (that Ms Ramos had considered the GNS allegations against him and dismissed them; that the delay in pursuing the 50 like new complaint was unreasonable; that the charges were too vague; and that Transnet was acting inconsistently in taking disciplinary action against Mr Gama).

55.2 On the GNS charge, the following extracts from the findings summarise the key conclusions on this charge:

> "Clearly Gama ought to have known that what he was signing was a confinement. The document which he signed was headed *"GNS confinement"* and clearly reflects in no less than 15 places over 7 pages that it is a contract on confinement. Even as the busy CEO of a large organisation Gama was negligent if he failed to observe that what was

condolences when a member of Gama's family died and to commiserate when Gama was suspended. Those are acts which one would not expect of a mere acquaintance and are to my mind the acts of a person one would probably describe as a friend, though not necessarily a close friend. Gama explained that the reason why he gave his lawyers a misleading version was because he wanted to gainsay the inference which he felt was being drawn, namely that he was a close friend of Nyanda's, even though that was not what the witnesses had in fact said. My impression is that Gama was evasive in this area of his testimony. While he explained why he had wanted to mislead the enquiry, the fact is he was prepared to do so and could well have similarly been prepared to present incorrect facts on other aspects of the enquiry, particularly as Beattie was not available to testify in order to gainsay anything Gama said about the events of their meeting on 5 December 2007."

....

"While Gama was clear that Beattie did not show him all the documents, page for page (there being three quarters of lever arch file of documents in Beattie's possession) he did testify that Beattie showed him "*the relevant documentation*". In particular he accepted that Beattie showed him the document on which the names of three companies appeared. Later in the interview he repeated that Beattie *"would have shown the names of companies"* and that "*He showed me three companies in this document to say: These are the companies that we have interviewed."* Gama confirmed in his testimony at the disciplinary enquiry that he was shown the names of the companies. He also confirmed that he paid attention when Beattie said to him *"Here is the one company that we are choosing."* In the light of this testimony of Gama it is hard to accept, though it is possible, that if he was shown the names of three companies he remained unaware that the contract he was approving was an agreement with GNS which was one of those three companies.

....

On Gama's own version he did nothing by way of reference to the GNS confinement document (or any other document) to satisfy himself, as opposed to relying merely on Beattie, as to the content of the document

which he was signing. He accepted that he was aware of the stipulation in the DPP policy that he was required to satisfy himself whenever he signed in terms of the delegated authority. He said that he was satisfied by virtue of the answers which Beattie gave to his questions which were around process. Gama accepted that he and Beattie never discussed the fact that the previous signatories had all approved the GNS proposal on condition that the CEO also approved it. It is noteworthy that the only questions which he asked Beattie related to the process which had been undertaken and whether the cost was budgeted for. As mentioned he said he never looked carefully at the documentation though he accepted that he "perused" the documents which Beattie was showing him while he was simultaneously talking to Beattie. He failed to ask Beattie who the other contracting party was and signed the document without ever knowing this important fact. He failed to determine in any detail what the cost of the contract was, and he failed to read the document which was in terms which made it abundantly clear that he was in fact dealing with the confinement. Gama didn't know for what period the contract was. He was content to accept Beattie's indication that there would be a trial period. In fact, had this been a tender process, Gama's signature would not have been required at all. This fact together with the fact that his signature was being sought should have alerted him to conduct a closer investigation. In addition, Gama's evidence it seems to me does disclose that he read other documents at least in part, including one which informed him that there had been three companies considered in the tender process. That information does not appear from the final page of the GNS confinement document. Gama's evidence under cross-examination that this was the *only* document which he read therefore contradicts his earlier evidence from which it is clear that he read the cover page of the document which called for open tenders. It also contradicts his version during the interview from which it appears that he also read – even if fleetingly- that part of the GNS motivation document which contained the list of the three companies considered for the confinement tender.

It was contended for Transnet that it was improbable that Gama as the CEO had simply signed a document which consisted of a page of signatures after a five to ten minute discussion in circumstances where he knew that there were problems with procurement procedures in TFR. There is considerable force in of this submission. Gama was the last

person in the chain of authority that approved the contract. Placing reliance on the fact that the proper process had been followed without ensuring and satisfying himself that this was so and then simply signing a page of signatures which was presented to him does seem somewhat inexplicable and therefore improbable. Gama's explanation to the effect that both he and Beattie were in a hurry; that he relied on the fact that the tender board had looked at the issues and signed its recommendation; the fact that Beattie his trusted General Manager had signed the document; and the fact that he posed process questions to Beattie who answered to his satisfaction is not a satisfactory explanation for his failure to properly execute his duties as CEO. In his own words his signature was "*an oversight*" and he "*probably just absentmindedly signed it* ". On his own version he didn't even satisfy himself that what he was signing was in fact of the GNS confinement document which preceded the page of signatures which he did look at. Gama conceded that with hindsight he failed to perform his duties as he ought to have done. He later agreed that even the one final page which he was handed and read he "*glossed over*" as he had discussed in detail with Beattie the process that had been followed.

As has been recorded above Gama conceded that had he read the GNS confinement document he would have concluded that what he was signing was a confinement for a period of one year with the contract value of some R18 million. He accepted that had he read the document he would also have seen that there was in fact no open tender process because the process which had occurred had been stopped. He would also have seen that one of the beneficiaries of the contract was General Nyanda and, knowing that he was (at its lowest) a personal acquaintance of Nyanda he would have known that there was a potential for this to adversely affect TFR. All this shows clear and serious negligence on Gama's part.

For Transnet it was contended, correctly in my view, that Gama's exposition of his role in the procurement process - namely to enquire of his General Manager whether there were sufficient funds and whether the process had been followed - was wholly inadequate. As the senior executive authorising the transaction he does not constitute a check-point in any sense in the procurement process if he relies entirely on the say-so of others. He is required at least to check the documents which he is

approving in order to satisfy himself that the procurement process and transaction that he is being asked to authorise are what they purport to be, are correct, that the contract is cost-effective, and that the correct procurement process has been followed before he authorises the transaction. It is no answer to say, as Gama does, that the questions which he asked of Beattie concerning the process followed were sufficient, when clearly they were not. The document which he was signing reflected something different and on his own version he was being misled. Gama said that he trusted all his General Managers to do the right thing, but in this instance that trust was misplaced. In short, it was his duty to check more carefully what he was signing and his failure to do so was negligent. Indeed, Gama himself agreed this was an oversight on his part and it was not sufficient where the requirement was that he satisfy himself as one of the various check points in the procurement process, for him merely to check whether one of the earlier stages in the procurement hierarchy was satisfied and therefore himself adopt the same position."

55.3 The chairperson went on to consider whether it had been proved that Gama's conduct in fact constituted wilful misconduct rather than simply "clear and serious negligence". He concluded that it had not been shown, on the probabilities, "that Gama acted wilfully rather than merely negligently."

55.4 The chairperson concluded on this charge as follows:

"In conclusion therefore I find that on charge 1 Gama is guilty of misconduct in that:

1. He negligently authorised the conclusion of a contract for the provision of security services by GNS on confinement and failed to carry out his duties as CEO in the manner expected of him; and

2. He negligently failed to take appropriate steps to investigate the irregularities associated with the halting of the open tender process and the replacement thereof with the GNS confinement tender process and the presentation to him of a document for approval which was the product of a confinement process but which was presented to him on the basis that it was an open tender process."

56. The essence of the chairperson's conclusions on the 50 "like-new" charge are set out in the following paragraph of the finding:

> "This was an important contract for a significant amount of money. The board had laid down only one single condition and had tasked Gama with executing the contract. He should in the circumstances have taken extraordinary care to ensure that he captured the import of the condition in the contract. This he failed to do. On his own version Gama failed to read the 50 like new contract and make himself sufficiently aware of its content and implications in order to ensure compliance with the board resolution. There is no doubt that Transnet has established that Gama was negligent in failing to secure a contract in terms which provided for TRE to perform all the local work even though he had conferred with his legal department on some aspects, but not on the critical aspect of compliance with the board resolution. This negligent failure does constitute misconduct."

57. The key findings of the chairperson on the charge that Gama's criticism of Transnet executives and board was unwarranted and constituted misconduct are set out in the following passage:

> "The statements are critical of Wells in particular, but also infer a wider criticism of Transnet executives and arguably even of the Transnet board for having an ulterior motive and conspiring in preferring the charges against Gama. These are serious allegations and allege dishonest conduct. This constitutes serious disrespect and gross insubordination insofar as criticisms were made of Wells who was then the Acting Group CEO. Certain of the criticisms also constitute insulting behaviour and conduct which is defiant and provocative of persons in authority. TIA was criticised as was the previous Group CEO, the Chairman of Transnet and Transnet in general. The fact that Gama is belatedly prepared to apologise to Wells and discuss the issues with him whilst perhaps going some way to resolving their personal differences, does not constitute a reason why this conduct should not be regarded as being misconduct as defined in the Transnet Code. In my view Mr. Gama overstepped the mark with his trenchant criticism which impugned the honesty of Wells and other senior executives.
>
> For these reasons I find that Gama is guilty of misconduct under this charge."

Dealing with the question of sanction

58. After these findings had been made, and in accordance with what had been agreed by the parties at the conclusion of the initial stage of the hearing, the matter was enrolled for evidence and submissions on sanction. Gama chose to submit written representations on sanction only, and his attorney gave notice that he would not attend the further hearing scheduled for that purpose. The only reason given for this was that he only wished to make written representations. Transnet lead evidence (which was unchallenged) and made submissions on sanction.

59. The chairperson subsequently made findings on sanction. The key findings were as follows:

59.1 On the general approach to deciding on sanction: ·

> "A few opening remarks about the assessment of sanction and the question of evidence in mitigation or aggravation is relevant. "Mitigation" is really a criminal law concept with no place in employment law. When an employer determines that an employee should be dismissed for misconduct that is not an expression of moral outrage and is certainly not an act of vengeance. Rather it is, as has been pointed out by the Labour Appeal Court, "... a *sensible operational response to risk management in the particular enterprise*. So *for example supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.*"

59.2 After dealing with the evidence lead by Transnet on sanction, the chairperson set out his conclusions in relation to each of the three relevant charges:

> "**Charge 1** The negligence on Gama's part in signing the GNS confinement document is nevertheless particularly inexcusable as he is the authorised person with delegated authority on behalf of TFR who as such is the gatekeeper tasked with ensuring that contracts of that nature can only be concluded for a value of more than R 10 million if an open tender process has been undergone. He is the key person in the procurement process whose duty it was to ensure that because the value of the contract exceeded his delegated authority for confinement a contract of that nature it could not be authorised by him where the

contract was to be concluded following a confinement process. The failure of the CEO as the gatekeeper to bother to read the document which constitutes the approval in that situation can fairly be described as gross negligence, Undermining this governance process is a serious internal adverse consequence for Transnet Gama knew that security, and particularly security regarding cable theft, was a high priority and he should have taken particular care when authorising what he knew to be a security contract.

The consequences of the negligent misconduct in approving the GNS contract can also not be ignored, The consequences of Gama's failure to read the document placed before him by Beattie his General Manager meant that he failed to recognize that he was dealing with a confinement process and moreover that he was dealing with the contract concluded with a company controlled by a friend of his. The ensuing consequences of Gama's negligent conduct in relation to the interests of Transnet were testified to by Wells as described above. The undermining of the governance process in respect of procurement is an important factor. This is all the more so where special efforts had been made within TFR to ensure that of the procurement processes were of a high standard and properly in place. Wells' unchallenged evidence is that in consequence of what had occurred in relation to the security contract security within TFR was a real mess. There is in addition the consequence of the adverse publicity that has surrounded the GNS contract and consequent reputational damage to Transnet which is also a consequence of this negligence by Gama. There is no doubt that having regard to the *consequences* his negligent conduct that it must be regarded as serious.

Transnet is placed in a position where it can really not be confident once negligence of this nature has occurred that Gama will in future be sufficiently careful to ensure that he knows whether what he is signing is a confinement or an open tender contract. Gama is the CEO of the largest division in Transnet and in fairness the company cannot be expected to continue to employ him in this role while the company lives with the doubt as to whether or not he will again in future make an error of this nature. An organisation like Transnet creates policies and procedures precisely so that it does not spend all day looking over the shoulders of its

senior employees to ensure that they are properly fulfilling their tasks within those prescribed policies and procedures. As CEO Gama is a very senior guardian and keeper of this system and his failure to properly consider what he was signing in my view constitutes very serious negligence even though he relied on Beattie's guidance.

Taking all these factors into account the misconduct under this charge is of such gravity and seriousness in the case of such a senior employee that the appropriate sanction is dismissal, even on a first offence."

....

"**Charge 2**

In relation to the 50 like new contract the negligent conduct of which Gama has been found guilty is that he signed the contract without ensuring that the assembly work would be secured to TRE. This was the single condition of the delegation to him of authority to implement the contract. The 50 like new contract was for a very large amount of money in excess of R800 million. In relation to the second charge it was submitted for Gama that it must be taken into account that his legal department viewed the contract and assisted and advised him. It is in respect of assessing the seriousness of this negligence importance to understand the evidence surrounding Gama's testimony that the internal legal advisors were aware of and had applied their minds to the contract. The nub of the issue, as set out in paragraph 321 of the previous findings is that although the wording of the 50 like new contract had been considered by the legal team their focus had been on other aspects of the contract and Gama had not required them to focus specifically on ensuring that the contract was worded so that TRE would secure all the work as required by the boards condition. The point really is that whilst Gama may have genuinely been under the impression that he had obtained the necessary legal advice, in fact he had not done so given that he was not pursing that particular question with the legal advisors. This was ultimately his responsibility and is the reason why he was found guilty of negligent misconduct for having failed to ensure that the contract complied with the board resolution.

One must have regard to the fact that the board needs to be able to be confident that when it delegates authority to a divisional CEO subject to a particular condition, that he will take specific and reliable steps to ensure that that condition is complied with. In fairness to the Transnet board it would be a big ask for the board to be required to continue entrusting Gama with large management projects when he has exhibited negligent failure of this nature and with these consequences. Bearing all these factors in mind, the misconduct under this charge viewed in isolation would probably be sufficiently grave to warrant a sanction as severe as dismissal on a first offence."

"Charge 4: Unwarranted criticism of Transnet and its executives

....

A CEO is employed to make the decisions necessary for the successful and profitable operation of area of the company under his control. He must independently recognise when decisions are to be made, make those decisions correctly and ensure their effective implementation. He is employed in the position of CEO precisely because he is thought to have the insight, ability and experience to do this. Our Courts recognise that because of the gravity of the responsibility which a senior executive such as a CEO bears, and the dire consequences which can follow if he fails to properly discharge that duty, that the standard of conduct with which such an employee must comply is an exacting one.

Our courts have recognised that employees in senior management positions are in a completely different position from more menial employees in that simple lack of confidence in the ability or willingness of that senior manager to perform the job the way that the owners or other senior executives require it to be performed could justify dismissal.

In the context of this approach in our law, the evidence of Wells on sanction that the continued employment relationship remains intolerable cannot be doubted. Gama's public statements demonstrate without doubt that there has been a total breakdown in trust and confidence between the parties. His contention that he would be prepared to discuss matters

with Wells and apologise to him really takes the matter no further as the destruction of the relationship is far more wide ranging than merely the personal relationship between himself and Wells. In any event, although Wells testified that he would be prepared to accept such a personal apology, he would only do so in circumstances where Gama was prepared to admit that his public attacks on Transnet and its executives were made up of statements which were untrue and that he was prepared to publically recognise this and recant such statements. Wells correctly points out that even if this were to now occur the damage has been done and it would not be practically possible to run an organisation and to maintain discipline therein if the CEO were permitted to conduct himself in this way with impunity in the sense that he was able to retain his employment.

In relation to the fourth charge it was submitted for Gama that he was incited or provoked into making the statements which he did because Transnet was alleging that his actions were intentional and wilful and thereby insinuated that he had acted fraudulently and that corruption could not be excluded. It is submitted that this was a normal reaction for anybody accused of corruption and that Transnet had insisted right up until closing argument in the enquiry that Gama's conduct was wilful. It was argued that this showed that Transnet had not acted objectively and that Gama had every reason to react in the way in which he did. This argument overlooks the fact that although the previous findings concluded that it was ultimately not shown that Gama had knowingly and intentionally granted to the GNS contract to his friend General Nyanda, there was nevertheless considerable evidence which showed various other irregularities in the tender process related to the GNS contract and in the TFR security department. These irregularities were shown in circumstances where the GNS contract was in fact granted to a company owned and controlled by a friend of Gama's. The argument which I am in effect now asked to accept would amount to saying that Transnet should not have investigated these apparent irregularities and not viewed them as potentially wilful and corrupt. Clearly, an investigation was called for. Matters looked very suspicious and at least in respect of Mr Gama the investigation into the GNS contract was not complete up until the conclusion of the disciplinary enquiry. In the end much turned on the fact

that there was no available witness who could testify about exactly what had happened in Gama's one-on-one meeting with Beattie. Transnet was constrained to argue that an adverse inference had to be drawn before a finding could be made on the probabilities that Gama had intentionally engaged in corrupt conduct. Ultimately, that inference could not be drawn. But it does not follow that there was not a substantial amount of circumstantial evidence to support Transnet's case that the conduct may have been intentional. Gama's conduct in making public statements of the nature which he did while the jury was still out was always going to be risky. Not only did he run the risk that Transnet might ultimately prove a case of wilful misconduct, but he also ran the risk that even if he was proved right, his conduct would severely damage if not destroy his relationship with his employer and the other senior executives within Transnet. That is in fact what happened.

It was contended that the first and second charges are an entirely new formulation at Transnet as it has never occurred in the history of that company that a CEO or senior executive for that matter has been held to have committed misconduct for activities and practices that are usually automatically condoned and accepted by various mechanisms and committees within Transnet. Apart from the fact that there is no evidence to this effect, it seems to me that if the conduct in question amounts to misconduct and then it is misconduct quite regardless of what mechanisms and committees within Transnet may have to say about that. If this submission is an attempt to make out a case of inconsistency, then it is necessary to say no more than that I have already concluded in the previous findings that there is no merit in the case of alleged inconsistency.

...

Then it was argued that as Gama's delegated authority in relation to the GNS contract was R 10 million and the contract value was R 18 million the amount for which he signed negligently in excess of his mandated authority was only R 8 million and that this was a "minute level of detail" when considered in the context of this being a R20 billion turnover company and having regard to ordinary human frailty. This argument is

breathtaking when one has regard to the fact that the R8 million concerns public funds and was contracted for in breach of stipulated and well known procurement procedures. I venture to suggest that the vast majority of South Africans would not consider the unauthorised expenditure of R8 million a minute level of detail. This argument only lends credence to Transnet's submission tha t Gama has consistently trivialised his misconduct.

[Note by BG: As indicated further below, Transnet ultimately paid R95 million to GNS pursuant to the contract authorised by Gama. This is the subject of separate civil proceeding by Transnet for the recovery of that amount, and of a criminal investigation as well.]

It was contended that the notion of an irretrievable breakdown in the relationship between an employer and employee should be viewed differently where government employees are concerned as opposed to the private sector. This is a novel submission. So far as I am aware there are not two separate arenas in which employment law principles operate when it comes to assessing misconduct and appropriate disciplinary sanctions. What makes it even more strange is that this submission is immediately followed by a statement in the same paragraph to the effect that I should consider the fact that Gama as CEO of a division of Transnet *"has turned around and contributed immense profits to the Transnet group"* which strikes me as a notion far more closely associated with the profit driven private sector than with public sector enterprises.

I would however comment that there is evidence to the effect that Gama was part of a team (and as the CEO no doubt an important part) which turned TFR around from a loss-making to a profit-making enterprise. This fact makes the fact that Transnet no longer wishes to employ Gama particularly tragic. The suggestion it seems is that because government is the shareholder of Transnet and only government can appoint the Group CEO of Transnet that relationships within the company are substantially "entangled and synchro nised with those of the public sector". It was submitted that it was therefore not up to an individual or group of individuals (a handful of Transnet management) to contend that there had

been a breakdown in relationships and that they could no longer work together. There is no principle in our law which permits a shareholder to intervene in a company's disciplinary functions and an employee could legitimately complain if a shareholder did so. It seems to me that even if this is correct that only the governmen t can determine the future of Transnet (which was not an aspect pertinently canvassed in evidence before this hearing) then "government" whatever that may entail in this context needs to take cognizance of the fact that the Acting Group CEO and other senior executives within Transnet no longer have a workable relationship with Mr Gama. ....

Transnet submits that no employment relationship can continue to exist in the circumstances of this public attack on its executives and on Transnet itself. In short, Wells' evidence on this aspect set out above is overwhelming and is un-contradicted. This charge goes to the heart of Transnet's loss of faith in Gama and there can be no doubt that dismissal is the only appropriate penalty for Gama's conduct under this fourth charge."

60. The chairperson concluded by making the recommendations on sanction, in the following terms:

"**Recommendations**

In conclusion I am satisfied that the appropriate sanction in respect of each of the charges viewed in isolation is dismissal.

Moreover, having regard to the unavoidable situation where the question of whether Gama should be dismissed or not entails a recognition that he is guilty of all three charges and that by their nature the misconduct is therefore to be viewed cumulatively, this serves only to emphasise that dismissal is the appropriate sanction.

Accordingly, the sanction which I recommend to Transnet is that of summary dismissal of Mr Gama."

Dismissal and dispute referred to the Transnet Bargaining Council

61. Following this recommendation, Gama was dismissed.

62. Gama then referred a dispute to the Transnet Bargaining Council, alleging that his dismissal was unfair. In doing so, he was exercising rights conferred on him under the Labour Relations Act. It should be pointed out that if the disciplinary enquiry had taken place by way of pre-dismissal arbitration before Adv. Antrobus SC, as initially agreed by Gama and his legal team, Gama would have enjoyed no right to pursue a dispute in the bargaining council in this way, and the findings of Antrobus would have been final and binding on him. The reasons why the initial enquiry did not proceed by way of arbitration in this way are set out earlier.

63. In the bargaining council process Gama has, contrary to the approach adopted by him in the disciplinary process, now formally admitted that he was guilty of all three of the charges of misconduct of which he was found guilty in the disciplinary process. This has been recorded in a statement of case and pre-arbitration minute, and has been formally placed on record in the bargaining council proceedings. The only ground on which Gama claims that his dismissal was substantively unfair is that dismissal was not a fair sanction.

64. The bargaining council arbitration that will determine this question once and for all was scheduled by agreement to take place in the week of 24 January 2011. A decision by the arbitrator might reasonably have been expected to be made by mid-February 2011. However, the parties agreed that in light of ongoing attempts to settle the dispute, the arbitration should be postponed by agreement. No further dates have yet been set.

Gama's weak prospects of success in the bargaining council arbitration

65. The legal team representing Transnet in the bargaining council proceedings, including senior counsel, believes that on Gama's own current version (in which he admits guilt on all three charges) it is likely that the sanction of dismissal will be found by the agreed bargaining council arbitrator to have been a fair sanction.

66. In addition Transnet and its legal team have prepared, for the purpose of the bargaining council arbitration proceedings, to present facts and circumstances showing that Gama's current version is in any event false in material respects. This further aggravates the seriousness of the misconduct, and makes it even more likely that the arbitrator will find Gama's dismissal to have been fair.

67. Further considerations to be taken into account are that:

67.1 the GNS contract approved by Gama has resulted in Transnet instituting civil proceedings (against GNS, now known as Abalozi) for repayment of R95 million that was in fact paid by Transnet under the contract. There is also a criminal investigation pending.

67.2 The disciplinary proceedings against Gama were instituted with due regard to Transnet's obligations under the PFMA, which required that disciplinary action be taken. Gama's dismissal took place following a properly and fairly constituted enquiry.

67.3 Transnet is required to take into account its duty to act consistently in the future when it imposes sanctions for instances of serious misconduct of the kind committed by Gama.

67.4 There would have to be compelling reasons not to abide by the outcome of a properly constituted disciplinary enquiry, and the outcome of the bargaining council arbitration mechanism that is prescribed by law (the Labour Relations Act) to determine a dispute about the fairness of a dismissal.

CONFIDENTIAL "MPM7"

MINUTES OF MEETING NO. 11/3 OF THE CORPORATE GOVERNANCE AND NOMINATIONS COMMITTEE 3 FEBRUARY 2011 AT 10:00 IN BOARDROOM 4906, 49TH FLOOR, CARLTON CENTRE, JOHANNESBURG

For attention/ Resolution No

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES, SIGNING OF ATTENDANCE REGISTER AND ADOPTION OF AGENDA**

1.1 **Welcome, Constitution of Meeting and Signing of Attendance Register**

The Chairman welcomed all members and attendee present and having noted that there was a quorum, declared the meeting duly constituted. The Attendance Register was circulated for signature.

1.2 **Present**

Mr ME Mkwanazi	Chairman
Ms T Mnyaka	Member
Ms DLJ Tshepe	Member
Mr IM Sharma	Member

1.3 **In Attendance**

Ms ANC Ceba	Group Company Secretary

1.4 **Partial Attendance**

Ms Z Stephen	Group Executive : Legal, Corporate and Public Affairs
Mr B Khumalo	Leaders Unlimited
Ms G Barrick	Leaders Unlimited
Mr M van der Walt	Manager: Enterprise Performance Management
Mr S Mapoma	General Manager: Group Legal

1.4 **Apologies**

None.

1.5 **Adoption of Agenda**

The agenda was adopted as tabled subject to the following:

- Addition of Item 6.7: Report back from the advert process;
- Addition of Item 7.2 : Detail of Mr Gama's investigation from inception; and
- Items 4, 5, 6.1, 6.2, 6.5 and 6.6 were deferred to the next meeting.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures for the 49th floor were taken as read and noted, as contained in the pack.

3 **DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

4 **APPROVAL AND NOTING OF THE MINUTES THE MEETINGS HELD ON 26 NOVEMBER 2010, 7 JANUARY 2010 AND 23 JANUARY 2011 RESPECTIVELY**

The matter was deferred to the next meeting.

5 **MATTERS ARISING FROM THE MINUTES OF PREVIOUS MEETINGS HELD**

The matter was deferred to the next meeting.

6 **MATTERS FOR DISCUSSION**

6.1 **Draft Corporate Governance and Nominations Committee Mandate**

The matter was deferred to the next meeting.

For attention/
Resolution No

6.2 **Board Audit Committee composition**

The matter was deferred to the next meeting.

The Chairman requested that Item 6.7 be dealt with next.

6.3 **Investigations by the Public Protector**

The matter is discussed under Item 6.9 below.

6.4 **Shareholder Compact for the 2011/12 financial year**

The matter is discussed under Item 6.8 below.

6.5 **Review of the Mandates**

The matter was deferred to the next meeting.

6.6 **Group Chief Executive's Performance Contract for 2011/12**

The matter was deferred to the next meeting.

Mr Khumalo and Ms Barrack joined the meeting at 10h12.

6.7 **Report back from the advert process**

6.7.1 The Chairman requested Mr Khumalo to update the Committee on the advert process while noting that the Committee had committed to doing more interviews if good candidates came after the 29th January. Mr Khumalo circulated a document for discussion in the meeting. The document was collected at the end of the discussion. He took the Committee through the advert process and stated that 30 applicants applied for the GCE position. He gave a brief resume of the applicants.

6.7.2 Ms Mnyaka indicated that she would have preferred to receive background history on the candidates. Ms Tshepe questioned the purpose of the exercise and enquired if the Committee was re-opening the short-listing process. The Chairman indicated that the intention of reviewing the advert process applicants was to promote transparency.

6.7.3 Ms Barrick stated that Mr Simo Lushaba had requested to be re-considered for the position on 1 February 2011. Mr Sharma cautioned the Committee not to intertwine the two processes, as Mr Lushaba was from the previous process. He stated that the candidates whose resume impressed the Committee were interviewed on 29 January 2011.

The Committee **agreed** to eliminate Mr Lushaba from the GCE selection process.

6.7.4 Mr Khumalo stated that the document was presented to evaluate if there were any candidates from the list that can beat the "Top 5" that was yielded by the previous two-pronged process of the GCE selection process. He indicated that he was of the view that the document had candidates that would have been likely considered for interviews on 29 January 2011.

6.7.5 Ms Ceba cautioned the Committee against inconsistent reporting. She stated that Mr Khumalo had informed the Board on 1 February 2011 that the advert process had not yielded any good candidates. Ms Mnyaka stated that the Committee must address the inconsistency in the reporting, but must not prejudice good applicants to cover up the process. She raised concern that the selection process was rushed, hence some applicants were missed.

6.7.6 Ms Tshepe stated that the correct decision should be made and requested the Committee to be consistent in its activities. The Committee proposed that a few names from the advert list be selected and interviewed. Mr Khumalo informed the Committee that he will avail a comprehensive document on the proposed applicants for short-listing.

ANC

Chairman/
Mr Khumalo

For attention/ Resolution No

6.7.7 The Committee was requested to nominate not more than 5 candidates each for short-listing. Ms Tshepe withheld her vote on Mr Gama pending the outcome of the legal opinion on Mr Gama's application. At the end of the nomination process, the following candidates were nominated for interviews:

a. Mr Ike Nxedlana;
b. Mr Mninawe Silinga;
c. Mr Monwabisi Kalawe; and
d. Mr Siyabonga Gama (possibly).

It was ***agreed*** that the interviews will be held 11 February 2011.

Mr Khumalo and Ms Barrick left the meeting at 11:15.

Mr van der Walt and Ms Stephen joined the meeting at 11:17.

6.8 **Shareholder Compact for the 2011/12 financial year**

The Chairman requested Mr van der Walt to give the Committee an update on the 2010/11 Shareholder Compact as well as inform the Committee on the proposals for the 2011/12 Shareholder Compact. Mr van der Walt handed out a copy of his presentation at the meeting.

6.8.1 **Revised 2010/11 Shareholder's Compact**

6.8.1.1 Mr van der Walt took the Committee through the submission and stated that the Company suffered a 3 to 4 weeks strike in May 2010. He indicated that the impact of the strike on the 2010/11 Corporate Plan was assessed and shared with the Shareholder Minister. He informed the Committee that the Company developed and implemented emergency recovery plans to normalise the operations and clear the backlog volumes as fast as possible including, amongst others, focus on priority commodities. He took the Committee through the cumulative volumes lost as a result of the strike. He highlighted that :

- Some of the lost volumes were irrecoverable;
- Due to the impact of the May 2010 industrial action and a number of unprecedented derailments on the iron ore line, the Company suffered a volume loss of 3 004 800t, and this necessitated a review of the 2010/11 Compact with the Shareholder Minister;
- It was agreed, in principle, with DPE to allow for deduction of targets on volumes that were lost due to strike; and
- A submission had been prepared for the Board to consider and approve revised targets on Annexure A of the 2010/11 Shareholder's Compact, which will be submitted to the Shareholder Minister for approval after the Board meeting of 16 February 2011.

The Committee **RESOLVED** that it approves that the Revised 2010/11 Shareholder's Compact be recommended to the Board for approval. 11/4/1

6.8.2 **Progress on 2011/12 Shareholder's Compact**

6.8.2.1 Mr van der Walt took the Committee through the submission that was circulated in the meeting.

6.8.2.2 Mr Sharma stated that the Company's expansion programme cannot be met through the balance sheet and tariff increases, but emphasised that the Company needs to boost operational efficiency. Mr van der Walt stated that the targets were benchmarked with various peers on terminal operations, not on the ports. He added that some targets are impacted upon by ports that are not structurally efficient. The Chairman requested Mr van der Walt to ensure that the Operating Divisions present their respective benchmarks reports for consideration at the Board Workshop. Ms Ceba

6.8.2.3 Ms Tshepe enquired why improvements/efficiencies were not obtainable in the medium-term. She stated that she needed more detail on the Company's plans to obtain operational efficiency in the medium-term. Chairman/ Ms Ceba

6.8.2.4 The Committee recommended that "*Reducing cost of doing business*" should remain a key objective for the Company.

For attention/ Resolution No

6.8.2.5 Mr van der Walt stated that Transnet agreed to have a zero target on employee fatalities.

6.8.2.6 On a question by Mr Sharma if there were any KPI's on transformation, Mr van der Walt stated that BEE did not have a specific target, but a broad developmental objective. Ms Tshepe stated that agreement needed to be reached on the BEE targets in Annexure A. Ms Mnyaka stated that a KPI on transformation in the Shareholder Compact would be an ideal for the Committee. She added that transformation was critical and should be included in the Shareholder Compact.

6.8.2.7 The Chairman requested the Company to include KPIs on the New Growth Path. Mr van der Walt stated that the KPI on the New Growth Path will be included in the Corporate Plan, and further translated into the individual executive's performance agreements.

6.8.2.8 Mr van der Walt took the Committee through the Way Forward for the 2011/12 Shareholder Compact and highlighted, amongst others, the following :

6.8.2.9 - Annexure A – Key Performance Indicators: A dedicated "rail session" had been scheduled with DPE on 3 February 2011 where Transnet Freight Rail's current targets (alignment with current Transnet Freight Rail plans) and context thereof will be shared with DPE. Feedback on the Ports and Pipelines current KPI targets (as per Transnet's current plans) will also be provided to DPE for their review and consideration.

Mr van der Walt stated that Transnet Freight Rail will make a presentation to DPE on its plans to achieve the Company's targets.

6.8.2.10 The Committee noted the 2011/12 Shareholder's Compact. The Committee **agreed** to uplift the BEE target from the Corporate Plan to Annexure A of the Shareholder Compact.

Mr van der Walt was excused from the meeting at 11:52.

Mr Mapoma joined the meeting at 11:54.

6.9 **Investigations by the Public Protector**

6.9.1 Mr Mapoma took the Committee through Senior Counsels' opinion that was obtained with regard to Mr Gama's application for the GCE's position. He highlighted that the legal opinion was based on the following 3 issues :

- Does the guilty verdict against Mr Gama exclude him from being considered in the current GCE selection process underway?
- How does the pending appeal affect the Board decision to interview or not?
- Does the Public Protector complaint currently being dealt with have a bearing on the selection process?

6.9.2 Mr Mapoma informed the Committee that Senior Counsels' opinion was that Mr Gama should not be excluded from the current GCE selection process underway. Ms Tshepe indicated that Senior Counsel's opinion was not the same as the lawyers' opinion. She stated the general rule was that in terms of clause 4.8.4 of the Company's Recruitment Policy, the Company may deviate from the Policy if there are exceptional circumstances that warrant the deviation.

6.9.3 Mr Mapoma further took the Committee through the proposed settlement agreement between the Company and Mr Gama and stated that there was no agreement on the following issues with Mr Gama's Legal Team:

- The date of reinstatement;
- The position in which Mr Gama will be reinstated into;
- The Company's proposed contribution to Mr Gama's legal fees;
- The sanction that will be imposed on Mr Gama; and
- The retraction of the PFMA Report that was submitted to the Auditor-General by the External Auditors in February 2010.

6.9.4 He informed the Committee that Mr Gama wanted to be reinstated to his TFR position on either 14 or 21 February 2011. He also informed the Committee that Mr Gama wanted the

Company to contribute 100% to his disciplinary proceeding costs and the High Court application costs. He stated that the Company was awaiting a taxed bill of costs from Mr Gama's Team. He reported that the attachment processes to recover the costs of fees from Mr Gama were halted pending the finalisation of the settlement agreement. He indicated that the proposal was that the Company will pay Mr Gama his salary retrospectively from the date of dismissal, and further award him his Long-Term Incentive Scheme and Short-Term Incentive Scheme grants.

6.9.5 Ms Tshepe stated that she was uncertain of the basis that was being used to exclude Mr Gama from participating in the current GCE selection process. She further sought clarity as to why Mr Gama will only be reinstated in April 2011. The Chairman stated that the Company was proposing a reinstatement date to Transnet with effect from a date that will be determined by the Board and to TFR with effect from 1 April 2011 so as to monitor the performance of the executives until 31 March 2011. He explained to the Committee the complexity of reinstating Mr Gama back to TFR and the chain of events that will unfold as a result thereof.

6.9.6 Mr Mapoma informed the Committee that Mr Gama was of the view that his name will only be cleared if he was immediately reinstated into TFR and when the PFMA Report to the Auditor-General is retracted.

6.9.7 Mr Sharma stated that a decision was needed on whether Mr Gama can be considered for the GCE's selection process. He further stated that terms of the settlement agreement were not discussed in the Committee and there was no universal agreement that Mr Gama will be re-instated into his former position.

6.9.8 The Chairman stated that the Company had made a written settlement offer to Mr Gama, however, he reported that some of the issues were still under negotiation, amongst others, the date of re-instatement and quantum to be contributed towards his taxed legal fees.

6.9.9 Mr Sharma stated that Mr Gama's re-instatement will be a proposal until both parties agree on all the terms. Ms Tshepe stated that the current settlement discussions with Mr Gama were, in her view, sound rational for deviating from Clause 4.8.4 of the Company's Recruitment Policy.

6.9.10 Mr Mapoma stated that he was uncertain if the current settlement discussion qualified for an exemption. He indicated that the he Committee must act in the best interest of the business.

6.9.11 Ms Mnyaka stated that the Committee must take a decision on what had been presented and decide what was in the best interest of the Company. She added that she was supportive of the proposal to deviate from Clause 4.8.4. Ms Tshepe seconded the proposal by Ms Mnyaka and requested a debate on the matter.

6.9.12 **Deviation from Clause 4.8.4**

6.9.12.1 Ms Tshepe and Ms Mnyaka stated that the current settlement negotiations with Mr Gama were a rational for deviation from Clause 4.8.4. Mr Sharma disagreed and stated that it was not in the best interest of the organisation to deviate from Clause 4.8.4.

6.9.12.2 Mr Sharma stated that he was concerned with how Mr Gama's matter was being handled. He indicated that he was of the view that the Committee was not considering the best interest of the Company, but that of an individual.

6.9.12.3 The Committee voted on whether or not it should deviate from Clause 4.8.4, and there were three votes against one in favour of deviation against Clause 4.8.4.

6.9.12.4 Mr Sharma proposed an investigation on the Committee as he was of the view that its deliberations had been leaked.

The Committee **RESOLVED** that it recommends that Mr Gama be considered for the GCE selection process. 11/4/2

The Committee further **RESOLVED** that it recommends that the proposed forensic investigation be referred to the Board for approval. 11/4/3

Chairman

CONFIDENTIAL

For attention/ Resolution No

Ms Mnyaka recused herself from the meeting at 12:58.

7 **GENERAL**

7.1 **Corporate Governance and Nominations Committee Mandate**

The Committee noted the Corporate Governance and Nominations Committee Mandate.

7.2 **Detail of Mr Gama's investigation from inception**

7.2.1 Mr Mapoma advised the Committee that he had acquired a detailed account on Mr Gama's matter, and he circulated a document on the matter to the Committee.

The Committee noted the submitted report.

8 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 13:00.

CHAIRMAN
Date: 03/03/2011

GROUP COMPANY SECRETARY
Date: 08 MARCH 2011

+IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

AFFIDAVIT

I, the undersigned,

MAKWENA PERTUNIA MOHLABI

do hereby make oath and say:

1

Unless the context indicates the contrary, the facts in this affidavit are, to the best of my knowledge and belief, true and correct.

2

I am an adult female, admitted attorney and the Group Company Secretary of Transnet. I was appointed as the Group Company Secretary of Transnet on 1 May 2020.

3

I hold the following academic qualifications:

(a) B Proc from University of Venda which I obtained in 1997;

(b) LLB from University of Pretoria which I obtained in 1999; and

(c) LLM from University of Pretoria, which I obtained in 2003.

(d) I became an admitted Fellow Member of Chartered Secretaries Southern Africa (FCIS) in 2018.

4

My Responsibilities and Functions as Group Company Secretary of Transnet

My responsibilities and functions as Group Company Secretary of Transnet include those set out in section 88 of the Companies Act, 71 of 2008 (the Companies Act). They include:

(a) ensuring effective governance of the Board and its committees;

(b) being the custodian of all statutory minute books, registers and related confidential documentation;

(c) providing the Directors, collectively and individually, with guidance on their duties, responsibilities and powers;

(d) making the Directors aware of any law relevant to or affecting the Company;

(e) reporting to the Board any failure by the Company or any Director to comply with the Memorandum of Incorporation or Rules of the Company or Companies Act;

(f) ensuring that minutes of all Board and committee meetings are properly recorded in accordance with the Companies Act; and

(g) managing Declarations of Interests Registers for the Board.

5

By way of a letter dated 23 July 2020, a copy of which is annexed hereto marked "**MPM1**", the Commission requested me, in my capacity as the Group Company Secretary for Transnet, to furnish it with certain information. I was required to:

(a) advise which lawyers represented each of the Board Members in the High Court proceedings against Mr Gama;

(b) state how much Transnet pain in lawyer's fees to Bowman Gilfillan and to the other lawyers representing the various Board Members; and

(c) state how much Transnet paid to Mr Gama or his lawyers to discharge its obligation in terms of the settlement agreement to pay 75% of taxed legal costs in respect of his unsuccessful application and in respect of the unfair dismissal dispute in the Transnet Bargaining Council.

6

The below sections addresses each point of the Commisssion's request for information as set out above. I have personally perused and studied Transnet's Records, I could find, relating to the relevant period before supplying the Commission with the information and documents requested.

7

Lawyer's That Represented the Board Members:

7.1 The 1st to 3rd Respondents – Transnet Limited, Mr Wells & Mr Maharaj were represented by Bowman Gilfillan. See attached, a document referenced **MPM2** (Legal Fees for 1st to 3rd Respondents - Bowman Gilfillan)

7.2 The 4th to 9th, 12th & 13th Respondents – Everingham, Gcaba, Hankinson, Haste, Joubert, Ramon & Singh were represented by Eversheds. See attached a document referenced **MPM3** Eversheds Attorneys for 4th to 9th-12th and 13th Respondents.

7.3 I could not find the proof of the lawyers who represented the 10th to 11th Respondents – Moyo & Ntshingila.

8

For the overall Lawyers' Fees, please see attached the document, referenced **MPM4,** I could find in Transnet's records detailing the fees though I cannot confirm completeness.

8.1 Also, I went through the invoices that have already been provided to the Commission and could not find the invoices highlighted in orange. The spreadsheet highlight the total costs for each of the Lawyers or Auditors.

8.2 The spreadsheet was tabled at Corporate Governance and Nominations Committee (CorpGov) on 11 August 2011 as a response to a matter arising from CorpGov meeting held on 11 April 2011. See attached the minutes of CorpGov 11 April 2011 (item 5.2.3.6) referenced **MPM5** and the minutes of 11 August 2011 (item 5/6/4 under matters arising) referenced **MPM6**.

9

How much Transnet paid to Mr Gama or his lawyers, Langa Attorneys:

9.1 See attached what I could find in the Transnet's records for your information:

a. a Memo dated 17 August 2011, referenced **MPM7** detailing the fees paid to Mr Gama's Lawyers; and

b. a letter to DPE, referenced **MPM8** Legal Fees for Langa Attorneys - Mr Gama's lawyers _ Letter to DPE

9.2 The Board Minutes of 10 June 2010 (item 10.4.1.3), referenced **MPM9**, highlight the value of the shortfall paid in respect of Mr Gama's retirement fund benefit for the period June 2010 to Feb 2011 amounting to **R456 506.41**. The below table, as provided by Human Resources (HR) / People Management Office, provides a detailed breakdown of the costs paid to Mr Gama:

Remuneration Element	Amount	Month of Payment
Backdated salary	R2,862,469.55	March 2011
STI Payment (2009/10)	R2,510,221.33	March 2011
LTI Payment (2006/07 conditional award)	R2,974,882.50	March 2011
Transmed refund Savings	R24,036.58	March 2011
LTI Payment (2007/08 conditional award)	R 4,784,747.02	May 2011

DEPONENT

I hereby certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Pretoria on this the 17 day of August 2020 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

EX OFFICIO:

SOUTH AFRICAN POLICE SERVICE
SUPPLY CHAIN MANAGEMENT
MIDRAND
2020 -08- 17
SUID-AFRIKAANSE POLISIEDIENS

MPM1

2nd Floor, Hillside House
17 Empire Road
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email:
inquiries@sastatecapture.org.za
Website:
www.sastatecapture.org.za

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

Date: 23 July 2020
Our reference: Ms Farrhah Khan
Email: farrhahk@commissionsc.org.za

The Company Secretary
Transnet
P.O. Box 72501
Parkview
South Africa
2122
Email: Makwena.Mohlabi@transnet.net

Attention: Ms Makwena Mohlabi

Dear Madam

Request for further information: Mr Siyabonga Gama

1. I refer to the correspondence that the Commission recently had with you through Ms Farrhah Khan of the Office of the Chairperson and the co-operation and the assistance you gave to the Commission on the matter on which it sought your assistance for which the Commission is grateful.

2. We understand from Mr Chris Todd of Bowman Gilfillan that in the High Court application brought by Mr Gama in 2009 under case number 09/38956 which was

dismissed with costs, the various Transnet Board members were cited individually and were represented by lawyers other than Bowman Gilfillan. In the light of the above, the Commission would like to obtain further information to allow it to ascertain the amount which Transnet elected to abandon when the decision was taken not to execute the costs order granted by the High Court against Mr Gama and to ascertain the costs incurred by Transnet when the decision was made to settle Mr Gama's matter on the terms on which it was ultimately settled.

3. I have been directed by the Chairperson of the Commission to request you to:

   (a) advise which lawyers represented each of the Board members in the abovementioned High Court proceedings;

   (b) state how much Transnet paid in lawyer's fees to Bowman Gilfillan and to the other lawyers representing the various Board members; and

   (c) state how much Transnet paid to Mr Gama or his lawyers to discharge its obligation in terms of the settlement agreement to pay 75% of taxed legal costs in respect of his unsuccessful application and in respect of the unfair dismissal dispute in the Transnet Bargaining Council.

4. We point out that Mr Todd of Bowman Gilfillan has said in an affidavit that as Transnet's attorney at the time he knows that the total taxed costs that Mr Gama owed Transnet was an amount of R 426 666,37 which he was busy seeking to recover for Transnet from Mr Gama in January 2011 when Transnet told him not to pursue recovery of that amount from Mr Gama.

5. It would be highly appreciated if you would furnish the abovementioned information and documents on or before 3 August 2020.

6. Your kind co-operation and assistance will be highly appreciated.

Yours sincerely

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations
of State Capture, Corruption and Fraud in the Public Sector including Organs of State

MPM2

TRANSNET

PAYMENT ADVICE

Payee :
Langa Attorneys
P.O. Box 2138
Parklands, 2121

Date: 28 March 2011

Description	Invoice no.	Date	R	C
Case No:09/38956 Southern Gauteng High Court S. Gama v Transnet Ltd and Others	000000	28/03/2011	319 999	78
		Sub total		
		VAT		
		Total	**319 999.78**	

Post/Per hand: _____ Tel. No.: 308-3962 Ref.: _____

Compiled by : Disemelo Leboea

Approved by:

X1 Head No
Sanction No (Capital Only)

X1 3200

COCE			GL					R	C
1	0	0	6	0	0	4	6	**319 999**	**78**
			3	7	0	0	3		

F _____

FOR OFFICE USE

Verified: _____ Approved: _____
Vendor No: _____ Date: _____/_____/20_____ Document no: _____

Brenda Beagle

Legal Costs Consultant

No. 9 The Manor, 27 Centre Rd,
Morningside, Sandton
Box 784764, Sandton, 2146
e-mail: brenda@beagle.org.za
Fax: 011-783-6741
☎ Tel: 011-784-2411
Cell: 083-454-2060

Bowman Gilfillan,
West St.,
Sandton.

MY REF:
070410

YOUR REF:
C TODD
117 8732

DATE:
03 June 2010

BY HAND

Dear Sirs,

RE: S GAMA / TRANSNET & OTHERS

I return herewith your file in the above matter, together with your two bills of costs and my invoice.

The bills were taxed in the respective sums of **R353457.36 AND R73209.01** including disbursements.

Thank you for your instructions.

Yours Faithfully

Brenda Beagle.

BRENDA BEAGLE

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG JOHANNESBURG)

CASE NO:
09/38956

In the matter between:

GAMA, SIYABONGA	APPLICANT
and	
TRANSNET LTD	1ST RESPONDENT
WELLS, CHRISTOPHER	2ND RESPONDENT
MAHARAJ, PRADEEP	3RD RESPONDENT
EVERINGHAM, GEOFFREY	4TH RESPONDENT
GCABA, NOLWAZI	5TH RESPONDENT
HANKINSON, MICHAEL	6TH RESPONDENT
HASTE, NORMAN	7TH RESPONDENT
JOUBERT, PIETER	8TH RESPONDENT
MATYUMZA, NOMGANDO	9TH RESPONDENT
MOYO, MTHANDAZO PETER	10TH RESPONDENT
NTSHINGILA, NUNU	11TH RESPONDENT
RAMON, KRISTINE	12TH RESPONDENT
SINGH, ANOJ	13TH RESPONDENT

129 2010 -06- 02 129
JOHANNESBURG 2000
REGISTRAR OF THE SOUTH GAUTENG HIGH COURT JOHANNESBURG

NOTICE OF INTENTION TO TAX BILL OF COSTS

TAKE NOTICE THAT 1ST TO 3RD respondents intend submitting the attached bills of costs to the taxing master at 10h30 on 2 JUNE 2010 for taxation.

You may inspect the documents or notes pertaining to any item on the bill of costs at Bowman Gilfillan between the hours of 9am and 4pm for a period of ten (10) days after receipt of this notice.

You may furthermore deliver a notice of intention to oppose the taxation within twenty (20) days after receipt of this notice.

In your notice of intention to oppose you shall list all items on the bill of costs to which you object, and a brief summary of the reason for your objection.

Should you fail to deliver your notice of intention to oppose within the time specified, the bills of costs will be submitted to the taxing master for taxation without further notice to you.

If you do give notice of intention to oppose within the specified time, you may at the taxation object to the items specified in your notice of opposition.

DATED at JOHANNESBURG this 22nd day of APRIL 2010.

TO: THE TAXING MASTER
HIGH COURT

BOWMAN GILFILLAN
1ST TO 3RD RESPONDENTS ATTORNEYS
165 WEST ST.
SANDTON.
TEL (011) 669 9000
FAX (011) 9001
REF: CHRIS TODD/1178732

AND TO:

LANGA ATTORNEYS,
APPLICANT'S ATTORNEY,
423 JAN SMUTS AVE.,
BLAIRGOWRIE,
RANDBURG
REF; T LANGA
TEL: 011 787 7214

RECEIVED COPY HEREOF THIS
DAY OF

22/04/10

IF YOU ARE OF THE OPINION THAT THIS BILL OF COSTS CAN BE SETTLED WITHOUT RESORTING TO TAXATION KINDLY CONTACT BRENDA BEAGLE AT 011-784-2411 OR FAX 011-783-6741

BB041209
Our Ref:C Todd 1175783

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG, JOHANNESBURG)

CASE NO.
09/38956

In the matter between:

GAMA, SIYABONGA	APPLICANT
and	
TRANSNET LIMITED	1ST RESPONDENT
WELLS, CHRISTOPHER	2ND RESPONDENT
MAHARAJ, PRADEEP	3RD RESPONDENT
EVERINGHAM, GEOFFREY	4TH RESPONDENT
GCABA, NOLWAZI	5TH RESPONDENT
HANKINSON, MICHAEL	6TH RESPONDENT
HASTE, NORMAN	7TH RESPONDENT
JOUBERT, PIETER	8TH RESPONDENT
MATYUMZA, NOMNGANDO	9TH RESPONDENT
MOYO, PETER	10TH RESPONDENT
NTSHINGILA, NUNU	11TH RESPONDENT
RAMON, CHRISTINE	12TH RESPONDENT
SINGH, ANOJ	13TH RESPONDENT

FEES AND DISBURSEMENTS DUE TO BOWMAN GILFILLAN, ATTORNEYS FOR 1ST TO 3RD RESPONDENTS AS BETWEEN PARTY AND PARTY

---

0 09.09	1	attend clients (1st to 3rd respondents) taking instructions to oppose urgent application 3 hrs 1.5hrs. 1066-00		2130.00
10.09.09	2	peruse notice of motion, affidavit and annexures 120 p -26p. 923-00.		4260.00
	3	copies for 2 counsel 128p x 2		460.80
	4	draw 1st to 3rd respondents' notice to oppose		71.00
	5	make extra copy for service 2p		3.60
	6	peruse 4th to 13th respondents' notice to oppose		35.50
	7	copies for 2 counsel 4p		14.40
		TOTAL B/F	6975.30	0.00

		TOTAL C/F	6975.30	0.00
		- 2 -		
10.09.09	8	draw brief to senior counsel, sort and arrange and deliver	248.50	
	9	draw brief to junior counsel sort and arrange and deliver	248.50	
	10	attend counsel and clients in consultation on guidance on settling affidavits 3 hrs aff/ct.	2130-00. 2130.00	
	11	peruse annexures to answering affidavit c wells CW1 -CW3 12p	426.00	
	12	draw affidavit c wells 14p -3p.	532-50 2485.00	
	13	peruse annexures to affidavit p maharaj PM1 - PM6 19p	674.50	
	14	draw affidavit p maharaj 35p -6p.	1065-00 6212.50	
14.09.09	15	attend counsel in telephonic consultation on settling .5 hrs	355.00	
15.09.09	16	attend consultation with clients and counsel on settling affidavits 3 hrs 2hrs.	710-00. 2130.00	
	17	peruse notice of withdrawal of attorneys for 10th & 11th respondents 2p	71.00	
	18	copies for 2 counsel 4p	14.40	
16.09.09	19	attend counsel and clients in consultation settling affidavits 4 hrs	2840-00. 2840.00	
17.09.09	20	attend at court with counsel when matter postponed to 22.9.09 - costs in the cause c.a. 1 hr	216.00	
	21	attend consultation with counsel 2h. and board's legal representatives and consultation with counsel to settle affidavit 6 hrs 1h.	2130-00. 4260.00	
	22	peruse applicant's notice of substitution of correspondent's address	35.50	
	23	copies for counsel 3p x 2	10.80	
18.09.09	24	attend on return of senior counsel's brief, noting charges and attend to pay:	106.50	
		TOTAL B/F	29439.50	0.00

	TOTAL C/F	29439.50	0.00
18.09.09	- 11.09.09 on consultation 3 hrs - on perusal of application and notes for answering affidavit 5 hrs		8100.00
	- on telephonic consultation with attorney, consultation with junior counsel and draft introduction to answering affidavit 4 hrs		13500.00
	- consultation with junior counsel , settling affidavit, consultation with attorney etc. 1 day		10800.00
	- 16.9.09 on consultation with attorney to finalise affidavit, consultation with junior counsel re heads of argument, on perusal of answering affidavit of board etc. 1 day		27000.00
	- 17.9.09 on court appearance, consultation with board's legal representatives, consultation with instructing attorney to settle affidavits 1 day		27000.00
			27000.00
25	attend on return of junior counsel's account and attend to pay	106.50	54000.00
26	peruse affidavits as settled by counsel 49p	1739.50	
27	making extra copy for service on other respondents 55p	99.00	
28	copies of annexures 28p x 5	252.00	
29	draw confirmatory affidavit v oates	71.00	
30	draw confirmatory affidavit c todd	71.00	
31	extra copies for service 4p	7.20	
32	attend 3 deponents traversing affidavits 1 hr	710.00	
33	draw filing sheet	71.00	
34	extra copy for service 2p	3.60	
35	peruse index 4p	142.00	
36	copies for 2 counsel 5p	18.00	
	TOTAL B/F	32730.30	167400.00

		TOTAL C/F	32730.30	167400.00
18.09.09	37	peruse 4th respondent's answering affidavit 115p -23 816-50.	4082.50	
	38	copies for 2 counsel 114p	410.40	
19.09.09	39	peruse addendum to index	35.50	
20.09.09	40	attend counsel in telephonic consultation 2 hrs 1hr. 710-00.	1420.00	
21.09.09	41	peruse 4th respondent's supplementary affidavit 2p	71.00	
	42	copies for counsel 6p x 2	21.60	
	43	attend at chambers to paginate counsel's files x 2 c.a. 2 hrs	432.00	
	44	peruse bundle of case law as requested by judge and supplied by 4th respondent's attorney 653p 10hrs. allowed. 4490-75	11590.75	
	45	peruse index thereto 5p	177.50	
	46	copies for 2 counsel 655p	2358.00	
22.09.09	47	peruse consolidated index 6p	213.00	
	48	attend at court with counsel when question of urgency argued and matter postponed to 9am on 25 september - replying affidavit to be filed on 23rd and heads on 24th - judge raises question of jurisdiction 1 hr	710.00	
2[illegible] 09.09	49	peruse applicant's replying affidavit 51p -6p. 213-00.	1810.50	
	50	copies for 2 counsel 70p	252.00	
	51	attend counsel in consultation on heads of argument 8 hrs 2hrs. 4260-00.	5680.00	
24.09.09	52	peruse applicant's heads of argument	35.50	
	53	copies for 2 counsel 25p	90.00	
	54	peruse 1st to 3rd respondents' heads	35.50	
	55	copies 23p x 5	207.00	
	56	peruse 4th to 9th and 12th and 13th respondents' heads	35.50	
		TOTAL B/F	62398.55	167400.00

		TOTAL C/F	62398.55	167400.00

24.09.09	57	copies for 2 counsel 31p x 2	111.60	
25.09.09	58	attend at court with counsel when matter argued and judgment reserved to 30 september 6 hrs	4260.00	
28.09.09	59	peruse applicant's contract of employment and disciplinary code (called for by judge) 23p	816.50	
	60	copies for 2 counsel	82.80	
	61	attend counsel in telephonic consultation re judge's request to see employment contract and instructing counsel to object thereto 2 hrs	1420.00	
30.09.09	62	attend court with counsel when matter further argued and judgment postponed to 7 october 2 hrs	1420.00	
	63	attend on senior counsel's account and attend to pay: - 18 & 19th september - on various consultations with opposing counsel, instructing attorney and adv gauntlett and preparing heads of argument 4 hrs - 20.9.09 on telephonic consultation with instructing attorney and on heads of argument 2 hrs - on various consultations with instructing attorneys and counsel for further respondents. on appearance where postponement argued 2/3 fee -23.9.09 on consultation with instructing attorney; draft heads of argument; peruse replying papers 1 day - 24.09.09 perusing case bundle and preparation 1 day - 25.09.09 on opposed application 28.09.09 - on telephonic consultations with advs. kennedy, gauntlett and instructing attorney, peruse contract documents 2 hrs 29.09.09 - on further consultations with attorney and adv kennedy and adv gauntlett etc. - 30.0.09 on court appearance 2/3 fee	106.50	10800.00 5400.00 18000.00 27000.00 27000.00 5400.00 2700.00 18000.00
	64	attend on account from junior counsel and attend to pay	106.50	63000.00
		TOTAL B/F	70722.45	371700.00

		TOTAL C/F	70722.45	371700.00
07.10.09	65	attend court to note judgment 1 hr	710.00	
	66	letters written x 21	1491.00	42.00
	67	letters received x 14	497.00	
	68	phone calls 178 min	2106.00	180.00
		SUBTOTAL	75526.45	371922.00
		LESS TAXED OFF	23092-75	83700-00
		SUB-TOTAL A	52433-70	288222-00
		ADD DRAWING BILL	4656-11	
		ADD DISBURSEMENTS	288222-00	
			345311-81	
		ADD ATTENDING TAXATION	8145-55	
		ADD VAT	-	
		TOTAL	353457-36.	

TAXED AND ALLOWED IN THE SUM OF: R 353457-36.

TAXING MASTER

OFFICE OF THE SOUTH GAUTENG HIGH COURT JOHANNESBURG
PRIVAATSAK/PRIVATE BAG X7
2010 -06- 02
129 129
JOHANNESBURG 2000
REGISTRAR

TRANSNET TO PAY 75 % (SEVENTY FIVE PER CENT) OF THE TAXED COSTS ABOVE, I.E 75% OF R353,457-36 (THREE HUNDRED AND FIFTY THREE THOUSAND, FOUR HUNDRED AND FIFTY SEVEN RANDS AND THIRTY SIX CENTS). PAYMENT HAS BEEN APPROVED AS PER ATTACHED MEMO DISCUSSED WITH AND

28/03/11

BB041209a
Our Ref: C Todd 1175783

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG, JOHANNESBURG)

CASE NO.
09/38956

In the matter between:

GAMA, SIYABONGA	APPLICANT
and	
TRANSNET LIMITED	1ST RESPONDENT
WELLS, CHRISTOPHER	2ND RESPONDENT
MAHARAJ, PRADEEP	3RD RESPONDENT
EVERINGHAM, GEOFFREY	4TH RESPONDENT
GCABA, NOLWAZI	5TH RESPONDENT
HANKINSON, MICHAEL	6TH RESPONDENT
HASTE, NORMAN	7TH RESPONDENT
JOUBERT, PIETER	8TH RESPONDENT
MATYUMZA, NOMAGANDO	9TH RESPONDENT
MOYO, MTHANDAZO PETER	10TH RESPONDENT
NTSHINGILA, NUNU	11TH RESPONDENT
RAMON, CHRISTINE	12TH RESPONDENT
SINGH, ANOJ	13TH RESPONDENT

FEES AND DISBURSEMENTS DUE TO BOWMAN GILFILLAN ATTORNEYS FOR 1ST TO 3RD RESPONDENTS AS BETWEEN PARTY AND PARTY AND BEING IN RESPECT OF APPLICATION FOR LEAVE TO APPEAL

22.10.09	1	taking client's instruction to oppose application for leave to appeal .75hr	532.50	
	2	peruse application for leave to appeal 4p	142.00	
	3	copies for 2 counsel 8p	28.80	
	4	peruse judgment of the court dd 7.10.09 42 pages	1491.00	
	5	copies for 2 counsel 59p	212.40	
	6	draw brief to senior counsel to oppose application, and attend to sort and arrange	248.50	
		TOTAL B/F	2655.20	0.00

		TOTAL C/F	2655.20	0.00
22.10.09	7	draw brief to junior counsel to oppose application and attend to sort and arrange	248.50	
	8	peruse 1st to 3rd respondents' heads of argument	35.50	
	9	copies 25p x 5	225.00	
	10	draw filing sheet	71.00	
	11	peruse 4th to 9th and 12th and 13th respondents' heads of argument	35.50	
	12	copies for 2 counsel 10p	36.00	
.10.09	13	attend court with counsel when application argued to judgment reserved 2.75 hrs	1952.50	
	14	attend on senior counsel's account and attend to pay on preparation (1day) on opposed application (1 day)	106.50	13500-00 54000.00
	15	attend on return of jnr counsel's brief noting charges and attend to pay (half of senior counsel's fee)	106.50	6750-00 27000.00
30.10.09	16	attend court with junior counsel to note judgment 1 hr	710.00	
	17	peruse junior counsel's account and paid	106.50	8000-00 9000.00
	18	peruse court order dismissing application with costs of 2 counsel	35.50	
	19	letters written x 15	1065.00	30.00
	20	letters received x 9	319.50	2100-00
	21	phone calls 1 hr	710.00	110.00

SUBTOTAL	8418.70	90140.00
LESS TAXED OFF	(210)	(28 290)
SUB-TOTAL A	8208-70	61890-00
ADD DRAWING BILL	728-93	
ADD DISBURSEMENTS	61890-00	
	70827-63	
ADD ATTENDING TAXATION	2381-38	
ADD VAT	—	
TOTAL	73209-01	

TAXED AND ALLOWED IN THE SUM OF: R73209-01

TAXING MASTER

GRIFFIER VAN DIE HOOGGEREGSHOF SUIDELIKE GAUTENG JOHANNESBURG
PRIVAATSAK/PRIVATE BAG X7
2010 -06- 02
JOHANNESBURG 2000
REGISTRAR OF THE SOUTH GAUTENG HIGH COURT JOHANNESBURG

TRANSNET TO PAY 75 % (SEVENTY FIVE PER CENT) OF THE TAXED COSTS ABOVE, I.E. R73 209-01 (SEVENTY THREE THOUSAND TWO HUNDRED AND NINE THOUSAND AND ONE CENT). PAYMENT HAS BEEN APPROVED AS PER ATTACHED MEMO. (DISCUSSED WITH ANDI)

28/03/11

PAUL PRETORIUS SC

Sandown Village Office Park, Fountain Chambers
Ground Floor, 86 Maude Street
Sandown
2146
Docex: 176, Johannesburg

Tel: 011-282 3700
Fax: 086 682 4941
E-mail: ppretorius@duma.nokwe.co.za
VAT No: 49401266693

Bowman Gilfillan Attorneys
Accounts Department: C Pillay
Docex 6
Johannesburg
c.pillay@bowman.co.za

Invoice No: 645
Debit Date: 30/09/2009
Due Date: 07/01/2010
VAT Number: 4530177197
Tel: 011 - 669 9000
Fax: 011 - 669 9001

DETAILED TAX INVOICE

In Re: Transnet Limited v Siyabonga Gama

Ref: C Todd/1178732

Date:	Particulars	Time		Amount
11/09/2009	On consultation with junior counsel and instructing attorney. On perusal of instructions.	3 hours	R	8,100.00
12/09/2009+ 13/09/2009	On perusal of application papers and annexures. On note for answering affidavit.	5 hours	R	13,500.00
14/09/2009	On telephonic consultation with instructing attorney. On consultation with junior counsel. To draft introduction to answering affidavit. On perusal of files of instructions.	4 hours	R	10,800.00
15/09/2009	On consultation with junior counsel re heads of argument. To settle draft answer. On consultation with instructing attorney to draft and settle answering affidavit. On advice. On research.	1 day	R	27,000.00

Bank: Standard Bank
B/Code: 001805 (Smal Street Branch)
Account No: 001133748

Sub Total:	R	59,400.00
Plus VAT:14%	R	8,316.00
Total:	R	67,716.00

Continued from page 1

DETAILED TAX INVOICE

In Re: Transnet Limited v Siyabonga Gama

Ref: C Todd/1178732

Date:	Particulars	Time	Amount
	Balance brought forward		R *59,400.00*
16/09/2009	On consultation with instructing attorney to finalise answering affidavit. On consultation with junior counsel re heads of argument. On perusal. On notes for argument. To peruse answering affidavit of Board and on notes for consultation.	1 day	R 27,000.00
17/09/2009	On court appearance.On consultation with Board's legal representatives.On consultation with instructing attorney. To settle answering affidavits.	1 day	R 27,000.00
18/09/2009-19/09/2009	Various telephonic consultations with opposing counsel, instructing attorneys and advocate Gauntlett. To prepare heads of argument.	4 hours	R 10,800.00
20/09/2009	On telephonic consultation with instructing attorney and to settle correspondence. On heads of argument.	2 hours	R 5,400.00
21/09/2009	On various consultations with instructing attorneys and junior counsel, counsel for further respondents and counsel for applicant. To peruse application papers. On heads of argument. To peruse further respondents' heads of argument.	1 day	R 27,000.00
22/09/2009	On various consultations with instructing attorneys and counsel for further respondents. On appearance where postponement argued.	½ fee	R 18,000.00

Sub Total:	R 174,600.00
Plus tax 14%	R 24,444.00
Total:	R 199,044.00

Bank: Standard Bank
B/Code: 001805 (Smal Street Branch)
Account No: 001133748

Continued from page 2

DETAILED TAX INVOICE

In Re: Transnet Limited v Siyabonga Gama

Ref: C Todd/1178732

Date:	Particulars	Time	Amount
	Balance brought forward		*R 174,600.00*
23/09/2009	On consultation with instructing attorney. On research and perusal. To draft and settle heads of argument and addendum. To peruse replying papers.	1 day	R 27,000.00
24/09/2009	On perusal of case bundle. To review papers, heads of argument for Transnet Board. On preparation for application	1 day	R 27,000.00
25/09/2009	On opposed application.	1 day	R 27,000.00
28/09/2009	On telephonic consultation with advocates Kennedy, Gauntlett. On telephonic consultation with instructing attorney. To peruse contract and on brief advice. On further telephonic consultations (Gauntlett, Kennedy). On further perusal. On further telephonic consultation with instructing attorney to consider response to presiding judge on request for documentation.	2 hours	R 5,400.00
29/09/2009	On further telephonic consultation with instructing attorney and advocate Kennedy. On settling correspondence and perusing further correspondence with Spilg J. On further telephonic consultation with advocates Kennedy and Gauntlett.		R 2,700.00
30/09/2009	On court appearance. On consultation.	¾ fee	R 18,000.00

Bank:	Standard Bank	Sub Total:	R 281,700.00
B/Code:	001805 (Smal Street Branch)	Plus tax 14%	R 39,438.00
Account No:	001133748	Total:	R 321,138.00

ADVOCATES
GROUP 621

ADV K H SHOZI
2ND FLOOR REX WELSH HOUSE
CNR GWEN & MAUDE STREET
SANDOWN VILLAGE
2196
PRIVATE BAG X9967
SANDTON 2146
DOCEX 242 RANDBURG
TEL +27-11-263 9000
FAX +27-11-263 9090
VAT REG NO: 4300216969

TAX INVOICE

Accounts Department
Bowman Gilfillan Inc
Vat reg no: 4530177197

Date: 30 September 2009
Invoice No: 23/2009

Matter: **S GAMA/TRANSNET LTD & OTHERS**
Reference: Mr C Todd/1178732

Date	Narrative	Amount
11/09/09	On reviewing brief, considering factual and legal issues, consultation with BG and Adv Pretorius	18000,00
15-16/09/09	On research, drafting heads of argument and consultation with Adv Pretorius re heads of argument	36000,00
22/09/09	On reviewing the board's answering affidavit and hearing	18000,00
24-25/09/09	On reviewing replying affidavit, applicant's and further respondents' heads of argument, preparation for hearing and hearing	36000,00
30/09/09	On hearing	9000,00
	Subtotal	117000,00
	VAT	16380,00
	TOTAL	**133380,00**

Electronic Payment Details: **Bank Deposit Details:**

PAUL PRETORIUS SC

Sandown Village Office Park, Fountain Chambers
Ground Floor, 86 Maude Street
Sandown
2146
Docex: 176, Johannesburg

Tel: 011-282 3700
Fax: 086 682 4941
E-mail: ppretorius@duma.nokwe.co.za
VAT No: 49401266693

Bowman Gilfillan Attorneys
Accounts Department: C Pillay
Docex 6
Johannesburg
c.pillay@bowman.co.za

Invoice No: 660
Debit Date: 31/10/2009
Due Date: 07/02/2010
VAT Number: 4630177197
Tel: 011 - 669 9000
Fax: 011 - 669 9001

DETAILED TAX INVOICE

In Re: Transnet Limited v Siyabonga Gama

Ref: C Todd/1178732

Date:	Particulars	Time	Amount
14/10/2009	On consultation and advice.	2 hours	R 5,400.00
23/10/2009-25/10/2009	On telephonic consultation with opposing counsel and instructing attorney re leave to appeal. On perusal of investigation files. On notes for prosecution.	2 hours	R 5,400.00
25/10/2009-28/10/2009	On perusal of judgment and notice of application for leave to appeal. To draft and settle heads of argument. On perusal of portions of record. To peruse Board's heads of argument. On research and preparation of note for oral argument.	1 day	R 27,000.00
29/10/2009	On application in High Court. On consultation and advice. To peruse correspondence. To peruse investigation file.	1 day	R 27,000.00

Bank: Standard Bank
B/Code: 001805 (Smal Street Branch)
Account No: 001133748

Sub Total:	R	64,800.00
Plus VAT:14%	R	9,072.00
Total:	R	73,872.00

Continued from page 1

DETAILED TAX INVOICE

In Re: Transnet Limited v Siyabonga Gama

Ref: C Todd/1178732

Date:	Particulars	Time	Amount
	Balance brought forward		*R 64,800.00*
30/10/2009	On perusal of investigation files. On notes for consultation. On consultation in preparation for enquiry and on advice.	2½ hours	R 6,750.00

Bank: Standard Bank
B/Code: 001805 (Smal Street Branch)
Account No: 001133748

Sub Total:	R	71,550.00
Plus tax 14%	R	10,017.00
Total:	R	81,567.00

ADVOCATES
GROUP 621

ADV K H SHOZI
2ND FLOOR FEX WELSH HOUSE
CNR GWEN & MALDE STREET
SANDOWN VILLAGE 2196
PRIVATE BAG X9957
SANDTON 2146
DOX EX 242 RANDBURG
TEL +27-11-263 9000
FAX +27-11-263 9090
VAT REG NO 4300216869

TAX INVOICE

Accounts Department
Bowman Gilfillan Inc
Vat reg no: 4530177197

Date: 30 October 2009
Invoice No: 25/2009

Matter: **S GAMA/TRANSNET LTD & OTHERS**
Reference: Mr C Todd/1178732

Date	Narrative	Amount
26-30/10/09	On reviewing the judgment, research, consultation with Adv Paul Pretorius SC, heads of argument, hearing and noting the judgment (5days)	90000,00
	Subtotal	90000,00
	VAT	12600,00
	TOTAL	102600,00

Electronic Payment Details:
K H Shozi
Investec Private Bank
Branch code: 580105
Account No: 10010770672

Bank Deposit Details:
K H Shozi
ABSA Bank Ltd
Branch code: 632005
Account No: 4051670616

Transnet Limited
Registration
Number
1990/000900/06

Carlton Centre
150 Commissioner
Str. Johannesburg
2001

P.O. Box 72501
Parkview
South Africa, 2122
T +27 11 308 2526
F +27 11 308 2312

TRANSNET

MEMORANDUM

www.transnet.net

To : Anoj Singh
Acting Chief Financial Officer

From : S.X. Mapoma

Date : 23 March 2011

MEMO FOR PAYMENT OF LEGAL FEES IN THE MATTER OF S. GAMA V TRANSNET

BACKGROUND

Following the disciplinary process that was instituted against Mr Gama, he launched an Application at the South Gauteng High Court to stop such proceedings. That matter was finalised, and costs were awarded to Transnet. The disciplinary process then went ahead, leading to Mr Gama's dismissal. He then filed an application disputing the dismissal sanction at the Transnet Bargaining Council. Prior to the hearing of the appeal, the parties engaged in settlement negotiations, and the matter was postponed indefinitely at the Bargaining Council.

The settlement negotiations were sanctioned by the Transnet Board, and the Chairman of the Board, Mr Mafika Mkwanazi was mandated to conclude such negotiations. Deneys Reitz Attorneys were briefed to assist Transnet in the settlement negotiations, which have since been finalised.

Mr Gama, as per the Settlement has now been reinstated.

MOTIVATION

The settlement agreement was concluded in February 2011. A copy of the agreement is attached. **(Please note that the agreement must not be forwarded to the officials who will be effecting the transaction as it is supposed to be confidential.)** Clause 3.5 and 3.6 of the agreement provides as follows:

"3.5. Transnet will make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council.

3.6. Transnet undertakes that such contribution towards the legal costs incurred by Gama will be made within a period of 14 days after submission by Gama of the relevant supporting documents".

The Public Finance Management Act was considered by the Board in taking the decision to settle the matter, and in so doing also took into consideration the element of risk. Risk is always a part of litigation. It is trite that the overriding consideration in determining whether or nor not to settle a legal dispute is the discounting of risk. A party discounts its risk taking into account, amongst others, that despite its considered confidence in its case there is always the risk that the presiding officer might come to a different conclusion than anticipated.

Transnet has also been advised as follows by its Attorneys, Deneys Reitz: *"There are various reasons why parties opt to settle disputes such as the present. Some of the reasons are the following...Litigation is by its nature time consuming and it can be very costly. In labour matters employees of the company who are involved in a dispute have to be involved in the preparation and presentation of evidence at arbitration which is a drain on the resources of the company. Further, litigation can be very costly. In labour matters it can take a very long time before the dispute is finally resolved because theoretically the matter can start at the arbitration stage thereafter it can be escalated to the Labour Court and if any party is unhappy with the outcome of the matter at that stage can take the matter up to the Labour Appeal Court. Thereafter, the matter can be taken up with the Supreme Court of Appeal and ultimately the Constitutional Court. It can take anything up to 5 years for all these processes to be completed and at the end of these processes millions of rands worth of costs would have been incurred by both parties. In executive dismissals this is the more so because executives are usually in a position to fight the matter all the way and this is one of the reasons why most of the dismissals involving executives end up being settled amicably. It may therefore, make sense to settle a matter rather than being involved in a drawn out and costly battle...It is accordingly our view that there is a probability that the Bargaining Council or a court considering the appropriateness of the sanction of dismissal of Mr Gama may reach the conclusion that dismissal was not appropriate having regard to the challenge on sanction advanced by him. In that instance the court may either award compensation to Mr Gama or find that a lesser sanction ought to have been imposed and therefore order his reinstatement".*

These are some of the considerations that the Board would have taken into account when it authorised the Chairman of Transnet to engage in the settlement negotiations and finalise same. Transnet has received copies of the relevant supporting documents, being the taxed costs of the two firms, Bowman Gilfillan Attorneys and Eversheds Attorneys. (The taxed fees copies were received directly from the two firms of attorneys mentioned above).

FINANCIAL IMPLICATIONS

75% of the attached invoices have to be paid to Mr Gama's Attorneys. Their banking details are as follows:

Langa Attorneys
Nedbank
Account No. 1984530100
Branch Code – 198405
Ref: MAT138/INV01-220

The breakdown of costs is as follows:

(a) Case No : 09/38956
Southern Gauteng High Court
Gama S. v Transnet Ltd and Others

The taxed costs awarded to Eversheds Attorneys were R201 066.33. Transnet, as per the Settlement Agreement has to pay 75% of this amount.

(b) Case No : 09/38956
Southern Gauteng High Court
Gama S. v Transnet Ltd and Others

The taxed costs awarded to Bowman Gilfillan Attorneys were R353 457.36. Transnet, as per the Settlement Agreement has to pay 75% of this cost.

We are still awaiting the taxed costs of Langa Attorneys (Mr Gama's Attorneys). It is recommended that when such has been obtained, payment of 75% of these taxed costs be also approved.

RECOMMENDATION

Based on the motivation above, I recommend that the contribution to the legal fees must be paid as per the Settlement Agreement.

Compiled by:

S.X. Mapoma
General Manager: Legal Services
22 March 2010

Recommended by:

Zola Stephen
Group Executive: Legal, Corporate and Public Affairs
Date: 22/03/2011

Mapoma:
I do not see the need for a lecture on the PFMA, ~~and~~ Risk and the Deneys Reitz opinion. If you don't want the agreement to leak why do you ~~attach~~ make copies and attach it?

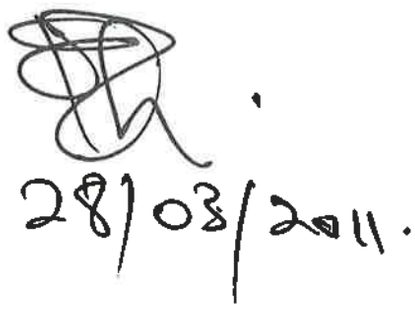
Approved / ~~Not Approved~~

Brian Molefe
Chief Executive Officer
Date: 28 March 2011

28 March 2011

I spoke to Leuven Naicker about Vat on this payment . Leuven said there is not VAT applicable.

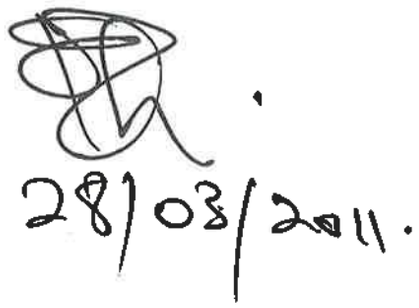
Disemelo Leboea



28 March 2011

I spoke to Leuven Naicker about Vat on this payment . Leuven said there is not VAT applicable.

Disemelo Leboea



TRANSNET

Transnet Group Services
Postnet Suite 310
P.O. Box 2226
Carlton Centre
Johannesburg
2000

LANGA ATTORNEYS
PO Box 2138
PARKTOWN NORTH
2001

SUPPLIER BANKING DETAILS:
Banking key: 198405
Bank account: 1984530100
NEDBANK, RANDBURG

Payment advice

Document / Date
1500015881 / 30.03.2011
Our accounting clerk

Telephone

Fax

Your account with us
2003348

Dear Sir/Madam,

We have cleared the items listed below with our document 1500015881.

Document	Your document	Date	Cash Discount	Gross amount
1900041248	CASE 09/38956	28.03.2011	0.00	696,565.12
1900041249	CASE 09/38956	28.02.2011	0.00	319,999.78
Sum total			**0.00**	**1,016,564.90**

Payment document	Date	Currency	Payment amount
1500015881	**30.03.2011**	**ZAR**	**1,016,564.90**

MPM3

TRANSNET

PAYMENT ADVICE

Payee :
Langa Attorneys
P.O. Box 2138
Parklands, 2121

Date: 28 March 2011

Description	Invoice no.	Date	R	C
Case No:09/38956 Southern Gauteng High Court S. Gama v Transnet Ltd and Others	000000	28/03/2011	696 565	12
		Sub total		
		VAT		
		Total	**696 565.12**	

Post/Per hand: _____ Tel. No.: 308-3962 Ref.: _____

Compiled by : Disemelo Leboea

Approved by:

X1 Head No
Sanction No (Capital Only)

X1 **3200**

COCE			GL					R	C
1	0	0	6	8	0	0	1	696 565	12
			3	7	0	0	3		

F _____

FOR OFFICE USE

Verified: _____ Approved: _____
Vendor No: _____ Date: _____/_____/20_____ Document no: _____

TRANSNET

Transnet Group Services
Postnet Suite 310
P.O. Box 2226
Carlton Centre
Johannesburg
2000

LANGA ATTORNEYS
PO Box 2138
PARKTOWN NORTH
2001

SUPPLIER BANKING DETAILS:
Banking key: 198405
Bank account: 1984530100
NEDBANK, RANDBURG

Payment advice

Document / Date
1500015881 / 30.03.2011
Our accounting clerk

Telephone

Fax

Your account with us
2003348

Dear Sir/Madam,

We have cleared the items listed below with our document 1500015881.

Document	Your document	Date	Cash Discount	Gross amount
1900041248	CASE 09/38956	28.03.2011	0.00	696,565.12
1900041249	CASE 09/38956	28.02.2011	0.00	319,999.78
Sum total			**0.00**	**1,016,564.90**

Payment document	Date	Currency	Payment amount
1500015881	**30.03.2011**	**ZAR**	**1,016,564.90**

Transnet Limited
Registration Number
1990/000900/06

Carlton Centre
150 Commissioner Street
Johannesburg
2001

P.O. Box 72501
Parkview, Johannesburg
South Africa, 2122
T +27 11 308 3000
F +27 11 308 2638

Directors : ME Mkwanazi* (Chairman) MA Fannuchi HD Gazendam NBP Gcaba MP Malungani BD Mkhwanazi T Mnyaka N Moola MP Moyo
NR Nishlngila IM Sharma Prof JE Schrempp# IB Skosana E Tshabalala DLJ Tshepe A Singh* (Acting Chief Financial Officer)
*Executive # German
Group Company Secretary : ANC Ceba

BB011009
Our Ref: V.Vurgarellis

IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAURTENG, JOHANNESBURG

CASE NO.
09/38956

In the matter between:

GAMA, SIYABONGA — APPLICANT

and

TRANSNET LIMITED	FIRST RESPONDENT
WELLS, CHRISTOPHER	SECOND RESPONDENT
MAHARAJ, PRADEEP	THIRD RESPONDENT
EVERINGHAM, GEOFFREY	FOURTH RESPONDENT
GCABA, NOLWAZI	FIFTH RESPONDENT
HANKINSON, MICHAEL	SIXTH RESPONDENT
HASTE, NORMAN	SEVENTH RESPONDENT
JOUBERT, PIETER	EIGHTH RESPONDENT
MATYUMZA, NOMNGANDO	NINTH RESPONDENT
MOYO, PETER	TENTH RESPONDENT
NTSHINGILA, NUNU	ELEVENTH RESPONDENT
RAMON, CHRISTINE	TWELFTH RESPONDENT
SINGH, ANOJ	THIRTEENTH RESPONDENT

FEES AND DISBURSEMENTS DUE TO EVERSHEDS, ATTORNEYS FOR 4TH TO 9TH AND 12TH AND 13TH RESPONDENTS AS BETWEEN PARTY AND PARTY

26.08.09	1	attend client taking instructions to respond to demand from applicant's attorney .5 hrs	355.00	
	2	peruse letter from applicant's attorney and minutes of board meeting of 24.08.09	142.00	
30.08.09	3	attend senior and junior counsel and client in consultation on response 2.5 hrs	1775.00	
11.09.09	4	taking instructions from 4th respondent and further respondents to oppose urgent application 2 hrs	1420.00	
	5	peruse notice of motion, affidavit and annexures 120p	4260.00	
	6	copies for 2 counsel 128p x 2	460.80	
		TOTAL B/F	8412.80	0.00

		TOTAL C/F	8412.80	0.00
11.09.09	7	draw 4th to 13th respondents notice of intention to oppose	71.00	
	8	making extra copies for service x 3 4p	21.60	
14.09.09	9	peruse 1st to 3rd respondents' notice to oppose	35.50	
	10	copies for counsel 2p x 2	7.20	
	11	peruse annexures to 4th respondents answering affidavit 73p	2591.00	
	12	peruse privileged documents to be handed to court if required 137p	4863.50	
	13	copies thereof 103p x 5	927.00	
	14	peruse board resolution 2p	71.00	
	15	draw answering affidavit 36p	6390.00	
	16	draw brief to senior counsel to settle affidavit as a matter of urgency, sort and arrange and deliver	248.50	
	17	draw brief to junior counsel to settle affidavit sort and arrange and deliver	248.50	
15.09.09	18	attend client and counsel in consultation on settling affidavit 6 hrs	4260.00	
16.09.09	19	attend client and counsel in consultation on affidavit 10 hrs	7100.00	
17.09.09	20	brief to junior counsel to postpone application to 21st	248.50	
	21	attend consultation with counsel on finalising affidavit 9- 15h30 6.5 hrs	4615.00	
	22	attend to pay junior counsel's fee to attend to postponement hearing	106.50	342.00 2052.00
	23	peruse affidavit as settled 36p	1278.00	
	24	copies of annexures 70p x5	630.00	
	25	draw confirmatory affidavit phaswana	71.00	
	26	draw confirmatory affidavit ceba	71.00	
		TOTAL B/F	42267.60	2052.00

		TOTAL C/F	42267.60	2052.00
17.09.09	27	draw index 4p	284.00	
	28	peruse applicant's notice of substitution of correspondent address	35.50	
	29	copies for counsel 3p x 2	10.80	
	30	attend 3 deponents traversing affidavit prior to signature	710.00	
18.09.09	31	peruse 1st to 3rd respondent's answering affidavit and annexures 81p	2875.50	
	32	copies for 2 counsel 89p	320.40	
	33	draw addendum to index	71.00	
20.09.09	34	taking instructions on 4th respondent's supplementary affidavit 15min	177.50	
	35	draw supplementary affidavit 2p	355.00	
	36	attend client traversing affidavit prior to signature	177.50	
	37	draw filing sheet	71.00	
	38	extra copy of affidavit and filing sheet for service on 1st to 3rd respondents attorney 6p	10.80	
	39	making copies of relevant case law and legislation as requested by judge - 653 pages x 5	5877.00	
	40	attend to sort and paginate same c.a. 1.5 hrs	324.00	
	41	draw index thereto 5p	355.00	
22.09.09	42	draw consolidated index 6p	426.00	
	43	attend court with counsel when question of urgency debated and matter postponed to 9 am on 25 september - replying affidavit to be filed on 23 september and heads on 24th - judge raises question of jurisdiction 1 hr	710.00	
23.09.09	44	peruse applicant's replying affidavit 51p	1810.50	
		TOTAL B/F	56869.10	2052.00

		TOTAL C/F	56869.10	2052.00

23.09.09	45	copies for counsel x 2 70p	252.00	
24.09.09	46	peruse applicant's heads	35.50	
	47	copies for 2 counsel 25p	90.00	
	48	peruse 1st to 3rd respondent's heads and addendum thereto	35.50	
	49	copies 23p	82.80	
	50	peruse 4th to 9th and 12 and 13th respondents' heads	35.50	
	51	copies 31p x 5	279.00	
25.09.09	52	attend court with counsel - matter argued and judgment reserved to 30 september 6 hrs	4260.00	
	53	peruse senior counsel's account and attend to pay:	106.50	
		- 29/30 august - preparation for and attend urgent consultation with client, attorney and junior counsel -considering demand from applicant's attorney, reading transcript of board meeting and settling response and consultation with attorney and junior counsel 4 hrs		60000.00
		- 13.9.09 studying founding papers and documents researching and planning answer, various discussions with junior counsel and attorneys 6hrs		14000.00
		-- 14/15 september studying draft answering affidavit consultations and settling affidavit 4 hrs		14000.00
		- 16.9.09 consulting attorneys and client and settling affidavit 1 day		35000.00
		- 17.9.09 consultations on settling affidavit 1 day		35000.00
		- 18 to 21 sept. preparation and heads of argument 20 hrs		70000.00
		- 21.9.09 - studying 1st to 3rd respondent's answering affidavit and preparing oral argument 1 day		35000.00
		- 22.9.09 attend court - preliminary argument 1 day		35000.00
		- 23.9.09. studying repling affidavit and preparing expanded and revised heads in light thereof 1 day		35000.00
		TOTAL B/F	62045.90	335052.00

		TOTAL C/F	62045.90	335052.00
25.09.09		- 24.9.09 preparation 1 day - 25.9.09. arguing opposed application 1 day - VAT - travel expenses and accommodation - 3 trips to johannesburg (per attached vouchers)		35000.00 35000.00 56420.00 35567.81
	54	peruse junior counsel's account and paid R170 800.00 1st half - second half	106.50	85400.00 85400.00
28.09.09		- VAT - travel expenses and accommodation (per vouchers annexed)		23912.00 19798.70
	55	peruse applicant's contract of employment and disciplinary code and procedure (called for by judge) 23p	816.50	
	56	instructions to junior counsel to argue judge's request to introduce applicant's contract of employment	177.50	
	57	draw brief to junior counsel and attend to sort and arrange	248.50	
30.09.09	58	attend court with junior counsel to argue introduction of contract of employment - judgment further reserved to 7 october at 9h30 2 hrs	1420.00	
	59	peruse jnr counsel's account at attend to pay	106.50	12768.00
07.10.09	60	draw brief to junior counsel to note judgment sort and arrange and deliver	248.50	
	61	attend court with counsel when judgment noted	710.00	
	62	peruse counsel's account and attend to pay	106.50	600.00
	63	peruse court order	35.50	
	64	letters written x 78	5538.00	156.00
	65	letters received x 53	1881.50	
	66	phone calls 233 minutes	2756.39	100.00

		741974
SUBTOTAL	76197.79	~~728174-5~~
LESS TAXED OFF	-	125598
SUB-TOTAL A	76197-79	616349-
		6766-36
ADD DRAWING BILL		
ADD DISBURSEMENTS		616349-57
		699313-66
ADD ATTENDING TAXATION		14700-46
ADD VAT		13673-04
TOTAL		727687-16

TAXED AND ALLOWED IN THE SUM OF: R727687-16

TAXING MASTER

GRIFFIER VAN DIE HOOGGEREGSHOF
(WITWATERSRANDSE PLAASLIKE AFDELING)
PRIVAATSAK/PRIVATE BAG X7
2009 -11- 25
JOHANNESBURG 2000
(WITWATERSRAND LOCAL DIVISION)
REGISTRAR OF THE HIGH COURT

TRANSNET TO PAY 75% (SEVENTY FIVE PER CENT) OF THE TAXED COSTS ABOVE, I.E. 75% OF R727 687-16 (SEVEN HUNDRED ~~AND~~, AND TWENTY SEVEN THOUSAND, SIX HUNDRED AND EIGHTY SEVEN RANDS, SIXTEEN CENTS) PAYMENT APPROVED AS PER ATTACHED MEMO. (DISCUSSED WITH ANDY)

28/03/11

BB 021109
Our Ref: V Vurgarellis

IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG, JOHANNESBURG

CASE NO.
09/38956

In the matter between:

GAMA, SIYABONGA	APPLICANT
and	
TRANSNET LIMITED	FIRST RESPONDENT
WELLS, CHRISTOPHER	SECOND RESPONDENT
MAHARAJ, PRADEEP	THIRD RESPONDENT
EVERINGHAM, GEOFFREY	FOURTH RESPONDENT
GCABA, NOLWAZI	FIFTH RESPONDENT
HANKINSON, MICHAEL	SIXTH RESPONDENT
HASTE, NORMAN	SEVENTH RESPONDENT
JOUBERT, PIETER	EIGHTH RESPONDENT
MATYUMZA, NOMAGANDO	NINTH RESPONDENT
MOYO, MTHANDAZO PETER	TENTH RESPONDENT
NTSHINGILA, NUNU	ELEVENTH RESPONDENT
RAMON, KRISTINE	TWELFTH RESPONDENT
SINGH, ANOJ	THIRTEENTH RESPONDENT

FEES AND DISBURSEMENTS DUE TO EVERSHEDS, ATTORNEYS FOR 4TH TO 9TH AND 12TH AND 13TH RESPONDENTS AS BETWEEN PARTY AND PARTY AND BEING IN RESPECT OF APPLICATION FOR LEAVE TO APPEAL

22.10.09	1	taking instructions to oppose application for leave to appeal .5 hr	355.00	
	2	peruse application for leave to appeal 4p	142.00	
	3	copies for 2 counsel 8p	28.80	
	4	peruse judgment of the court dd 7.10.09 42 pages	1491.00	
	5	copies for 2 counsel 59 pages	212.40	
	6	draw brief to senior counsel to oppose application for leave to appeal and attend to sort and arrange	248.50	
		TOTAL B/F	2477.70	0.00

		TOTAL C/F	2477.70	0.00
22.10.09	7	draw brief to junior counsel and attend to sort and arrange	248.50	
	8	peruse 1st to 3rd respondent's heads of argument	35.50	
	9	copies for 2 counsel 25p	90.00	
	10	peruse 4th to 9th and 12th and 13th responsents' heads of argument	35.50	
	11	copies x 5 10p	90.00	
	12	draw filing sheet	71.00	
27.10.09	13	making copies of the main application papers, heads of argument and judgment for judge at his specific request (2 leverarch files) 558 pages	1004.40	
	14	attend to sort arrange and paginate same .5 hrs	108.00	
29.10.09	15	attend court with counsel when application argued and judgment reserved 9h45 - 12h30 2.75 hrs	1952.50	
	16	peruse snr counsel's account and attend to pay	106.50	
		- studying judgment and preparing heads of argument		52000.00
		- studying heads for 1st to 3rd respondents and preparation		35000.00
		- arguing opposed application		35000.00
		- VAT		17080.00
		-travel expenses 1/2 share avis		1895.00
		- 1/2 share hotel		5825.00
	17	peruse junior counsel's account and attend to pay	106.50	
		- half of senior counsel's fee		61000.00
		- VAT		8540.00
		- half share of travel expenses and hotel		7720.00
	18	draw brief to junior counsel to note judgment sort and arrange and attend to deliver	248.50	
30.10.09	19	attend court with junior counsel to note judgment 1 hr	710.00	
		TOTAL B/F	7284.60	224060.00

		TOTAL C/F	7284.60	224060.01
30.10.09	20	peruse court order dismissing application with costs of 2 counsel	35.50	
	21	peruse junior counsel's account and attend to pay	106.50	500.00
	22	letters written x 14	994.00	30.00
	23	letters received x 10	355.00	
	24	phone calls made and received 1 hr	710.00	110.00
		SUBTOTAL	9485.60	224700.00
		LESS TAXED OFF	-	41070-00
		SUB-TOTAL A	9485-60	183630-00
		ADD DRAWING BILL		842-32
		ADD DISBURSEMENTS		183630-00
		ADD ATTENDING TAXATION		~~19357~~ 193957-92
		ADD VAT		4967-11
				2141-30
		TOTAL		201066-33

TAXED AND ALLOWED IN THE SUM OF: R201066-33

TAXING MASTER

GRIFFIER VAN DIE HOOGGEREGSHOF
(WITWATERSRANDSE PLAASLIKE AFDELING)
PRIVAATSAK/PRIVATE BAG X7
2009 -11- 25
JOHANNESBURG 2000
(WITWATERSRAND LOCAL DIVISION)
REGISTRAR OF THE HIGH COURT

TRANSNET TO PAY 75 % (SEVENTY FIVE PERCENT) OF THE TAXED COSTS ABOVE, I.E 75 % OF R 201 066.33 (TWO HUNDRED AND ONE THOUSAND, SIXTY SIX [redacted] RANDS AND THIRTY THREE CENTS). THE PAYMENT HAS BEEN APPROVED AS PER THE ATTACHED MEMO. [DISCUSSED WITH ANDY]

28/03/11

TRANSNET

Transnet Group Services
Postnet Suite 310
P.O. Box 2226
Carlton Centre
Johannesburg
2000

LANGA ATTORNEYS
PO Box 2138
PARKTOWN NORTH
2001

SUPPLIER BANKING DETAILS:
Banking key: 198405
Bank account: 1984530100
NEDBANK, RANDBURG

Payment advice

Document / Date
1500015881 / 30.03.2011
Our accounting clerk

Telephone

Fax

Your account with us
2003348

Dear Sir/Madam,

We have cleared the items listed below with our document 1500015881.

Document	Your document	Date	Cash Discount	Gross amount
1900041248	CASE 09/38956	28.03.2011	0.00	696,565.12
1900041249	CASE 09/38956	28.02.2011	0.00	319,999.78
Sum total			0.00	**1,016,564.90**

Payment document	Date	Currency	Payment amount
1500015881	**30.03.2011**	**ZAR**	**1,016,564.90**

Transnet Limited
Registration Number
1990/000900/06

Carlton Centre
150 Commissioner Street
Johannesburg
2001

P.O. Box 72501
Parkview,Johannesburg
South Africa, 2122
T +27 11 308 3000
F +27 11 308 2638

Directors : ME Mkwanazi* (Chairman) MA Fannuchi HD Gazendam NBP Gcaba MP Malungani BD Mkhwanazi T Mnyaka N Moola MP Moyo
NR Nishingila IM Sharma Prof JE Schrempp# IB Skosana E Tshabalala DLJ Tshepe A Singh* (Acting Chief Financial Officer)
*Executive #German
Group Company Secretary : ANC Ceba

MPM4

BREAKDOWN OF COSTS

Pre-Public Protector Complaint					
Law Firm	**Invoice number**		**Amount**	**Date**	**Narration**
Edward Nathan Sonnenbergs	281419	R	94 255,66	31/03/2009	Transnet Freight Rail Irregularities
Edward Nathan Sonnenbergs	284125	R	71 515,28	30/04/2009	Transnet Freight Rail Irregularities
Edward Nathan Sonnenbergs	294281	R	198 985,80	31/07/2009	Transnet Freight Rail Irregularities
Edward Nathan Sonnenbergs	300611	R	5 326,47	30/09/2009	Transnet Freight Rail Irregularities
Edward Nathan Sonnenbergs	301918	R	5 341,29	15/10/2009	Transnet Freight Rail Irregularities
Bowman Gilfillan	311446	R	52 925,14	31/07/2009	Disciplinary Investigations
Bowman Gilfillan	318614	R	662 906,58	30/09/2009	High Court Application
Bowman Gilfillan	324589	R	311 614,44	31/10/2009	High Court Application and Disciplinary Investigations
Bowman Gilfillan	384584	R	538 287,48	31/01/2011	Consultations and Preparations
Bowman Gilfillan	389708	R	296 406,20	28/02/2011	Consultations and Preparations
Bowman Gilfillan	329125	R	337 851,35	14/12/2009	High Court Application
Bowman Gilfillan	333923	R	890 070,27	29/01/2010	Disciplinary Hearing and related matters
Bowman Gilfillan	338838	R	1 155 097,58	26/02/2010	Disciplinary Hearing and related matters
Bowman Gilfillan	347496	R	256 672,16	30/04/2010	Disiciplinary Hearing and related matters
Bowman Gilfillan	351294	R	67 180,95	31/05/2010	Arbitration
Bowman Gilfillan	355026	R	549 965,48	30/06/2010	Disciplinary Hearing, Arbitration and related matters
Bowman Gilfillan	360335	R	533 842,14	30/07/2010	GNS Blacklisting, Criminal Matter preparation
Bowman Gilfillan	365413	R	124 886,20	31/08/2010	Various preparations for Disciplianry enquiries
Bowman Gilfillan	369857	R	66 351,78	30/09/2010	Senamela Arbitration
Eversheds	605925	R	14 845,24	26/02/2010	Independant Advice to Chairman
Eversheds	604653	R	9 215,43	29/01/2010	Independant Advice to Chairman
Eversheds	599991	R	13 485,27	29/10/2009	Investigation
Eversheds	601793	R	7 343,88	26/11/2009	Professional services
Eversheds	603247	R	92 514,34	18/12/2009	Independant Advice to Chairman
Eversheds	601745	R	159 241,40	26/11/2009	Independant Advice to Chairman
Eversheds	600276	R	705 438,20	30/10/2009	Independant Advice to Chairman
Eversheds	598439	R	905 034,65	2009/01/10	Independant Advice to Chairman
Ernst & Young		R	484 087,50	October 2008 - March 2009	Various investigations re the GNS Locomotives Acquisition quiries
Ernst & Young		R	1 690 805,00	April 2009 - March 2010	Various investigations re the GNS Locomotives Acquisition quiries
Ernst & Young		R	605 660,00	April 2010 - March 2011	Various investigations re the GNS Locomotives Acquisition quiries
Total		**R**	**10 907 153,16**		

Post Public Protector Complaint

Law Firm	Invoice number		Amount	Date	Narration
Ningiza Horner	0120/2011	R	626 840,00	31/01/2011	Ernst and Young Complaint with the Public Protector
Ningiza Horner	0125/2011	R	617 214,00	18/02/2011	Ernst and Young Complaint with the Public Protector
Ningiza Horner	0140/2011	R	64 320,40	2011/06/04	Ernst and Young Complaint with the Public Protector
Deneys Reitz	676302	R	6,29	03/02/2011	Complaint by Public Protector and Settlement Negotiations
Deneys Reitz	680049	R	183 403,66	03/02/2011	Complaint by Public Protector and Settlement Negotiations
Deneys Reitz	678319	R	68 402,28	3/3/2011	Complaint by Public Protector and Settlement Negotiations
Deneys Reitz	683880	R	171 383,04	28/02/2011	Complaint by Public Protector and Settlement Negotiations

Deneys Reitz	683893	R	199 945,74	28/02/2011	Complaint by Public Protector and Settlement Negotiations
Deneys Reitz	691240	R	248 073,35	31/03/2011	Complaint by Public Protector and Settlement Negotiations
Deneys Reitz	691066	R	152 419,86	31/03/2011	Complaint by Public Protector and Settlement Negotiations
Deneys Reitz	695294	R	9 182,70	21/04/2011	S. Gama settlement Negotiations
Deneys Reitz	695301	R	45 932,88	26/04/2011	Complaint by Public Protector
Deneys Reitz	700921	R	80 433,16	30/05/2011	Complaint by Public Protector
Deneys Reitz	700919	R	11 528,60	31/05/2011	Gama settlement
Nkonki Inc	002819	R	1 403 518,98	28/02/2011	Forensic Review emanating from Public Protector Complaint
Nkonki Inc	2801	R	835 681,28	02/02/2011	Forensic Review emanating from Public Protector Complaint
Nkonki Inc	002862	R	1 674 278,10	31/03/2011	Forensic Review emanating from Public Protector Complaint
Nkonki Inc.	2897	R	1 389 377,85	29/04/2011	Forensic Audit Services
Nkonki Inc.	2999	R	872 727,00	16/08/2011	Forensic Services
Nkonki Inc	2920	R	1 661 994,60	31/05/2011	Forensic Services
Nkonki Inc	2950	R	1 372 943,61	19/07/2011	Forensic Audit Services
Xulu Liversage Inc	GWA1.1	R	365 380,00	9/12/2010	Gwala & Others
Werksmans Attorneys	379037	R	10 494,84	23/05/2011	Discovery health
Norton Rose	706481	R	17 210,86	28/06/2011	Complaint to Public Protector
Norton Rose	706482	R	29 165,83	28/06/2011	Complaint to Public Protector
KPMG	406731	R	510 711,45	2/2/2011	Forensic Review emanating from Public Protector Complaint
KPMG	409344	R	1 252 598,17	08/03/2011	Forensic Review emanating from Public Protector Complaint
KPMG	413137	R	653 217,43	14/04/2011	Forensic Audit Services
KPMG	414783	R	737 908,03	13/05/2011	Forensic Audit Services
KPMG	417879	R	110 369,10	20/06/2011	Forensic Services
KPMG	422712	R	244 676,85	23/08/2011	Forensic Services
Langa Attorneys	09/38956	R	696 565,12	28/03/2011	Legal costs of Mr Gama as per Settlement Agreement
Langa Attorneys	09/38956	R	319 999,78	28/03/2011	Legal costs of Mr Gama as per Settlement Agreement
Langa Attorneys	09/38956	R	1 720 220,76	2011/09/06	Gama settlement
Bowman Gilfillan	384584	R	538 287,48	31/01/2011	Disciplinary Hearing, Arbitration and related matters
Bowman Gilfillan	389708	R	296 406,20	28/02/2011	Disciplinary Hearing, Arbitration and related matters
Total		**R**	**19 192 819,28**		

MPM5

CONFIDENTIAL

MINUTES OF MEETING NO. 11/5 OF THE CORPORATE GOVERNANCE AND NOMINATIONS COMMITTEE HELD ON 11 APRIL 2011 AT 09:00 IN BOARDROOM 4906, 49TH FLOOR, CARLTON CENTRE, JOHANNESBURG

For attention/ Resolution No

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES, SIGNING OF ATTENDANCE REGISTER AND ADOPTION OF AGENDA**

1.1 **Present**

Mr ME Mkwanazi	Chairman
Ms T Mnyaka	Member
Mr IM Sharma	Member
Ms DLJ Tshepe	Member
Mr IB Skosana	Member

1.2 **In Attendance**

Mr SI Gama	Acting Group Chief Executive
Ms Z Stephen	Group Executive : Legal, Corporate and Public Affairs
Ms ANC Ceba	Group Company Secretary

1.3 **Partial attendance**

Ms N R Ntshingila	Non-Executive Director (Remuneration Committee member)
Mr HD Gazendam	Non-Executive Director (Remuneration Committee member)
Ms NBP Gcaba	Non-Executive Director (Remuneration Committee member)
Mr MP Malungani	Non-Executive Director (Remuneration Committee member)

1.4 **Apologies**

Mr B Molefe	*Ex-officio* Member

1.5 **Welcome, Constitution of Meeting and Signing of Attendance Register**

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. The Attendance Register was circulated for signature. The Chairman noted the apologies from Mr Molefe who was out of the country on official business. He welcomed Mr Gama, who was acting in Mr Molefe's stead.

1.6 **Adoption of Agenda**

The agenda was adopted as tabled with the following amendments:

1. Withdrawal of Item 6.7; and
2. Addition of Item 7.2 on "Notification on claims received against the Company."

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures were conducted through the video system.

3 **DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

4 **APPROVAL AND NOTING OF THE MINUTES OF THE MEETING HELD ON 7 MARCH 2011**

The minutes of the meeting held on 7 March 2011 were approved without corrections.

Ms Tshepe joined the meeting at 09:10.

5 **MATTERS ARISING FROM THE MINUTES OF PREVIOUS MEETINGS HELD**

ANC

5.1 **More detail to be provided on the Company's plans to obtain operational efficiency in the medium-term**

The Chairman requested Management to prepare the document for deliberation at the next meeting. He indicated that the matter will be tabled once the Shareholder's Compact is finalised and signed.

Mr Molefe

CONFIDENTIAL

MINUTES OF MEETING NO. 11/5 OF THE CORPORATE GOVERNANCE AND NOMINATIONS COMMITTEE HELD ON 11 APRIL 2011 AT 09:00 IN BOARDROOM 4906, 49TH FLOOR, CARLTON CENTRE, JOHANNESBURG

For attention/ Resolution No

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES, SIGNING OF ATTENDANCE REGISTER AND ADOPTION OF AGENDA**

1.1 **Present**

Mr ME Mkwanazi	Chairman
Ms T Mnyaka	Member
Mr IM Sharma	Member
Ms DLJ Tshepe	Member
Mr IB Skosana	Member

1.2 **In Attendance**

Mr SI Gama	Acting Group Chief Executive
Ms Z Stephen	Group Executive : Legal, Corporate and Public Affairs
Ms ANC Ceba	Group Company Secretary

1.3 **Partial attendance**

Ms N R Ntshingila	Non-Executive Director (Remuneration Committee member)
Mr HD Gazendam	Non-Executive Director (Remuneration Committee member)
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1.4 **Apologies**

Mr B Molefe	*Ex-officio* Member

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Ms Tshepe joined the meeting at 09:10.

5 **MATTERS ARISING FROM THE MINUTES OF PREVIOUS MEETINGS HELD**

5.1 **More detail to be provided on the Company's plans to obtain operational efficiency in the medium-term**

The Chairman requested Management to prepare the document for deliberation at the next meeting. He indicated that the matter will be tabled once the Shareholder's Compact is finalised and signed.

Mr Molefe

For attention/ Resolution No

5.2 **Structural changes to Group Exco**

5.2.1 **The Company will approach the Board with a revised strategy for consideration**

Management informed the Committee that the matter is work-in-progress.

5.2.2 **A Group Exco break-away session to deliberate on operational efficiency will be organised**

The Chairman informed the Committee that the matter was finalised. Management had utilised the session to align the Group Exco activities. The Delegation of Authority Framework had been revised. The Committee will have sight of further sub-delegation to the Group Exco, once all the processes are finalised. Mr Molefe

5.2.2.1 The Chairman requested Management to give feedback on the Group Exco Break-away Session. Management gave the Committee feedback on the session and stated, amongst others, the following :

- The session was convened in George from 4 to 6 April 2011, to review efficiency of structures, create synergies and manage inter-dependencies between functions;
- Management introduced a 100 Days Plan for the Company that will be monitored and measured every three months; and
- The focus will be on volume growth, operational efficiencies and best practice issues such as the newly introduced Scheduled Rail Maintenance programme.

5.2.3 **Engage Mr Morwe on the Commercial role**

5.2.3.1 The Chairman stated that the matter had been finalised. The Committee was concerned that two different dates were communicated as effective dates for the reconstituted Group Exco structure. The Chairman informed the Committee that the administrative changes were effected from 22 March 2011, however, the new roles came into effect on 1 April 2011.

5.2.3.2 The Chairman advised the Committee that Mr Maharaj had resigned. In the short-term, the GCE will house the human resources function under Corporate, Legal and Public Affairs, and has requested Ms Stephen to table a proposal on the Company's human resources function going forward. The strategy and human resources functions had been separated.

5.2.3.3 Management also informed the Committee that the CFO of TFR, Mr Thomson, had resigned on 8 April 2011.

5.2.3.4 The matter was extensively deliberated upon. The Committee indicated that it is best practice to separate the corporate affairs function from the legal function. The Chairman indicated that the GCE will submit the final Group Exco structure for noting purposes to the Committee on completion thereof. Mr Molefe

The Committee indicated that the Group Exco structure was not gender representative, and further requested the GCE to address the matter. Mr Molefe

5.2.3.5 The Committee advised the Company to determine the materiality of the issues before pursuing a possible disciplinary process against Mr Maharaj. The Chairman indicated that the proposed disciplinary process against Mr Maharaj will be deliberated upon further with Ms Stephen and the GCE. Chairman/ Mr Molefe/ Ms Stephen

5.3 **Investigation by Public Protector**

5.3.1 **Investigate the draft audit report that had been submitted by Nkonki and KPMG and provide feedback at the next meeting**

Management advised the Committee that all the progress reports were circulated with the pack, and these were extensively discussed under Item 5.3.2 below.

5.3.2 **Management to table a status report on other matters that were raised in the Public Protector's complaint**

5.3.2.1 Management stated that the Public Protector had granted the Company an extension to 21 April 2011 to submit its response on Mr Gama's matter.

		For attention/ Resolution No
	Mr Gama recused himself from the meeting at 09:50.	
5.3.2.2	The matter was extensively deliberated upon. Management stated that the Public Protector had requested detail on Mr Gama's matter, irrespective of his re-instatement into the employ of the Company. The Committee was concerned that the Auditors had engaged Webber Wentzel to advice on legal issues that Deneys Reitz was also working on. Management indicated that the Auditors had obtained authority from the Chairman to engage Webber-Wentzel for legal services. Management indicated that Deneys Reitz had been engaged to "*bring all the Public Protector matters together*" and to respond to the Public Protector on behalf of the Company.	
5.3.2.2	The Committee requested that the "legal briefs" be tabled to the Committee prior to issue. It also requested the original brief that was circulated to the Auditors (Nkonki and KPMG) when they were engaged in January 2011. Management undertook to circulate the requested information to the Committee.	Ms Stephen Ms Stephen
	Mr Gama re-joined the meeting at 10:15.	
5.3.2.3	The Committee requested Management to address a memorandum to all the employees that were failing to provide the requested information to the Auditors, and issue a deadline of 15 April 2011 for submission of the requested documentation.	Mr Molefe
5.2.3.4	The Committee requested Management to make a presentation covering, amongst others, the following issues : - What is a condonation process? - Where does it originate from? - Where does it get approved and regularised?	Mr Molefe
5.2.3.5	Management informed the Committee that the final report from the Auditors will be submitted before end of April 2011. It was agreed that the Committee will be availed the response on Mr Gama's matter before it is submitted Public Protector. Management was requested to arrange a meeting on the matter, if necessary.	Ms Stephen Ms Ceba
5.2.3.6	The Committee requested the Company to detail the costs emanating from the Public Protector process (legal costs and auditors' fees), and to further give detail on the costs that were incurred by the Company since Mr Gama's matter commenced in August 2009.	Ms Stephen
5.3.3	**A meeting to discuss the Public Protector matter with Mr Molefe, Ms Stephen and Mr Mapoma**	
	The matter was finalised.	
5.3.4	**Request an extension for submission to 30 April 2011**	
	The matter was finalised.	
5.4	**Progress on the 2011/12FY Shareholder's Compact**	
5.4.1	**Management will request DPE to exclude the Port of Ngqura on the ROTA consideration as it is currently not operating on its full capacity**	
5.4.1.1	The Chairman indicated that a meeting will be held with the Shareholder Minister on 20 April 2011 to discuss the three outstanding matters.	Mr Molefe
5.4.2	**Management should consider the use of current technology in its operations, amongst others, on the signalling infrastructure**	
5.4.2.1	Management reported that at the April 2011 Group Exco Break-away session, each OD was requested to formulate and present plans on technology enhancements in July 2011. Management reported that TFR's technology requirements were assessed, and there are plans to boost some of the security issues that need improvement. Management further indicated that the Company still has to conduct an assessment exercise to determine whether	Mr Molefe Mr Molefe

For attention/ Resolution No

the technology that is being utilised by Class 1 Railways can be utilised locally.

5.5 **Group Chief Executive Performance Contract for the 2011/12FY**

5.5.1 **Proposed new weights for the GCE's SPOs to be circulated to the Committee for approval after the finalisation of the Shareholder's Compact for the 2011/12FY**

The Chairman stated that the matter was not finalised and it will be brought back to the Committee once the 2011/12FY Shareholder's Compact has been finalised. The Committee requested that the Group Exco SPOs be tabled to the Committee for noting as soon as they are finalised. — Mr Molefe

5.5.2 **Ensure that discussion documents are circulated on time and not in the meeting**

The matter was finalised.

5.5.3 **The Committee requested that issues from the NGP should be taken into consideration in the GCE's SPOs**

The matter was finalised.

5.6 **Appointment of the Group Chief Financial Officer**

5.6.1 **Circulate the appointment of Mr Skosana to the Corporate Governance and Nominations Committee through an urgent written resolution to the Board**

The matter was finalised.

5.6.2 **The Steering Committee should assist with procuring a suitable head-hunter for the Group CFO selection process**

The Chairman indicated that the matter is work-in-progress. — Steering Committee

5.7 **Damage to the Jet-Fuel Pipe**

5.7.1 **Explore the available technology to address security issues**

Management indicated that discussions will be held with Denel to seek a resolution to address the Company's security challenges. — Mr Molefe

6 **MATTERS FOR DISCUSSION**

6.1 **Appointment of a Trustee to the Transnet Retirement Fund**

6.1.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was deliberated upon.

RESOLVED that it recommends that the Board approves :

The appointment of Ms Zola Stephen as an Employer Trustee to the Board of Trustees of the Transnet Retirement Fund with immediate effect;

The appointment of Mr Gerhard Bierman as an alternative Trustee to the Board of Trustees of the Transnet Retirement Fund with immediate effect. — 11/5/1

6.2 **Annual General Meeting : Arrangements and statutory authorisations applicable to some of the proposed agenda items**

6.2.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon.

6.2.2 The Committee proposed that the Chairman of the Board Audit Committee should engage the GCE on the AGM preparations with regard to the re-appointment of the external auditors. — Mr Molefe/ Ms Ceba

RESOLVED that it recommends that the Board approves the Annual General Meeting: Arrangements and statutory authorisation applicable to some of the proposed agenda items. — 11/5/2

For attention/ Resolution No

6.3 **Potential nominees for appointment at the Annual General Meeting of the Company as members of the Board Audit Committee**

6.3.1 Management took the Committee through the submission as contained in the pack under Item 6.2 above. The submission was taken as read.

RESOLVED that it recommends that the Board supports the following potential nominees for appointment at the Annual General Meeting of the Company as members of the Board Audit Committee:

- Mr MP Moyo (Chairman);
- Mr MA Fanucchi (Member);
- Ms T Mnyaka (Member);
- Mr IB Skosana(Member); and
- Ms E Tshabalala (Member).

11/5/3

6.4 **Shareholder's Compact for the 2011/12FY**

6.4.1 The Chairman informed the Committee that the matter is not yet finalised. A meeting will be held with the Shareholder Minister on 20 April 2011. Chairman

The Committee noted the update.

6.5 **Draft Delegation of Authority Framework**

6.5.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon.

6.5.2 Management indicated that the final Delegation of Authority Framework, incorporating further delegations to the Group Exco and the HR delegations, will be tabled at the next Committee meeting for noting. Mr Molefe/ Ms Stephen

RESOLVED that it recommends that the Board approves the draft Delegation of Authority Framework. 11/5/4

Members of the Remuneration Committee, but for Mr Malungani, joined the meeting at 10:59.

6.6 **Legal opinion on the payment of the LTI Grant for the 2007/08FY**

6.6.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon.

6.6.2 The Chairman gave background to the matter. The Company is in possession of a legal opinion that advises against the suspension of the vesting of the LTI for the 2007/08FY. The only employee with a "NMPP KPI" in her SPOs is Ms Moses; however, there was no specific legal opinion that addresses the suspension of Ms Moses' LTI.

6.6.3 The Chairman opined that disciplinary action could be instituted against certain TCP employees that were engaged in the NMPP project due to :

- An element of incompetence in preparing the submission that was tabled to the Board in November 2009 (failed to do a baseline recalculation when reviewing the financial projections); and
- The draft Auditors' Report (Nkonki and KPMG) had highlighted poor financial controls in TCP governance systems.

Mr Malungani joined the meeting at 11:07.

6.6.4 The meeting highlighted discomfort on the bonus scheme that does not allow the Board to intervene in bonus-related matters, and was of the view that the Board should have overall discretionary powers in awarding performance bonuses, notwithstanding the legal issues involved.

6.6.5 The meeting recommended that the LTI Rules should be amended to reserve certain powers

For attention/ Resolution No

to Remco and the Board going forward. The Chairman stated that going forward, Remco will review the annual LTI contracts when the LTI conditional grants are awarded.

6.6.6 The Chairman advised the meeting that the performance evaluations for Group Exco, specifically for three quarters of the 2010/11FY, had been concluded by Mr Wells. He indicated that the Company was in the process of formalising governance requirements so the Chairman may conduct performance evaluations for the Group Exco for the last quarter of the 2010/11FY.

The Committee noted the submission.

6.7 **Vesting of the full conditional awards in terms of the LTI Scheme for Mr Wells**

6.7.1 The matter was withdrawn from the Agenda. However, the Committee requested that the corporate governance elements that were being highlighted in the matter, be addressed by the Committee at some point. Chairman

7 **GENERAL**

7.1 **Corporate Governance and Nominations Committee Mandate**

The Committee noted the Corporate Governance and Nominations Committee Mandate.

7.2 **Notification on claims received against the Company**

7.2.1 Management advised the Committee that the Company was served with two claims on 8 April 2011, and these were detailed as:

- Summons from Sibanye Trade & Services (Pty) Ltd ["STS"] against Transnet and its (STS') former Joint Venture partners, EMD and EMDLC, in which it is claiming damages in the sum of approximately R539m. This claim arises out of two locomotives procurement contracts which are the "50 Like New" claim and the "212 tender"; and
- In its recent correspondence addressed to the Chairman of the Board of Transnet, Abalozi through its attorneys, request the Board of Transnet to intervene in the litigation matters pending between the two parties, failing which they are threatening to file a damages counterclaim, in the amount of R250m for amongst others, loss of business and business opportunities and damage to reputation of its directors.

Management indicated that it will review the claims and advise the Committee accordingly.
The Committee noted the update.

8 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 11:25.

CHAIRMAN
Date: 14/08/2011

GROUP COMPANY SECRETARY
Date: 12 AUGUST 2011

1 MPM6 **CONFIDENTIAL AND PRIVILEGED**

MINUTES OF MEETING NO. 11/8 OF THE CORPORATE GOVERNANCE AND NOMINATIONS COMMITTEE HELD ON 11 AUGUST 2011 AT 09:00 IN BOARDROOM 4906, 49TH FLOOR, CARLTON CENTRE, JOHANNESBURG

For attention/ Resolution No

1 WELCOME, CONSTITUTION OF MEETING, APOLOGIES, SIGNING OF ATTENDANCE REGISTER AND ADOPTION OF AGENDA

1.1 Present

Mr ME Mkwanazi	Chairman
Mr IM Sharma	Member
Mr IB Skosana	Member
Ms DLJ Tshepe	Member
Mr B Molefe	*Ex officio* Member

1.2 In Attendance

Ms Y Forbes	Non-Executive Director
Ms Z Stephen	Group Executive: Corporate Services
Ms P Difeto	General Manager: Office of the GCE
Mr T van Zyl	Company Secretary

1.3 Partial attendance

Ms ANC Ceba	Group Company Secretary
Mr SI Gama	Chief Executive: Transnet Freight Rail
Mr CA Möller	Chief Executive: Transnet Pipelines
Mr T Morwe	Chief Executive: Transnet National Ports Authority
Mr KXT Socikwa	Chief Executive: Transnet Port Terminals
Mr R Vallihu	Chief Executive: Transnet Rail Engineering
Mr V Dube	Acting COO: Container Sector and Terminal Executive (TPT)
Mr T Majoka	General Manager: Strategy (TRE)
Mr M Motlohi	Terminal Executive Manager: DCT (TPT)
Ms S Lund	General Manager: Public Policy

1.4 Apologies

Ms T Mnyaka	Member

1.5 Welcome, Constitution of Meeting and Signing of Attendance Register

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. The Attendance Register was circulated for signature.

1.6 Adoption of Agenda

The agenda was adopted as tabled.

2 SAFETY BRIEFING AND EVACUATION PROCEDURE

The safety briefing and evacuation procedures were conducted through the video system.

3 DECLARATION OF INTERESTS

The Declaration of Interests Register was circulated to all members and attendees for signature.

4 APPROVAL OF THE MINUTES OF THE MEETING HELD ON 11 APRIL, 9 AND 23 JUNE 2011, RESPECTIVELY

The minutes of the meetings held on 11 April, 9 and 23 June 2011, respectively, were corrected and approved as follows:

Minutes of the meeting held on 11 April 2011

Item 5.2.3.5, second sentence, insert the word "possible" between the words "a" and "disciplinary" and add the words "against Mr Maharaj" after the word "process."

Minutes of the meeting held on 9 June 2011

Item 3.1.5, fifth sentence, replace the word "*context*" with the words "*timing of the exercise, five months into the tenure of the Board*".

Items 3.2.2 to 3.2.5, replace "Auditors' Report" with "KPMG and Nkonki Report".

5 **MATTERS ARISING**

5/1 **More detail to be provided on the Company's plans to obtain operational efficiency in the medium-term** – The Chairman requested Management to prepare the document for deliberation at the next meeting

The matter was dealt with under Item 6.6 below. *The Chairman requested that Items 6.6 and 5/5 be dealt with next. These minutes reflect the order of the meeting.*

Messrs Gama, Möller, Socikwa, Vallihu, Dube, Majoka and Motlohi joined the meeting at 9:20.

6.6 **Company's plans to obtain operational efficiency in the medium-term**

Management took the Committee through the submission as contained in the pack. The submission was taken as read.

6.6.1 **Transnet Freight Rail**

6.6.1.1 Management stated that the current locomotive fleet was between 30 and 40 years old and that most of the parts were obsolete. Technicians will be placed on the running trains to improve the uptime and address the maintenance challenge. Management stated that the revised Locomotive Fleet Plan will be tabled to the Board for approval on 31 August 2011. The Company has considered the capital requirement for the Locomotive Fleet Plan after the Board approval in April 2011; however, the cost was not affordable.

6.6.1.2 Management indicated that the Company will introduce an inspectorate function in the train system in the near future to monitor behaviour. The Company also has a Human Factors Standards which measures, amongst others, fatigue, rostering, workload assessments, rest periods and machinery for employees. Management indicated that the Company will present on the structure of Class 1 Railway at the Board Strategy Workshop in August 2011. Messrs Molefe/ Gama

6.6.2 **Transnet Rail Engineering**

6.6.2.1 TRE was attempting to minimise train cancellations by assembling technical teams within the hot spots to fix trains in instances where the train fails on route. Further, as indicated above, technicians will be placed on trains to ensure that the journeys are completed on time.

6.6.2.2 The Committee emphasised that human resource initiatives were an important aspect for operational efficiency. The Committee requested Management to table a view on the Company's current state in terms of technology, human resources issues and further requested that the Company's current state be verified against international benchmarks. Management advised the Committee that a Strategic Leadership Forum ("SLF"), meeting with the leadership of Labour, was held recently. The Company will utilise shop stewards to change the employees' behaviour. Another SLF meeting is scheduled to take place in September 2011, where all the full time shop stewards will be taken through the business plans, safety issues and productivity targets. Mr Molefe

6.6.3 **Transnet National Ports Authority**

6.6.3.1 *On Marine Operation, the main focus is on:*

- Management of Vessel Delays at Pier 2;

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- Marine Fleet Replacement; and
- Training initiatives.

6.6.3.2 *With regard to Operational Efficiency, there is focus on:*
- Terminal Performance Targets;
- Issue of Deemed Licences to Terminal Operators; and
- Oversight role of TNPA through regular meetings with the cities and provincial governments.

6.6.4 **Transnet Port Terminals**

6.6.4.1 Management indicated that approval had been obtained to procure seven STS Cranes. In the interim, TNPA will ensure that the berths are deepened and quay walls strengthened before the installation of the new STS Cranes as from Q3 of the 2012/13FY. The berths will be taken out in sequence from January 2012 in preparation of the deployment of the STS Cranes.

6.6.4.2 Management stated that it was untrue that South African ports were the most expensive ports in the world as reported in the media. Management informed the Committee that the Company had failed to properly respond to the Bloomberg article when prompted for a response. The Company will issue a statement and correct the media report, which was based on the Ports Regulator's Report that was issued in 2010. Subsequently, a study was conducted by the Company, which indicated that the Company's ports charges were minimal. The Committee was concerned on the Company's non-response to the article as such behaviour has an element of reputational risk.

6.6.5 **Transnet Pipelines**

6.6.5.1 Management indicated that the main concern was the volumes that were not met for the first part of the year.

Mr Morwe joined the meeting at 10:22.

6.6.5.2 Management indicated that there was a huge gap for future planning purposes as the Company was challenged with securing formal data from the Oil Industry and the Department of Energy since December 2009 (linked to the Competition Commission concerns). The Company will request DPE Ministerial intervention on the matter.

6.6.5.3 Management discussed the issues relating to future capacity and the location of the proposed PetroSA refinery. The main concern was on the location of Project Mthombo and how the inland requirement will be serviced (as there was no petroleum pipeline from the Eastern Cape).

6.6.5.4 Management informed the Committee that the Company was against the corporatisation of TPL as the Company needs annuity from its investment on the NMPP. The Committee sought clarity on the rationale for the corporatisation of TPL. Management stated that the instruction from the Shareholder Minister to corporitise TPL was based on the 2010 Petroleum Levy Agreement. Management indicated that it will engage DPE on the proposed TPL corporatisation matter, and attempt to convince DPE otherwise. Mr Molefe

The Committee noted the Report.

5 **MATTERS ARISING FROM THE MINUTES OF PREVIOUS MEETINGS HELD**

5/5 **Damage to the Jet-Fuel Pipe** – Explore the available technology to address security issues

5/5/1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. Management highlighted that a fibre optic cable had been installed for the operational control of the NMPP, and an intruder detection system will be installed along the trunk line. The fibre optic intrusion system was being researched for utilisation.

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For attention/ Resolution No

5/5/2 Management indicated that the physical pipeline facilities were satisfactorily monitored from the operations centre. The NMPP was buried under the ground, however, it has adequate intelligence, and technology will be implemented to detect intrusion on the pipeline. The Company is aware of the NMPP hotspots, and will install the relevant technology to detect intrusion on the pipeline. It would have been ideal to declare the entire NMPP as a National Key Point issue.

5/5/3 The Committee requested that information on the implementation of the technology systems on the hotspots be submitted for consideration. Management undertook to give feedback on surveillance systems and CSI initiatives linked to the NMPP. Messrs Molefe/ Möller

Messrs Gama, Möller, Morwe, Socikwa, Vallihu, Dube, Majoka and were excused from the meeting at 10:49.

5/2 **Structural changes to Group Exco**

5/2/1 **Delegation of Authority Framework – Management indicated that the final Delegation of Authority Framework, incorporating further delegations to the Group Exco and the HR delegations, will be tabled at the next Committee meeting for noting**

The matter was dealt with under Item 6.10 below.

5/2/2 **The Chairman indicated that the GCE will submit the final Group Exco structure for noting purposes to the Committee on completion thereof. The Committee indicated that the Group Exco structure was not gender representative, and further requested the GCE to address the matter**

5/2/2/1 Management took the Committee through the Group Exco structure as contained in the pack. The submission was taken as read. The following issues were raised by the Committee:

- The structure needs to have a standalone group executive responsible for the human resources function.
- Consideration should be given to the possible revival of the COO portfolio.
- The structure should address gender issues and the introduction of physically-challenged people into the Company. Mr Molefe

5/2/2/2 The Chairman stated that the potential revival of the COO's portfolio can be reviewed once the GCE has settled into the Company. Management indicated that it preferred to have an opportunity to deal with some issues that were currently not elevated to the GCE's Office, amongst others, Transnet Property that currently reports to the CFO's Office. Consideration will be given to the introduction of either a Deputy GCE or the reintroduction of the COO portfolio as there is a need for additional assistance in the GCE's Office. Mr Molefe

5/2/2/3 Management stated that the whole organisation will be sensitive to gender representation and physically-challenged people.

5/2/2/4 The Committee requested Management to develop a HR plan and strategy for implementation to address the current human resource-related challenges. The Committee **agreed** on the following:

- There will be proper succession planning for all financial heads throughout the Company, and a female candidate will be groomed for the CFO's position.
- The position of GE: Human Resources will be filled as soon as possible, and preferably, by a female candidate.

5/2/3 **The Chairman indicated that the potential disciplinary process against Mr Maharaj will be deliberated upon further with Ms Stephen and the GCE**

The Chairman stated that the Company accepted Mr Maharaj's resignation, and the potential disciplinary process was not pursued as the issue was minor.

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For attention/ Resolution No

5/3 **Group Chief Executive Performance Contract for the 2011/12FY**

The Committee requested that the Group Exco SPOs be tabled to the Committee for noting as soon as they are finalised

The matter was dealt with further under Item 6.8 below.

5/4 **The Steering Committee should assist with procuring a suitable head-hunter for the CFO selection process**

The Committee extensively deliberated the CFO's selection process in an off-the-record session. Management was given certain tasks to execute, and requested to report back at the Board meeting in August 2011. Mr Molefe

5/6 **Investigations by Public Protector**

5/6/1 **The Committee requested that the "legal briefs" be tabled to the Committee prior to issue**

The matter has been finalised.

5/6/2 **The Committee requested Management to make a presentation covering, amongst others, the following issues:**

- **What is a condonation process?**
- **Where does it originate from?**
- **Where does it get approved and regularised?**

Management took the Committee through the submission as contained in the pack. The submission was taken as read. The matter has been finalised.

5/6/3 **It was agreed that the Committee will be availed the response on Mr Gama's matter before it is submitted to the Public Protector. Management was requested to arrange a meeting on the matter, if necessary**

The matter has been finalised.

5/6/4 **The Committee requested the Company to detail the costs emanating from the Public Protector process (legal costs and auditors' fees), and to further give detail on the costs that were incurred by the Company since Mr Gama's matter commenced in August 2009**

The matter has been finalised.

5/6/5 The GCE was requested to give the Committee continuous feedback on the matter

Management indicated that feedback will be given at the next meeting.

5/6/6 **The Chairman indicated that he will personally deliver the draft KPMG and Nkonki Report to the Public Protector so he may engage the Public Protector on the matter**

The Chairman stated that due to an urgent matter on his diary, the response to the Public Protector was delivered by Mr Mapoma.

5/6/7 **A revised response, incorporating amendments from the Committee, will be submitted and circulated to the Committee by 13 June 2011**

The matter has been finalised.

5/6/8 **Public Protector matters:** The Committee requested that the following amendments be made to the draft letter:

- Paragraphs 1 (last sentence) and 2 (first sentence) on page 1 be re-worded;
- Paragraph 3.1.3 commence with the words, "*In the circumstances*";
- Paragraphs 3.1.7 to 3.1.9 be quoted from the South Gauteng High Court judgment, Case

ANC

Number 09/38/956;
- Paragraphs 6.1 and 6.2 be cross-referenced to paragraph 3.1;
- The spelling of Ernst be corrected in paragraph 8.2;
- The 's' be deleted from the word 'documents' in paragraph 7.4; and
- Paragraph 9.1 should include an additional paragraph stating that, going forward, the Board will be reviewing the Procurement Policy, in particular, condonation and confinement rules

The matter was finalised.

5/6/9 **The Committee stated that should the requested documentation surface at a later stage, particularly the document referred to as "*Analysis: Controllable vs. Uncontrollable costs*", the necessary disciplinary action must be taken against the employee that did not disclose the documentation initially**

Management reported that the matter is work-in-progress.

5/7 **Shareholder's Compact for the 2011/12FY: Management will request DPE to exclude the Port of Ngqura on the ROTA consideration as it is currently not operating on its full capacity:** The Chairman indicated that a meeting will be held with the Shareholder Minister on 20 April 2011 to discuss the three outstanding matters

The matter has been finalised.

5/8 **Management should consider the use of current technology in its operations, amongst others, on the signalling infrastructure:** At the April 2011 Group Exco Break-away session, each OD was requested to formulate and present plans on technology enhancements

Management reported that the matter is work-in-progress.

5/9 **Annual General Meeting: Arrangements and statutory authorisations applicable to some of the proposed agenda items:** The Committee proposed that the Chairman of the Board Audit Committee should engage the GCE on the AGM preparations with regard to the re-appointment of the external auditors

The matter was finalised.

5/10 **Draft Delegation of Authority Framework** - Management indicated that the final Delegation of Authority Framework, incorporating further delegations to the Group Exco and the HR delegations, will be tabled at the next Committee meeting for noting

The matter was dealt with under Item 6.10 below.

5/11 **Vesting of the full conditional awards in terms of the Long-Term Incentive Scheme for Mr Wells:** The matter was withdrawn from the Agenda. However, the Committee requested that the governance elements that were being highlighted in the matter, be addressed by the Committee at some point

The Chairman informed the Committee that Mr Wells withdrew his complaint against the Company. Management was requested to co-ordinate a coffee meeting between the Chairman and Mr Wells. Ms Stephen

5/12 **Headline in the Business Day of 9 June 2011 –** The Chairman will be interacting with the Shareholder Minister, and will update the Board on the way forward

The matter has been finalised.

5/13 **Board Evaluation Report for the year ending 31 March 2011**

5/13/1 The Committee agreed that a team building session will be arranged in August 2011 to allow the Board to reflect on the recommendations from the Board Evaluation Report

The proposed date for the session was recorded as 29 August 2011.

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5/13/2 **A facilitated four hour meeting must be scheduled prior to the Board Strategy Workshop in August 2011 to address the action plans emanating from the findings of the Board Evaluation Report**

The matter will be addressed at the team building session scheduled for 29 August 2011.

5/14 **Restructuring Policy matters:** The Committee noted the deliberations, and agreed that the Corporate Governance and Nomination Committee's Mandate will be revised accordingly

The matter was dealt with under Item 6.1 below.

6 **MATTERS FOR DISCUSSION**

6.1 **Draft Mandates**

6.1.1 **Board Acquisitions and Disposals Committee**

6.1.1.1 The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read. He highlighted, amongst others, the following proposed amendments to the Mandate:

- The name Transnet Limited was being changed to Transnet SOC Ltd, and it should be changed as such throughout the mandate; and
- The inclusion of the Committee's powers from the Delegation of Authority Framework.

6.1.1.1 The Committee agreed that in instances of potential conflict of interest, the affected Director will recuse himself/herself from the meeting during the deliberation of the agenda item.

RESOLVED that it recommends that the Board approves the Board Acquisitions and Disposals Committee Mandate. 11/8/2

6.1.2 **Remuneration Committee**

6.1.2.1 The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read. He highlighted, amongst others, the following proposed amendments to the Mandate:

- The name Transnet Limited was being changed to Transnet SOC Ltd, and it should be changed as such throughout the mandate;
- The inclusion of the Committee's powers from the Delegation of Authority Framework; and
- The change of the Committee name to Remuneration and Human Resources Committee.

RESOLVED that it recommends that the Board approves the Remuneration and Human Resources Committee Mandate. 11/8/3

6.1.3 **Corporate Governance and Nominations Committee**

6.1.3.1 The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read. He highlighted, amongst others, the following proposed amendments to the Mandate:

- The name Transnet Limited was being changed to Transnet SOC Ltd, and it should be changed as such throughout the mandate; and
- The addition of Item 8.9 on Policy and Regulation issues.

RESOLVED that it recommends that the Board approves the Corporate Governance and Nominations Committee Mandate. 11/8/4

6.1.4 **Board Audit Committee**

6.1.4.1 The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read. He highlighted, amongst others, the following proposed amendments to the Mandate:

- The name Transnet Limited was being changed to Transnet SOC Ltd, and it should be changed as such throughout the mandate; and
- The inclusion of the Committee's powers from the Delegation of Authority Framework.

6.1.4.2 The Committee recommended the following amendments:

- Under Item 9.16, insert the word "financial" between the words "significant" and transaction; and
- All Ethics provisions under Item 13, but for Item 13.5, be transferred to the Social and Ethics Committee Mandate.

RESOLVED that it recommends that the Board approves the Board Audit Committee Mandate, subject to the amendments under Item 6.1.4.2 above. 11/8/5

6.1.5 **Board Social and Ethics Committee**

6.1.5.1 The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read. He highlighted, amongst others, the following proposed amendments to the Mandate:

- The name Transnet Limited was being changed to Transnet SOC Ltd, and it should be changed as such throughout the mandate; and
- The inclusion of the Committee's powers from the Delegation of Authority Framework.

6.1.5.2 The Committee recommended the following amendments:

- Deletion of Items 2.3 and 3.4.1, respectively; and
- Item 3.4.2 should read "*Sponsorships and donations in excess of R5 million but not exceeding R10 million.*"

RESOLVED that it recommends that the Board approves the Board Social and Ethics Committee Mandate, subject to the amendments under Item 6.1.5.2 above. 11/8/6

6.1.6 **Board of Directors**

6.1.6.1 The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read. He highlighted, amongst others, the following proposed amendments to the Mandate:

- The name Transnet Limited was being changed to Transnet SOC Ltd, and it should be changed as such throughout the mandate; and
- The inclusion of the Board's powers from the Delegation of Authority Framework.

6.1.6.2 The Committee recommended the following amendments:

- Item 5.7.14 of the extract from the Delegation of Authority should read "*Board to approve Rewards/awards/exceptional payments, ex gratia payments to employees exceeding R10 million*";
- The deletion of Item 5.8.4 of the extract from the Delegation of Authority in its entirety; and
- Item 5.8.5 of the extract from the Delegation of Authority should read "*Board to approve sponsorships and donations exceeding R10 million.*"

ANC

6.1.6.3 The Committee requested that the Board be informed of the provisions of the sponsorship strategy. Mr Molefe

RESOLVED that it recommends that the Board approves the Board of Directors Mandate, subject to the amendments under Item 6.1.6.2 above. 11/8/7

6.2 **Board Evaluation Report: Corrective action list**

The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read.

For attention/ Resolution No

RESOLVED that the matter be dealt with at the Board Strategy Workshop on 29 August 2011. 11/8/8

6.3 **Formation of a Steering Committee on legal matters**

6.3.1 The Chairman requested that more work be conducted on the matter. He requested the Company to ensure that litigation matters are dealt with reasonably and effectively.

The Committee noted the feedback.

6.4 **Board Committees' composition**

6.4.1 The Chairman took the Committee through the submission as contained in the pack. The submission was taken as read. The Chairman stated that the Board Committees' composition was too large. The Committee proposed that Ms Tshabalala be retired as a member of the Board Audit Committee, pending consultation between the Chairman and Ms Tshabalala. Chairman

RESOLVED that it recommends that the Board to approve the following:

- The Chairman of the Board be retired as a member of the Board Risk Committee.
- Mr Skosana be retired as a member of the Corporate Governance and Nominations Committee.
- Mr Molefe be retired as an *ex officio* member of the Corporate Governance and Nominations Committee.
- Ms Tshabalala retired as a member of the Board Audit Committee.
- Messrs Molefe and Singh be retired as *ex officio* members of the Board Acquisitions and Disposals Committee.
- Ms Forbes be appointed as a member of the Board Audit and Corporate Governance and Nominations Committees. 11/8/10

6.5 **Close out Report: Annual General Meeting**

6.5.1 Management indicated that the Company had conveyed an apology to DPE at the Annual General Meeting as the Company would not have been able to conduct its international investor road shows in July 2011 as planned, had the Annual General Meeting been cancelled.

6.5.2 Ms Ceba indicated that Group Secretariat normally has interactions with DPE in preparation for the Annual General Meeting. Group Secretariat had alerted DPE that the Board Audit Committee was not in support of submitting draft AFS with the Notice for the Annual General Meeting, and DPE had insisted that the draft AFS be submitted so that DPE has a longer period to consider the documentation in preparation for the Annual General Meeting.

The Committee noted the feedback.

Ms Ceba was excused from the meeting at 12:24.

6.6 **Company's plans to obtain operational efficiency in the medium term**

The matter was dealt with above under Item 5/1.

6.7 **Rail Transport Policy Green Paper**

Ms Lund joined the meeting at 12:25.

6.7.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. Management indicated that the Company has commenced on a consultation process with DPE to ensure alignment on the matter. The Chairman indicated that there was still an opportunity for the Company to provide inputs to the Rail Transport Policy Green Paper. The Committee agreed that the discussion document be redrafted, and once finalised, the discussion paper should be circulated to the Board for consideration. Mr Molefe

The presentation was noted.

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For attention/ Resolution No

6.8 **GCE's Performance Contract for the 2011/12FY**

6.8.1 Management indicated that, as per agreement, the GCE's SPOs will be monitored on a half-yearly basis. Management informed the Committee that Group Exco will be monitored through quarterly reviews, which will be aggregated and moderated at the end of the year.

RESOLVED that it recommends that the Board approves the GCE's Performance Contract for the 2011/12FY. 11/8/11

6.9 **Group's Performance Contract for the 2011/12FY**

6.9.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read.

The Committee noted the submission.

6.10 **Delegation of Authority to Group Exco**

6.10.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read.

The submission was noted.

6.11 **Appointment of a trustee to the Transmed Medical Fund (Transnet Employer Trustees)**

6.11.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read.

RESOLVED that it recommends that the Board approves the appointment of Mr P Fusi as Employer Trustee to the Board of Trustees of the Transmed Medical Fund with effect from 1 September 2011. 11/8/12

6.12 **Draft Memorandum of Incorporation**

6.12.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. Management indicated that the Company has submitted the draft Memorandum of Incorporation ("MOI") to DPE for consideration. In terms of the new Companies Act, the Company has two years to finalise the Memorandum of Incorporation. DPE indicated that the Department will develop a framework for the MOI for its SOCs.

The matter was noted.

7 **GENERAL**

7.1 **Corporate Governance and Nominations Committee Mandate**

The Committee noted the Corporate Governance and Nominations Committee Mandate.

8 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 12h52.

CHAIRMAN
Date: 28/11/2011

GROUP COMPANY SECRETARY
Date: 25 NOVEMBER 2011

MPM 7

TRANSNET

① Averaging
② Attempts to resolve
③ Payments made

Mr Brian Molefe
Group Chief Executive
Transnet SOC Ltd

Received by e-mail from Lydia on 25/08/11
S.M.

SUBJECT

OUTSTANDING LEGAL FEES: GAMA vs TRANSNET

For your attention, please

COMMENTS / NOTES:

Sir/s.
Draft Response to DG's letter for my signature.
Have you sent any correspondence to Gama attorneys to clarify our position?
Sent. 24.8.11.

14354 / 2011

From: Mr Tshediso Matona, DG, DPE

Draft 17-08-2011 letter from GCE to Gama Attorneys

Transnet SOC Ltd
Registration
Number
1990/000900/06

Carlton Centre
150 Commissioner
Str. Johannesburg
2001

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F +27 11 308 2348

www.transnet.net

MEMORANDUM

To: Mr Brian Molefe, Group Chief Executive

cc: Mr Mafika Mkwanazi, Chairman

From: Mr S Mapoma, General Manager: Group Legal Services
(Acting Group Executive: Corporate Services)

Date: 17 August 2011

SUBJECT: LEGAL FEES: S GAMA VS TRANSNET

PURPOSE:

1. The aim of this memorandum is to:

2. Advise the Group Chief Executive of the background facts on the above matter.

BACKGROUND:

3. The Director General of the Department of Public Enterprises sent a letter to the Group Chief Executive, dated 16 August 2011, advising that, "*Langa Attorneys is complaining that Transnet is allegedly reneging on its undertaking to pay, without taxation, the bill of costs of Langa Attorneys arising from the dispute between Transnet and Mr Gama. Langa Attorneys further states that it has made every attempt to resolve this matter with Transnet, but so far Transnet has only paid R1,720,220.76 of the R3,183,406.01 owed to Langa Attorneys*".

The Settlement Agreement

4. The relevant clause of the Settlement Agreement is Clauses 3.5, which provides that "*Transnet will make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council*". The agreement clearly does not provide for Transnet undertaking to pay without taxation as alleged. Furthermore, not only does the agreement specifically refer to taxation of the legal costs, it provides that Transnet will pay 75% of such taxed costs.

5. It is also not true that Transnet has only paid R1,720,220.76. The correct facts are that Transnet has paid R2,736,785.66. Copies of Transnet's Payment Advices are attached.

How were the figures calculated?

6. Mr Gama incurred legal costs in two matters. The first is his Application to the High Court, in which Transnet used two sets of attorneys, Bowman Gilfillan Attorneys and Deneys Reitz Attorneys. The second matter in which he incurred costs is the labour matter in which he was charged in a disciplinary process.

7. The costs in the High Court were granted in Transnet's favour by the Court. These costs were supposed to have been paid by Mr Gama. On reaching settlement with Mr Gama, Transnet sought and obtained the taxed bills from these two firms of attorneys, and paid 75% of the total amounts. The taxed amounts included the fees of counsel, which are indicated as disbursements in the attorneys' bills. The amounts of R696,565.12 and R319,999.78 were paid to Langa Attorneys on the 28 March 2011, being 75% of the taxed costs incurred by Transnet to its attorneys Deneys Reitz and Bowman Gilfillan respectively. The total amount paid to Langa Attorneys on 28 March 2011 was therefore R1,016,564.90.

8. Mr Gama's own attorneys in both the High Court Application and the labour matter was Langa Attorneys. When Transnet received their bill, being presented for payment, it became apparent that the bill had not been taxed as agreed. Prior to this, Transnet had been asking for the taxed bill (and offered to pay for a private taxing master in order to facilitate and fast-track the taxation) to no avail. When the bill arrived it was pointed out that the bill was not taxed, but merely drawn up properly.

9. After a number of meetings, during which it became clear that the parties would not reach agreement, Transnet instructed its legal advisors to instruct a private taxing master to tax the bill. This was done, and the total amount came to R2,293,627.68. According to the taxing master, Langa Attorneys' consultant who drew their bill was instructed not to co-operate with the taxation process. (Normally in a taxation process, a party is usually present to justify its various costs it claims it is entitled to. If the party opts to be absent, it cannot claim to be prejudiced). Transnet then paid the sum of R1,720,220.76 on 09 June 2011 to Langa Attorneys, being 75% of the taxed costs.

10. Langa Attorneys are obviously unhappy with these payments. Unfortunately for them, Transnet is under instruction in terms of the Settlement Agreement to pay only 75% of the taxed costs. If the Agreement is amended to state that Transnet must pay Mr Gama's legal costs as presented by his attorneys, Group Legal will arrange for such payment to be effected.

Compiled by:

S Mapoma
General Manager: Group Legal Services
(Acting Group Executive: Corporate Services)
Date: 17 August 2011

Noted:

Brian Molefe
Group Chief Executive
Date: 24.8.11.

Noted:

Mafika Mkwanazi
Chairman
Date:

TRANSNET

PAYMENT ADVICE

Payee :
Langa Attorneys
P.O. Box 2138
Parklands, 2121

Date: 28 March 2011

Description	Invoice no	Date	R	C
Case No:09/38956 Southern Gauteng High Court S. Gama v Transnet Ltd and Others	000000	28/03/2011	319 999	78
		Sub total		
		VAT		
		Total	**319 999.78**	

Post/Per hand: _____ Tel. No.: 308-3962 Ref.: _____

Compiled by : Disemelo Leboea

Approved by:

X1 Head No
Sanction No (Capital Only)

X1 3200

F _____

COCE	GL	R	C
1606004	6638001	319 999	78
	37003		

FOR OFFICE USE

Verified _____ Approved _____
Vendor No: _____ Date: ____/____/20____ Document no _____

TRANSNET

Transnet Group Services
Postnet Suite 310
P.O. Box 2226
Carlton Centre
Johannesburg
2000

LANGA ATTORNEYS
PO Box 2138
PARKTOWN NORTH
2001

SUPPLIER BANKING DETAILS:
Banking key: 198405
Bank account: 1984530100
NEDBANK, RANDBURG

Payment advice

Document / Date
1500015881 / 30.03.2011
Our accounting clerk

Telephone

Fax

Your account with us
2003348

Dear Sir/Madam,

We have cleared the items listed below with our document 1500015881.

Document	Your document	Date	Cash Discount	Gross amount
1900041248	CASE 09/38956	28.03.2011	0.00	696,565.12
1900041249	CASE 09/38956	28.02.2011	0.00	319,999.78
Sum total			**0.00**	**1,016,564.90**

Payment document	Date	Currency	Payment amount
1500015881	**30.03.2011**	**ZAR**	**1,016,564.90**

Transnet Limited
Registration Number
1990/000900/06

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Johannesburg
2001

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Directors : ME Mkwanazi* (Chairman) MA Fanuchi HD Gazendam NBP Gcaba MP Malungani BD Mkhwanazi T Mnyaka N Moola MP Moyo
NR Nishinglia IM Sharma Prof JE Schemppf IB Skosana E Tshabalala DLJ Tshepe A Singh* (Acting Chief Financial Officer)
*Executive # German
Group Company Secretary : ANC Ceba

Brian Molefe, Group Chief Executive

TRANSNET

MPM8

Mr Tshediso Matona
Director General
Department of Public Enterprises
Suite 301, Infotech Building
1090 Acacia Street
Hatfield

By Fax: 086 501 2624

Dear Mr Matona

OUTSTANDING LEGAL FEES : GAMA V TRANSNET

Your letter dated 16 August 2011 refers.

Your letter advised that, *"Langa Attorneys is complaining that Transnet is allegedly reneging on its undertaking to pay, without taxation, the bill of costs of Langa Attorneys arising from the dispute between Transnet and Mr Gama. Langa Attorneys further states that it has made every attempt to resolve this matter with Transnet, but so far Transnet has only paid R1 720 220.76 of the R3 183 406.01 owed to Langa Attorneys".*

Three issues will be addressed in the reply, which are:

a) The allegation that Transnet is reneging on its undertaking to pay, without taxation, the bill of costs of Langa Attorneys;
b) That Langa Attorneys has made every attempt to resolve this matter with Transnet; and
c) That so far Transnet has only paid R1 720 220.76 of the R3 183 406.01 owed to Langa Attorneys.

A.
A Settlement Agreement was entered into by Transnet and Mr Gama for his reinstatement. The relevant clause for purposes of this reply is Clauses 3.5. It provides that, *"Transnet will make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council".*

The agreement does not provide for Transnet undertaking to pay *without taxation* as alleged. As per the agreement Transnet will contribute 75% of such taxed costs. The complaint from Langa Attorneys, as stated in your letter, does not reflect the true state of the agreement.

B.
Langa Attorneys have had several communications (both written and oral) with Transnet's attorneys in an attempt to resolve the issue. There is also further communication (both

TRANSNET

written and oral) between Langa Attorneys and the office of Ms Zola Stephen, Group Executive: Corporate Affairs, the Executive responsible for legal affairs at Transnet.

The various communication between the parties could not resolve and change the fact that Transnet, as per the agreement, insists that the costs should be taxed and that Langa Attorneys, contrary to the agreement, does not want the costs to be taxed. Transnet asked Langa Attorneys to appoint a taxing master, which Transnet was prepared to pay for to tax the costs. Langa Attorneys failed to do so. Transnet ultimately instructed its own attorneys to appoint a taxing master and invited Langa Attorneys to participate in the taxation. Langa Attorneys also failed to do so. (The bill that Langa Attorneys presented was not taxed as required by the agreement, and Transnet could not therefore pay it as presented.)

C.
It is also not true that Transnet has only paid R1, 720 220.76. The correct facts are that Transnet has paid R2 736 785.66.

Mr Gama incurred legal costs in two matters. The first is his Application to the High Court, in which Transnet used two sets of attorneys, Bowman Gilfillan Attorneys and Deneys Reitz Attorneys. The second matter in which he incurred costs is the labour matter in which he was charged in a disciplinary process.

The costs in the High Court were granted in Transnet's favour by the Court. These costs were supposed to have been paid by Mr Gama. On reaching settlement with Mr Gama, Transnet sought and obtained the taxed bills from these two firms of attorneys, and paid 75% of the total amounts. The taxed amounts included the fees of counsel, which are indicated as disbursements in the attorneys' bills. The amounts of R696 565.12 and R319 999.78 were paid to Langa Attorneys on the 28 March 2011, being 75% of the taxed costs incurred by Transnet to its attorneys Deneys Reitz and Bowman Gilfillan respectively. The total amount paid to Langa Attorneys on the 28 March 2011 was therefore R1 016 564.90.

Mr Gama's own attorneys in both the High Court Application and the labour matter was Langa Attorneys. When Transnet received their bill, being presented for payment, it became apparent that the bill had not been taxed as agreed.

After a number of meetings, during which it became clear that the parties would not reach agreement, Transnet instructed its legal advisors to instruct a private taxing master to tax the bill. This was done, and the total amount came to R2 293 627.68. Transnet then paid the sum of R1 720 220.76 on the 9th June 2011 to Langa Attorneys, being 75% of the taxed costs.

Kind regards

Brian Molefe
Group Chief Executive
Date:

(Amended offer Zola advised that the next day agreed that Mr Gama & Langa will provide the further information which he had - and then they agreed to have a meeting after 19 Aug when Zola came back from leave).

7 MPM9

PRIVILEGED AND CONFIDENTIAL

MINUTES OF MEETING NO. 11/6 OF THE BOARD OF DIRECTORS OF TRANSNET SOC LTD HELD ON 10 JUNE 2011 AT 09:00 IN BOARDROOM 4901, 49TH FLOOR, CARLTON CENTRE, 150 COMMISSIONER STREET, JOHANNESBURG

Resolution No/ For Attention

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER**

1.1 **Present**

Mr ME Mkwanazi	Chairman
Mr B Molefe	Group Chief Executive
Mr A Singh	Acting Chief Financial Officer
Mr MA Fanucchi	Non-Executive Director
Mr HD Gazendam	Non-Executive Director
Mr MP Malungani	Non-Executive Director
Mr BD Mkhwanazi	Non-Executive Director
Ms T Mnyaka	Non-Executive Director
Ms N Moola	Non-Executive Director (Teleconference)
Mr MP Moyo	Non-Executive Director
Mr IM Sharma	Non-Executive Director
Mr IB Skosana	Non-Executive Director
Ms E Tshabalala	Non-Executive Director
Ms DLJ Tshepe	Non-Executive Director

1.2 **In attendance**

Ms P Difeto	General Manager : Office of the Group Chief Executive
Ms ANC Ceba	Group Company Secretary

1.3 **Apologies**

Ms NBP Gcaba	Non-Executive Director
Ms NR Ntshingila	Non-Executive Director
Ms Z Stephen	Group Executive: Corporate Services

1.4 **Partial attendance**

Mr R Toka	General Manager: Security Management
Ms T Siwendu	Partner: Siwendu & Partners
Mr K Reddy	General Manager: Planning and Monitoring
Ms M Moses	Group Executive : Transnet Capital Projects
Mr N Eve	General Manager: Transnet Capital Projects
Mr G Pita	Group Chief Supply Chain Officer
Mr KC Phihlela	Group Executive : Commercial

1.5 **Welcome, Constitution of Meeting and Signing of Attendance Register**

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. He noted the apologies from Ms Gcaba, Ms Ntshingila and Ms Stephen. Mr Molefe introduced Mr Rodney Toka, the newly appointed Head: Security Management, to the Board. The Board welcomed Mr Toka and wished him well in his activities.

Mr Toka was excused from the meeting.

1.6 **Adoption of Agenda**

The agenda was adopted as tabled with an additional item under General : Item 11.1 Board matters.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures were conducted by video facility.

Resolution No/ For Attention

3 **DIRECTORS' DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature. The Board noted the Directors' Declaration Register for the 2011/12FY that was circulated in the meeting, indicating the Chairman's resignation from the Board of Saatchi & Saatchi.

4 **APPROVAL OF THE MINUTES OF THE MEETING HELD ON 20 APRIL 2011**

4.1 The minutes of the meeting held on 20 April 2011 were corrected and approved.

5 **MATTERS ARISING**

5a **Update on the legal action against Thyssen Krupp (Ship loaders in Saldanha)**

The matter has been finalised. Both parties have since signed the Settlement Agreement in which Transnet has agreed to accept a sum of R70m in full and final settlement. The parties have also agreed that Thyssen Krupp will remedy the defects in the Ship loaders at no cost to Transnet, to the extent that such defects were as a result of their poor workmanship.

5b **New Multi-Product Pipeline**

5b1 ***Report from the benchmarking report to be tabled at the Board for consideration***

Management reported that the final Turner & Townsend Benchmarking report was issued to TPL and TCP on Monday 16 May 2011 with a request for Management comments. The final report will be tabled at the NMPP Steering Committee on 18 July 2011 as well as the next Board meeting. Mr Singh

5b2 **Stream 1: Governance, Prudency and Assurance Review:** Findings of TIA and KPMG – Circulate draft Report from TIA to the Board Audit Committee.

Mr Moyo reported that the final report was submitted to the Board Audit Committee for consideration.

5b3 **Conclusion on the NMPP**: Thorough review of the EPCM costs and the Owner's costs

Management reported that the matter will be conducted as part of Phase 2 of the KPMG Prudency Review. The scope of work for Phase 2 includes the Asset and EPCM costs. Management reported that the draft KPMG report covering owners cost will be issued by 30 July 2011 for Management comments. Management reported that the information relating to Turner & Townsend has been reviewed and a clarification meeting will be scheduled. Mr Singh

5c **Transnet Internal Audit:** All the forensic matters under Section 2 of the Report to be tabled at the Board Audit Committee for finalisation

The matter was addressed at the Board Audit Committee meeting held on 1 June 2011.

5d **Corporate Plan for the 2011/12FY:** The Company will review the definition of BEE as well as the categorisation of the different BEE levels

Management reported that the matter has been finalised. The proposed Supplier Development Strategy was presented to the Board Acquisitions and Disposals Committee, and various amendments were suggested. The newly revised Supplier Development Strategy will enable the Company to move away from the 90:10 evaluation criteria, to a 60:30:10 criteria or various permutations based on the relevant procurement tier.

5e **Proposal on the rotation of external auditors be made to DPE**

The matter was addressed at the Board Audit Committee meeting held on 1 June 2011.

5f **Company to implement a policy guideline on the rotation of external auditors**

Resolution No/ For Attention

The matter has been finalised. There is no policy required as DPE has provided guidelines requesting SOCs to rotate auditors every five years.

5g **81mt coal contracts and business case**

5g1 **The Board requested Management to conduct a continuous assessment of potential anti-competitive behaviour by the Company**

Management reported that the matter is an on-going process and that a continuous assessment on anti-competitive behavior is being conducted.

5g2 **TFR to report back on a quarterly basis on the progress with regard to capacity allocation issues at RBCT**

Management reported that the matter is being attended to. An agreement has been drafted and will be signed soon. The Company will hold discussions with RBCT on available capacity on the channel, which may be allocated to emerging players.

Mr Molefe

5h **The Board agreed that TCP's vesting should be isolated and the matter be further investigated**

The matter was considered at the Remuneration Committee on 7 June 2011.

5i **Role of a SOE in a developmental state**: Arrange a presentation on the role of the SOE in a developmental state for the Board

The matter was dealt with under Item 8.21 below.

5j **Feedback from Corporate Governance and Nominations Committee:** The Board requested Management to consider de-linking the corporate affairs function from the legal function for optimal efficiency.

The matter was dealt with under Item 8.20 below.

5k **Review the Power of Attorney**

Management reported that the matter has been finalised. The submission was forwarded to the Chairman for signature to give effect to the Board resolution.

5l **TSDBF matters – Table a submission for approval at the next meeting**

The matter was dealt with under Item 8.12 below.

5m **Financial Report:**

5m1 Management indicated that there were two outstanding issues in relation to the Annual Financial Statements, the TSDBF provision of R1.9bn and the STI bonus provision.

The TSDBF matter was dealt with under Item 10.3.3 below.

5n Management was requested to verify if there has been further engagement with Parliament on the TSDBF matter

Management reported that the last engagement with the Portfolio Committee on Public Enterprises was on 12 January 2011 when Transnet was requested to provide progress update in respect of the implementation of the Portfolio Committee on Public Enterprises' recommendations. Transnet's response was that the Company had provided DPE with comments on the affordability of the funding solution.

5o **Proposed Annual Work Plan for the 2011/12FY:** The Board requested that the item on "Review of the Sustainability Report Framework for the 2010/11FY" be moved to 10 June 2011 for consideration

The matter was dealt with under Item 8.11 below.

5p **Locomotive Fleet Modernisation Plan**: Mr Singh to review the capital expenditure requirements in the funding plan and to revert if there were challenges

Resolution No/ For Attention

Management reported that the financial evaluation exercise was being reviewed internally for alignment. The Board will be updated at its next meeting. Mr Singh

5q **Transport Pension Fund cash flow matching :** The activities of the Transport Pension Fund's three sub-funds be included in the Board's Annual Work Plan

Management reported that the matter has been finalised.

6 **GROUP CHIEF EXECUTIVE'S REPORT**

6.1 Management took the Board through the GCE's Report as contained in the pack. The Report was taken as read. The matter was extensively deliberated upon. Management highlighted, amongst others, the following:

- GFB volumes were 3.3% above target for the month and 9.0% above April 2010;
- Export coal volumes were 12% below budget for the month and 6% below April 2010, mainly as a result of a major derailment causing 81 train cancellations, crew related problems and infrastructure failures (electrical, signals and communications);
- Export Iron Ore volumes were 0.9% above the month's budget and 21% above April 2010 volumes;
- Container volumes were 0.8% below budget for the month with imports and exports at 12.9% and 2.6% below budget, respectively. The major contributing factor to the lower import/export volumes was the implementation of the NAVIS operating system at DCT Pier 2. In addition, GCMPH at Pier 1 were negatively impacted upon by high transhipment containers, small vessels and crane breakdowns;
- Total petroleum volumes transported by TPL for the month were 6.1% above budget and 10% above April 2010;
- Two employees' fatalities were recorded during April 2011 compared to zero employee fatalities in April 2010. TRE also reported a fatality on 31 May 2011 and details thereof will be reported in the next GCE's Report; Mr Molefe
- The Company has R8bn cash on hand. Transnet met with the PIC to discuss the possible prepayment of the T018 (R6bn bond issued to PIC for the recapitalisation of SAA in 2004). Transnet will be able to prepay 50% of the bond which will reduce the cost of carry by R45m per month; and
- The under-spending to date has necessitated that monthly budgets be reviewed to forecast more accurate monthly splits of the budget. The revised monthly forecasts from ODs will be consolidated by Group Treasury as soon as possible.

6.2 **Rail Economic Regulation**

On 20 May 2011, DoT issued a draft National Rail Policy Green Paper to stakeholders. It proposes a two-stage process to create a separate SOE to own the rail infrastructure. Management was requested to table a discussion paper on the Green Paper at the next Corporate Governance and Nominations Committee for consideration. Mr Molefe

6.3 **Proposed corporatisation of Transnet Pipelines**

Management indicated that it was not in support of the corporatisation of TPL. Management was granted a mandate to engage DPE on the TPL corporatisation issue. Mr Molefe

6.4 **Shareholder's Compact for the 2011/12FY**

6.4.1 Management reported that the finalisation of the 2011/12FY Shareholder's Compact and related targets was almost complete. There was agreement on the ROA at 8% and GCMPH at Pier 2, excluding the East Quay berths which service small vessels, was agreed upon at 28 GCMPH. Management was requested to arrange a workshop before the 2012 AGM to consider the Strategic Intent Statement. Mr Molefe

6.4.2 The Board was of the view that there is misalignment between the Corporate Plan, Shareholder's Compact and the corporate strategy, and Management undertook to review the targets from the respective documents for alignment as from the 2012/13FY.

Resolution No/ For Attention

RESOLVED that the Chairman is mandated to finalise and sign the Shareholder's Compact for the 2011/12FY on behalf of the Board. 11/6/1

6.5 **Wage negotiations for the 2011/12 FY**

6.5.1 Management took the Board through the provisions of the signed Wage Agreement. Mr Gazendam was concerned that the level of increases that the country has offered in the past two years is not sustainable. He requested Management to work towards inflation related increases, or move towards multi-year increases. Management stated that a day is being arranged to take Labour through the business.

The Board congratulated Management on the finalisation of the wage negotiations.

6.6 **TFR Fatality - Ermelo**

6.6.1 Management advised the Board of a fatality that occurred on 25 April 2011, in which a TFR Train Driver, Mr Erasmus Mandla Nkambule was electrocuted whilst working on a stationary train. The School of Rail will be requested to include "Near Misses" and fatalities as part of its case studies in the train driver curriculum.

6.6.2 The Board was concerned with the increase of the DIFR. Management stated that the increase was due to the extent of the current incidents. The Board stated that safety is a culture issue and that employees must be educated on safety issues.

Ms Mnyaka joined the meeting at 10:01.

6.6.3 Management reported that the Assistant Train Driver was unwilling to co-operate with the BOI process. The Board **agreed** that the matter be further deliberated upon at the Board Risk Committee. Ms Ceba

6.7 **Financial performance**

Management indicated that net operating expenses were R258m below budget for the month, mainly due to personnel, maintenance and materials costs and savings on other expenditure. As a result, EBITDA was R135m above budget for the month. Management indicated that the Company has a false sense of security as the EBITDA has increased for the wrong reasons (neither volumes nor revenue).

6.8 **Transnet Property**

6.8.1 Management informed the Board of the Company's hostels that are currently occupied by communities not related to the Company. Attention will be given to the property issue as there is a huge reputational risk. Management will compile a proposal on how to deal with the property portfolio for the Board's consideration at its next meeting. Mr Molefe

6.8.2 Management also stated that the Company's property portfolio was not properly captured and consolidated in the balance sheet; however, there is a current process of streamlining the capturing of the Company's property portfolio.

6.9 **Security Management function**

The Company plans to reduce the security expenditure from R750m per annum to approximately R300m per annum. In future, the model is to move towards an in-house security guarding service.

The Board requested Mr Molefe to present on his impression on the state of the Company at the next meeting. Mr Molefe

The Chairman requested that Items 8.8, 8.23 and 8.14 be dealt with next. These minutes reflect the order of the meeting.

Ms Siwendu joined the meeting at 10:53.

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8.8 **Draft Board Evaluation Report for the year ending 31 March 2011**

8.8.1 Ms Ceba introduced Ms Siwendu to the Board. Ms Siwendu took the Board through the submission as contained in the pack. The submission was taken as read. Ms Siwendu indicated that it was too early in the life of the Board to introduce a board evaluation exercise. Boards normally take up to 18 months to mature, and the current board evaluation exercise was introduced five months into the tenure of the Board. Ms Siwendu highlighted, amongst others, the following :

- The Board Development Phases since 2005;
- The context of current Board Evaluation;
- Consequences in Board development and maturity;
- Findings on the core governance areas; and
- There should be targeted induction on areas where the Board would be required to exercise its mind.

8.8.2 The Board highlighted, amongst others, the following issues:

- There should be deliberation on the perception of a "*fractured Board, camps and pre-lobbying*". The period of tenure of the Board was not long enough to suggest "*fracture*" and further questioned if the statement can be substantiated further.
- The draft Board Evaluation Report was misleading in suggesting that "*many other employees resigned due to the reinstatement of Mr Gama*" and there should be clarity on the analysis that led to this conclusion.
- The timing of the exercise five months into the tenure of the Board (too short to give a reliable result). The draft Board Evaluation Report can be used as an "early warning system". The comments will improve over time.
- The draft Board Evaluation Report does not capture a true reflection of the current state of the Board, and if it lands in the wrong hands, it could be used detrimentally against the Board.

8.8.3 Ms Siwendu indicated that Mr Gama's issue was raised by a number of Board members. A verbatim report that substantiates the statements will be provided to the Board. Three interviews were outstanding and that the Report will be finalised shortly.

8.8.4 Ms Siwendu stated that she will draft an executive summary for submission to the Shareholder Minister. Ms Ceba was requested to convene a special Corporate Governance and Nominations Committee to review the revised Board Evaluation Report before the Annual General Meeting. — Ms Ceba

RESOLVED that the draft Board Evaluation be revised further to take into consideration the concerns that were raised in the meeting. — 11/6/2

Ms Siwendu was excused from the meeting at 11:42.

8.8.5 Mr Moyo indicated that in other companies, the Board Evaluation Report is not submitted to the Shareholder Minister. Mr Skosana stated that the Board needs a qualification that contextualises the timing of the exercise, five months into the tenure of the Board. The Company should benchmark best practise in managing Board Evaluation Reports. The Chairman stated that the Board will arrange a workshop in August 2011 to consider the recommendations emanating from the Board Evaluation Report. Mr Moyo requested Management to engage the Shareholder Minister on what is considered best governance practise on, amongst others, the sequencing of the Annual General Meeting and the publication of the Annual Financial Statements. — Mr Molefe/ Ms Stephen

Mr Reddy joined the meeting at 11:53.

8.23 **Transnet National Infrastructure Plan**

8.23.1 Mr Molefe introduced Mr Reddy to the Board. Management took the Board through the submission as contained in the pack. The submission was taken as read. Management

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informed the Board that the submission was for noting purposes; however, since the matter was being submitted to the Shareholder Minister, the Board took a view that it should approve the submission to the Shareholder Minister. Management took the Board through the background and highlighted, amongst others, the following :

- The draft executive summary of the 2011 Transnet National Infrastructure Plan ("TIP 2011") was presented to the Board and Group Exco at the Strategy Workshop in January 2011. On 30 March 2011, it was presented to DPE.

8.23.2 The Board requested that the National Planning Commission be engaged on TIP before its submission to the Cabinet. Mr Molefe

8.23.3 Management indicated since the Board's deliberation on the matter in January 2011, a new section on the Investment Strategy had been introduced into TIP. Management took the Committee through Section D and highlighted areas where the Company would require DPE's intervention and support on, amongst others, the following:

- Waterberg Coal Rail Route;
- Manganese Export Expansion;
- Eskom – TFR Long-term Planning;
- Eskom – TFR Domestic Coal Rail Planning;
- Durban Vision 2050; and
- Gauteng Inland Terminals.

8.23.4 Management stated that the document will be reviewed internally on an annual basis and submitted to the Shareholder Minister on a three-year cycle for approval. Management stated that the Annual Report covers a 5-year programme overview on capital projects, whilst TIP takes a long-term view on the infrastructure plans.

RESOLVED that it approves the following :

- That the document contained in the Board pack (TIP 2011) be submitted to the Shareholder Minister through the Chairman's Office.
- That TIP 2011 be used as the basis of ongoing engagements with national, provincial and local government departments on matters relating to infrastructure planning and development. 11/6/3

Mr Reddy was excused from the meeting at 12:00.
Ms Moses and Mr Neville Eve joined the meeting at 12:01.

8.14 **AWP Contract**

8.14.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. Management gave the Board feedback on the background on the NMPP, and stated that all contracts that were time-based had to be extended due to the delay in the project. The AWP Contract forms part of the approved R23.4bn budget. The submission is a procurement mechanism to give effect the approved budget.

8.14.2 The Board was informed that the matter was withdrawn from the Board Acquisitions and Disposals Committee Agenda on 31 May 2011 as the GCE had not yet been briefed on the AWP Contract, and Management was still awaiting confirmation on the status of the AWP contract expenditure. Management indicated that there was an urgency to secure approval on the matter as the current budget has been exhausted, and the NMPP cannot continue until the resolution of the AWP contract issue.

8.14.3 The Board agreed that the matter should be referred back the Board Acquisitions and Disposals Committee for consideration. The Board was concerned that the submission should have been circulated as part of the Board pack so as to allow for proper decision-making. Ms Ceba

Ms Moses and Mr Eve were recused from the meeting at 12:20.

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8.14.4 Mr Moyo reported that the irregularity was based on the manner in which the procurement process was conducted. The AWP entity that was appointed did not have preferred bidder status, so it should not have been appointed outside a transparent tender process.

8.14.5 Management took the Board through the appointment of AWP JV as EPCM Service Provider and highlighted, amongst others, the following :

- The AWP Joint Venture had been adjudicated as reserve bidders at the time of awarding the EPCM services contract to Fluor. However, a different AWP entity was appointed once the relationship with Fluor was discontinued; and
- Transnet received a proposal from AWP to execute the project with a maximum value of R751m, excluding escalation but including contingency. The proposal was based on a fundamentally different project execution philosophy. The change in philosophy had an impact on the resourcing requirements. In addition, the change in timeline impacted on the man hours originally estimated.

8.14.6 The Board **agreed** on the following:

- The wording in the Annual Financial Statements in relation to the AWP Contract should be confirmed as a matter of urgency. — Mr Singh
- If misconduct is established on the AWP Contract, Management should act on the matter based on the recommendations from TIA.

8.14.7 The Board took into consideration that if does not condone the AWP Contract, the delivery of the NMPP will be delayed.

RESOLVED that it approves the following:

- Condonement of expenditure incurred with AWP JV, the appointed EPCM Service Provider to the NMPP Project, as a result of the Transnet procurement process for appointment being considered irregular.
- A Compensation Event (CE) to the current EPCM Option E Professional Services Contract with AWP JV that :
  - Increases the current Contract Value of R1 753 095 000 to R3 511 963 576 as per the NMPP budget approved by the Board in November 2010;
  - Extends the current contract completion date of 30 April 2012 to 31 December 2013 as per the NMPP schedule approved by the Board in November 2010;
  - Allows for interim month-to-month payments to AWP JV :
    - To avoid breach of contract interest which is "wasteful" in terms of the PFMA;
    - To ensure "Right of Way" lessees are paid timeously; and
    - To limit the aggregate payments to date that could be declared "irregular". — 11/6/4

7 FINANCIAL REPORT

7.1 Management took the Board through the Financial Report as contained in the pack. The Report was noted. The matter was extensively deliberated upon. Management highlighted, amongst others, the following :

- Spending to date amounted to R853m against a budget of R2.3bn representing an under spending of 63%. Prior year spending over the same period was R1.2bn representing a 43% decrease.
- The internal audit controls were showing improvement.

7.2 Management took the Board through the Week 11 Dynamic Report.

7.3 Management took the Board through the PRASA update and highlighted, amongst others, that the GCE of PRASA has instructed that no payments be made to Transnet until the SLA issues on access, haulage, locomotive hire, locomotive heavy maintenance, locomotive light maintenance and coaches and wagon heavy maintenance were finalised. Mr Molefe will send a letter to PRASA requesting an urgent meeting to discuss the status of the matters, and further request that payment of amounts due and payable continue in

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line with a payment plan to be provided by the CFO of PRASA. The Company catered for a R400m provision in the Annual Financial Statements in respect of the PRASA debt.

7.4 Management reported that PRASA's commercial agreements did not adequately cover the financial risks. The new commercial agreements that are being drafted will take into account the current challenges with PRASA.

7.5 The Board requested Management to revert to the initial agreement that was agreed upon between the Ministers of Transport and Public Enterprises before taking any major step on the matter, prior to escalating the PFMA issues to the Shareholder Minister for consideration.

The Board noted the update.

The Chairman requested that Item 10.3 be dealt with next. These minutes reflect the order of the meeting.

10.3 **Board Audit Committee**

10.3.1 Mr Moyo gave the Board feedback from the Board Audit Committee ("the Committee") that was convened on 1 June 2011. Mr Moyo indicated that the Committee had extensively deliberated on the draft Annual Report, and recommended the following matters for Board approval :

- The Going Concern Assertion;
- The Management Representation Letter;
- The Annual Financial Statements;
- The Board Audit Committee Report;
- The Director Valuation Report; and
- PFMA Reportable items.

10.3.2 Mr Moyo informed the Board that Deloitte has issued a report indicating that it was of the view that the NMPP will be delayed by 5 – 6 months, with a cost of approximately R140m.

10.3.3 **TSDBF**

10.3.3.1 The Committee was of the view that there was no need to make a provision. Management will examine different proposals on the matter and present scenarios to the Board for consideration. There will be processes undertaken to amend the Fund Rules.

10.3.3.2 Management indicated that the TSDBF investment mandate should be amended to immediately give returns better than the inflationary rate. An asset and liability matching exercise should be conducted as a matter of urgency. The Company will publicly announce that the TSDBF matter will undergo administrative processes and indicate that the matter can take up to nine months to reach completion stage.

10.3.3.3 Mr Moyo stated that the Company and the TSDBF Board of Trustees need to agree on the communication strategy.

10.3.4 **Appointment of the External Auditors**

The appointment of the External Auditors was dealt with in a closed session. The Committee recommended that Deloitte continue as the Company's External Auditors until 31 March 2012. The Committee will embark on a process to appoint new auditors for the Company. He indicated that there is a need to review the appropriate model for the Company's internal audit function.

10.3.5 **PRASA**

The Committee was comfortable that PRASA has been adequately provided for in the Annual Financial Statements.

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Ms Moola was excused from the meeting at 13:09.

10.3.6 Mr Moyo indicated that the Committee had raised concern on Management's intention to submit the draft Annual Financial Statements with the AGM Notice to the Shareholder Minister. He indicated that it is not good governance practice to publish the Annual Financial Statements only after the AGM. It was **agreed** that the above-mentioned issues will be dealt with at the AGM. Chairman

10.3.7 Mr Moyo reported that the Company over-estimated its 3rd provisional tax payment, and as a result, overpaid SARS by R466m. This was predominately due to awaiting final approval from the Remuneration Committee on the incentive bonuses; wear and tear estimations provided by TFR were underestimated; and accrual of RBCT and other coal contracts post year end which increased profits. SARS has agreed to off-set this amount against Transnet's VAT payments for the next two to three months.

10.3.8 The Committee approved audit fees for audit at R62.6m.

10.3.9 The Committee expressed overall comfort with the financial function of the Company and commended the finance team on the good quality of information provided to the Committee, and further confirmed the competency of the Acting CFO.

The Board noted the Report.

8 MATTERS FOR DISCUSSION/APPROVAL

8.1 Draft Press Release

Management took the Board through the draft Press Release. The Press Release was taken as read.

The Board **RESOLVED** that it approves the Press Release for the year ending 31 March 2011. 11/6/5

8.2 Draft Annual Financial Statements

Mr Moyo took the Board through the submission as contained in the pack. The submission was taken as read.

RESOLVED that it approves the Annual Financial Statements for the year ending 31 March 2011. 11/6/6

8.3 Draft Director valuation of unlisted investment

Mr Moyo took the Board through the submission as contained in the pack. The submission was taken as read.

RESOLVED that it approves the Director valuation and unlisted investment for the year ending 31 March 2011. 11/6/7

8.4 Going concern assertion – Transnet SOC Ltd and Group

Mr Moyo took the Board through the submission as contained in the pack. The submission was taken as read.

RESOLVED that it approves the Going concern assertion for Transnet SOC Ltd and Group for the year ending 31 March 2011. 11/6/8

8.5 Management Representation Letter

Mr Moyo took the Board through the submission as contained in the pack. The submission was taken as read.

RESOLVED that it approves the Management Representation Letter for the year ending 31 March 2011. 11/6/9

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8.6	**PFMA Reportable items**	
8.6.1	Mr Moyo took the Board through the PFMA Reportable items. The PFMA Reportable items were taken as read. The Board suggested that Messrs Moyo, Molefe, Singh and the Auditors convene an urgent meeting to review the AWP Contract matter, and if there were fundamental issues that need consideration, convene a special Board Audit Committee. Mr Moyo informed the Board that the Board Audit Committee had considered the matter, and there was agreement that the AWP contract was irregular and it will be disclosed as such in the Annual Report.	Messrs Moyo/ Molefe/Singh
8.6.2	The Chairman and Messrs Skosana, Moyo and Singh were nominated to form part of the Sub-Committee to review and finalise the Annual Report.	
8.6.3	On the appointment of Ernst & Young, Mr Moyo indicated that the matter had been finalised. The appointment was done properly and that there were lessons to be learnt from the process.	
	RESOLVED that it approves the PFMA Reportable items for the year ending 31 March 2011.	11/6/10
8.7	**Report of the Directors**	
	Mr Moyo took the Board through the draft Report of the Directors. The Report of the Directors was taken as read.	
	RESOLVED that it approves the Report of the Directors for the year ending 31 March 2011.	11/6/11
8.8	**Draft Board Evaluation Report for the year ending 31 March 2011**	
	The matter was discussed after Item 6 above.	
8.9	**Talent management and succession planning**	
8.9.1	Mr Mkhwanazi took the Board through the submission that was distributed in the meeting. The matter was extensively deliberated upon. He highlighted, amongst others, the following from the document: ▪ It promotes appropriate standardisation of human resources policies, procedures and systems that are aligned with best practice; ▪ It oversees compliance with employment legislation, including submission of annual workplace skills plans and employment equity reports; and ▪ It aims to develop Transnet into an "*employer of choice*".	
8.9.2	Mr Mkhwanazi stated that the focus area was on people development and talent nurturing. He indicated that top performers within the Company must be identified, and a frequent report on the top performers' capabilities must be submitted to the Board for consideration. He indicated that it may be problematic not to have a dedicated HR executive, taking into consideration the magnitude of the Company.	
8.9.3	The Board stated that a framework on talent management should be developed, and Management undertook to develop the required framework on succession. Management further indicated that the issue of a dedicated HR champion will be reviewed, and the matter will be tabled to the Board for noting after the August 2011 strategic session. There was agreement that the Remuneration and Corporate Governance and Nomination Committees would review the talent plotting matrix, at least once a year.	Mr Molefe/ Ms Stephen Mr Molefe
	The Board noted the submission and agreed that the talent management and succession planning matter be referred to the Remuneration Committee for consideration.	Ms Ceba
8.10	**Investigations by the Public Protector**	
8.10.1	Management took the Board through the submission as contained in the pack. The submission was taken as read.	

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8.10.2 The Chairman informed the Board that the Corporate Governance and Nominations Committee had considered the draft KPMG and Nkonki Report dated 28 April 2011 and the draft response to the Public Protector, and requested further amendments.

The Board noted the update and **agreed** that the matter will be tabled for approval at a special Board meeting to be convened on 24 June 2011.

8.11 **Sustainability Report framework for the year ending 31 March 2011**

8.11.1 Management took the Board through the submission as contained in the pack. The submission was taken as read.

RESOLVED that it approves the Sustainability Report Framework for the year ending 31 March 2011. 11/6/12

8.12 **Funding for the Transnet Second Defined Benefit Fund**

The matter was extensively deliberated on above under Item 10.3.3 above.

RESOLVED that it approves the exploration by Transnet, together with the TSDBF and TPF, of the funding alternatives, together with the required Act and rule amendments. 11/6/13

8.13 **Transmed Medical Funding**

8.13.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. Management took the Board through the background and highlighted, amongst others, the following :

- Transnet has been seeking a sustainable solution to the provision of medical assistance to the retired employees (and their dependants) of the South African Transport Services ("SATS"), a state department that preceded and was succeeded by Transnet with effect from Transnet's incorporation in 1990 in terms of the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989)("the Legal Succession Act");
- Senior Counsel has advised, *inter alia*, that Transnet did not acquire any obligation to the SATS pensioners and neither did Transmed within the meaning of the legislation governing the conditions of employment of the SATS pensioners and the Legal Succession Act;
- Senior Counsel's opinion obtained by DPE, however, advised that Transnet has the obligation to fund the medical aid obligations of the SATS pensioners;
- Transnet continues to recognise the actuarial obligation in respect of the SATS pensioner members of Transmed as directed by the Shareholder Minister. At 31 March 2011, the projected accrued liability in this regard was R934m, assuming a contribution of R800 per principal member per month for the number of principal members in existence at 1 January of each year;
- Transnet would like to consider the alternative financial implications of various strategies related to the SATS pensioner group and their medical aid provision; and
- In addition to the actuarial obligation of R934m for SATS pensioners, Transnet has provided for additional contributions to Transmed in respect of SATS pensioners for R579m.

8.13.2 Management indicated that the Company will devise a working solution on the matter in the near future. SATS was not unbundled with the rest of the transactions, and there was no mechanism of allocating the SATS liability to the new entities. Management advised that the Fund is carried on Transnet's balance sheet.

RESOLVED that it approves the exploration of possible options to provide a solution for

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the SATS pensioner group and their medical aid provision, and, in the interim, approves the funding of the shortfall in the amount of R579m until 1 January 2014. 11/6/14

Ms Moola re-joined the meeting at 14:31 by tele-conference.

8.14 **AWP Contract**

The matter was discussed after Item 8.23.4 above.

Mr Pita joined the meeting at 14:32.

8.15 **Proposed RFP : Fleet management contract**

8.15.1 Mr Singh introduced Mr Pita to the Board. Management took the Board through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon. Management advised that the Board Acquisitions and Disposal Committee had recommended one fleet management contract for specialised vehicles, and potentially five regional light vehicle contracts, managed from the Corporate Office.

8.15.2 Management indicated that suggestions made by the Board Acquisitions and Disposal Committee entail, amongst others, the following :

- Implementation of a transparent tender process;
- The RFP specifications should clearly stipulate enterprise development conditions;
- Geographical spread of business should be considered in promotion of rural integration and community development;
- Evaluation criteria should promote the NGP; and
- No new leases should be entered into beyond the current contract end date of 31 March 2012.

8.15.3 Management further took the Board through the two-pronged methodology. Potential suppliers will first need to pass a technical evaluation phase in order to determine whether or not the supplier will be able to meet Transnet's business requirements. However, the Board **agreed** that the BEE qualification phase should be the first step on the evaluation criteria.

8.15.4 The Board requested, amongst others, the following:

- There should be a consideration of "sets-aside" for BEE.
- The contract should be broken down into smaller portions and that caution should be taken to ensure that the consortium arrangement does not misuse BEE (fronting).
- The specialised vehicle service could be further broken down (so that monopolies are not reinforced) as it is a financial burden on emerging players in the market.

8.15.5 Management undertook to table a revised Procurement Strategy, aligned with the NGP, for consideration and approval at the next Board meeting. Mr Singh

RESOLVED that it approves the following:

- The principles of the sourcing strategy and evaluation criteria.
- That the GCE or his delegate, be delegated the authority to approve the final request for proposal (RFP) ensuring that the principles have been incorporated as agreed. 11/6/15

Mr Pita was excused from the meeting at 15:06.

8.16 **Capitalisation of Infrastructure Maintenance for the 2011/12FY (ETC R1.9bn)**

8.16.1 The submissions in relation to Items 8.16, 8.17 and 8.18 were withdrawn from discussion as the memoranda did not correctly capture the approval that was sought. The Board agreed that Items 8.16, 8.17 and 8.18 be approved by way of a written resolution process. The Chairman of the Board Acquisitions and Disposals Committee was requested to recommend the matters for approval by the Board. Mr Singh/ Ms Ceba

8.17 **Capitalisation of Locomotive Maintenance for the 2011/12FY (ETC R1.8bn)**

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The matter was discussed under Item 8.16 above.

8.18 **Capitalisation of Wagon Maintenance for the 2011/12FY (ETC R1.2bn)**

The matter was discussed under Item 8.16 above.

8.19 **Shareholder's Compact for the 2011/12 FY**

The matter was discussed under Item 6 above.

8.20 **Revised Company structure**

8.20.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. The following matters, amongst others, were highlighted:

- Ms Mnyaka should engage the GCE on the composition of the Risk function. — Ms Mnyaka
- There are plans in place to elevate the Transnet Property portfolio to Group Exco level. A strategy discussion document on the matter will be compiled for consideration.
- The role of the Deputy CEO at TPL was as a result of historical arrangement. The position of the COO should be abolished as both posts are currently budgeted for. There were concerns on transformation issues at TPL.
- The Group Compliance and Company Secretariat functions report to Corporate Services for administrative purposes only. Both functions report to the Board and its respective Committees.
- TCP will continue as a specialised unit to focus on capital projects above the R300m threshold, and the ODs will be included in the Steering Committee for capital projects.
- The RME function, responsible for rail maintenance, will be transferred back to TFR.

8.20.2 The Board raised, amongst others, the following issues:

- The direct reports appear to be too wide.
- The current Group Exco structure is gender insensitive. Most females are in the support function role. Some females cannot act in the GCE's position, and thus excluded from the GCE's succession pool.
- There was discomfort with the composition of Corporate Services.
- The HR function needs to be a stand-alone function, taking into consideration the size of the Company.

8.20.3 Mr Gazendam cautioned that employees might end up being overpaid (with the constant restructuring).

8.20.4 Mr Skosana emphasised the urgency in appointing a CFO. He also sought comfort from Mr Molefe on whether the current Group Exco has the required skill for the respective portfolios.

Mr Moyo was excused from the meeting at 15:41. Ms Ceba and Ms Difeto were recused from the meeting at 15:41. Ms Ceba joined the meeting at 15:58.

The Board noted the revised Company Structure, and agreed that Mr Molefe will review the Group Exco structure and report back at the strategy session in August 2011. — Mr Molefe

8.21 **Role of a SOE in a developmental state**

8.21.1 Management took the Board through the submission as contained in the pack. The submission was taken as read.

The Board noted the submission.

8.22 **VAE Contract**

The matter was withdrawn from the Agenda.

8.23 **Transnet National Infrastructure Plan**

The matter was dealt with after Item 8.8.7 above.

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8.24 **Sea-to-Shore Crane Fleet Modernisation Plan**

8.24.1 Management informed that the Board that the Company will embark on an acquisition process to procure 7x Ship-To-Shore Cranes for DCT Pier 2. The matter was tabled at the Board Acquisitions and Disposals Committee, and the GCE was mandated to finalise the RFP and embark on the acquisition process. Management advised that it will issue a limited tender to five crane fleet manufacturers that have a market share of 5% or more. The Board noted the update.

Mr Phihlela joined the meeting at 16:03.

8.25 **Assmang transport agreement for 14mtpa Iron Ore**

8.25.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. Management indicated that the purpose of the submission was to seek approval for the amended and restated Main Agreement with Assmang (Pty) Ltd for the transportation of 14mtpa of iron ore from Sishen to Saldanha for storage and loading onto vessels for export.

8.25.2 Management indicated that an additional 3.6mtpa may be available if Transnet is able to deliver at the targeted 93% efficiency of the phase 1 capacity (in conjunction with the loading capacity).

The Board congratulated Management on a brief, clear and concise submission.

RESOLVED that it approves the following:

- The amended and restated Main Agreement with Assmang (Pty) Ltd for the transportation of 14mtpa of iron ore from Sishen to Saldanha for storage and loading onto vessels for export.
- That the GCE or his delegate be authorised to finalise all the necessary documentation for the amended and restated Main Agreement with Assmang (Pty) Ltd.

11/6/16

Mr Phihlela was excused from the meeting at 16:07.

9 **STANDING ITEMS**

9.1 **NMPP Update**

9.1.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. The matter was extensively deliberated upon. Management highlighted, amongst others, the following :

- Contract review – in instances where procurement documentation was assessed, the procurement procedures have been adhered to;
- All events listed as "cracks" in urban areas have been addressed, apart from 1 listed as peri-urban remaining unrepaired. The number of digs relating to LWA events remains high; and
- PL2 and PL3 were completed in April 2011, and PL4 started operating in May 2011.

The Board noted the NMPP update.

9.2 **IT Governance Report**

The Board noted the IT Governance Report as contained in the pack.

9.3 **Legal and Compliance Report**

9.3.1 Management circulated the document at the meeting. The matter was extensively deliberated upon. Management indicated that the criterion used to identify litigation matters tabled to the Board for information purposes was based on a R5m threshold and the strategic importance of the litigation matter.

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9.3.2 The Board sought clarity on where decisions to sue, litigate or settle litigation matters were taken. There was agreement that a Board Steering Committee on legal matters should be formed, with a mandate to sign-off on all proposed settlements. It was agreed that the matter be referred to the Corporate Governance and Nominations Committee for consideration. Ms Ceba

9.3.3 The Board indicated that in other instances, emerging businesses were taken to court due to "technical challenges" emanating from the Company's policies and procedures. The Board further highlight discomfort with the fact that most of the litigation matters have an element of disregard to the approved Delegation of Authority Framework.

9.3.4 On *Transnet vs. Abalozi Risk Advisory Services*, in which Abalozi through its attorneys, request the Board to intervene in the litigation mattes pending between the two parties, failing which they are threatening to file a damages counterclaim, in the amount of R250m, Management indicated that the final proposed solution will be submitted to the Board for consideration and approval. Ms Stephen

9.3.5 The Board was advised of the *Chris Wells vs. Transnet matter*, in which Mr Wells has issued a letter of demand to Transnet for R3. 8m as the outstanding balance owing to him in terms of the LTI Scheme. Management advised the Board that Mr Wells refused to sign the Director's Emoluments, and that a note will be added under his remuneration in the Annual Financial Statements. The Company will defend the matter.

9.3.6 The Board requested visibility of all the litigation matters as it seeks to make an assessment in terms of consistency in the application of the processes. The Board was of the view that there could be litigation matters below the R5m threshold that may have a reputational impact, and thus be of interest to the Board.

The Board noted the update on the Litigation Report, and indicated comfort with the qualification note under Mr Wells' remuneration in the Annual Report.

10 NOTING OF MINUTES AND REPORT BACK FROM BOARD COMMITTEE MEETINGS

10.1 Board Acquisitions and Disposals Committee

10.1.1 Mr Mkhwanazi took the Board through the minutes of the Board Acquisitions and Disposals Committee held on 31 May 2011. He highlighted, amongst others, the following:

- The Committee, supported by a legal opinion, had taken a decision to cancel the fuel and scrap metals tenders. The Committee was concerned that the RFPs for both the fuel and scrap metal tenders do not properly convey Transnet's imperatives as set out in, amongst others, the NGP, Shareholder's Compact and the CSDP.
- The List of Restricted Suppliers has been amended to take into consideration how the Company will deal with potential suppliers that have been found to be transgressing the law.
- On the proposed RFP for the Fleet Management Contract, the Committee has requested Management to revise the weighting of the BEE score, and also consider "set-asides" for emerging players.

The Board noted the update.

10.2 Board Social and Ethics Committee

10.2.1 Ms Tshabalala gave the Board verbal feedback on the Board Social and Ethics Committee. She highlighted, amongst others, the following issues that were considered :

- The Reputation Management: Stakeholder Engagement Strategy.
- The quarterly update on the Foundation.
- The Employee Volunteer Programme.

10.2.2 Ms Tshabalala informed the Board that the Committee has agreed that the Employee Volunteer Programme should focus on projects that will have an impact on the Transnet

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community.

10.2.3 Ms Tshabalala indicated that the Committee supports that Transnet should continue to sponsor the School of Excellence, however, its contribution should be substantially reduced, and robust efforts should be made to solicit sponsorships from other major companies or soccer clubs. The Committee mandated the GCE to manage Transnet's relationship with the SAFA.

The Board noted the update.

10.3 **Board Audit Committee**

The matter was discussed after Item 7.5 above.

10.4 **Remuneration Committee**

10.4.1 Mr Malungani took the Board through the Remuneration Committee meeting held on 7 June 2011 and highlighted, amongst others, the following :

10.4.1.1 Approval of the STI and LTI payments for the 2010/11 FY. The bonus provision, for both the STI and LTI Schemes for the year ending 31 March 2011 was capped at R950m, as per resolution taken by the Committee on 20 April 2011.

10.4.1.2 Approval of the Annual Remuneration Adjustment for Group Exco Members. The approved increase ratios for Group Exco range between 0% to 14.8%.

10.4.1.3 Approval that Transnet pays the shortfall in respect of Mr Gama's Retirement Fund benefit that occurred during the time while he was out of service, from June 2010 to February 2011. The value of the shortfall is R456 506.41.

The Board noted the update.

10.5 **Corporate Governance and Nominations Committee**

10.5.1 The Chairman gave the Board verbal feedback from the special meeting held on 9 June 2011. He indicated that most of the issues from the meeting had already been considered by the Board.

10.5.2 The Chairman advised the Board that the Company had performed at 46% of the agreed upon targets of the 2010/11FY Shareholder's Compact. He also advised the Board that the mandate of the Corporate Governance and Nominations Committee will be reviewed to take into consideration the Company's involvement in Government policy processes and the potential restructuring matters that may flow from such policy decisions.

The Board noted the update.

11 **GENERAL**

Ms Difeto was recused from the meeting at 16:53.
Ms Tshabalala was excused from the meeting at 16:55.

11.1 **Board matters**

11.1.1 The Chairman informed the Board that he became aware of potential Board changes on 1 June 2011. The Chairman interacted with DPE on the Business Day article on 9 June 2011, and was advised that the matter was work-in-progress but that it had been prematurely leaked to the media. DPE sent a Cabinet press release which was sent to the Board. A meeting with the Shareholder Minister is scheduled for 13 June 2011, and the Chairman will update the Board on the developments.

11.1.2 The Board was advised that Messrs Malungani and Moyo were mandated by the Board to accompany Mr Molefe to engage the Shareholder Minister on the matter, specifically the sensitivity aspect. The Board stated that it was comfortable with the Shareholder Minister's role in effecting changes the Board; however, the process should not cast

Messrs Malungani/ Moyo/Molefe

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aspersions on Board Members' integrity. The Board was of the view that the matter should have been dealt with elegantly and decently.

The Chairman requested the Board to retain confidentiality on Board matters. The Board noted the deliberations.

12 **TRANSNET BOARD OF DIRECTORS MANDATE**

The Board noted the Mandate as contained in the pack.

13 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 17:29.

CHAIRMAN
DATE: 09/09/2011

GROUP COMPANY SECRETARY
DATE: 06 SEPTEMBER 2011

AFFIDAVIT AND ANNEXURE OF

SIYABULELA XHANTI MAPOMA

(Dated 31/07/2020)

Please refer to

EXHIBIT BB 16 pages

BB16-SXM-xxx to **BB16-SXM-xxx**

or

TRANSNET BUNLDE XX pages

TANSNET-XX-xxx to **TANSNET-XX-xxx**

AFFIDAVIT AND ANNEXURE OF SIYABULELA XHANTI MAPOMA

(Dated 31/08/2020)

Please refer to

EXHIBIT BB 16 pages

BB16-SXM-xxx to **BB16-SXM-xxx**

or

TRANSNET BUNLDE XX pages

TANSNET-XX-xxx to **TANSNET-XX-xxx**

AFFIDAVIT

I, the undersigned,

SIYABONGA MAHLANGU

do hereby make oath and state that:

1. I am an adult male non-practising attorney and former Special Advisor to the then Minister of Public Enterprises, Minister Malusi Gigaba.

2. The facts contained in this affidavit are, save where otherwise stated or indicated by context, within my personal knowledge and are, to the best of my knowledge and belief, true and correct.

3. I have been invited by the Chairperson of the Commission of Inquiry into State Capture ('**the Commission**') to depose to an affidavit and respond to allegations made by Advocate Siyabulela Mapoma ('**Mapoma**') in an affidavit he submitted to the Commission. In essence, Mapoma alleges that '*Mr Mahlangu called and put pressure on me to finalize the reinstatement of Mr [Siyabonga] Gama, accusing me of causing the delay, telling me "No.1" wanted to get it done quickly*'. He further alleges that he scolded me and told me never to call him again.

4. Furthermore, the Chairperson has requested me to give a full account of what I know about how the settlement between Mr. Gama and Transnet Limited '*including indicating any other person in government at the time or outside of government who, to [my] knowledge, played a role, either directly or indirectly, in the reinstatement of Mr Gama at Transnet or in the conclusion of the settlement agreement on the terms on which it was concluded. In particular [I am] requested to indicate whether, to [my] knowledge, anybody in cabinet in*

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2011 played a role, directly or indirectly, in the reinstatement of Mr Gama or in the conclusion of the settlement agreement on the terms on which it was concluded.'

5. Below, I respond to the request of the chairperson under the following headings: (1) my lack of knowledge of the settlement discussions between Mr Gama and Transnet, (2) I do not know of any persons who may have been involved in the negotiation or conclusion of the settlement agreement between Mr Gama and Transnet, (3) nature of my relationship with Mr Gama at the time, and (4) Mapoma's allegations.

No knowledge of the contents and details of the settlement negotiations and consequent agreement

6. I was not involved (directly or indirectly) in the settlement discussions leading to the reinstatement of Mr. Gama. The only insight I have on the discussions was when I was informed by Mr Mafika Mkhwanazi ('**Mkhwanazi**'), the then chairperson of Transnet and acting Chief Executive Officer at the time, that the company intended to reinstate Mr Gama.

7. Due to the passage of time, I cannot recall the exact reason for, or context of, my discussion with Mkhwanazi. He conferred with me on a variety of matters in my capacity as a Special Adviser to the Minister and in his capacity as Chairman of Transnet on things that he needed me to convey to the Minister informally or prior to any formal process. I recall that during my conversation with Mkhwanazi, I advised that it was prudent for Transnet to seek legal advice on the company's proposed course of action. We discussed a few options on eminent labour lawyers that he could consult. One of the names that came up is that Mr. Sbu Gule who, at the time, was a partner or director at Deneys Reitz (now Norton Rose). I offered suggestions because of my familiarity with the legal profession. It all remained with the Chairman on how he intended to proceed.

8. I do not recall whether the Minister was officially briefed by the Transnet board of directors on its intention or decision to reinstate Mr. Gama. If this happened,

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ordinarily there would be correspondence to this effect addressed to the Minister. This correspondence would be considered by the department's units responsible for transport enterprises and one for Legal and Governance. The Deputy Directors General who headed these units would make suitable recommendations to the Minister through a decision memorandum. This memorandum would get to the Minister via the office of the Director-General. This type of internal correspondence is officially kept and registered by the department's registry.

Persons involved in the settlement discussions

9. Save as I have stated in the earlier paragraphs of this affidavit, I have no personal knowledge of the settlement discussions between Mr Gama and Transnet and the persons who were involved in such discussion. I only saw the settlement agreement for the first time on 11 August 2020 when the Commission's Acting Secretary favoured me with a copy of it.

10. Save as I have stated in this affidavit, I do not know of any person in government at the time or outside government who played a role, either directly or indirectly, in the reinstatement of Mr Gama at Transnet or in the conclusion of the settlement agreement between Mr Gama and Transnet. In particular, I do not know of anybody in cabinet in 2011 who played a role, directly or indirectly, in the reinstatement of Mr Gama or in the conclusion of the settlement agreement between him and Transnet on the terms on which it was concluded.

Nature of my relationship with Mr Gama at the time

11. I joined Minister Gigaba as his Special Advisor in December 2010. According to the copy of the settlement agreement between Mr. Gama and Transnet, it was concluded on 22 February 2011. By this time, I was still familiarising myself with my new work environment. I had not met Mr. Gama or engaged with issues pertaining to his employment or dismissal. Prior to joining government, I had not had any dealings with Mr Gama, whether professionally or socially.

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Mapoma's allegations

12. Mapoma's allegations are contained in paragraphs 26-7 of his affidavit. Principally, he alleges that (1) I pressured him to expedite Mr Gama's reinstatement; (2) he scolded me for doing so and advised me never to call him again; (3) he only knew me professionally. Given that, at the time, I was still new in my job, I could not have pressured Mapoma. I had no reason or motive to pressure Mapoma or anyone. In any event, my role or function did not involve pressuring officials.

13. Furthermore, my disposition towards Mapoma and its complementary social network would not permit me to act rudely towards him or pressure him in the manner that he alleges. I was taken by surprise to learn of these allegations.

14. First, Mapoma's recount of the nature of the relationship that existed between us is not entirely correct. During my time as a partner at Mahlangu Nkomo Mabandla Ratshimbilani Attorneys ('**MNMR**'), I interacted with Mapoma frequently and developed a professional relationship that was based on mutual respect. I would seek his counsel on how our firm could increase its flow of work from Transnet. He gave me good advice and was favourably disposed towards me. This type of professional proximity continued even after our firm merged into Edward Nathan Sonnenbergs.

15. Secondly, we had a common social circle. In his affidavit, Mapoma underplays this social circle and its effect on how I would view him. This circle consisted of friends predominantly from Umthatha and the surrounding areas. Some of these friends were attorneys. I developed a strong bond with them. Some of them I know from as early as 1999. Mapoma socialized with this social circle. I may not remember the specific events but I do recall meeting him at some of the social gatherings where I was invited. In this social circle, Mapoma was regarded as one of the elder brothers and was accorded commensurate respect. I also treated him with the respect I reserve for my older siblings.

16. I was introduced to this social circle by a friend who then worked as legal advisor for a client of Webber Wentzel, where I did my articles. Our friendship

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grew and persists to this day. Mapoma errs in his affidavit that I went to university with any of the friends in the social circle.

17. I submit that the support that Mapoma gave to MNMR, the intersection between one of our social circles, and the nature of my social interactions with him forbade me from being rude to him or putting any pressure on him. This would have resulted in backlash in an important friendship circle and would have adversely affected my standing as an attorney amongst the community of lawyers in that social circle. I care about my reputation and standing amongst my friends and peers.

18. Thirdly, I had no motive or reason to pressure or call Mapoma about the pace or details of the settlement between Mr Gama and Transnet.

19. Lastly, If I had any questions (which I did not), I would have raised these with Mkhwanazi. To the best of my recollection, Mapoma was a few levels down in the Transnet executive management hierarchy which meant that I would not encounter him in the normal course of my duties as Special Advisor to the Minister.

20. I have never said to Mapoma, as he alleges, ' *"No.1" wanted to get it done quickly*'. In the South African political lexicon, the term 'No.1' is usually used to refer to a sitting President of the Republic. I assume that, in his allegation, Mapoma ascribes the same meaning to this term. If that is so, Mapoma is allegation's without basis. In my normal use of language, I do not refer to a sitting President as No.1. In particular, I have not referred to former President Zuma as No.1 in my ordinary us of language. What comes naturally to me in conversations is to refer to President Zuma using his initials, surname or clan names.

21. For avoidance of doubt, I wish to state that I have never used former President's Zuma's name as alleged by Mapoma. I have never met or had conversation of any substance with President Zuma other than in large government gatherings. He has never instructed or requested me to put pressure on anyone to finalize the reinstatement of Mr Gama.

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22. Furthermore, my erstwhile principal has never instructed me to put pressure or follow up with anyone regarding the reinstatement of Mr. Gama. At no point did the Minister advised me that the President wished to have Mr Gama reinstated expeditiously or that the dispute with him be resolved expeditiously.

23. All I recall is that after the board had decided to reinstate Mr Gama but prior to him resuming his duties at Transnet, the Minister requested a meeting with him. I was not part of this meeting.

THUS DONE AND SIGNED IN ROSEBANK ON THE 25TH AUGUST 2020

SIYABONGA MAHLANGU (deponent)

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn before me at Rosebank on this the 25th day of August 2020.

CST
TSHIKOVHI
2033-F3-2

COMMISSIONER OF OATHS

Full names: Thusani Sydney

Address 15 Sturdee Ave, Rosebank 2196 Jhb

Capacity CST

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2020 -08- 25
CSC
ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS

SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

SIYABONGA MAHLANGU

do hereby make oath and state that:

1. I am an adult male non-practising attorney and former Special Advisor to the then Minister of Public Enterprises, Minister Malusi Gigaba.

2. The facts contained in this affidavit are, save where otherwise stated or indicated by context, within my personal knowledge and are, to the best of my knowledge and belief, true and correct.

3. On 25 August 2020, I deposed to an affidavit at the invitation of the Chairperson of the Commission of Inquiry into State Capture ('**the Commission**'), Deputy Chief Justice Zondo. In particular, the Chairperson requested me to address certain allegations made by Advocate Siyabulela Mapoma ('**Mapoma**') in an affidavit he submitted to the Commission. I have done so.

4. Furthermore, the Chairperson requested that I give a full account of what I know about how the settlement between Mr. Gama and Transnet Limited '*including indicating any other person in government at the time or outside of government who, to [my] knowledge, played a role, either directly or indirectly, in the reinstatement of Mr Gama at Transnet or in the conclusion of the settlement agreement on the terms on which it was concluded. In particular [I am] requested to indicate whether, to [my] knowledge, anybody in cabinet in 2011 played a role, directly or indirectly, in the reinstatement of Mr Gama or in the conclusion of the settlement agreement on the terms on which it was concluded.*'

5. After I submitted the affidavit to the Commission, I discovered two emails in my personal email, one dated 18 January 2011 (annexure **SMA1** hereto) and the other 4 February 2011 (annexure **SMA2**) which are relevant to what I was required to answer in my main affidavit. These emails refer, albeit briefly, to the settlement negotiations between Mr Gama and Transnet. I came upon the two emails in my personal email box in the course of my preparation of a separate affidavit that I have been invited by the Commission to submit and which relates to my employment at the Department of Public Enterprises and my role in events identified by the Commission. Their omission in my affidavit of 25 August 2020 was not deliberate.

6. The two emails are from me to then Minister of Public Enterprise, Mr Malusi Gigaba. I did not remember the communication to Minister Gigaba as recorded in the email and still do not have an independent recollection of it.

7. Although in annexure **SMA1** I promised the Minister that I would obtain the settlement agreement for him and to brief him on it, I did not do so and in fact saw the settlement agreement for the first time when it was provided to me by the Commission. In **SMA1**, I also advised the Minister to brief the President about Transnet's intended settlement with Mr Gama. I do not remember the reasons why I advised the Minister to do so, but in hindsight, I think that it was probably because of the public interest that the matter had invoked at the time. I can think of no other reason. I have no knowledge whether Minister Gigaba discussed the matter with President Zuma.

8. In **SMA2**, I set out my advice to the Minister on matters that Mr Mafika Mkhwanazi, the then Chairperson of Transnet, wished to convey to him through me. I do not recall me and Mr Mkhwanazi discussing the terms of the settlement with Gama in any detail and in fact have no independent recollection of the discussion with him that preceded my email to the Minister.

9. In my main affidavit, I state that in January 2011 I would not have been involved with the settlement discussion because at the time I was newly employed as the Minister's Special Adviser. **SMA1** and **SMA2** show that I had had meetings

or discussions with Mr Mkhwanazi around 18 January 2011, about two weeks after the Christmas break, and around 4 February 2020. These emails are the only reminder to me that I held discussions with Mr Mkhwanazi and the Minister separately before the settlement agreement was concluded. I have no recollection of any other discussion with Mr Mkhwanazi or the Minister. I reiterate that I was new in my job and could not have been involved in the settlement discussions in any substantive way. Any discussion with Mr Mkhwanazi on the dispute between Mr Gama and Transnet was intended for me to convey to the Minister Transnet's position on the matter.

10. Should I come across any documentation or correspondence that may be of assistance to the Commission, I will submit it at the earliest opportunity.

THUS DONE AND SIGNED IN ROSEBANK ON THE 28TH AUGUST 2020

SIYABONGA MAHLANGU

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn before me at SANDTON on this the 28th day of August 2020.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity:

Akhona Lihle Bilatyi
The Central, 96 Rivonia Road
Sandton, Johannesburg, 2196

Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A.

"SMA 1"

From: Siyabonga Mahlangu mahlangusiyabonga@gmail.com
Subject: Heads up
Date: 18 Jan 2011 at 19:22:42
To: nkanyezi.gigaba@gmail.com

Dear Minister

- I have been invited on a trip to India on 24 January-1 Feb 2010. Although this a private excursion, it promises to be of great political value. I therefore suggest that we take full advantage of it. I therefore request leave to undertake this sojourn.
- I understand that Transnet may be nearing a settlement with Gama. I will obtain the details of the settlement and brief you accordingly. I suggest that you socialise the President and his key aides (formal & informal) on the proposed settlement. It is intended that the forthcoming board should consider and authorise it.
- Manyi may be nominated by certain quarters in the board for the position of Transnet GCE. I had a meeting with him (at his instance) . I expressed my reservations. It seems to me that there may be attempts to divide the board on this point. I will obtain an update from the Chair on the latest developments.
- Ayanda and I have identified a public speaking and media coach. We have socialised the DG on this issue. A formal submission is being prepared. I suggest that this programme be factored in the diary partly in preparation of your maiden Budget Vote;
- Meetings with senior editors have been organised subject to your confirmation. I suggest that these one on ones be placed in your diary and be held in a relaxed environment;
- I have reviewed the media and publicity campaign for Feb until March 2010. It is a bit more robust and near completion. I seem to agree with the latest draft. Upon completion, Ayanda will share it with the rest of the political team. It will then be recommended to you for authority to implement.

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- I met with Dr Khulu Mbatha in the DP's office. We have agreed to create a closer interaction between the DP's office and ours. In particular, the DP's office is keen on coordinating efforts on the energy front. Our political aim is to foster closer interaction between you and the DP. Mbatha proposed that a meeting of advisors be convened after the cabinet Lekgotla to prepare for a meeting between you and the DP. In my view, quarterly one on one interaction with the DP is advised;
- I met with Nqaba Nqandela, the Chief of Staff of the Minister of Higher Education. He shared with with me their National Skills Development Strategy III. In particular, their goal to deliver 10 000 artisans per year. It seems there are identifiable synergies between our respective departments. In my view, the cooperation with the DEHT is critical to establish a deeper relationship with the left. This process will give us a focussed access to the SG of the SACP and to develop a rapport with him in the context of Ministerial responsibilities.
- I met with Robert Nkuna, the special advisor to Minister Padayachee. He wanted to explore a possible meeting between you and his Minister regarding Broadband Infraco/ Sentech. The DoC view seems to be aligned with ours on the need for consolidation of government's rollout of ICT infrastructure and broadband in particular. The disjuncture is on institutional location. We have agreed to pursue this matter with our respective principals.
- On 17 January 2010, we received a letter from the Chairperson of Broadband Infraco addressed to you highlighting the historical background of interactions between Infraco and Sentech. The chairperson seeks political guidance. In this letter synergies are identified and acknowledged. Politcal differences between the previous principals are cited as the

causes of the stalemate. This view is similar to that shared by the department in its briefing to the DG which I attended.

We shall take discussions on some of these matters eyeball to eyeball when you are around should such be desired.

Kindest regards

Siya

'SMA2"

From: Siyabonga Mahlangu mahlangusiyabonga@gmail.com
Subject: Transnet dynamics
Date: 04 Feb 2011 at 01:03:53
To: nkanyezi.gigaba@gmail.com

Dear Minister

At my meeting with Chair, he acknowledged that advertising the GCE position was a mistake. In light of Gama's response to the advert, the board seeks guidance on the wayforward. Despite the ongoing without prejudice discussions, G insists on staying on the list. He was informed through his lawyer of an offer to reinstate him with no loss of benefits and a contribution towards his legal costs. It is my recommendation that the issue regarding his discipline and the appointment of the GCE be dealt with separately. His challenge to his dismissal should not delay the appointment of the new GCE.

In light of the current impasse on the case regarding his dismissal, the board should go ahead and deal with the appointment of the GCE.

The following options seems to present themselves:

1. The board should not interview G but proceed to make a recommendation on the available candidates. The board may base its view on the quality of CVs that it received. G may challenge the appointment of the new GCE as flawed arguing that he is entitled to be heard by the committee because he was previously shortlisted. I am persuaded that the the foregoing argument is not likely to sway a court to come to G's aid but it is likely to require political management.

2. The board should interview him and not shortlist him for consideration by Minister. The risks higlighted in 1 above equally apply.

3. The board should interview him and shorlist him for consideration by the Minister. The Minister may proceed and appoint his choice. It is still likely that G will challenge the process and allege that the appointed candidate was a *fait accompli.* This may attract unnecessary attention to the Minister. Minister should avoid being a bearer of bad news.

In my view, there is a need to contain the drama at Transnet level. In either scenario, it is likely that G will sue. He has no right to be appointed GCE and therefore any likelihood of an urgent interdict succeeding is very minimal.

I further recommend that G should not be interviewed or short listed. In that way, the Minister does not have to deal with him. A Transnet act in this regard will constitute a valid act in law upon which a Minister may base his action. Should he wish to interdict the Minister, he will have to show that the Minister will infringe one of his legally recognosed rights. In order to succeed in that argument, he will have to show that he has prospects of

success in overturning the recommendation to the Minister. In light of the facts and circumstances surrounding G's case, it is not likely that a court will uphold such proposition.

Further, there is a great likelihood that the leaks of the case between him and Transnet emanate from his side. If such speculation holds, his interviews and shortlisting will arise publicity that is unncessary and may result in unintended political statements.

The matter surrounding his dismissal may be dealt with by the GCE and the board going forward. It seems unavoidable that he may sue but it is a lawsuit I think we should be prepared for and we should defend.

I await your guidance.

Regards

Siya

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

STATEMENT OF MR MALUSI GIGABA IN RESPONSE TO THE LETTER OF THE SECRETARY DATED 13 AUGUST 2020

Presented for filing:- **STATEMENT OF MR MALUSI GIGABA IN RESPONSE TO THE LETTER OF THE SECRETARY DATED 13 AUGUST 2020**

DATED at Sandton, Johannesburg on Wednesday, 26 August 2020.

Reginald Tshabalala

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TO:
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TEL: 010 214 0651
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REF: Ms KB Shabalala

Filed with the Secretary of the Commission by e-mail
secretary@commissionsc.org.za
brigittes@commissionsc.org.za
farrhahk@commissionsc.org.za
on Wednesday, 26 August 2020

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

STATEMENT OF MR MALUSI KNOWLEDGE NKANYEZI GIGABA

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1 an adult male; and

   1.2 the Former Minister of the Department of Public Enterprises.

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

PURPOSE OF THIS STATEMENT

3. On Tuesday, 13 August 2020 the Commission, at the request of the Chairperson, requested that I furnish an affidavit relating to everything that I know about how the settlement agreement between Transnet and Mr. Gama was reached or how his reinstatement as the Chief Executive Officer of Transnet Freight Rail (TRF) came to be.

4. I have also been requested to indicate what role that may have been played by any other member of the Cabinet or any senior leader or leaders of the ruling party or anyone else in the reinstatement of Mr. Gama.

5. A copy of the said letter is annexed hereto as "**A**" (excluding the annexures)

MY RESPONSE

6. I have had regard to the agreement of settlement concluded between Transnet and Mr. Gama. I was not involved in the process of settlement or the reinstatement of Mr. Gama and played no role in that process. Having had regard to the minutes of the Transnet board, the matter was decided by the Transnet board without reference to me.

7. It is apposite to state that the appointment of the CEOs of the subsidiaries of Transnet fell directly within the authority of the Transnet board and not the Minister of Public Enterprises.

8. In addition to what is stated above, I am not aware of any role played by a member of Cabinet or any senior leader or leaders of the ruling party or anyone else (other than the Transnet board) in the reinstatement of Mr. Gama.

9. I have noted paragraphs 27 and 28 of the affidavit of Adv. Siyabulela Mapoma in which he alleges that my former advisor, Mr. Siyabonga Mahlangu contacted him with a view to put pressure on him to finalise the agreement of settlement with Mr. Gama. I was not aware that Mr. Mahlangu made contact with Adv. Mapoma as alleged and if he did, that was not on my instruction.

10. I am also not aware of the alleged conversation which Mr. Mahlangu may have had with a "No.1" which is generally a reference to the President in South Africa.

DEPONENT

THUS SIGNED AND SWORN TO before me at Sandton on this the 26TH day of August 2020 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

KMN

COMMISSIONER OF OATHS

EX OFFICIO:
FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION:

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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

Date: 13 August 2020
Our reference: Ms Farrhah Khan
Email: farrhahk@commissionsc.org.za

Mr Malusi Gigaba
C/o Tshabalala Attorneys
By Email: reginald@tshabalala.com

Dear Sir

Request for an affidavit: Settlement Agreement between Transnet and Mr Siyabonga Gama: February 2011

1. I write this letter to you on the directions of the Chairperson of the Commission.

2. Part of the Commission's investigations relate to allegations that in certain state-owned entities certain senior managers or executives were removed from certain positions because they were not prepared to facilitate wrongdoing such as corruption or acts of state capture and that those pursuing state capture or those who sought to loot public resources sought to have malleable individuals appointed to those positions so that they could carry out their acts of corruption or state capture.

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3. You were appointed as Minister of Public Enterprises with effect from 1 November 2010 after Ms Barbara Hogan had been dismissed as Minister of Public Enterprises on 31 October 2010. When you were appointed as Minister of Public Enterprises there was, it seems, an unfair dismissal dispute that Mr Siyabonga Gama, at that stage a former Chief Executive Officer (CEO) of Transnet Freight Rail (TFR), had referred to the Transnet Bargaining Council in terms of which he sought reinstatement in the position of CEO of TFR. That dispute was settled between the Board of Directors of Transnet and Mr Gama in terms of a settlement agreement dated 22 February 2011. A copy of the settlement agreement is attached to this letter for your convenience marked "A".

4. You will note that in terms of the settlement agreement Mr Gama was reinstated in the position of CEO of TFR under terms and conditions that seem very favourable to him but quite prejudicial to Transnet. The strange features of that settlement agreement are dealt with under (a) to (f) below.

(a) Reinstatement

The Transnet Board decided to settle the matter on the terms on which it settled the matter including reinstating Mr Gama in circumstances where Transnet had strong or reasonable prospects of successfully defending Mr Gama's dismissal in the arbitration or where there was no sound reason for the Board to reinstate Mr Gama or to settle the matter on the terms on which it settled it.

(b) Retrospectivity of the reinstatement

The Transnet Board decided to award Mr Gama full backpay and gave him all benefits covering nine months in circumstances where it was

highly unlikely that, if the arbitrator reinstated Mr Gama, the reinstatement would have been fully retrospective or that the arbitrator would have awarded Mr Gama full backpay, especially because Mr Gama accepted that he had been properly found guilty of three serious acts of misconduct and, therefore, should not have been dealt with as if he was innocent of any misconduct.

(c) Final Written Warning

Despite the fact that Mr Gama accepted that he was guilty of three serious acts of misconduct, the Transnet Board decided to impose on him a final written warning valid for six months that was deemed to have commenced running from Mr Gama's date of dismissal and had, thus, expired by the time the settlement agreement was concluded which allowed Mr Gama to return to Transnet as someone with a clean disciplinary record as if he had not been found guilty of any misconduct; in other words, the Board decided to impose an ineffective final written warning when it could have imposed an effective warning that could have commenced running on his return to Transnet.

Costs

(d) The Transnet Board undertook to pay 75% of Mr Gama's costs in respect of a High Court application that Mr Gama had brought against Transnet to interdict his disciplinary hearing which was dismissed and Mr Gama had been ordered by the High Court to pay Transnet's costs as well as the legal costs of certain members of the Board of Directors of Transnet including the costs of two Counsel. This undertaking was made in circumstances where there appears to have been no justification at all

for it because that High Court litigation had been finalised. Furthermore, there was no risk that, if the arbitration was pursued in the Transnet Bargaining Council, the arbitrator could have ordered Transnet to pay Mr Gama any costs for the High Court application; indeed, the arbitrator would have had no power to do so.

(e) The Transnet Board undertook to pay Mr Gama's costs in regard to the unfair dismissal dispute in the Transnet Bargaining Council in circumstances in which not only was it unlikely that the arbitrator would order Mr Gama's reinstatement but also there was no reasonable prospect or risk that if Mr Gama was successful in the arbitration, the arbitrator would order Transnet to pay Mr Gama's costs in regard to the unfair dismissal dispute.

(f) The Transnet Board, without any valid reason or any justification, instructed Transnet's then attorneys, Bowman Gilfillan, not to take any further steps to recover an amount of R 423 666,00 which represented taxed costs due by Mr Gama to Transnet as a result of an order of the High Court; it is difficult to understand what possible justification the Transnet Board may have thought there was to not only effectively give Mr Gama an amount of R423 666,00 in taxed costs that he owed Transnet but also to undertake that Transnet would pay 75% of Mr Gama's legal costs in circumstances in which hardly any justification could be advanced.

5. The purpose of this letter is to request you to depose to an affidavit or affirmed declaration and furnish it to the Commission on or before 28 August 2020 in which you share with the Commission everything you know about how the settlement

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agreement came about or how Mr Gama's reinstatement as CEO of TFR came about and how his reinstatement came to be on the terms reflected in the settlement agreement. In particular you are requested to indicate what role, if any, you played in Mr Gama's reinstatement or you played in regard to the terms on which he was reinstated. Furthermore, you are requested to indicate any role that may have been played by any other member of the Cabinet or any senior leader or leaders of the ruling party or anyone else in the reinstatement of Mr Gama or in his reinstatement on the terms on which he was reinstated.

6. I attach to this letter:

(a) marked "B" a copy of Advocate Antrobus SC's ruling relating to his findings that Mr Gama was guilty of three acts of misconduct;

(b) marked "C" a copy of Advocate Antrobus SC's ruling on sanction in terms of which he recommended that Mr Gama be dismissed;

(c) marked "D" a copy of the Transnet Company Secretary's affidavit with regard to what was before the Board of Transnet when it authorised that the unfair dismissal dispute with Mr Gama be settled;

(d) marked "E" a copy of the affidavit of Mr Chris Todd who had been Transnet's attorney on the matter until just before the conclusion of the settlement agreement; and

(e) marked "F" a copy of the affidavit of Advocate Siyabulela Mapoma who was the General Manager: Group Legal Services at Transnet at the time of the settlement agreement; you will note that in his affidavit Advocate Mapoma states that Mr Siyabonga Mahlangu who was your Special

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Advisor at the time allegedly sought to put pressure on him with regard to the reinstatement of Mr Gama.

7. If you require assistance in the preparation of your affidavit or your affirmed declaration, the Commission will be able to assist you to prepare the affidavit or affirmed declaration and you will not be charged any fees or costs for that assistance. You are also free to make use of your own lawyer or you may prepare the affidavit or affirmed declaration on your own. If, however, you choose to use your own lawyer, the Commission will not be liable for the payment of your lawyer's fees or costs.

8. You are requested to advise the Commission within 3 calendar days of receipt of this letter whether you undertake to furnish the Commission with the affidavit or affirmed declaration within the stipulated time. If you do not advise the Commission that you will furnish it with the affidavit or affirmed declaration within that time, the Commission will take it that you do not intend to furnish it with the required affidavit or affirmed declaration.

9. Your kind co-operation will be highly appreciated.

Yours sincerely

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations

of State Capture, Corruption and Fraud in the Public Sector including Organs of State

AFFIDAVIT AND ANNEXURE OF CHRISTOPHER NEALE TODD

(14/07/2020)

Please refer to

EXHIBIT BB 16 pages

BB16-SXM-xxx to **BB16-SXM-xxx**

or

TRANSNET BUNLDE XX pages

TANSNET-XX-xxx to **TANSNET-XX-xxx**

AFFIDAVIT AND ANNEXURE OF CHRISTOPHER NEALE TODD

(29/09/2020)

Please refer to

EXHIBIT BB 16 pages

BB16-SXM-xxx to **BB16-SXM-xxx**

or

TRANSNET BUNLDE XX pages

TANSNET-XX-xxx to **TANSNET-XX-xxx**

AFFIDAVIT AND ANNEXURE OF MAFIKA EDMUND MKWANAZI

(Dated 31/08/2020)

Please refer to

EXHIBIT BB 16 pages

BB16-SXM-xxx to **BB16-SXM-xxx**

or

TRANSNET BUNLDE XX pages

TANSNET-XX-xxx to **TANSNET-XX-xxx**

IN THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE
(HELD IN JOHANNESBURG, BRAAMFONTEIN)

AFFIDAVIT

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I, the undersigned

NOLWAZI GCABA

do hereby make oath and say as follows:

INTRODUCTION

1. I am a practising attorney of the High Court. I depose to this affidavit in response to the request ("**the Request**") of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State ("**the Commission**"). The Request to which I respond in this affidavit is dated 29 July 2020.

2. The Commission seeks an explanation of my conduct in the context of my previous position, as a director and member of the Board of Transnet SOC Limited ("**the Board**"). I served on the Board of Transnet from October 2004 to July 2012. I am grateful for the opportunity to respond to the Request, and I do so to the best of my ability by deposing to this present affidavit.

3. I have also received a further document from the Commission, namely a Notice in Terms of Rule 3 of the Commission's Rules, dated 7 September 2020 ("**the Notice**"). The Notice refers to oral testimony which has been sought by the Commission from Mr Christopher Todd ("**Mr Todd**"), and invites me to apply to cross-examine Mr Todd, if I wish to do so. I am not specifically named in Mr Todd's affidavit, and I accordingly do not seek leave to cross-examine Mr Todd at this time. However, I otherwise reserve my rights, in respect of testimony and may seek the leave of the Commission in due course.

4. Unless the context indicates otherwise, the facts deposed to in this affidavit are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

5. For reasons that will appear below, it will be necessary for me to advance certain propositions of law. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I accept as correct.

PURPOSE AND OVERVIEW OF THIS AFFIDAVIT

6. I understand the Request to be concerned with a specific issue. This is the events that led to an agreement (**"the settlement agreement"**) concluded several years ago, between Transnet SOC Limited ("Transnet") and Mr Siyabonga Gama ("Mr Gama"). The Request expresses a concern about the reasons why Transnet concluded the settlement agreement. The concern is expressed in the following terms:

> *"[I]t prima facie seems to the Chairperson of the Commission that the settlement agreement Transnet concluded with Mr Gama may not have been in the interests of Transnet and may have been one sided in favour of Mr Gama. This may mean that you, as a member of the Transnet Board of Directors at the time, may have acted in breach of your fiduciary duties".*[1]
>
> (My emphasis).

7. I confirm that I was indeed a member of the Board, at and around the time that the settlement agreement was concluded. I furthermore confirm that I supported the decision to conclude the settlement agreement, at that time. I emphasise at

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1 At paragraph 6.

the outset that my support of the decision was not premised on my perception of Mr Gama's innocence or guilt. I accept that Mr Gama was indeed guilty of the misconduct charges – as explained in the affidavit furnished to the Commission by Mr Christopher Todd ("**Mr Todd**"). My support of the settlement agreement was made in the context not only of my knowledge concerning the narrow issue of Mr Gama. It was made having regard to other factors and broader considerations which I believed were in Transnet's best interests.

8. It bears emphasising in this context that I was wholly supportive of the decision to charge Mr Gama initially. That was a decision I made, as is the case in respect of the settlement agreement, on the basis of the information that I had before me at the relevant time. I have no quibble with Mr Todd's assertion that the prospects of success in the case insofar as Mr Gama's innocence or guilt on the charges were very strong.

9. I supported the decision to conclude the settlement agreement later, on the basis of information that subsequently emerged, which in my judgement outweighed the benefits to Transnet of Mr Gama's continued prosecution. That information has since been investigated and verified by independent auditors, namely KPMG and Nkonki. For reasons on which I shall expand below, I am advised and respectfully submit that I did not act in breach of my fiduciary duties, and I therefore respectfully disagree with the view expressed in the Request. In summary, the reasons are as follows:

   9.1. I understand that the question of whether I exercised my discretion as a director unlawfully will not be determined in hindsight, but rather on the basis of the information available to me at the time. I am advised and

submit that the decision is evaluated against a subjective standard which permits necessary flexibility to a director's exercise of her discretion, in accordance with the director's own reasonable business judgment.

9.2. I took no issue whatsoever with the finding that Mr Gama was guilty of misconduct. Indeed, I was a member of the Board that supported the decision to charge Mr Gama at the time. I accepted that he had a case to answer.

9.3. My decision to support the conclusion of the settlement agreement took account of Mr Gama's finding of guilt, as well as the fact that it emerged Mr Gama was selectively disciplined when he was dismissed. That information was not available to me when I decided to support that Mr Gama be charged with misconduct. It emerged in motivation for the settlement, but has since been independently verified by forensic auditors, namely KPMG and Nkonki. I understood this to be in conflict with the parity principle that is applicable to labour relations in South Africa.

9.4. The reason that Mr Gama was reinstated was not concerned with his guilt or innocence, but rather with the need for consistency of discipline, and the justification of the sanction of dismissal when compared with Transnet's conduct in respect of other employees. The conclusion of the settlement agreement was considered not in light of Mr Gama's case in isolation, but rather in the light of what I understood to be all of the relevant facts. The inconsistent imposition of discipline was the prime motivation for the company seeking the Board's approval for settlement, when the matter served before the Board.

9.5. I understand that the submissions of Mr Todd are solely premised on the circumstances pertaining to Mr Gama's case, in isolation. I exercised my discretion in the light of broader factors. I can confirm that it was my *bona fide* view that, in the light of all relevant circumstances, a decision to reinstate Mr Gama was prudent and fair.

10. I accept that reasonable people may have disagreed with my conclusion at the time, but I am advised and submit that this is not the applicable legal test. When measured against the appropriate standard, I respectfully submit that my decision to support the settlement was lawful and appropriate.

11. I shall furnish the necessary context in this affidavit. I make these introductory submissions in order to summarise what I am advised are the key facts of which I am personally aware. I shall organise the remainder of my submissions in this affidavit under the following themes:

11.1. First, it is important to explain the manner in which Transnet's failure to furnish me with documents relevant to the Request has hampered my ability to depose to this affidavit. I am forced to depose to this affidavit to based on my recollection of past events. If I am furnished with the requested documentation, it will be necessary for me to supplement this affidavit and I will seek leave to do so.

11.2. Second, I shall summarise the relevant context in which the decision in the Request was made, and I shall explain why I submit that the context at the time of the decision was important when considering my support for the settlement.

11.3. Third, I shall turn to the allegations regarding the settlement agreement. I shall summarise the facts which arose after Mr Gama's dismissal, which were relevant to my decision to support Mr Gama's reinstatement. Those include the position of other employees within Transnet, as well as the systemic difficulties extant in Transnet at the time.

11.4. Fifth, I shall summarise what I am advised are the applicable legal requirements that pertain *inter alia* to the decision in relation to Mr Gama, and the exercise of my discretion as a director. On an application of those principles, I shall submit that my decision was not in any way unlawful, and also why I submit that it meets the requirements of my fiduciary duties as a director.

11.5. Sixth, I shall respond to each of the allegations in the Request. I shall also, to the extent possible, respond to relevant allegations contained in affidavits that serve before the Commission, with which I have been furnished.

12. I shall summarise my conclusions in the final section of this affidavit. In summary, I shall submit that, when the decision to conclude the settlement agreement is viewed in its proper context, I respectfully submit that I conducted myself in a lawful manner, and in accordance with my best business judgment at the time.

TRANSNET'S FAILURE TO FURNISH RELEVANT DOCUMENTS AND THE DIRECTIVE SOUGHT FROM THE COMMISSION IN CONSEQUENCE

13. In order to respond to the Request, it is obviously important that I be furnished with the documents that the Board and I considered at the relevant time. This is

important not only in order to refresh my memory about long-past events arising almost a decade ago, but also, I am advised, so that the issues that arise may be adequately ventilated. The proper ventilation of the issue furthers the mission of the Commission to seek the truth.

14. I have repeatedly sought the disclosure of relevant information from Transnet. However, to date, some of the crucial information requested from Transnet is yet to be provided. This despite the following repeated efforts of my attorneys:

14.1. On 14 August 2020, my attorneys wrote to MNS Attorneys seeking various documents that I submit are necessary for the purposes I have described above. I have attached a copy of this correspondence to this affidavit, marked "**NG1**".

14.2. On 19 August 2020, MNS Attorneys responded to my attorneys. A copy of this response is similarly attached hereto, marked ""**NG2**. For reasons unknown to me, the response made clear that Transnet was less than willing to assist.

14.3. The time provided to me by the Commission in order to depose to this affidavit continued to run. Given the urgency of the information required from Transnet, my attorneys directed a further letter to MNS Attorneys, on 23 August 2020. That letter is attached hereto marked "**NG3**". It reiterates the need for the requested documents.

14.4. MNS Attorneys responded to the latter letter on 28 and 31 August 2020. In each response, Transnet disclosed only some of the documents



requested, without furnishing what I am advised is an adequate reason as to why the other documents I requested were not provided.

14.5. My attorneys thus immediately responded to MNS Attorneys, on 31 August 2020. The correspondence is attached hereto marked "**NG4**", and it lists the documents that remained outstanding, at that point.

14.6. On 4 September 2020, I instructed my attorneys to direct a letter to the Commission, which (*a*) recorded the prejudice caused by Transnet's unexplained failure to furnish the necessary documents; and (*b*) sought a directive from the Commission, in order to ensure that Transnet's intransigence was brought to an end.

14.7. After receipt of my latter correspondence seeking *inter alia* a directive from this Commission, and on 5 September 2020 (and some 48 hours before this affidavit was due be filed at the time), MNS Attorneys sent a number of documents to my attorneys. The documents did <u>not</u> include the full set of documents requested. Many of the documents were in fact simply duplicates of the documents that had already been furnished.

14.8. I have been furnished with further documents since the Commission's extension of the time required to furnish this affidavit. However, even to date, I am yet to be provided with all of the documents I requested. Transnet has since furnished me with the following documents:

14.8.1. In-Committee minutes of the meeting of the Board of Directors held on 25 January 2011;

14.8.2. Board of Director meeting pack of meeting held on 25 January 2011;

14.8.3. Audio recording of the Corporate Governance and Nominations Committee meeting held on 3 February 2011;

14.8.4. In-Committee minutes of meeting No. 11/4 of the Board of Directors of Transnet held on 16 February 2011;

14.8.5. Meeting pack special Corporate Governance and Nominations Committee meeting held on 7 March 2011;

14.8.6. Audio recording of the Human Resources and Remuneration Committee ("REMCO") meeting on 11 April 2011;

14.8.7. Minutes of meeting of the Board of Directors held on 20 April 2020; and

14.8.8. Meeting pack of the Board of Directors meeting held on 20 April 2020.

15. The documents that remain outstanding are important, and are summarised in the attachment hereto marked "**NG5**". Included amongst the outstanding documents are among other things written legal opinions that were provided to the Board. These and other documents with which I have not been furnished would have been considered by me prior to my decision to support for the settlement agreement. They may be materially relevant to the decision that was ultimately taken.

16. In the circumstances, I am now placed in the invidious position of deposing to facts, on oath, without the long-requested documents that have still not been received.

17. I do not raise these issues in order to advance trifling or technical complaints. I do so because the non-disclosure is materially prejudicial to my ability fully to respond to serious allegations, and my rights to procedural fairness, particularly in circumstances where the Commission has expressed a *prima facie* view.

18. This affidavit must of necessity be regarded as incomplete. If the documentation request is furnished, it may be necessary for me to supplement this affidavit, and I reserve my right to do so. This is necessary to avoid the risk of being subjected to an adverse finding being made against me in circumstances where I am deprived of an opportunity meaningfully to respond.

THE CONTEXT

19. The Commission's invitation, I am advised, is concerned with my conduct in my capacity as a director of Transnet. The question asked by the Commission, in essence, is whether I lawfully discharged those company-law duties.

20. When the facts are viewed in context, I respectfully submit that I did so. I shall presently explain that context, in the paragraphs below. I shall thereafter summarise why I respectfully submit that I discharged my duties appropriately in all the circumstances arising at the time.

(a) <u>The extant culture of procurement deviations within Transnet at the time</u>

21. During my tenure on the Board of Transnet, I learned that deviations from procurement processes, within Transnet generally, were a regrettably frequent occurrence. Within the organization, there was apparently a *modus operandi* of asking for forgiveness as opposed to permission, in that deviations were sought to be condoned after-the-fact. This culture of condonation was an issue that the Board had identified as requiring urgent remediation. I return to the steps taken by the Board in order to address this problem, further below.

22. There are various scenarios in which a deviation may in fact be justified, in good faith and for the benefit of an organization. I accept that *ex post facto* condonation should scarcely be the norm.

23. The fact however remains that deviations are best avoided, and that a 'culture' of condonation poses a clear and obvious governance risk. That risk was manifest at Transnet. That this was so was presented to the Board by the Chairperson at the time, and instances in that same list have since been independently verified in the "**KPMG/Nkonki Report**" (which is attached hereto, marked "**NG6**"). The Board commissioned and procured the Report after the saga in relation to Mr Gama, in its efforts to address these issues. Among other things, the KPMG/Nkonki Report has independently confirmed the following:

    23.1. There was a review of condonations at Transnet that occurred between 2008 and 2011;

    23.2. Among other things, a "*list*" of condonations granted by Transnet Capital Projects is considered, and it is noted that "*no instances of disciplinary action taken against any of the staff members for condoned irregularities*" were evident;

23.3. KPMG/Nkonki's investigations found various instances of factually incorrect recordals of condonation, as well as inconsistencies in the manner in which applications for condonations were made and processed;

23.4. KPMG/Nkonki concluded that "*the practice on condonation at Transnet in general is more in line with the dictionary definition of the verb 'condone'*", in that "*irregularities on the part of personnel are treated as 'forgivable'*", or else that they are entirely "*disregarded without protest or censure*"; and

23.5. The disciplinary process was not consistently applied to all transgressions within Transnet. Rather, having regard to various matters which are listed at paragraph 1.3.3 of the KPMG/Nkonki Report, a process of condonation was consistently applied. Similarly consistent is that no disciplinary action was taken against offenders:

> "*Accordingly, we submit that with regard to the Gama matter and a review of similar fact matters, the disciplinary action instituted for the committed irregularities appear rather to be the exception rather than the rule. We further note that the disciplinary process is not consistently applied to all transgressions but rather that a process of condonation is consistently applied with no disciplinary action being taken against offenders. These observations are in line with Gama's view that "he (Gama) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges*"".[2]

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2 Page 22 of the KPMG/Nkonki Report.

(My emphasis).

24. One further relevant issue considered in the KPMG/Nkonki Report was the inconsistency of Transnet's approach in relation to disciplinary proceedings it instituted against Mr Gama which led to his dismissal as opposed to the approach taken in cases involving other members and employees within the organisation. The KPMG/Nkonki Report concluded that the approach followed with respect to Mr Gama was inconsistent with Transnet's general approach. There are three examples of similarly placed executives which bear mention:

24.1. The first is the example of Ms Moira Moses ("**Ms Moses**"), the former Chief Executive at Transnet Capital Projects. In her capacity as Chief Executive:

24.1.1. Ms Moses approved additional work on a contract with HMG Joint Venture ("**HMG JV**") that far exceeded her lawful delegated authority.

24.1.2. "*By entering into this contract she eliminated the process of tendering and complying with other procurement procedures and consequentially eliminated fair competition amongst service providers*".[3]

24.1.3. Ms Moses furthermore signed the contract for additional work before an offer from HMG JV had been made.

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3 Page 268 of the KPMG/Nkonki Report.

24.1.4. She also authorised the implementation of a bonus scheme for non-Transnet employees retrospectively, to the tune of "*R185.4 m (per an agreement in 2008, payment commencing January 2009) ... without taking cognisance of any funding challenges*".[4]

24.1.5. Ms Moses conduct was condoned. She subsequently left the organisation with a clean record of conduct.

24.2. The second example that bears mentioning in the context of the decisions relating to Mr Gama is that of Mr Louis van Niekerk ("**Mr van Niekerk**"), the former Group Chief Operations Officer at Transnet, as a whole:

24.2.1. Mr van Niekerk agreed to and approved a "*R960 million contract of VAE for the acquisition rails, maintenance thereof, etc*".

24.2.2. In law, Mr van Niekerk was only "*authorised to approve amounts up to but not exceeding R200 million*". Mr van Niekerk accordingly exceeded his delegated authority by some R760 million rand.

24.2.3. Mr van Niekerk's conduct was condoned. He subsequently left the organisation, with a clean record of conduct.

24.3. The third example is Mr Chris Wells, ("**Mr Wells**"), at the time Transnet's CFO. Mr Wells was confirmed to have engaged in similar conduct, and

4 Page 219 of the KPMG/Nkonki Report.

also in regard to the VAE Contract. Mr Wells, among others, had approved increases to the contract value on the VAE contract, in the tens of millions of rands, and he had done without the requisite authority.[5] The conduct of Mr Wells and Mr van Niekerk could not be pursued further by KPMG/Nkonki, given that they had, by then, left Transnet's employ.[6]

25. I shall return to what I considered to be the import of similar examples in relation to my support of the decision regarding Mr Gama. I was made aware of the cases of the employees above at the time of my decision.

26. The outcomes of these internal investigations were discussed in a meeting of the Board, on 25 January 2011. I attach and refer to relevant content of the minute and the meeting further below.

(b) <u>Mr Gama's history of high achievement within Transnet</u>

27. I am of course aware of the various media reports over the years documenting Mr Gama's 'fall from grace'. I indicated in the introduction to this affidavit that I readily accept that Mr Gama was guilty of misconduct.

28. However Mr Gama might today be viewed, the fact is, before his misconduct came to light, Mr Gama was known within Transnet as one of its high-performing and capable executives:

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5 Page 76 of the KPMG/Nkonki Report.

6 Page 76 of the KPMG/Nkonki Report.

28.1. He was successfully managing Transnet Freight Rail ("**TFR**"), which is Transnet's largest and most important business unit, from a revenue perspective;

28.2. TFR is the highest contributor to Transnet's revenue;

28.3. He consistently met and exceeded his performance targets, and frequently earned multiple performance incentives; and

28.4. He was perceived to have the trust of other employees who worked within the organization.

29. I can in fact recall that even Ms Maria Ramos ("**Ms Ramos**"), the then GCE of Transnet, extolled the high quality of Mr Gama's performance to the Board, and that she did so on more than one occasion. I had no reason to disagree with this assessment. At the time, I had no reason to think that high praise for Mr Gama was misdirected.

30. The evidence of Mr Gama's past achievement appeared to me to vindicate the view expressed by Ms Ramos. Mr Gama built an impressive reputation within the organization. So much so that, on the basis of the facts at the time, until the point that he was charged, Mr Gama was doing well in the contest to choose Ms Ramos's replacement. At the time, this came as no surprise to me.

(c) Mr Gama's disciplinary process

31. Mr Gama's candidacy for the GCE race was well-received insofar as it was concerned with the objective metrics necessary for the job. He was ranked as

the top internal candidate in the GCE race. He was, furthermore, among the top five overall candidates who were shortlisted.

32. That changed in or around late August, when the Board was furnished with evidence suggesting that Mr Gama had been involved in procurement irregularities. On that basis, the Board authorised that Mr Gama be charged with misconduct, on or about 2 September 2009. Pursuant to these charges being laid against Mr Gama, and in accordance with protocol at Transnet, Mr Gama was placed on suspension from his position, pending the determination of these charges.

33. My recollection is that a majority of the Board had no issue whatsoever with Mr Gama being charged. Indeed, on the basis of the information available to me, I have confirmed that I supported the majority decision.

34. The decision was not however unanimous. Those members of the Board who disagreed with the decision expressed the view that Mr Gama was being singled out, and that it was important that Transnet ought to be consistent in its approach to all of its employees. The complaint was that, by charging Mr Gama alone, Transnet's approach was inconsistent, and that charges should be laid against further, similarly-positioned employees. I recall that these dissenting views were championed, in the main, by Mr Moyo and Ms Ntshingila.

35. I was not unsympathetic to the argument raised against disciplining Mr Gama, at the level of principle. If the argument was substantiated, I considered that it would indeed raise broader concerns than that of Mr Gama's disciplinary proceedings in isolation. In ordinary circumstances it would require that disciplinary

proceedings be instituted against all offenders equally, lest Transnet be at risk of unlawfully imposing selective discipline.

36. My difficulty at the time was that I did not understand there to be evidence before us as a Board that the allegations of selective discipline were indeed substantiated. Against that consideration, we as a Board had been presented with information that Mr Gama was guilty of misconduct, which proved to be the case. To my mind, we as a Board were duty-bound to act on any reliable information we had before us, as and when that information arose. I did not think we could reasonably and prudently withhold charges against Mr Gama on the basis that further information may or may not arise in due course.

37. Mr Gama was dismissed at or around the end of June 2010. I supported the decision to dismiss Mr Gama, and I believed he was guilty of misconduct. My view changed in the light of further information, as I explain below.

THE SETTLEMENT AGREEMENT

(a) Prelude to the settlement agreement

38. Mr Gama did not capitulate upon receiving the sanction of dismissal. Instead, Mr Gama contested the decision, by referring a dispute to the Transnet Bargaining Council, in which he persisted in his contention that the sanction given was unfair. Although Mr Gama accepted that he was indeed guilty of the

charges laid against him, his further complaints in the Bargaining Council were concerned with the process followed that led to that outcome.

39. I understand that the arbitration before the Bargaining Council had initially been scheduled to take place in October 2010. It was later postponed, by agreement between the parties. I understand that the arbitration was then re-scheduled to occur during the week of 24 January 2011.

40. Mr Gama raised a complaint of selective discipline, and the Board had since been furnished with information and evidence that supported Mr Gama's assertion as correct. This was a different concern to whether or not Mr Gama was guilty of the misconduct, which he was. It instead raised broader concerns regarding the trite principle of employment law, that an employer is required at all times to be "*consistent*" in the application of disciplinary action, and concomitantly that an employer should avoid inconsistency. In labour-law parlance, I am advised that the principle is referred to as the 'parity principle'. The relevant principles in this regard are summarised as follows:

40.1. The principle expresses that it would be unfair to measure the seriousness of the acts of misconduct by a different standard than the standard that was applied to others who have committed the same or comparable acts of misconduct.

40.2. It entails a fact-specific enquiry,[7] and does not necessarily mean that the same sanction must be applied in every instance of the same act of misconduct. It does however require at a minimum that the same

[7] *National Union of Metalworkers of SA & Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A)

procedure must be applied in addressing similar instances of the same act of misconduct.

40.3. The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, and a value judgment must be exercised, and this must be informed by the relevant circumstances

41. I mention these principles because they are directly relevant to what informed the decision to reinstate Mr Gama, pursuant to the settlement agreement. Indeed, the Chairperson furnished the Board with a list of 30 similar transgressions at the time that I decided to support the decision. Although the KPMG/Nkonki Report was not before us at the time the decision was made, it is illuminating from a factual perspective, because it is a direct result of an investigation by KPMG/Nkonki which was authorised by the Board. My decision to support the conclusion of the settlement agreement was accordingly informed by information which the KPMG/Nkonki Report subsequently confirmed. The relevant conclusions reached in the KPMG/Nkonki Report included the following:

41.1. Ms Moses, Mr van Niekerk and Mr Wells, all executives at the same level or higher in relation to Mr Gama, (namely, the Transnet Capital Projects' Chief Executive, Transnet's Executive Chief Operations Officer and Transnet's CFO at the that time) had exceeded their respective delegated authorities by amounts in the tens if not hundreds of millions, and had not received censure for their conduct. Mr Gama by comparison had been fired for exceeding his authority by no more than R10 million – which is clearly a far lesser amount.

41.2. The practice in general at Transnet is more in line with "*condoning*" in that irregularities on the part of personnel are treated as "*forgivable*" or "*disregarded without protest or censure*";

41.3. With regard to the Gama matter and a review of similar fact matters, the disciplinary action instituted for the committed irregularities appeared to be the exception rather than the rule.

41.4. The disciplinary process was not consistently applied to all transgressions but rather a process of condonation was consistently applied with no disciplinary action being taken against offenders. These observations were in line with Gama's view that "*he (Gama) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges*".

42. It was against this factual and legal backdrop, to the best of my recollection, that the settlement agreement arose for consideration.

(b) <u>The available evidence of the Board's discussions of the settlement agreement</u>

43. As an attorney, I was well aware that the settlement of disputes is encouraged. I am advised that the law, and public policy in particular encourage the amicable settlement of disputes.[8] By corollary, I am advised that parties are discouraged from resorting to adversarial litigation, where this is avoidable. I am advised that

[8] See *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677B-D; and *Bradford & Bingley plc v Rashid* [2006] 4 All ER 705 at para 38.

this was confirmed *inter alia* in the judgment of the Constitutional Court in *Parsons*.[9]

44. The issue of Mr Gama's reinstatement was first raised with the Board, to the best of my recollection, at a Board meeting on 25 January 2011. The relevant Board Minute is attached hereto marked "**NG7**". At that meeting, the Chairman of the Board, Mr Mkhwanazi, indicated that –

44.1. he had spoken with Mr Gama about possible settlement agreement on 22 January 2011;

44.2. the matter of a potential settlement would be further deliberated at the Corporate Governance and Nominations Committee meeting;

44.3. subsequent to the latter deliberation, the issue would be presented to the Board on 16 February 2011.

44.4. when Ms Mnyaka, another Board member, raised the issue of "*fairness in treatment of Executive*" vis-à-vis Mr Gama, she indicated that fairness could only be determined by investigating what sanctions were imposed on other executives who committed offences similar to Mr Gama's offences;

44.5. in response, the Chairman stated that he was occupied with 30 cases with similar allegations as those levelled against Mr Gama by Transnet, and he furnished the Board with a list; and

9 *Eke v Parsons* 2016 (3) SA 37 (CC).

44.6. the Chairman further stated that there was evidence that there is a culture of condonation of exceeding delegated authority within Transnet.

45. It was evident to the Board, in light of the above, that the treatment of Mr Gama had the potential to cause problems for Transnet, going forward. It was thus decided that the matter of settlement should to be deliberated by the Corporate Governance and Nominations Committee ("**CGN Committee**"), and then recommended to the Board for approval on 16 February 2011.

46. A meeting of the CGN Committee was then held on 3 February 2011. I have been furnished with the relevant minutes of that meeting. I do not however attach the minutes of that meeting to this affidavit, nor speak to the discussions held there in any detail, because I did not sit on the CGN Committee, and therefore lack the necessary direct personal knowledge.

47. I speak only to the relevant outcomes of the meeting, which were that Transnet was in ongoing negotiations with Mr Gama, but had reached provisional agreement with him on certain issues, and was aware of his position on certain outstanding issues, including that Mr Gama wanted to be reinstated to his position, prior to his entry into the race for GCE.

48. The Board met again on 16 February 2011 (the relevant minute is attached hereto marked "**NG8**"), and I can recall *inter alia* being present at that meeting. There, it was resolved by majority that reinstatement would be fair and prudent in the circumstances, given *inter alia* that he had been selectively disciplined by

the company. In relation to the minute and to the meeting itself, I am advised that the following facts bear emphasis:

48.1. In the minute, the Chairman took the Board through a draft settlement agreement. Transnet has not furnished me with the contents of that draft settlement agreement, and I am forced to reserve my rights in that regard, as previously stated.

48.2. The Chairman furthermore informed the Board that there was a list of contraventions that were comparable to the case of Mr Gama, and it seemed to me that the instances were so numerous that mass discipline could have de-stabilised the organization, or at a minimum posed a serious set-back to the best interests of Transnet as a whole.

48.3. The Board resolved that it supported the acting GCE in his endeavours to settle Mr Gama's matter. It was on this basis, as I recall, that the acting GCE was given a mandate to finalise the settlement agreement's terms. This, in my view at the time, was consistent with the reports I had referred to concluding that Mr Gama was selectively disciplined. Given these conclusions, Mr Gama's dismissal seemed to me to be unfair, and there was at least a risk that a court would so find.

48.4. After concluding that Mr Gama's reinstatement would be fair and prudent given *inter alia* that he had been selectively disciplined by the company, the Chairman indicated that the necessary settlement agreement would be finalised in March 2011. He further informed the Board that there were human resources issues that would be referred to the Group Remuneration Committee ("**REMCO**"), for its consideration.

49. The minute reflects that there were dissenters from the majority decision of the Board. I can confirm that I was not one of the dissenters, and that I supported the decision of the majority of the Board. I acknowledge that the Commission takes issue with this decision in the Request, but I can confirm that I did so in the following circumstances:

    49.1. Having considered Mr Todd's written advice, which was before the Board.

    49.2. In the light of all the information available to the Board at the time, which as I have said went beyond Mr Gama's case in isolation.

    49.3. In my best judgement of that information, and of Transnet's bests interests, in the light of that information.

    49.4. Having considered the fact that Mr Gama would be found guilty of misconduct, albeit not with the sanction of dismissal.

50. Taking into account the various documents and legal advice that served before the Board. I have consistently requested copies of these documents, to no avail. I cannot now recall what the advice and information at the time contained, but I can confirm that it would at least have been taken into account. possessed of the same facts might have taken a different position in relation to the decision. That, I am advised, is not the test for the breach of one's fiduciary duties as a director. I shall expand on what I am advised in relation to the test to be applied to my conduct later in this affidavit. What I wish to emphasise, at this stage, is the main reason my view changed in relation to the reinstatement of Mr Gama, given my prior support for charging him. Although reasonable people may have, and did, dissent from the decision, my support for it was based *inter alia* on new

information about the existence of analogous transgressions, which I believed and relied on, in good faith. That information, as I have said, has since been confirmed by independent auditors, in the KPMG/Nkonki Report.

51. The matter was tied up in the REMCO meeting referred to at the meeting of 16 February 2011, which was ultimately held on 11 April 2011. The memorandum which was considered at the said meeting is attached hereto marked "**NG9**". As indicated in the minute, REMCO considered the Long Term Incentive payment for Mr Gama. Consistently with the principles of reinstatement, it concluded that "*[a]ny employment benefits that were due to him for the intervening period of 30th June 2010 to 23 February 2011 in terms of his employment contract shall be deemed to be fully restored*".

52. The proposal was subsequently approved, and a Press Statement on the issue was issued by the Chairman, on 23 February 2011("**Press Statement**"). I have attached the Press Statement hereto marked "**NG10**". It provides in relevant part as follows:

> "*We would like to reiterate that Transnet is satisfied with the finding of the disciplinary forum but after careful consideration, the Board took the view that the sanction meted out, taking all factors into account, was harsh. Therefore, we resolved that a 6 months final written warning was a fair and just sanction, given that he was not found guilty of corruption and/or dishonesty. The Board is of the view that such a decision is in the best interest of the company.*
>
> *In addition, the Board considered the reputational impact of the ongoing uncertainty surrounding this litigation, which has dragged for more than a year. Mr Gama was appealing against the dismissal. The settlement, the Board believes, brings finality to this matter, and would bring to an end harmful publicity surrounding it, especially now that a new GCE has been appointed.*

As a result of this decision, it will be possible for Mr. Molefe to reassess all acting positions at executive level within the company. The various acting arrangements were due to the litigation with Mr. Gama. Also, we believe, that this decision will assist in focusing all management efforts on making Transnet, especially TFR, a world class operation.

Finally, the Board mandated me to handle the Gama matter to its conclusion. This includes facilitating the cultivation of cordial relations between Mr. Gama, his colleagues in the executive committee and the rest of Transnet's employees".

53. I can confirm that the Press Statement is an accurate reflection of my understanding of the processes followed by the company. The Board then proceeded to draw a line in the sand after issue of Mr Gama's reinstatement had been considered and, in my judgement, addressed.

THE REMEDIAL MEASURES TAKEN BY THE BOARD

54. The KPMG/Nkonki Report confirms that, after the condonation of the conduct of Ms Moses and Mr van Niekerk, Mr Gama was the last similarly-positioned executive who had committed similar acts. Their conduct and transgressions, in my judgement and that of the Board, were symptoms of what was a more serious problem. After the decision to reinstate Mr Gama, the Board drew a line in the sand, and it resolved to address and reverse the culture of condonation that had taken root.

55. We did so as a Board within the statutory limits of our powers. We considered the optimal course of action would be to address the systemic culture of condonation in a structural manner, to provide for clear requirements and furthermore, where non-compliance was concerned, to impose enhanced

obligations of enforcement. The measures taken by the Board in this regard included the following:

55.1. The Board at its Special Board meeting instructed Mr Mkhwanazi who was the Chairman and AGCE at the time, to ensure that employees at Transnet were explicitly informed of the new policies in relation to condonation, and that the previously existing culture of condonation would no longer be tolerated.

55.2. The Board saw to it that terms of reference were implemented for the establishment of a Board Acquisition Disposal Committee. This measure was implemented on 31 August 2011. I have attached those terms of reference hereto, marked "**NG11**".

55.3. The Board saw to it that amendments were made to Transnet's Procurement Policy Framework, a copy of which is attached hereto, marked "**NG12**". These amendments were made during August 2012, and included –

55.3.1. the clarification of the rules in relation to condonation in the course of procurement processes; and

55.3.2. the establishment of checks and balances in respect of the delegated authority of the GCE.

55.4. The Board saw to it that the previously existing norms in relation to these matters were tightened into binding legal obligations, such that violation of those obligations would have the potential that any such procurement

decisions were invalidated, and such that it should trigger disciplinary action against any person found to be in contravention of these rules.

56. These measures were all taken in the best interests of Transnet, with the goal of reversing the culture of condonation and ensuring better corporate governance, going forward. They were taken in the light *inter alia* of the independent advice which was sought by the Board, and furnished to Transnet by KPMG and Nkonki.

MY DECISION WAS NOT UNLAWFUL

57. In the light of facts I have addressed above, I respectfully submit that my support of the decision to conclude the settlement agreement was not unlawful, or in breach of my statutory duties. I respectfully submit that –

57.1. it was consistent with the parity principle in labour law, which I have summarised further above;

57.2. it was not inconsistent with the duties imposed upon directors by applicable public finance legislation; and

57.3. it was consistent with the fiduciary duties of directors under common law and the Companies Act 71 of 2008 ("**the Companies Act**"), *inter alia* in that, even if reasonable people might have disagreed with the decision, on the facts available at the time, the decision –

57.3.1. accords with my duty to act in good faith and in the best interests of Transnet;

57.3.2. accords with my duty as a director to act for a proper purpose at all material times; and

57.3.3. did not fall outside of the proper exercise of a director's 'business judgment', as that term is legally defined and understood.

58. I have already set out what I understand to be the applicable principles of law arising under the parity principle, and I have explained why I considered that, regardless of Mr Gama's guilt on the charges, I considered, in my judgement, that a selective discipline issue has been sufficiently substantiated to warrant consideration.

59. I further respectfully submit that in supporting the settlement of the dispute, I did not breach my fiduciary duties as a director.

The decision accorded with the applicable duties of directors under company law

60. In terms of section 66(1) of the Companies Act, the business and affairs of a company must be managed by or under the direction of its board of directors, which has the authority to exercise all of the powers and perform any of the functions of the company. The primary way in which a board discharges this responsibility, and especially in circumstances where the Board of Transnet was vested with powers of a non-executive nature, is through the CEO of the company responsible for the implementation of the board's policies and directions.

61. As a general principle, a director such as myself owed a fiduciary duty to Transnet as a company. My paramount duty was to act in good faith and therefore for Transnet's overall benefit.[10] I am advised that the basic goal of directors is the company's success and collective best interest of the shareholders, without other ulterior motives. I am further advised that the directors must consider both the short-term and long-term consequences of their actions for the company.

62. The duties of the directors of a company include the duty of acting in the best interests of the company, the duty to avoid a conflict of interest and the duty of care, skill and diligence when acting on behalf of the company.

63. These duties have now been codified under sections 75 to 77 of the Companies Act. I am advised that there are 3 such duties that are relevant to the issue in respect of which the Commission has invited submissions to be made. I address them separately below.

I discharged the duty to act in good faith and in the best interests of the company

64. The duty to act in the best interests of the company is the main fiduciary duty of a director under the common law as well as the Companies Act. Section 76(2)(b)

10 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (1) All SA 150 (SCA) at para 22.

provides for the duty of disclosure of any material information that a person obtains as a director.

65. According to the Companies Act, a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director in the best interests of the company.[11] This fiduciary duty, I am advised, is owed to the company alone, and therefore only the company can enforce the duties against the director who has breached them.[12]

66. My role in the support of the decision to reinstate Mr Gama, in my respectful submission, accorded with my duty to act in good faith and in the best interests of the company. I respectfully submit that this is evident from my submissions above, namely:

66.1. I supported the decision to charge Mr Gama initially. I did so on the basis of the information which served before me at that time, including that the outcome of Transnet's investigations suggested that the misconduct was established. I considered the dissenting views which were based on broader considerations, but decided to support charging Mr Gama nonetheless, given that my judgement of those claims is that there was insufficient information to bear consideration at the time.

66.2. I supported the decision to reinstate Mr Gama later on. I did so on the basis of the new information which had come to light, which included the

11 Section 76(3) of the Companies Act

12 Section 165 of the Companies Act. Also see *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (1) All SA 150 (SCA); and *Prudential Assurance Co Ltd v Newman Industries Ltd* (1982) CH 204.

fact that Mr Gama had indeed been selectively disciplined. The fact that these concerns were valid is confirmed in the KPMG/Nkonki Report.

66.3. I also considered it to be in the best interests of Transnet to draw a line in the sand, and I submit the Board did so to the best of its ability, after the inconsistency in discipline was addressed. The Board imposed structural reforms to reverse the culture of condonation, which was also in Transnet's best interests.

I discharged the duty to act for a proper purpose

67. The duty to act for a proper purpose is provided for in section 76(3) of the Companies Act.[13] This duty, I am advised, derives from the common law and continues to apply under the regime imposed by the Companies Act. Although I am advised that 'proper purpose' is not defined in terms of the Companies Act, the common law requires that directors must exercise their powers for the objective purpose for which the power was given to them and not for other ulterior purposes or motive.[14]

68. I respectfully submit that my discharge of my duty to act for a proper purpose has been clearly established. At all times, I considered the issue of the settlement agreement in an open manner, and at no time did I harbour any ulterior purpose. There is no evidence with which I have been furnished which suggests otherwise. I had absolutely nothing to gain personally from supporting the settlement.

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13 Cassim *et al* at 487.

14 Cassim *et al* at 487.

69. The purpose for which I exercised the powers, as I have explained, was to ensure fairness and parity of discipline, whilst simultaneously seeking to address systemic maladies within the organization broadly, which are both considerations that are in Transnet's best interests.

The duty of care skill and diligence & the 'business judgment' rule

70. I am advised that the duty of care, skill and diligence is provided for in sections 76(3)(c)(i) and (ii) of the Companies Act. I am advised that:

70.1. The Companies Act lays down a subjective test in determining the liability of the director as far as her general knowledge is concerned. Even if an objective test were applied, I respectfully submit that my conduct cleared the bar. As I have explained, from my perspective, the interests of fairness and parity of discipline outweighed considerations of whether Mr Gama was indeed guilty of the misconduct, which I believed he was. I supported the charging of Mr Gama on the basis of information I considered reliable, and within the context of my knowledge at the time. The same applies to the position I took subsequently to reinstate Mr Gama.

70.2. The duty of care and diligence is a flexible one, and that this is so for good and practical reasons. I am advised that it is designed to be interpreted contextually, and that in each case it will be given a commercially sensible meaning, which permits directors to exercise judgment in the affairs of the company without straitjacketing their discretion. This consideration is referred to as the 'business judgment rule', and I am advised that this rule is the standard against which a director's decision will be assessed.

71. I am advised that the rationale for the rule is that it is designed to protect the decisions of honest directors from inevitable commercial risks that are inherent to the function of directors, namely the risk of making unsuccessful decisions. This facilitates the legitimate objective of optimal business growth, which requires that certain risks be taken.

72. The rule, I am advised, states that a director shall be deemed to have fulfilled certain of her duties if she complied with a number of requirements set out in section 76(4) of the Companies Act. In accordance with recent case law, I am advised that, a director will have acted in accordance with the business judgment rule in the event that she –

72.1. took reasonably diligent steps to become informed about the matter in question;

72.2. had no material personal financial interest in that matter, or if she did, followed the requisite disclosure and recusal provisions contained in section 75 of the Companies Act; and

72.3. had a rational basis for believing, and did believe, the decision to be in the best interests of the company, then

73. In these circumstances, I am advised that a director in question will have acted unimpeachably,[15] even in the event that, with the benefit of hindsight, a decision

15 See *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC).

proves to have been an error in judgment. I submit that my conduct in relation to the Request meets this requirement for reasons above and below.

74. The 'reliance rule', in sections 76(4)(b) and (5) of the Companies Act, complements the 'business judgment rule' and provides that, in exercising her functions as such, a director is entitled to rely on others (such as employees, committees or advisors of the company) reporting to her, as well as opinions and information provided to her. That is what I did in the context of the present issue. This is clear because –

74.1. even the limited documents furnished by Transnet to date demonstrate that I considered all relevant issues in order to ensure that I was fully apprised of all relevant information;

74.2. there can be no suggestion I had a personal financial (or other improper) interest in the matter, and no such suggestion has been made; and

74.3. given the clear and independently verified selective application of discipline at Transnet, I submit that I had a rational basis for believing, and did believe, the decision to conclude the settlement agreement to be in the best interests of the company.

INDIVIDUAL RESPONSES

75. I have now set out what I am advised and submit are the applicable legal principles, in context. I now turn to deal with –

75.1. the relevant contents of the Request;

75.2. the relevant contents of the affidavit of Ms Mohlabi, which was given to me by the Commission, and which I have read; and

75.3. the relevant contents of the affidavit of Mr Todd.

76. Insofar as any specific allegation is not dealt with, it is to be taken as denied insofar as it is inconsistent with my submissions in this affidavit.

(a) Responses to the Request

77. **Ad paragraphs 1 to 2**

77.1. Of relevance in these paragraphs is the allegation that I was "*a member of the Transnet Board of Directors at the time when a settlement agreement was concluded*".

77.2. As is evident from my submissions earlier in this affidavit, I admit the contents of these paragraphs.

78. **Ad paragraph 3**

I admit the contents of this paragraph. However, I wish to point out that my decision to support the settlement of Mr Gama did not relate to issue that the Commission is investigating, in particular that he was reinstated in order to facilitate wrongdoing, such as corruption or acts of state capture.

79. **Ad paragraphs 4 to 5**

I admit the contents of these paragraphs.

80. **Ad paragraph 6**

80.1. I note that it "*prima facie seems to the Chairperson of the Commission that the settlement agreement Transnet concluded with Mr Gama may not have been in the interests of Transnet and may have been one sided in favour of Mr Gama*":

80.2. However, I respectfully deny that the agreement was not in Transnet's interests, when assessed against the information that was available at the time. I refer to my submissions above in this regard.

80.3. I note the Commission's suggestion that it believes I "*may have acted in breach of my fiduciary duties*". I respectfully deny that this was the case, for reasons I have traversed comprehensively above.

80.4. Given *inter alia* the independently verified facts that Ms Moses and Mr van Niekerk had gone unpunished for similar transgressions, I submit that the decision to conclude the settlement agreement was consistent with the parity principle under labour law. I further submit that it constituted the proper discharge of my fiduciary and statutory duties.

80.5. I do not understand there to be any suggestion that the individual terms of the settlement are in issue. It is the very fact of settlement that I am required to address. As is self evident, settlement is always a process of give and take.

81. **Ad paragraphs 6(a) to 6(c)**

81.1. These paragraphs are concerned with the issues of (*a*) the reinstatement of Mr Gama; (*b*) the retrospectivity of Mr Gama's reinstatement; and (*c*) the fact that Mr Gama's sanction was changed to a final written warning.

81.2. I understand that the paragraphs may suggest that there was no basis for any of these decisions. I respectfully deny this suggestion, for reasons given above.

81.3. In light of the fact that Mr Gama was guilty of acts which were known to have been committed by other employees under analogous circumstances (i.e. the quantum, seriousness, facts and the respective positions of seniority of the employees were similar to Mr Gama), and given that there was reliable information before me that Mr Gama had been targeted for selective discipline, I respectfully submit that there was indeed reason to reinstate him.

81.4. I further submit that my support for the decision constituted the proper discharge of my fiduciary duties.

82. **Ad paragraphs 6(d) to 6(f)**

82.1. These paragraphs are concerned with the issues of the contents of the settlement agreement as it concerned the issue of legal costs. I do not recall whether this was finally resolved at Board level, and I have not been furnished with information to suggest otherwise.

82.2. As pointed out above, settlement is always about give and take. I was not involved in the negotiations at all. I deferred to those who were, leaving this detail to them, once I had accepted the principled reasons for entering into the settlement.

83. **Ad paragraphs 7 and 8**

83.1. I have set out my explanation of why I considered the settlement agreement to be the appropriate course in all the circumstances. Whether or not my business judgement proved to be correct, in hindsight, I respectfully submit that it was lawfully exercised, taking account of all relevant circumstances.

83.2. I can confirm that no member of Cabinet or any person at all exercised any pressure on me regarding the settlement agreement, and I confirm that my decision to conclude the settlement agreement was not informed by the conduct of any member of Cabinet.

(b) <u>Responses to the affidavit of Ms Makwena Pertunia Mohlabi</u>

84. Ms Mohlabi has deposed to an affidavit which I have read. Ms Mohlabi contends that she is currently the Group Company Secretary of Transnet. I admit this allegation.

85. Ms Mohlabi contends that she has been Group Company Secretary since 1 May 2020. I do not understand her to suggest that she has personal knowledge of the relevant events prior to her appointment.

86. Ms Mohlabi's evidence before the Commission is limited to referring the Commission to relevant documents that she has on file. I have referred *inter alia* to the same documents in this affidavit. I admit the contents of those documents to the extent that they are not inconsistent with my prior allegations.

87. I furthermore admit that the documents referred to by Ms Mohlabi are relevant documents for the Commission to consider. I point out, however, that Ms Mohlabi does not refer to the entirety of the documents that are relevant. In this affidavit, I have referred to certain documents that are additional to those referenced by Ms Mohlabi.

88. I have also sought the disclosure of further documents from Transnet which I believe to be relevant. To date, those documents have not been forthcoming. I have attached the relevant correspondence in this regard.

(c) **Responses to the affidavit of Mr Christopher Francis Neale Todd**

89. I understand that the affidavit of Mr Christopher Todd ("**Mr Todd**") was deposed to at the request of the Commission, and that the affidavit was requested from Mr Todd on account of his involvement in issues concerning Mr Gama, as a partner of the firm that Transnet instructed in that matter.

90. Mr Todd alleges that he "*was at all material times the attorney responsible for discharging the firm's mandate*" in regard to Mr Gama's matter. I admit that allegation. However, it appears to me that Mr Todd's personal knowledge of Transnet's affairs may have been limited to the issues of Mr Gama's case alone,

as opposed to the broader considerations, confirmed in the KPMG/Nkonki report, which led to my support for reinstatement.

91. I note that Mr Todd makes no allegation in his affidavit against me, specifically. He does however draw inferences in his affidavit, to which I am advised that it is prudent for me to respond. I do so below.

92. **Ad paragraphs 1 to 8**

92.1. I admit the contents of these paragraphs.

92.2. I point out that Mr Todd does not attest to any personal knowledge outside of the issues pertaining to Mr Gama, specifically.

93. **Ad paragraph 9 to 10**

93.1. I have no personal knowledge of whether the Commission has been furnished with copies of the two findings of the chairperson in Mr Gama's disciplinary proceedings.

93.2. Save as aforesaid, I admit the contents of these paragraphs.

94. **Ad paragraph 11**

94.1. I admit the contents of these paragraphs.

94.2. I reiterate that I understood Mr Gama to be guilty, as he then admitted, and that the decision to reinstate him was not concerned with his innocence or guilt of the charges.

95. **Ad paragraphs 12 to 18**

I admit the contents of these paragraphs.

96. **Ad paragraphs 19 to 20**

96.1. I have no personal knowledge of whether Mr Todd received a telephone call from Mr Ndiphiwe Silinga ("**Mr Silinga**").

96.2. I can however confirm that Mr Silinga was a Transnet internal legal advisor at the relevant time.

96.3. Save as aforesaid, the contents of these paragraphs are admitted.

97. **Ad paragraphs 21 to 25**

97.1. I admit that Bowmans prepared a report to Transnet, and that Transnet was taking legal advice from Deneys Reitz, in addition, at the time referred to in these paragraphs.

97.2. Deneys Reitz's advice has not been given to me, despite repeated requests from my instructing attorney.

97.3. I can however confirm that the report served before the Board at the time that it made its decision to reinstate Mr Gama, and furthermore that I considered the report. I have traversed the reasons I did so above.

97.4. Save as aforesaid, I have no knowledge of the contents of these paragraphs, which are concerned with Mr Silinga and Mr Mkhwanazi.

98. **Ad paragraph 29**

98.1. I admit that the agreement appears to have been signed by Mr Mkhwanazi himself. I understood Mr Mkhwanazi to be authorised to do so, and as I

have said, I supported the decision on reinstatement for reasons that were concerned with broader considerations than Mr Gama's guilt or innocence.

98.2. Save as aforesaid, I have no personal knowledge of the allegations in this paragraph.

99. **Ad paragraphs 30 to 30e.**

99.1. I admit that Transnet changed course in deciding to conclude the settlement agreement. I deny that there was anything untoward in doing so, to the extent that this is suggested.

99.2. I deny the contents of these paragraphs to the extent inconsistent with my narrative above.

99.3. Save as aforesaid, the contents of these paragraphs are admitted.

100. **Ad paragraph 31**

100.1. I can confirm that the Board considered legal advice beyond solely the report furnished to it by Bowmans. The further legal advice that was furnished in written form has not been disclosed to me, despite repeated requests.

100.2. In addition to considering the Bowmans report and the further legal advice, I can confirm that I relied further upon my own knowledge and expertise, as a practicing attorney. In all the circumstances I have described above, it seemed to me to be prudent and fair to reinstate Mr Gama, notwithstanding his guilt on the charges.

100.3. The contents of this paragraph are thus denied, to the extent inconsistent with the facts I have set out above.

101. **Ad paragraph 32**

101.1. I deny Mr Todd's assumption that the contents of the Bowmans report "*were completely ignored by those who decided to conclude the settlement agreement*". I have explained further above that my support for the decision bore that advice in mind.

101.2. Due to the fact that the further written advice from Deneys Reitz has not been provided to me, I cannot comment on it.

101.3. I admit the contents of this paragraph only to the extent that it is consistent with my submissions above. Save as aforesaid, the contents of this paragraph are denied.

102. **Ad paragraphs 33 to 33e**

102.1. I admit that my support for the decision to conclude the settlement agreement was not ultimately motivated by Transnet's legal position in the arbitration, when viewed in isolation. I reiterate that it was informed by broader considerations of governance, and I respectfully refer to my submissions above in this regard.

102.2. I admit that Transnet's case against Mr Gama had strong prospects of success insofar as Mr Gama's guilt was concerned, given that Mr Gama had admitted to the misconduct. I reiterate that colleagues at Mr Gama's level were not disciplined by Transnet for analogous conduct, which

subsequently came to light. I furthermore reiterate that the Board implemented structural reforms to reverse the process, thereafter.

102.3. I note that Mr Todd suggests that the decision to conclude the settlement was irrational, in these paragraphs under reply. I am advised and submit that it was indeed rational as a matter of law, given the contextual circumstances that I have set out further above.

102.4. Save as aforesaid, the contents of these paragraphs are denied to the extent they are inconsistent with my submissions in this affidavit.

103. **Ad paragraph 34**

103.1. Mr Todd himself avers that he does "*not have any personal knowledge of why the [settlement] agreement was concluded*", which I admit.

103.2. However, Mr Todd then proceeds to infer that the decision to conclude the settlement agreement "*was taken elsewhere, outside the governance structures of Transnet*". For reasons traversed above, I can confirm that Mr Todd is not correct. I am not aware of any facts that support Mr Todd's inference. And any suggestion in my case that the decision was "*taken elsewhere*" is simply false.

103.3. From Mr Todd's admittedly limited knowledge, he proceeds to contend that the terms of the settlement agreement "*were not rationally connected to the legal, financial or governance interests of Transnet*", and that "*the decision could not rationally have been taken by the board of Transnet if its members had exercised their fiduciary duties and had applied their minds to the best interests of the company*". I have explained above why

I respectfully submit that Mr Todd is incorrect in seeking to draw this inference, and I am advised and submit that it is unsubstantiated.

103.4. I therefore deny the allegations in these paragraphs, and I refer the Commission to my submissions further above. The decision was taken in light of considerations outside of the narrow issue of which Mr Todd has personal knowledge. From my perspective, the decision was made with the legal, financial and governance interests of Transnet being at the front of mind. I can confirm that I supported the decision in good faith and in a manner that accorded with my best business judgment at the time.

104. **Ad paragraphs 35 to 38**

104.1. I admit that Mr Gama's conduct had adverse consequences for Transnet. I reiterate that the same applies to other similarly situated employees, who saw no consequences for their conduct.

104.2. I point out that, by comparison with Ms Moses and Mr van Niekerk, Mr Gama's breach of his authority involved far lower amounts than the latter two former employees. I have also drawn attention to the measures that were put in place to bring an end to the culture of condonation.

104.3. I note that Mr Todd avers that he does not know "*what motivated Mr Mkhwanazi, or anyone else involved in the decision, to make that decision*". I have submitted further above that the law encourages the settlement of litigation, and I have explained the relevant context to my decision to support the conclusion of the settlement agreement in my submissions further above. To the extent that the contents of these

paragraphs are inconsistent with my submissions in this affidavit, they are denied.

105. **Summation on Mr Todd's affidavit**

Mr Todd, to sum up, was apprised of information relating only to the issue of Mr Gama. The Board however was differently positioned, and was required in all the circumstances to take a decision in the interests of Transnet as a whole, which called for a holistic view of all relevant circumstances. Save to state the above, I deny the contents of Mr Todd's affidavit to the extent inconsistent with my submissions in this affidavit.

CONCLUSION

106. It was in the circumstances above that the decision to support the settlement agreement was made. I respectfully submit that I have demonstrated that it was a decision that was made by the Board in good faith.

107. I reiterate that I acted at all times in a manner that I considered to be in Transnet's best interests. When my decision is placed in its proper context, as I have attempted to do in this affidavit, I respectfully submit that no cogent reason has been presented to conclude otherwise.

DEPONENT

I certify that on the 29th **day of SEPTEMBER 2020** and at Sandton the above deponent appeared before me and that he acknowledged to me that he knows and understands the contents of the above Affidavit, which Affidavit was signed and sworn

to in my presence in accordance with the requirements of Regulation No. R1428 dated 16 November 1984, as amended, which have been fulfilled.

Commissioner of Oaths

FULL NAMES: **LUNGILE VENESSA SWANDLE**
CAPACITY: COMMISSIONER OF OATHS
PRACTISING ATTORNEY GAUTENG
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NG 1

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Our Ref: T Malatji/S Masombuka/M00498
Direct Email: tmalatji@mcinc.africa

Your Ref:
Direct Tel: 011 072 2601

Date: 14 August 2020

MS MAKWENA MOHLABI
THE GROUP COMPANY SECRETARY
Transnet
Parkview
South Africa
2122

BY EMAIL: Makwena.Mohlabi@transnet.net

Dear Madam,

LEGAL REPRESENTATION OF FORMER BOARD MEMBERS OF TRANSNET AT THE ZONDO COMMISSION OF INQUIRY

1 We refer to the above matter and confirm that we act for and on behalf of Ms Doris Tshepe, Ms Nolwazi Gcaba and Ms Nunu Njeke, former members of the Board of Transnet ("our clients").

2 As you are aware the President of the Republic of South Africa acting in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, 1996 appointed a Commission of Inquiry to investigate allegations of state capture, corruption and fraud in the Public Sector ("the Zondo Commission").

3 Kindly take note that the Zondo Commission has transmitted letters to Ms Doris Tshepe and Ms Nolwazi Gcaba requesting them to furnish the Zondo Commission on or before 20 August 2020 with an affidavit or affirmed declaration in which she must explain why she, as a member of the Board of Directors of Transnet at the time, considered it correct or proper or justified to conclude a settlement with the former Chief Executive Officer, Mr Siyabonga Gama. We attach the Zondo Commission's letter to Ms Tshepe for your ease of reference.

4 In order to enable us to prepare our clients' affidavits in response to the notice from the Commission, we have been instructed to make a request to you as the Group Secretary of Transnet to furnish our clients with the following documents:

4.1 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 13 February 2009;

4.2 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Corporate Governance and Nominations Committee meetings held on 23 January and 03 February 2011. The opinion from senior counsel referred to in paragraph 6.9.1 of the minutes of the Committee's meeting of 03 February 2011 is pertinently requested;

Directors: Tebogo Malatji Sunelle Eloff Bonang Masia Sayi Nindi
Practising Consultants: Willie van Wyk Osborne Molatudi Luise von Durkheim-Botes Molatelo Mathikithela (Notary & Conveyancer)
Senior Associate: Ally Makgopa
Associates: Samuel Masombuka Khathutshelo Nethavhani
Office Manager: Tummy Seboko

Reg No: 2018/261984/21
Vat No: 4920281922

4.3 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 16 February 2011;

4.4 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Human Resources and Remuneration Committee meetings held immediately prior to and immediately after the Board meeting of 16 February 2011.

4.5 The memorandum of the Acting Group Chief Executive Officer referred to in the last bullet of paragraph 2.1.2 of the minutes of the Board meeting of 16 February 2011.

4.6 The Committee Charter and Terms of Reference of the Board Acquisition and Disposal Committee that was established in 2011/2012.

4.7 The 2011 revised Procurement Policy incorporating the new rules on confinement and condonation.

4.8 The list of officials and contracts which exceeded the relevant Transnet officials' delegated authority for contracts awarded on confinement as at 16 February 2011.

5 Please note that the Commission requires our client to respond to the Commission's notice by 20 August 2020. We have requested an extension but are yet to be granted one. We will thus appreciate if the requested records can be made available to us as urgently as is practicable.

6 We look forward to your response.

MALATJI & CO

Electronically transmitted and thus unsigned

PER: T Malatji/S Masombuka

NG 2

Liezl Swanepoel

From: Tshiamo Sedumedi <Tshiamo@ndlovu-sedumedi.co.za>
Sent: Wednesday, 19 August 2020 17:16
To: Tebogo Malatji; Sam Masombuka
Cc: Feziwe Phungula
Subject: Information requested from Transnet
Attachments: INDEX - Tshepe et al.doc; 13 February 2009 - Board meeting minutes.pdf; 14 February 2011 - Remuneration Committe meeting minutes.pdf; 16 February 2011 - Board meeting minutes.pdf; Board Acquisition and Disposal Committee that was established in 2011-2012.pdf; Procurement Procedures Manual (PPM) - 26 May 2009.pdf; Siyabong Gama - Agreement of Settlement.pdf

Dear Mr Malatji

1. We refer to the writer's telephonic discussions with your Mr Masombuka and yourself earlier today.

2. Kindly find attached hereto a list of documents to date as per your request to our client.

3. You will note from the comments made on the document titled "Index" that we are still trying to locate some of the requested information. As soon as same is located and reviewed for relevance we will immediately forward to you.

4. We must indicate that it will take some time to provide you with the audio recordings of the relevant meetings. This is so because the recordings include matters that are not related to what your client must provide to the Zondo Commission. Accordingly it will take some time to be "redact" the said recordings to ensure that only parts that are relevant to your clients interests are provided. You are however welcome to propose any other quicker alternative ways of accessing such information.

kind regards

MNS
MASOMBUKA NDLOVU & SEDUMEDI ATTORNEYS

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Legal Expertise In Your Corner

18 YEARS
EST 2002

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MNS

MNS is in solidarity with the entire country as we all grapple with the COVID-19 pandemic.

We remain committed to rendering quality legal services to our clients during this testing time for our nation.

In order to ensure business continuity, we assure you that all of our professional staff members will be working remotely during the lockdown period and will remain available telephonically should you require any assistance.

We value the health and wellbeing of our employees, clients, suppliers and counterparts and thank you for your cooperation and understanding during this critical time.

Legal Expertise in your corner!

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NG 3

MALATJI & CO
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Our Ref: T Malatji/S Masombuka/M00498
Direct Email: tmalatji@mcinc.africa

Your Ref:
Direct Tel: 011 072 2606

Date: 24 August 2020

Mr TSHIAMO SEDUMEDI
MNS Attorneys
2nd Floor, 16 Fricker Road,
Illovo

BY EMAIL: Tshiamo@ndlovu-sedumedi.co.za

Dear Sir,

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("the Commission")

1 We refer to the above matter as well as your email on Wednesday, 19 August 2020.

2 Our client has difficulty accepting Transnet's position that it will selectively provide us with information and records sought, redacted by you and Transnet at your discretion. This difficulty is demonstrated by a few considerations we set out below:

2.1 Your response that you see no relevance in us requesting the list of officials and contracts which exceeded the relevant Transnet officials' delegated authority for contracts awarded on confinement as at 16 February 2011 is a classic example. Our clients have instructed us that the list was circulated at the meeting of 16 February 2011.

2.2 Evidently the list of officials and contracts which exceeded the relevant Transnet officials' delegated authority for contracts awarded on confinement as at 16 February 2011 is relevant as one of the issues our clients intend to address is the application of discipline in Transnet at the time.

2.3 The minutes of Board and committee meetings do not refer to all documents considered and circulated thereat. Transnet is no doubt aware that it is common practice that documents which were not in Board packs are circulated at meetings and immediately returned to the Chairperson.

2.4 The Board meeting of 13 February 2009 is a very crucial meeting to our clients' affidavit. Again, you will not know why and hence your statement that *"We have reviewed the minutes and no reference was made to Mr Gama's matter/s...."* This is not accurate when regard is had to the attached highlighted extract from the Report that served at the Board meeting of 16 February 2011 [this document was attached to Ms Mohlabi's

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Senior Associate: Ally Makgopa
Associates: Samuel Masombuka Khathutshelo Nethavhani
Office Manager: Tummy Seboko

Reg No: 2018/261984/21
Vat No: 4920281922

affidavit to the Commission dated 10 July 2020]. You will note from the said report that the Gama matter was discussed at the Board meeting of 13 February 2009 which is the genesis of consideration of the Gama disciplinary matter by the Board.

2.5 The points we make above demonstrates further that Transnet's failure to provide us with the board packs and unedited recordings of meetings will not only prejudice our clients, but it hampers the work of the Commission. Our clients were after all Board members at the time of the said meetings and were present at those meetings. There cannot possibly be any grounds to contend for confidentiality to matters they were privy to in their capacity as Transnet Board members at the time. Kindly but urgently let us have the full meeting packs and recordings of the meetings previously requested.

2.6 The legal opinions which served at Board and committee meetings which we sought in our request are crucial to our client's affidavit. Kindly expedite that we be provide with copies.

2.7 Regarding the memorandum of the Acting Group Chief Executive Officer referred to in the last bullet of paragraph 2.1.2 of the minutes of the Board meeting of 16 February 2011, you say that the said minutes do not have a paragraph 2.1.2. We attach the said minutes on which we have highlighted the said paragraph. Kindly provide us with this memorandum urgently. It is this memorandum that resulted in the formation of the Board Acquisition and Disposal Committee.

3 We are of the considered view that the Commission is the ultimate arbiter, and not Transnet, as to access to information since the information/records we are soliciting from Transnet is for the benefit of the Commission. We have thus directed the attached letter to the Commission to avoid prolonged exchange of correspondence between ourselves as to the relevance of documents and completeness of access to documents and records sought. This especially in light of the fact that the Commission has imposed strict deadlines for the filing of our clients' affidavits.

4 We look forward to urgent receipt of your response.

Yours faithfully,

MALATJI & CO

PER: T Malatji/S Masombuka

NG 4

MALATJI & CO
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Our Ref: T Malatji/S Masombuka/M00498
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Your Ref:
Direct Tel: 011 072 2606

Date: 31 August 2020

Mr TSHIAMO SEDUMEDI
MNS Attorneys
2nd Floor, 16 Fricker Road,
Illovo

BY EMAIL: Tshiamo@ndlovu-sedumedi.co.za
CC: farrahk@commissionsc.org.za

Dear Sir,

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("the Commission")

1 We refer to the above matter, our letter dated 14 August 2020 ("our letter"), as well as your emails on 29 August 2020.

2 As you are aware, on 14 August 2020 we transmitted a letter to Transnet SOC Limited ("your client / Transnet") which letter was in turn forwarded to you to attend to our request for access to various documents and audio recordings. In our letter we requested to be furnished with the following documents:

2.1 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 13 February 2009.

2.2 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Corporate Governance and Nominations Committee meetings held on 23 January and 03 February 2011. The opinion from senior counsel referred to in paragraph 6.9.1 of the minutes of the Committee's meeting of 03 February 2011 is pertinently requested.

2.3 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 16 February 2011.

2.4 The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Human Resources and Remuneration Committee meetings held immediately prior to and immediately after the Board meeting of 16 February 2011.

2.5 The memorandum of the Acting Group Chief Executive Officer referred to in the last bullet of paragraph 2.1.2 of the minutes of the Board meeting of 16 February 2011.

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2.6 The Committee Charter and Terms of Reference of the Board Acquisition and Disposal Committee that was established in 2011/2012.

2.7 The 2011 revised Procurement Policy incorporating the new rules on confinement and condonation.

2.8 The list of officials and contracts which exceeded the relevant Transnet officials' delegated authority for contracts awarded on confinement as at 16 February 2011.

3 In addition to the above documents and/or audio recording, on Monday 8 August 2020 our Mr T Malatji sent an email to Ms Mohlabi (Transnet Group Secretary) requesting that the following documents be added to our 14 August 2020 letter:

3.1 The draft settlement that was circulated at the Board meeting of 16 February 2011; and

3.2 An opinion from Deneys Reitz Attorneys/senior counsel appointed by Deneys Reitz Attorneys on or about end January/early February 2011 regrading Mr Gama's disciplinary hearing.

4 On 19 August 2020 you provided us with the following documents:

4.1 The 13 February 2009 – Board meeting minutes;

4.2 The 14 February 2011 – Remuneration Committee minutes;

4.3 The redacted version of the 16 February 2011 Board meeting minutes;

4.4 The Board Acquisition and Disposal Committee Mandate;

4.5 The Procurement Procedures Manual 26 May 2009; and

4.6 The signed settlement agreement between Transnet and Mr Gama.

5 Subsequently, on 29 August 2020 you provided us with further documents. We wish to place on record that to date we have not been provided with the following crucial documents and/or audio recordings:

5.1 Audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 13 February 2009;

5.2 Audio recording(s) and/or transcripts of the recording(s) of the Corporate Governance and Nominations Committee meetings held on 23 January and 03 February 2011;

5.3 The opinion from senior counsel referred to in paragraph 6.9.1 of the minutes of the Committee's meeting of 03 February 2011;

5.4 Audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 16 February 2011;

5.5 Audio recording(s) and/or transcripts of the recording(s) of the Human Resources and Remuneration Committee meetings held immediately prior to and immediately after the Board meeting of 16 February 2011.

5.6 The memorandum of the Acting Group Chief Executive Officer referred to in the last bullet of paragraph 2.1.2 of the minutes of the Board meeting of 16 February 2011.

5.7 The list of officials and contracts which exceeded the relevant Transnet officials' delegated authority for contracts awarded on confinement as at 16 February 2011.

5.8 The draft settlement that was circulated at the Board meeting of 16 February 2011; and

5.9 An opinion from Deneys Reitz Attorneys/senior counsel appointed by Deneys Reitz Attorneys on or about end January/early February 2011 regarding Mr Gama's disciplinary hearing.

6 As demonstrated in our letter of 23 August 2020 with the Board meeting of 16 February 2011, there are minutes of In-Committee meeting sessions of both Board and Committee meetings of Transnet. We are now instructed that upon perusal of the 13 February 2009 Board minutes under Item 9.1, the Corporate Governance and Nominations Committee report was given at the Board Closed Session (see page 155 of the pack). There are no minutes of the Board Closed Session provided by you. It is at this Closed Session that the then GCEO reported for the first time to the Board of the investigations that had been conducted against Mr Gama. Please provide the following:

6.1 The minutes, the meeting pack, audio recordings and the report of the Corporate Governance and Nominations Committee meeting of immediately preceding the Board meeting of 13 February 2009.

6.2 The In-Committee Minutes of the Board meeting of 13 February 2009 and its audio recording.

7 In the attached extract of minutes of the Board meeting of 25 January 2011 at items 4.1.4 through to 4.1.9, reference is made to a document titled "***Procurement Irregularities at Transnet***", a ***Report being prepared by Deneys Reitz*** on the complaints made to the Public Protector, ***30 cases of similar allegations as those levelled against Mr Gama*** which are currently occupying the Chairman and ***"Fairness in treatment of Executives"***. In the light thereof, kindly request Transnet to provide us with the following:

7.1.1 The In-Committee Minutes of the meeting of the Corporate Governance and Nominations Committee of 07 January 2011, the meeting pack as well as their audio recordings.

7.2 The In-Committee Minutes of the meeting of the Board Meeting of 25 January 2011, the meeting pack as well as their audio recordings.

7.3 The report by Deneys Reitz on the Public Protectors complaints received by Transnet on 22 December 2010.

7.4 Kindly also provide the following previously requested and now clearly very important documents/records:

7.4.1 The In-Committee Minutes of the meeting of the Corporate Governance and Nominations Committee of 23 January 2011, the meeting pack as well as their audio recordings.

7.4.2 The In-Committee Minutes of the meeting of the Corporate Governance and Nominations Committee of 03 February 2011, the meeting pack as well as their audio recordings.

8 It is of utmost importance, not only for our clients but for the Commission as well, that our clients receive the information they requested as indicated above as expeditiously as possible. The deadline for the filing of the affidavit by our clients is in a week on 07 September 2020. When we discussed this matter on Friday 28 August 2020, you advised that you were in possession of the audio recordings but that you need to catalogue them in light of our request. We must insist on being provided with the previously requested and outstanding documents and audio recordings listed in paragraphs 5 and 6 above by close of business today. May we request that the new documents referred to in paragraph 7 above be provided by close of business tomorrow.

9 We look forward to your urgent receipt of your response.

Yours faithfully,

MALATJI & CO

PER: T Malatji/S Masombuka

CC: **MS KB SHABALALA**
THE ACTING SECRETARY
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NG 5

IN THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE: SUBMISSIONS TO THE ZONDO COMMISSION RE: TRASNET FORMER BOARD OF DIRECTORS

PARA	OUR REQUEST	STATUS OF DOCUMENTS
4.1	The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 13 February 2009;	We have the meeting pack. The following is outstanding: 1. Audio Recording(s); and/or 2. Transcripts of recording(s)
4.2	The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Corporate Governance and Nominations Committee meetings held on 23 January and 03 February 2011. The opinion from senior counsel referred to in paragraph 6.9.1 of the minutes of the Committee's meeting of 03 February 2011 is pertinently requested;	We were provided with the minutes of both meetings 23 January and 3 February 2011 and audio recording of meeting of 3 February 2011. The following are outstanding: 1. Audio records for 23 January 2011; and/or 2. The opinion of Senior Counsel.
4.3	The minutes, meeting pack and audio recording(s) and/or transcripts of the recording(s) of the Board meeting held on 16 February 2011;	We were provided with the meeting pack for this meeting. The following are outstanding: 1. Audio recording(s); and/or 2. Transcripts of the record(s)
4.4	The memorandum of the Acting Group Chief Executive Officer referred to in the last bullet of paragraph 2.1.2 of the minutes of the Board meeting of 16 February 2011.	The memorandum is still outstanding has not been provided.

4.5	The 2011 revised Procurement Policy incorporating the new rules on confinement and condonation.	We were provided with the 2009 and 2012 policies – according to MNS there is no revised 2011 Procurement Policy.
4.6	The draft settlement that was circulated at the Board meeting of 16 February 2011.	The "Draft Settlement" we have been provided with is not the one we are referring to – hence the draft settlement deliberated on by the Board is **outstanding**
4.7	An opinion from Deneys Reitz Attorneys/senior counsel appointed by Deneys Reitz Attorneys on or about end January/early February 2011 regarding Mr Gama's disciplinary hearing.	The opinion is still **outstanding**.

NG 6

Transnet Limited

Forensic investigation
Report on factual findings

16 November 2011

This report contains 271 pages

Transnet Limited
Forensic investigation
Report on factual findings
16 November 2011

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Distribution

- ***Mr Siyabulela Mapoma,*** Transnet Limited,
  General Manager: Group Legal Services *(4 copies)*

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Abbreviations

Detailed descriptions and explanations of terms and abbreviations relevant to this report are listed below. These descriptions and explanations however serve to clarify our report and are not intended to be authoritative.

AC	Acquisition Council
AG	Auditor General South Africa
Antrobus	Advocate Antrobus, Senior Counsel
ATP	Advice To Procure
Basson	Rudie Basson, TCP, Acting GM: Project Development and Execution
Bateman	Bateman Engineered Technologies
BBBEE	Broad-based Black Economic Empowerment
BEE	Black Economic Empowerment
BG	Bowman Gilfillan Attorneys
Bierman	Gerhard Bierman, TCP, CFO
Board	Transnet Board of Directors
Branford	Arthur Branford, Transnet Freight Rail Sourcing Senior Manager
Budhai	Niresh Budhai, Transnet, Manager: Capital Investment
CAPEX	Capital Expenditure
CAPIC	Capital Investment Committee
CE	Chief Executive
CEO	Chief Executive Officer
CIDB	Construction Industry Development Board

CIPRO	Companies and Intellectual Property Registration Office
CPO	Chief Procurement Officer
CPPPPM	Construction Procurement Policy, Processes, Procedures and methods within TCP
CTCT	Cape Town Container Terminal
DAC	Divisional Acquisition Council
DAF 2005	Delegation of Authority Framework, approved June 2005
DAF 2007	Delegation of Authority Framework, approved October 2007
DAF 2009	Delegation of Authority Framework, approved May 2009
DAF 2010	Delegation of Authority Framework, approved August 2010
DAF	Delegated Authority Framework
DAF	Delegation of Authority Framework approved by the Transnet Board from time to time
DCF	Delegation Consent Form
DCP	Disciplinary Code and Procedure
DHEW	Durban Harbour Entrance Widening
Diedericks	Kenneth Diedericks, TFR, Executive Manager: Legal Services
DPE	Department of Public Enterprises
DPP 2003	Detailed Procurement Procedures, dated June 2003
DPP 2006	Detailed Procurement Procedures, dated 28 November 2006

DPP	Detailed Procurement Procedures approved by the Transnet Board from time to time
E&Y	Ernst & Young
ECIC	Eastern Catchment Integrated Corridor
EPCM	Engineering Procurement and Construction Management
Esterhuizen	Wynand Esterhuizen, Group, Procurement Policy Specialist
ETC	Estimated Total Cost
Eve	Neville Eve, TCP, GM: Projects
Everingham	Professor Geoff K Everingham, former Acting Chairman of Transnet
Exco	Transnet Executive Committee
FEL	Front End Loading
FFC	Forecasted Final Cost
Flour	Flour SA (Pty) Limited
Fredericks	Brian Fredericks, TFR, Former CPO
Gama	Siyabonga Gama, TFR CEO
GCEO	Transnet Group Chief Executive Officer
GCFO	Transnet Group Chief Finance Officer
GCOO	Transnet Group Chief Operating Officer
GM	General Manager
GNS	General Nyanda Security Advisory Services (Pty) Limited
GOBA	GOBA (Pty) Limited

Govender	Simeshni (Sue) Govender, TCP, Portfolio Executive: Investment Planning & Development
Greeff	Ansley Greeff, TFR, SSM Technical Specialist
Group	Transnet Group
Hamilton	Greig Hamilton, HMG Project Control Manager
Hatch	Hatch Africa (Pty) Limited
HMG	An unincorporated joint venture of Hatch, Mott MacDonald and GOBA
HOAC	Head Office Acquisition Council
Hogan	Barbara Hogan, Minister: DPE
HR	Human Resources
JV	Joint venture
Khanye	Sipho Khanye, TFR, Former Manager: Security Contracts
Koen	Quintin Koen, TCP, Legal
Laher	Yousuf Laher, TFR, Acting CPO
Langa	Langa Attorneys
LRA	Labour Relations Act No 66 of 1995
Lund	Sue Lund, GM: Policy & Research Manager: Branch Lines Concessioning
MacDonald	Mark Gregg-MacDoncald, Group, Acting Group Executive: Commercial and Freight Corridors
Madhav	Keeran Madhav, E&Y, Associate Director
Maharaj	Pradeepkumar Maharaj, Transnet, Group Executive of Human Resource and member of Exco

Mapoma	Siyabulela Mapoma, Group, GM: Group Legal Services
Masianoga	Alex Masianoga, TFR, Executive Manager: Marketing
Mkwanazi	Mafika Mkwanazi, Group, Chairperson of the Transnet Board
Modise	Kgomotso Modise, TFR, Senior Manager: Transformation and Regulation
Mogale	Duke Mogale, TFR, Senior Account Executive: Africa Trade
Morake	MS Morake, TRE, Former Project Manager
Morwe	Tau Morwe, TFR, Acting CEO
Moses	Moira Moses, TCP, CE
Mosweu	Percival Mosweu, TFR, former GM: Capital Program
Motaung	Letaba Daniel Motaung, TFR, Senior Manager
Mott MacDonald	Mott MacDonald (Pty) Limited
MP	Member of Parliament
MPAC	Mega Projects Acquisition Council
mtpa	Mega tons per annum
Murray & Roberts	Murray & Roberts Engineering Solutions
Naicker	Karthi Naicker, Group, Forensic Manager
NCT	Ngqura Container Terminal
NEC	New Engineering Contracts
NEC3 PSC	New Engineering Contracts 3 Professional Services Contract as published by the Institution of Civil Engineers

NMPP	New Multi-Product Pipeline
NPA	National Ports Authority, a division of Transnet
Nteo	Naph Nteo, E&Y, Partner
Oates	Viv Oates, E&Y, Partner and Head of TIA
OD	Operating Division of Transnet
OPCO	Operations Committee
OPEX	Operational Expenditure
PCN	Project Change Notice
PE	Port Elizabeth
PEP	Project Execution Plan
Pereira	Joe Pereira, HMG JV, Program Procurement and Contracts Manager
PES	Project Environment Specification
PFMA	Public Finance Management Act No 1 of 1999
Pita	Garry Pita, Group, GM: Business Services
PLP	Project Lifecycle Process
PP	Package Plan
PPM	Procurement Procedures Manual, dated 26 May 2009
Public Protector letter (Dec 2010)	Letter from the Public Protector to Transnet (addressed to Mkwanazi), dated 22 December 2010
Public Protector letter (Feb 2011)	Letter from the Public Protector to Transnet (addressed to Mkwanazi), dated 7 February 2011
Public Protector	Public Protector South Africa
Ramos	Maria Ramos, Group, former CEO
Reddy	Krish Reddy, TCP, GM: Group Planning

Ryan	James Ryan, TFR, former Manager: Strategic Sourcing
SAPO	South African Port Operations, operating under TPT
Senamela	Dingaan Senamela, TFR, Former Executive Manager: Security
Singh	Anoj Singh, Group, Acting CFO
Smith	Bernard Smith, Transnet, former GM: Capital Investment Management
Socikwa	Karl Socikwa, TPT, Acting CEO
Spoornet	Spoornet, a division of Transnet
SSM	Strategic Supply Management
SU	Specialist Unit of Transnet
TAC	Transnet Acquisition Council
TBC	Transnet Bargaining Council
TCP	Transnet Capital Projects, a Division of Transnet
TEAR	Tender Evaluation and Adjudication Report
TFR CEO	TFR Chief Executive Officer
TFR CFO	TFR Chief Financial Officer
TFR Exco	TFR Executive Committee
TFR	Transnet Freight Rail, a Division of Transnet
TFRAC	Transnet Freight Rail Acquisition Council
Thomson	Nick Thomson, TFR, CFO
TIA	Transnet Internal Audit
TPT	Transnet Port Terminals
Transnet Code	Transnet Disciplinary Code and Procedure

Transnet	Transnet Limited
TRE	Transnet Rail Engineering, formerly Transwerk, a Division of Transnet
USD	United States Dollar
Uys	Nic Uys, TCP, Action CPO
VAE	VAE SA (Pty) Limited
Van Niekerk	Louis van Niekerk, former GCOO
Van Vuuren	Karen van Vuuren, former GM: SSM
Volmink	Peter Volmink, Group, Senior Legal Specialist
Webber Wentzel	Webber Wentzel Inc Attorneys
Wells	Christopher Wells, Group, former Acting CEO
Williams	Bridget Williams, TFR, Former Manager: Procurement

Exhibits

Copies of all documentation referred to in the footnotes to this report have been collated into exhibit files and should be read in conjunction with the contents of this report.

Annexures

The annexures are attached to this report and should be read in conjunction with the contents of this report.

1 Executive Summary

The executive summary provides an overview of the key issues identified by KPMG and Nkonki in terms of the Transnet mandate for the Gama investigation. This executive summary should be read in conjunction with the detailed findings set out in this report.

1.1 The Allegations

The Public Protector's letters to Transnet dated 22 December 2010 and 7 February 2011 has reference. The allegations in respect of each area of investigation has been summarised hereunder and included in more detail under each section. In brief the allegations relate to:

- Procedural fairness in relation to the dismissal of Gama;
- Substantive fairness in relation to the dismissal Gama – Similar fact matters dealt with through the disciplinary process;
- Substantive fairness in relation to the dismissal Gama – Similar fact matters not dealt with through the disciplinary process:
  - TFR condonations list for the period 2007 to 2010 as provided to us;
  - Procurement irregularities in relation to the Oliver Wyman contract and unfair consideration of employee to work in regulatory affairs; and
  - Procurement irregularities in relation to the VAE contract.
- Overspending on certain mega projects namely Ngqura Container Terminal, Durban Harbour Entrance Widening, Cape Town Container Terminal, NMPP and Phase 2 of the Orex feasibility study with reference to variances not authorised and alleged invoicing greater than the approved EPCM budget; and
- HMG receiving preferential treatment in the procurement process, award of contract to HMG without proper authorisation, the drafting of the contract by HMG and the lack of application of penalties clauses in the HMG contract.

1.2 Procedures followed – high level summary

Our procedures followed, at a high level, consist of:

- An analysis of the allegations;
- In-depth review of the relevant documents as far as these pertain to this assignment including inter alia contracts, invoices, reports, etc;
- Conducting interviews with individuals considered by us to have relevant information;
- Obtaining and studying further documentation as identified by us;
- Utilising legal counsel as and where required; and
- Report on our findings.

1.3 Allegations and key findings

1.3.1 Procedural fairness in relation to the dismissal of Gama

1.3.1.1 Allegations

With reference to: Procedural fairness in relation to the dismissal of Gama:

The Public Protector requires Transnet to comment on allegations made in what it labels items (A), (B) and (C), to advise it whether any of these allegations were ever investigated and, if so, what the outcome of such investigation was, including any disciplinary action taken against officials of Transnet as a result.

Item (A) relates to alleged tender irregularities, which apparently emanate from an unsigned document titled *"Procurement irregularities at Transnet"*. Item (A) thereafter sets out a number of allegations. None of these allegations have any bearing on procedural fairness relating to Gama.

Item (B) sets out further allegations emanating from an unsigned statement titled *"Private and Confidential"*. Two of the allegations have a bearing on procedural fairness relating to Gama. These are as follows:

- *"The charges against Gama relate to events that occurred in 2007, yet he was only charged in 2009"*; and
- *"In October 2008, the former GCE, Maria Ramos, dismissed the allegations against Gama as "baseless and utter rubbish", yet she raised them again in her last Board meeting"*.

Item (C) relates to an article published in the Sunday Times on 13 September 2008 in which certain allegations were made. None of these allegations have any bearing on procedural fairness relating to Gama.

Gama has referred a dispute regarding his dismissal to the TBC, as he was entitled to do. The Statement contained those issues which Gama required to be addressed at the arbitration proceedings before the TBC.

The Statement contained the following issues pertinent to procedural fairness relating to Gama:

- The manner in which Gama was suspended and subsequently charged with misconduct which Gama alleges was an unlawful delegation of authority by Wells to Maharaj (referred to hereinafter as the *"First Issue"*);
- Transnet's decision to convert the pre-dismissal arbitration into a disciplinary inquiry which Gama alleges was procedurally unfair (referred to hereinafter as the *"Second Issue"*);
- The appointment of Antrobus to chair the pre-dismissal arbitration (and subsequently the disciplinary inquiry) which Gama alleges constituted a breach of an agreement reached between Transnet and Gama which, in turn, rendered the disciplinary process and subsequent dismissal procedurally unfair (referred to hereinafter as the *"Third Issue"*); and
- An allegation that Gama's contract of employment makes a distinction between misconduct and serious misconduct which Gama alleges was not taken into account by Antrobus in recommending the sanction of dismissal. Gama asserts that his dismissal was therefore a violation of his employment contract which rendered such dismissal procedurally unfair (referred to hereinafter as the *"Fourth Issue"*).

Based on this, and in order to determine the matter of consistency, we looked at similar fact matters dealt with through Transnet's disciplinary process, as well as other matters.

1.3.1.2 Summary of findings and overall conclusions

Nkonki and KPMG engaged Webber Wentzel by to assist by providing a report on the procedural fairness of:

- The events leading up to the disciplinary inquiry into Gama 's conduct;
- The conduct of the disciplinary inquiry itself; and

- The events post the disciplinary inquiry up to the present time.

We shall refer to these aspects as *"procedural fairness relating to Gama"*.

Our findings in relation to the allegations are as follows:

First Issue

Gama contends (at paragraph 4.1 of the Statement) that the decision taken by Maharaj to proceed with disciplinary action against him was unauthorised. This is not an issue that the Arbitrator of the unfair dismissal proceedings is required to decide, since Gama has abandoned his reliance upon it.

In respect of the unlawful delegation of authority by Wells to Maharaj, Gama did not, in fact, dispute that the powers of delegation and sub-delegation were properly authorised in terms of a resolution. In dismissing the application, Spilg J found "*....reasonable and probable grounds exist for supporting the decision to institute disciplinary proceedings and to suspend [*Gama]".

Webber Wentzel found no reason to disagree with the finding of Spilg J. Gama appears to have accepted the finding, since he did not appeal the decision, and places no further reliance on this particular ground of alleged procedural unfairness.

Second and Third Issues

Regarding the application of the facts to the Second and Third Issues, the following was found.

Third Issue: Was agreement reached between BG and Langa regarding the appointment of Antrobus to chair the pre-dismissal arbitration process?

Having reviewed all of the relevant documentation, Webber Wentzel is of the view that:

- Having proposed Antrobus as one of the seven possible arbitrators, Langa was bound by BG's choice of him as the arbitrator and agreement was thereby concluded on the identity of the arbitrator; and
- Whether such agreement was concluded, or not, is in any event immaterial and does not render any part of the (different) process that was actually followed procedurally unfair.

Second Issue: Did Transnet, after opting to proceed by way of a pre-dismissal arbitration process, thereafter *"unilaterally change its mind and impose a disciplinary hearing"* (Gama's words)

- Having initially decided to proceed by way of a pre-dismissal arbitration process, Transnet subsequently informed Gama s legal representatives that it would instead proceed by way of a disciplinary hearing. It took this decision based on its view that Gama had repudiated the agreement concluded on the identity of the arbitrator;
- Whether Transnet was correct in its view of the repudiation, or not (in Webber Wentzel's view it was correct), it was in any event entitled to proceed by way of a disciplinary inquiry instead of a pre-dismissal arbitration. In Webber Wentzel's view, it would be entitled to change its option at any stage, at its sole discretion, prior to the institution of either proceeding, provided such change did not prejudice Gama in any manner;
- Transnet's conduct was not procedurally unfair in opting to convert the pre-arbitration hearing to a disciplinary hearing; and
- Relevant legal principles relating to Second and Third Issues.

Webber Wentzel's view is that the disciplinary process that was followed by Transnet in respect of such issues was in all respects procedurally fair.

Fourth Issue

In respect of Gama's letter of appointment, paragraph 14 provides that Transnet may terminate Gama's employment for reasons relating to his conduct or for any other reason that is recognised by law as being sufficient. Clause 15 of the agreement states that Gama will be subject to Transnet's disciplinary procedures, code of conduct and other policies that serve to regulate the employment relationship.

The Transnet Code provides that it is applicable to all employees falling within Transnet's management category. *"Management"* is defined in the Transnet Code to include supervisors, managers, senior managers and executives of Transnet. Transnet has the right to decide when an employee's behavior is unacceptable and to institute appropriate action. Any employee who commits an act of misconduct may be subject to appropriate disciplinary action. Although the purpose of disciplinary action is corrective, the employer is not obliged to give any warnings in respect of misconduct that would justify summary dismissal, provided that the employer may only dismiss an employee after a fair hearing.

There are certain categories of disciplinary transgressions for which Transnet may take disciplinary action called Primary Offences. These offences are considered serious and may lead to the employee's summary dismissal. Gross insubordination or serious disrespect, breach of Transnet's Code of Ethics, Contravention of the Section 51(1) of the PFMA (contraventions that the Gama was found guilty of) is examples that fall under the category of Primary Offences.

Delay in bringing charges against Gama

In his response to the charges, Gama contended that the delays experienced between the time Transnet became aware of the charges against him and the time he was charged are materially prejudicial to him and in breach of the Transnet Code.

Antrobus accepted Transnet's evidence that even though Transnet was aware that Gama had not complied with the Transnet Board resolution as early as April 2008, steps had not been taken to charge Gama at that stage as the full implications of Gama's failure to ensure that the 50 *"like new"* locomotives contract resulted in TRE performing the local work were not realised until much later. It was accordingly necessary to continue with the investigation.

Webber Wentzel concludes that it is trite law that an employer should not allow excessive periods to pass between the time the commission of the offence comes to its attention and the time disciplinary action is commenced. Clause 6.2.2 of the Transnet Code provides that Transnet must endeavour to institute disciplinary proceedings soon after the investigation has been finalised and not necessarily after the commission of the offence has come to its attention. Webber Wentzel are in agreement with Antrobus' finding that it can reasonably be argued that the investigation in this matter was finalised on 20 July 2009. Webber Wentzel are of the view that though there were substantial delays in charging Gama, such delays were necessary for a thorough investigation to be completed and the delays are not so gross as to amount to a waiver of Transnet's right to proceed with action against Gama. A delay will only vitiate dismissal where there is no reasonable explanation for the delay.

Overall conclusions

Webber Wentzel found no merit in the procedural issues upon which Gama still relies - the so-called Second, Third and Fourth Issues, for reasons expressed above [also covered in our detailed report]. The two allegations raised by the Public Protector do not disclose instances of procedural unfairness in relation to Gama either. Webber Wentzel are satisfied that Gama has been fairly treated by Transnet in terms of its Human Resources Policies and Procedures and Labour Law requirements, and that the processes followed during the investigation phase, in charging Gama, and the disciplinary process itself were fair and objective.

1.3.2 Substantive fairness in relation to the dismissal of Gama - Similar fact matters dealt with and reported through the disciplinary process

Our review of the similar fact matters revealed that the matters in respect of which were referred to disciplinary procedures and were finalized, have resulted in dismissals or resignations.

From the information provided to us it appears that a consistent approach is applied by Transnet during the disciplinary process.

It therefore appears that the disciplinary matter of Gama was treated in a consistent manner to other similar fact matters which had been referred to a disciplinary procedure.

1.3.3 Substantive fairness in relation to the dismissal of Gama - Similar fact matters not dealt with through the disciplinary process

In order to address the substantive fairness of the Gama matter and specifically Gama's view that *"he (*Gama*) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges"* we investigated the possible existence of similar fact matters not dealt with through the disciplinary process. This review process made specific reference to the granting of condonations for procurement irregularities and the treatment of other reported procurement irregularities. In the course of our investigations we reviewed:

- A list of condonation submissions rejected or granted by the TFR Acquisition Council from 2007 to 2010;
- TCP list of condonations granted (2008 to February 2011) by TCP National Acquisition Council;
- Procurement irregularities reported in the Transnet Internal Audit report dated 10 October 2008 *"Tender process audit"*; and
- Two matters dealing with alleged procurement irregularities brought to our attention at the start of the Gama investigation, namely VAE (a TFR matter) and Oliver Wyman (a Transnet Group matter) which also incorporates issues around the condonement process.

The matters below are matters which were not subject to any disciplinary procedure, but still have a bearing on the Gama matter.

1.3.3.1 Application of the condonation process

During the course of our investigation we noted that the process of applying for and the granting of condonations has been an accepted practice at Transnet and its operating divisions for many years. We evaluated the application of the condonation process against a directive (May 2010) issued by Garry Pita at Transnet Group entitled *"PPM Directive 3 – 2010 Condonements"* which is the most extensive written source on the practice of condonement we found at Transnet. This directive, we submit, even though written in May 2010 would give a fair view of the condonation practice prior to 2010. This directive addresses *inter alia* matters relating to the format of a condonation application; the possible action for non compliance including the line managers role, the role of DAC in the condonation process, the discretionary role of the Group CFO and CE in granting the condonation; reasons the condonations is applied for; time to apply for condonations and the possible instituting of disciplinary actions against staff members.

1.3.3.2 Review of Condonations at TFR (2007-2010), TCP (2008-Feb 2011) and TIA Oct 2008 report

Our findings, in summary:

- In the context of TFR, the condonements were related to procurement irregularities including contracts not extended correctly, contracts amended without the appropriate authorisation, issuing of tenders for a five year contract contrary to the limited two year period per PPM, condonements to pay for the security services rendered without contracts in place and condonations for the confining and award of business;
- There is no prescribed period within which to apply for condonements as a *"reasonable time"* concept is not defined in the DPP/PPM and Directive 3 – May 2010. Our review of TFR and TCP condonations has indicated that no specific time frame is applied in the application for and granting of condonation;
- For condonations reviewed at TFR and TCP we noted no instances of disciplinary action taken against any of the staff members for the condoned irregularities; and
- For the relevant procurement matters, of similar nature, as reviewed under the reported procurement irregularities by TIA we note that management responses under the management comment section of the report does not indicate any intention to investigate the matters in order to take the necessary disciplinary steps.

Given the above review of the condonations process and specifically matters on procurement irregularities we found no evidence that Gama was afforded the opportunity to submit a condonation before disciplinary actions were taken as there is no regulation of the concept of "*reasonable time*" to submit condonations nor are there application of disciplinary measures against employees granted condonations. In terms of the procurement memorandum dated 12 May 2010 a process in respect of condonation requires a line manager to submit a request for condonation to the relevant authority. The memorandum does not indicate that a person responsible for non compliance must be afforded the opportunity to apply. The memorandum appears to be silent on who the line manager is who may submit a request for condonation (the line manager of the person responsible for non compliance or the line manager himself/herself who is responsible for non compliance.

We would further submit that the practice on condonation at Transnet in general is more in line with the dictionary definition of the verb *"condone"* in that irregularities on the part of personnel are treated as *"forgivable"* or *"disregarded without protest or censure."*

Accordingly we submit that with regard to the Gama matter and a review of similar fact matters, the disciplinary action instituted for the committed irregularities appear rather to be the exception rather than the rule. We further note that the disciplinary process is not consistently applied to all transgressions but rather that a process of condonation is consistently applied with no disciplinary action being taken against offenders. These observations are in line with Gama's view that *"he (*Gama*) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges"*.

The matters below are matters which were not subject to any disciplinary procedure, but still have a bearing on the Gama matter.

1.3.3.3 VAE

Allegations

With reference to similar fact matters noted during the investigation, not dealt with through the disciplinary process, the following allegations were made in terms of the VAE contract:

- Possible non-compliance with the DAF;

- Possible scope change and contract adjustments exceeding R800 million;
- Possible non-implementation of TFRAC resolutions;
- Irregular amendment of the contract detail on SAP;
- Possible non-compliance with Transnet procurement processes;
- Possible irregular payments of VAE invoices;
- Possible violation of Transnet group procurement processes; and
- Disciplinary action for non-compliance.

Approach to the VAE matter

The steps performed comprised the following:

- Consulted with the varies parties concerned;
- Reviewed documentation we considered necessary;
- Reviewed the applicable policies and procedures;
- Reviewed other investigation reports on the VAE matter;
- Requested VAE related data from SAP; and
- Performed analysis on data and documents received.

The documentation we reviewed included, *inter alia*, the following:

- The project file of VAE from TFR;
- Copies of invoices submitted by VAE to Transnet;
- Condonations in relation to VAE;
- The VAE contracts;
- Contract amendment documents;
- Internal audit reports;
- The accounting policy of Transnet to ascertain whether or not the acquisition of rails is considered an investment item or capital item, and

- The approved corporate budgets for TFR for the 2006, 2007, 2008 and 2009 with a view to ascertain whether or not VAE related purchases were included in therein.

Summary findings on VAE

Approval of the Capex and Copex spend

- The approved budget of TFR was more than sufficient to cover R960 million contract of VAE for the acquisition rails, maintenance thereof, etc; and
- However, in spite of the adequacy of the approved budget, Van Niekerk appears to have acted beyond his delegated authority by approving the Capex and Copex spend in the amount of R960 million as he was authorised to approve amounts up to but not exceeding R200 million for Capex in the approved budget/plan to commence projects.

Increases in the contract value

- The then COO (Van Niekerk) and then GM:SSM (Van Vuuren) did not have the necessary delegated authority to approve amendments of the VAE contract values.

Extension of the contract

- Resolutions of TFRAC, adopted in a meeting held on 15 December 2009, were not implemented;
- The negotiating team did not act in the best interest of Transnet in that it focused its negotiations with VAE only on price rather than also ensuring that procurement related processes were complied with as the contract was due to expire on 30 September 2009. The team contravened section 2.5 of the PPM by confining the services of VAE without obtaining prior approval from the relevant delegated authority;
- The SSM team of the time and Thompson and his finance team acted beyond their delegated authority by extending the contract to a further three year period without obtaining prior approval, thereby contravening section 2.8 of the PPM;
- The SSM team of the time, Thompson and his finance team and the negotiating team contravened the provisions of the PPM and DPP by extending the contract of VAE by pursuing the extension route when such was no longer an option;

- The SSM team of the time, Thompson and his finance team and the negotiating team did not table the submission for regularising VAE within a reasonable time upon the occurrence of the non compliance, thereby contravening the provisions of the PPM Directive 03/2010 on condonations;
- Pita did not act in the best interest of Transnet by not ensuring that all procurement related issues regarding VAE were regularised, prior to TFR procuring goods from VAE after the contract expired;
- Thompson, who is also member of TFRAC, did not act in the best interest of Transnet in that he after he signed the condonation submission of VAE in May 2010 he did not ensure that the matter of VAE was regularised within reasonable period, given the fact that the procurement section of TFR reports to him. Since expiry of the contract in 2009, the confinement and award of business to VAE, has to date still not been signed by the GCEO, despite the resolution taken by TFRAC, which he sometimes chaired, in December 2009; and
- The statement by the CFO of TFR that he was not made aware of the state of the VAE contract until this was tabled at TFRAC during November 2010 is inconsistent with the documentation in possession which reflects that CFO of TFR signed the condonation submission during May 2010.

Payment of invoices

- The continued procurement of goods from and payment of VAE even after expiry of the 2006 contract and while no prior approval was sought from the delegated authority, constitutes a contravention of Section 51 of the PFMA; and
- The mitigation of commercial benefit cannot be used to justify the flagrant disregard of policy and the law.

The negotiating team, the SSM team of the time and Thompson and his finance team did not act in the best interest of Transnet in continuing to procure from and effecting payments to VAE while the contract of VAE was not approved by the delegated authority, thereby rendering the payment to VAE irregular.

1.3.3.4 Oliver Wyman

Allegations

The allegations in relation to the Oliver Wyman contract, based on various written correspondence received by Transnet, are as follows:

- Thomson apparently contracted Oliver Wyman bypassing the TFR Exco and going directly to Wells;
- TFR Exco was apparently *"greatly upset"* as it appeared as if a lot of money had been spent on the Coal Line Expansion in the past. TFR Exco was apparently also concerned that the expenditure on the Coal Line Expansion was *"wasteful and fruitless"* as it is alleged that they (Oliver Wyman) did not produce anything different from previous work performed on similar Coal Line Expansion studies;
- Thompson apparently gave feedback at a special TFR Exco, which was minuted;
- It is further alleged that Oliver Wyman was appointed without a proper tender process, which constituted a *"serious breach of governance"*;
- Thomson and Wells apparently also appointed Oliver Wyman, without a proper tender process, to perform work on the Waterberg Coal Deposits;
- In December 2010, Sue Lund apparently appointed Oliver Wyman to perform work for Transnet on Regulatory Affairs; and
- A certain Transnet employee, Modise, was apparently not considered to work for Transnet on Regulatory Affairs, although she was supposedly knowledgeable on the matter.

Summary findings on Oliver Wyman

Our findings in brief, are as follows:

- ***Involvement of TFR Exco in the appointment of Oliver Wyman***

  We support the view of Thomson and MacDonald that it was not necessary for the appointment of Oliver Wyman to be approved by the TFR Exco, as the appointment was done by Commercial and Freight Corridors and therefore followed Group procurement procedures in accordance with the PPM.

- ***Possible duplication of work by Oliver Wyman***

  According to MacDonald, the work performed by Oliver Wyman was not a duplication of previous work but rather built on previous work performed by Oliver Wyman for Transnet and the coal mining industry. Further needs identified by Eskom, Waterberg and Botswana were also included in Oliver Wyman's appointment. The review and consolidation of previous studies was therefore required to enable Oliver Wyman to further advice Transnet on the expansion of the coal lines to meet industry's needs.

- ***Procurement processes followed in the appointment of Oliver Wyman***

  It appears that the appropriate procurement processes were not followed in the appointment of Oliver Wyman during August 2010. Although MacDonald, as Acting GCE: Commercial and Freight Corridors, was authorised to approve the confinement and appointment of consultants, this was done after Oliver Wyman commenced with the work. The confinement was condoned by Pita because it was noted that Oliver Wyman commenced work prior to the application for confinement. Pita was authorised in terms of a sub-delegation from Singh to condone the confinement of the procurement process. The condonation, in terms of the PPM, therefore served to regularise the confinement process followed by MacDonald.

  It should be noted that the confinement memorandum, dated 12 May 2010, in respect of the condonation of a confinement do not provide further clarification on the process of condonation, except to state that prior authority for confinement should have been sought from the relevant DAC or delegated authority.

  The condonation by Transnet of non-compliance with its policies and procedures may pose challenges in its application of good governance practices in respect of procurement matters.

- ***Work performed by Oliver Wyman on Regulatory Affairs***

  Our consultation with Lund indicated that Oliver Wyman was appointed to provide Transnet with specific policy and regulatory services. She was of the view that Modise did not have the appropriate skills and expertise to perform these services. Our consultation with Modise indicated that she was of the view that she had the necessary skills, although she acknowledged that she did not have relevant prior experience. She also informed us that she should have been given the opportunity to perform the relevant work with the assistance of an external consultant (such as Oliver Wyman), if and where required.

1.3.3.5 The dismissal of Gama

One may conclude that in respect of the matter of Gama's dismissal, condonement was not requested by Ramos (Gama's direct line manager) as these matters were considered serious enough to warrant the implementation of disciplinary action, as indicated in the condonation directive/memorandum. Gama has, however, made the claim that there are other senior persons within Transnet who have also contravened Transnet's procurement policy and procedures, and they were provided with the opportunity to apply for condonation in accordance with the PPM and Directive, with no disciplinary action being taken.

The VAE and Oliver Wyman matters suggest that this claim does have merit. It is further supported by the Internal Audit Report on the Tender Process followed at Transnet Freight Rail, issued during October 2008, where audit findings highlighted senior employees having not complied with procurement procedures and no evidence was provided that the employees responsible for non-compliance were subjected to Transnet's disciplinary procedures.

1.3.4 Mega Projects

1.3.4.1 Allegations & review process

With reference to the mega projects the allegations include:

The Public Protector's letter to Transnet, dated 22 December 2010, various complaints listed on page 5, bullet 2:

"A sample of projects where irregularities occurred and governance was flouted include: Ngqura container terminal; Durban Harbour entrance widening, Cape Town container terminal, Transnet pipelines NMPP and Phase 2 of the Orex feasibility study. It is further alleged that the total variance for these projects amounted to R53 billion. A document titled "Analysis: Controllable costs vs. Uncontrollable costs" seems to support this allegation, although it is not clear whether these variances were authorised or not".

A subsequent letter to Transnet by the Public Protector to clarify matters, dated 7 February 2011, under point 7 on page 3, clarifies that the total variance for these project amounted to R5.3billion and not R53 billion due to a typographical error.

The Public Protector's letter dated 7 February 2011 on page 2 also states:

"Regarding the issue of "alleged tender irregularities", our letter refers specifically to the following:

- Alleged invoicing greater than the approved EPCM budget;
- The Ngqura Terminal Project;
- Durban Harbour Entrance Widening;
- Cape Town Container Terminal;
- Transnet Pipelines NMPP; and
- Phase 2 of the Orex Feasibility Study.

The above mega projects are those which apparently are examples where *"... the budget is exceeded by 10% (an allowable deviation) or allowable maximum of R100 mil without approval of Transnet Group"*.

Our review of the budgeted and actual costs associated with the mega projects cover the following areas where governance could possibly be flouted:

- A mega project budget is not approved by CAPIC for referral to the Board;
- An increase in the project budget is not referred to CAPIC;
- The Mega project budget is not approved by the Board;
- A variance of 25% or R100m in the estimated total cost of the budget is not brought to the attention of CAPIC;
- The expenditure or commitments of the project exceed the approved budget;
- A contract approved budget may not be exceeded by more than the permissible 10% variance; and
- Packages and package budget elements expenditure and commitments exceed the package budget and package element's budget.

The review of the mega projects budget and actual cost variances excludes areas relating to:

- The tender process and all tender related issues;

- Procurement processes in relation to the mega projects and procurement of goods and services;
- Internal control issues not related to the cost and contract management of costs on mega projects;
- The accounting and financial disclosure for mega projects costs;
- Human resources and employment issues on mega projects; and
- Contractor and personnel performance management issues of mega projects.

The review process consisted of:

- An overall review of the cost monitoring of the mega project;
- A review of the CAPIC and Board minutes to assess whether the mega project budget has been approved and a warrant or amended warrant has been issued by the Board for the mega project;
- A review of the monthly FFC, as an indicator of ETC, to verify whether it has increased by more than 25% of the original budget or by more than R100m from month to month;
- A review of the monthly level 4 cost reports for the mega project concerned to verify if any variances have occurred in terms of the commitment and actual expenditure in relation to the:
  - Project overall totals;
  - The package totals per package; and
  - The package line items.

  Where variances occur at package level or within package line items a verification that it is timeously corrected and with the approved budget transfer authority; and
- A review of the list of condonations and minutes of the TCP Mega Projects Acquisition Council (MPAC) or National Acquisition Council (NAC) to highlight variances greater than 10% of contract approved budget. The review of the minutes and condonations determined whether there was adherence to the authorisation procedures as required by the DPP, PPM and CPPPPM to have any variances greater than 10% of the FFC/Original approved contract budget approved by the appropriate authority.

We are aware that KPMG Performance and Technology Project Advisory Services have performed work on the CTCT and NMPP mega projects.

The scope of the CTCT review was to perform an independent review on the cost and scope of work of the EPCM contractor, including, amongst others, the quantum and structure of the EPCM fees, claims by the EPCM contractor and to evaluate the overall governance structures of the project.

The scope of the NMPP review was to perform a Prudency review of the NMPP capital cost expenditure. The objectives of the review were, amongst others, to classify capital costs in terms of the Regulated Asset Base ("RAB") per a certain NERSA document (ie *"Tariff Methodology for the Petroleum Pipelines Industry"*).

During consultations with the relevant KPMG representatives from Project Advisory Services, we were informed that the abovementioned engagements were currently ongoing and also at a very early stage. We have also been informed that the reports in respect of these projects are in draft phase and KPMG has not had the opportunity to discuss the report with Transnet in detail.

1.3.4.2 Summary findings on Mega Projects

NCT

- Our review raised a concern that management may not be properly and or timeously informed of the proper monthly costs on mega projects due to the fact that the snapshot reports initially provided did not reconcile with the level 4 reports and explanations for the differences were only provided after significant delays;
- Our review of the project budget approvals indicated that the overall project budget was properly approved by CAPIC and the Board. We noted that no change to the approved project budget over the review period and no governance was flouted in terms of the project budget approval;
- The review of the monthly level 4 reports revealed a flouting of governance in the following areas:

- Instances where the package line items commitments and actual expenditures exceeded the budget of the line items concerned but the package budget totals were not exceeded. These package line item variances, per se, are not a flouting of governance as the package budget totals were not exceeded. The variances on the line items were not timeously corrected through authorised budget transfers. The level 4 detailed reports on IPAS were corrected in the March 2011 reports for items dating back months before;
- The HMG retention bonus/allowance (package 95/Z004) commitment and expenditure amounts exceeded the budget for this package. The budget authorisations noted indicate that the authorisation of budget transfers were only signed off in May 2011 whilst the package line item variances were long outstanding and the line item budget corrections performed in May 2011. The budget authorisations therefore came long after the package line item variances were noted and after the level 4 detailed reports were corrected; and
- We have noted 6 instances on the mega projects condonations where Compensation Events or PMI's have been issued on certain packages/contracts that caused the original contract budgets to be exceeded by more than the 10% permissible amount. NAC/MPAC condoned the 6 cases where the original contract budget values were exceeded by more than the permissible 10% variance. There were no recommendations on the MPAC minutes that the appropriate persons be disciplined for these unauthorised activities.

DHEW

- The approved warrants were authorised by CAPIC and the Board. For DHEW there were no changes to the approved warrant value subsequent to May 2009;
- The review of the total current approved budget compared to the FFC has revealed that the budget is higher than the FFC at December 2010 and that no significant variances were recorded;
- The review of the monthly level 4 cost reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;

- We identified certain package line items where the commitments and actual expenditure exceeded the current budget. These items were adjusted and corrected during the re-baselining of the budget. These items were addressed and corrected by HMG; and
- The line items of 95/Z009/1110, 95/Z009/1111, 95/Z009/1110 95/Z009/1112, 95/Z009/1113, 95/Z009/1114, 95/Z009/1115 and 95/Z009/1116 with reference to HMG Retention allowance, however, have not been corrected. Hamilton has indicated that they were waiting for instruction from TCP as to the budget for the HMG Retention allowance. However, during handover of the project, they have still not been advised. Thus a budget amount has not allocated as of yet by TCP at the date of writing the report. This line item indicates an expenditure of R4 804 231.

CTCT

- From our review of the project budget approvals we noted that the initial overall project budget and subsequent increases, of more than 25% or more than R10m of the original budget, were properly approved by CAPIC and the Transnet Board and therefore no governance was flouted in terms of the project budget approval;
- A review of the level 4 reports from 2007 to Dec 2010 revealed instances where the package line items' actual expenditures and commitments exceeded the approved budget of the line items. The budget transfers to correct these variances were properly approved. It should be noted that the variances in the package line items however do not constitute a flouting of governance as the package budget totals were not exceeded on the project;
- As our review revealed that on the HMG retention bonuses or allowances, commitments were made and actual expenditure incurred without an approved budget. The authorisations of budget transfers were only signed off in May 2011 whilst the package line item variance was outstanding for a long time. Governance was therefore flouted in this area;
- The KPMG Performance and Technology Project Advisory Services work on the CTCT mega project revealed the following:
  - The capital vote adjustment for certain PCNs was only approved during November 2009 after being implemented used as early as January 2009 to commence with discussion of the capital vote adjustment. Furthermore, it was stated that formal approval of PCNs was required in a timely manner in terms of governance requirements.

One of the root causes for the delay in approval of the capital vote adjustment was identified as being the lack of ownership and decision making on the CTCT project, as TCP indicated that the two ODs, TNPA and TPT, were consulted on the PCNs and were therefore responsible to obtain the necessary approvals from their respective CAPICs;

- Three of the top six PCNs in terms of highest financial costs and time impact were reviewed. The PCNs referred to delays and resulting increases in costs due to delays as a result of the late approval of the environmental impact assessment, the redesign of the quay wall and subsequent delays in the appointment of contractors and the delayed completion of quays 601 and 604, which resulted in the delayed delivery of equipment, which attracted additional foreign exchange costs, over and above the forward cover and contingency costs; and
- Two broad categories of PCNs were identified, ie:
  - Errors, omissions and materialisation of identified risks as the design phase to be funded from the CTCT project contingency fund; and
  - Changes to the scope of work requested by the ODs, TCP or HMG to be funded by a business case application to the relevant OD CAPIC requesting funding.

NMPP

- The approved warrants were authorised by CAPIC and the Board. For NMPP, the increase in the budget, dated August 2008, was noted in e-mail correspondence as the necessary submissions and minutes reflecting this approval could not be found;
- The review of the total current approved budget compared to the FFC has revealed that the budget was equal to the FFC as at December 2010;
- The review of the monthly level 3 cost reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;
- The review of the package line items' commitments and actual expenditure against the current budget has revealed instances where the current budget has been exceeded. The budgets were subsequently increased and approved through Project Change Notices;

- The KPMG Performance and Technology Project Advisory Services work on the CTCT mega project revealed the following:
  - R15.3 billion of the R22 billion estimate was found allowable cost from a NERSA perspective;
  - R6.6 billion was identified as subject to further investigation through the provision of additional supporting documentation; and
  - The balance of R166 million was identified as being disallowed costs from a NERSA perspective.

Orex Feasibility Study

Our review of the CAPIC and Board submissions presentations and minutes confirmed the following:

- The approval of the original budget dated June 2006 was agreed to the submission to CAPIC (dated 12 June 2006) and the CAPIC minutes (dated 12 June 2006). No Board approval was required, as CAPIC was authorised to approve the budget up to R400 million;
- The increase in the original budget dated January 2009 was agreed to the submission to CAPIC (dated 18 July 2008) and the CAPIC minutes (dated 18 July 2008).No Board approval was required, as CAPIC was authorised to approve increases in ETC up to R400 million;
- The review of the monthly level 4 reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;
- The review of the total current approved budget compared to the FFC has revealed that the budget is higher than the FFC at December 2010 and that no significant variances were recorded; and
- The project was finalised within budget.

1.3.5 HMG JV

1.3.5.1 Allegations and review process

In the Public Protector letter (Dec 2010), one of the allegations which required further investigation is the one relating to an EPCM contract between Transnet and HMG.

The allegation is as follows:

"That HMG received preferential treatment from Transnet in that it started working for Transnet before authorisation by the Board. It is further alleged that the senior manager who has now retired, Bernard Smith, had signed the R800 million HMG contract without the necessary authority to do so. Further, that the said contract was drafted by HMG themselves and merely signed by Transnet. A perusal of the contract indicates that the contract is drafted on a Transnet letterhead, but is stated to be prepared by HMG. It was signed on 8 March 2006, yet the starting date on the contract is stipulated as 16 January 2006. The contract stipulates that the "Consultant incurs a penalty if the actual cost is above the definitive estimate", but it is not clear whether HMG incurred any penalties given the allegations of variances in terms of what was costed and budgeted for vs. the invoices that were submitted".

The scope of work for our investigation is guided by the allegations and is augmented by additional findings uncovered in the course of the investigation. The allegations and this section of the report, in relation to the HMG matter, have been categorised as follows:

- Preferential treatment received by HMG from Transnet including, inter alia, that HMG commenced work before authorisation by the Board and prior to the signing of the contract;
- Smith signed the contract without the necessary authority to do so;
- HMG drafted the contract; and
- The contract provides for penalties in the event that the actual expenses exceeded the budget.

For ease of reference, in relation to the HMG matter, we report the findings under these broad categories even though some of the issues are interlinked across some of the categories.

The review consisted of:

- Requesting and reviewing appropriate documentation;

- Performing an analysis of information and documentation received;
- Conducting interviews with various personnel and service provider;
- Establishing instances where irregularities occurred;
- Quantifying the magnitude of irregularities;
- Detecting any non compliance with policies and procedures;
- Collating corroborative evidence in respect of the identified irregularities; and
- Identifying responsible parties involved in irregularities.

1.3.5.2 Summary findings on HMG

Our summary findings in terms of the allegations on HMG in terms of the various categories are:

- **Preferential Treatment**

  There is sufficient evidence to conclude that HMG has received preferential treatment from the appointment as successful bidder up to and including the management of the contract and also subsequent amendments to the initial contract. The preferential treatment of HMG occurred in the following areas of the overall contract:

  - *Preferential treatment at tender stage* – Transnet prevented the sole remaining HMG competitor Murray and Roberts to make presentations as agreed and finalised the tender evaluation without this representation. Transnet effectively eliminated the HMG competition and allowed HMG to be the sole bidder;
  - *Discrepancies between the terms of tender offer and contract* – our review indicates that the terms and conditions of the contract and the subsequent amendments are in conflict with the corresponding terms and conditions in the NEC template, the tender conditions and the terms on HMG JV's proposal;
  - *HMG commenced work prior to receiving appropriate authorisation* – there is sufficient evidence to indicate that HMG commenced work in January 2006 prior to a valid letter of instruction setting out the salient terms and conditions and also prior to the signing of a valid contract with Transnet. HMG therefore earned EPCM fees prior to a proper appointment;

- *Bernard Smith lacked authority to appoint HMG JV as EPCM contractor* - We submit that neither Bernard Smith nor Louis van Niekerk had the authority to appoint HMG as a consultant;
- *Lack of Board authorisation for the appointment of HMG JV* - We submit that the appointment of HMG JV bypassed the governance structures of Transnet. No evidence exists that the DAC, OPCO or the Board authorised the appointment of HMG;
- *Possible non-compliance with Procurement Procedures* – Based on evidence we submit that there were various procurement irregularities in the appointment of HMG including lack of authority to confine, lack of authority of Smith and Van Niekerk to appoint consultants in excess of R10m, the bypassing of the DAC, the GCE and the Board. We submit that the contract had been deliberately left without an estimated contract value, which would have allowed the persons concerned to bypass the governance structures;
- *Retention and completion bonuses paid to HMG JV* – Based on evidence we submit that the agreement and implementation of a retention scheme for HMG, to the value of some R185.4 million, is irregular. The payment of retention bonuses in respect of staff of a service provider is not in line with best business practice or with the policies of Transnet. No other Transnet suppliers, including AWP the other EPCM contractor, were offered the same bonus scheme. No evidence was found that this scheme was ever approved by any of the Transnet governance structures like DAC or the Board. Furthermore the retrospective implementation of the retention bonus scheme from 2006 is highly irregular;
- *Payment of interest to HMG JV for late payment of accounts* – we submit that the R20.1 million in interest charged by HMG from June 2009 and for 2006 under the Hatch name was a preventable occurrence. Of the R20.1 million some R6.3 million has actually been paid to date. We submit that the Section 57(c) of the PFMA may have been contravened in that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;
- *Mark up on rental on office accommodation for TCP* – based on evidence we submit that the office rental charge by HMG JV to Transnet, for office buildings rented on Transnet's behalf, at cost plus 10% is an irregular, fruitless and wasteful expenditure. We submit that Transnet could have entered into a lease by itself and pay the lease at the agreed cost with the lessor;

- *Charging of overheads by HMG JV* – Evidence suggests that HMG charged Transnet for overheads over and above that which was catered for in the multiplier that is added to the base staff rates when invoicing occurs. Transnet was/is being double charged by the HMG JV for overhead costs because overheads and profit are provided for in the multipliers applied to base staff rates whilst the HMG JV charged Transnet separately, and in addition to the multipliers, for all disbursements at cost plus 10%;
- *Granting of work to HMG JV outside of EPCM contract* - Transnet afforded HMG JV an unfair advantage by providing them review work, to the value of R1 418 003, outside of the EPCM contract. This work consisted of reviewing aspects of projects in the R20m to R300m budget range as managed by TCP. This work was granted to HMG JV without following proper tender and procurement procedures which would have given the opportunity to other potential service providers to bid competitively;
- *Unreasonableness of hours charged by HMG JV* - Based on evidence from a sample of hours charged by HMG JV it appears that hours in excess of a normal work month hours were charged. Further detailed work may be required by TIA in this regard to verify the overall extent of the problem;
- *The "cash neutral position" concept* – Evidence suggests that Bernard Smith disadvantaged Transnet by entering into an agreement with HMG JV whereby the concept of a cash neutral position is applied. This cash neutral position is effectively payments in advance for work still to be completed based on estimates. This arrangement was not part of HMG JV's offer to Transnet at tender stage;
- *The option G contract between HMG JV and Transnet* – Evidence suggests that Moira Moses entered into an irregular contract with HMG when she authorised the Option G contract whereby additional work is granted to HMG by means of task orders. By entering into this contract she eliminated the process of tendering and complying with other procurement procedures and consequentially eliminated fair competition amongst service providers;

- *Waiver of payment by HMG JV for Professional indemnity (PI) insurance and payment thereof by Transnet* – Evidence suggests that Transnet undertook to take out professional indemnity insurance on HMG's behalf whereas the terms of reference of the request for proposal, HMG's response to the proposal and NEC3 PSC template all require that the service provider shall incur the cost of its own insurance; the insurance policy schedules indicate that Transnet took insurance for HMG and AWP in spite of the fact that the tender terms, in the case of HMG, indicate the service provider will take out the PI insurance in the case of AWP that the AWP contract indicates that the contractor will take out PI insurance; and

- *Preferential terms in the HMG JV EPCM contract in relation to the AWP EPCM contract* - Evidence suggests that in our comparison between the HMGJV contract and the AWP contract indicates that HMG JV was given preferential treatment, relative to AWP. The issues include, *inter alia*, *retention bonuses* granted to non-Transnet staff retrospectively to 2006 with no bonuses offered to AWP or other suppliers; *scope of work* – HMG has Option G in addition to Option E; AWP contract states a reduction in scope of work, *professional indemnity insurance* paid for by Transnet (and not HMG) for HMG and Transnet in terms of the contract whereas AWP and Transnet, on a contractual obligation level, both pay for the insurance.

- **Factual findings regarding the allegation that Smith signed the contract without the necessary authority to do so on 8 March 2006**

  - Evidence suggests that both Smith and van Niekerk exceeded their delegated level of authority. Bernard Smith did not have the appropriate authority to appoint the HMG JV as consultant as the value of the contract was beyond his limits in terms of Delegation Authority Framework. Further, Louis van Niekerk did not have the authority to delegate to Smith, as the HMG contract was also above his level of authority. We also submit that the delegation of authority given by Van Niekerk to Smith was after the signing date of the contract and does not apply retrospectively.

- **Factual findings regarding the allegation that HMG drafted the contract**

  - Based on documentary evidence we submit that HMG prepared the Option E contract and no documentary evidence was noted that suggest the HMG contract was subjected to a review from the Transnet legal department. This contract prepared by HMG, without Transnet legal input, favours the HMG Joint Venture to the prejudice of Transnet given the terms contained therein;

- Furthermore it is our view that the subsequent amendments to the contract created unfair advantage in favour of the joint venture as against other tenderers at the tendering stage. We submit that had the information amending the original contract been included in the joint venture's proposal, the joint venture's proposal might not have been selected as the most suitable one by Transnet;
- It is our prima facie view that the contracts entered into between Transnet and HMG JV and the amendments thereto are, in contravention of the provisions of section 50(1)(b) of the Public Finance Management Act, Act No. 1 of 1999 ("the Act"), not in the best interests of Transnet;
- Entering into the said contracts and the amendments on behalf of Transnet point to possible contravention of provisions of section 57(b) and (c) of the Act by the concerned officials. Section 57(b) of the Act provides that an official in a public entity is responsible for effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility. Further, section 57(c) of the Act provides that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due; and
- It is also our view that the amendments to the original agreement, Retention Procedure contract and Option G contract had been effected and or entered into without following proper procurement procedures as set out in the Detailed Procurement Procedures, 28 November 2006.

- **Factual findings regarding the allegation that the contract provides for penalties in the event that the actual expenses exceeded the budget**

  Based on our findings that HMG prepared the contract we conclude that the gains and penalties clause was never implemented based on the provisions of the original contract. Instead HMG was paid bonuses by an amendment to the original contract without any reference to determine penalty clauses. We submit that Transnet has been prejudiced in this arrangement.

2 Objectives of our procedures

As appears from our engagement letter, dated 12 January 2011, we were requested by Transnet to assist in providing Forensic review and investigation services.

The purpose of our procedures is to consider and analyse all the available documents as well as to identify and obtain additional documents considered by us to be relevant to our procedures.

The primary objectives of our assignment are to assess whether Gama was treated fairly by Transnet in terms of:

- Human Resource Policies and Procedures pertaining to the dismissal of Gama;
- Common precedent at Transnet in respect of matters similar to those under which Gama was dismissed;
- Labour Law practice;
- The processes followed during the investigation, in charging the employee and the disciplinary procedure, with specific reference to the fairness and objectivity of such processes; and
- Report on our factual findings together with supporting exhibits and annexures.

3 Scope and nature of our procedures

The scope of our work was limited to an inspection and analysis of the documentation and information provided to us during the course of our investigation, which is still ongoing. We have not verified the validity or authenticity of the relevant records and documentation, other than the instances specifically indicated in the report.

This engagement is not performed by us in the capacity as a Registered Auditor and does not constitute an audit. There are no International Engagement Standards applicable to an assignment of this nature. The procedures performed of this report, were those that we considered appropriate in the circumstances.

Our scope is focused on the objectives detailed in paragraph 1. The level and depth of the procedures performed are determined by us and are dependent on time or other constraints, where applicable.

In terms of our mandate, the scope of the assignment will include the perusal of at least the following documents:

- The E&Y Investigation Report pertaining to the dismissal of Gama;
- Letter from the Public Protector to Transnet (addressed to Mr M Mkwanazi), dated 22 December 2010;
- The transcript of Gama's interview which formed part of the E&Y investigation;
- The transcript of Gama's disciplinary hearing;
- Legal opinions obtained from E&Y, Edward Nathan Sonnenbergs and Bowman Gilfillan;
- Review of consistency with any other similar cases against other Transnet employees; and
- Any interviews that might be considered necessary to complete the forensic review.

In addition, we are to consider and advise Transnet whether irregularities occurred or whether governance was flouted in respect of the following *"mega"* projects:

- Nqgura Container Terminal;
- Durban Harbour Entrance Widening;
- Cape Town Container Terminal;

- Transnet Pipelines NMPP; and
- Phase 2 of the Orex feasibility study, as alleged on the second bullet point on page 5 of the letter from the Public Protector (December 2011).

We are also to investigate the allegations made on the Public Protector Complaint regarding HMG (as per the fourth bullet on page 5 of the letter from the Public Protector).

In addition to the above, we have been requested to look into allegations of non-compliance with procurement policy and procedures in respect of the contracts entered into with the following two entities:

- VAE SA (Pty) Limited; and
- Oliver Wyman.

3.1 Limitations and subsequent events

We have attempted to include all information relevant to the specific transactions. However, it is possible that documents and information exist which were not made available to us, or which we were unable to locate.

Any documents or information brought to our attention subsequent to the date of this report which would affect the findings listed below, will require our findings to be adjusted and qualified accordingly.

3.2 Restriction on distribution of report

This report was prepared solely for the purposes of reporting our findings to you. This report should therefore not be utilised for any other purpose. No part may be quoted, referred to or disclosed in whole or in part, by any party, without our prior consent.

3.3 Legal advice

Although our report may contain references to relevant laws and legislation, we as KPMG and Nkonki do not provide legal opinion on the compliance with such laws and our findings in this report are not to be construed as providing legal advice. Our discussion of the relevant laws is intended solely to facilitate the determination of applicable facts which may be relevant to the interpretation and/or application of such laws. We have appointed legal practitioners to assist in the performance of our assignment. Where relevant, their report has been included as an Annexure to this report.

4 Engagement approach

In order to achieve the objectives, we confirm that Transnet has agreed that we conduct the investigation in the following phases:

4.1 Phase 1 – Planning and preliminary enquiries

During this phase of the investigation the following procedures, *inter alia*, will be performed:

- Requesting all documentation considered by us to be relevant for the purposes of our assignment;
- Initial review of such documentation with the view of gaining an understanding of the pertinent issues relevant to this assignment; and
- Compiling a project plan with timelines and key milestones.

4.2 Phase 2 – Detailed procedures

During this phase the following procedures, *inter alia,* will be performed:

- In-depth review of the relevant documents as far as these pertain to this assignment;
- Conducting interviews with individuals considered by us to have relevant information;
- Obtaining and studying further documentation as identified by us; and
- Utilising legal counsel as and where required.

4.3 Phase 3 – Feedback and reporting

During this phase of the investigation the following procedures, *inter alia*, will be performed:

- Compiling a draft report, together with exhibits and annexures, setting out our factual findings;
- Discussing the draft report with yourselves with the view to finalising it; and
- Issuing a final report.

5 Structure of this report

The structure of this report is set out to cover the various aspects required to be investigated by ourselves. In this regard, the report will broadly cover the findings as follows:

- Fairness of the disciplinary procedure instituted against Gama;
- Fairness in respect of matters of a similar nature and consistency of disciplinary action taken;
- Alleged irregularities regarding the 5 mega projects; and
- Alleged irregularities regarding the HMG contract.

6 Procedural fairness – dismissal of Gama

6.1 Introduction

Webber Wentzel was appointed by KPMG/Nkonki to assist it with certain aspects of the forensic review. As per the objectives, the purpose of the forensic review is to assess whether a former employee of Transnet, Gama, has been fairly treated by Transnet in terms of:

- Human Resources Policies and Procedures pertaining to the dismissal of Gama;
- Common precedent at Transnet in respect of matters similar to those on which Gama was dismissed;
- Labour Law; and
- Whether the processes followed during the investigation phase, in charging the employee and the disciplinary process itself were fair and objective.

We appointed Webber Wentzel to assist by providing a report on the procedural fairness of:

- The events leading up to the disciplinary inquiry into Gama 's conduct;
- The conduct of the disciplinary inquiry itself; and
- The events post the disciplinary inquiry up to the present time.

We shall refer to these aspects as *"procedural fairness relating to Gama"*.

The findings comprise the following:

- Pertinent issues relating to the scope of Transnet's forensic review;
- Gama 's identification of procedural issues as set out in his statement ("the Statement") annexed to his referral of an unfair dismissal dispute to the TBC[1];
- A framework for the identification of issues relevant to procedural fairness relating to Gama; and
- Webber Wentzel's overall conclusion.

[1] Refer Exhibit 1 – Statement by Gama

The matters dealt with in the subsequent paragraphs have been extracted from the detailed Webber Wentzel report[2].

6.2 Issues raised by the Public Protector

The Public Protector requires Transnet to comment on allegations made in what it labels items (A), (B) and (C), to advise it whether any of these allegations were ever investigated and, if so, what the outcome of such investigation was, including any disciplinary action taken against officials of Transnet as a result.

Item (A) relates to alleged tender irregularities, which apparently emanate from an unsigned document titled *"Procurement irregularities at Transnet"*. Item (A) thereafter sets out a number of allegations. None of these allegations have any bearing on procedural fairness relating to Gama.

Item (B) sets out further allegations emanating from an unsigned statement titled *"Private and Confidential"*. Two of the allegations have a bearing on procedural fairness relating to Gama. These are as follows:

- *"The charges against* Gama *relate to events that occurred in 2007, yet he was only charged in 2009"*; and
- *"In October 2008, the former GCE, Maria Ramos, dismissed the allegations against* Gama *as "baseless and utter rubbish", yet she raised them again in her last Board meeting"*.

Item (C) relates to an article published in the Sunday Times on 13 September 2008 in which certain allegations were made. None of these allegations have any bearing on procedural fairness relating to Gama.

6.3 Procedural issues raised by Gama in his referral to the TBC

Gama has referred a dispute regarding his dismissal to the TBC, as he was entitled to do. A Statement contained those issues which Gama required to be addressed at the arbitration proceedings before the TBC.

The Statement contained the following issues pertinent to procedural fairness relating to Gama:

[2] Refer Annexure A – Webber Wentzel report on procedural fairness

- The manner in which Gama was suspended and subsequently charged with misconduct which Gama alleges was an unlawful delegation of authority by Wells to Maharaj (referred to hereinafter as the *"First Issue"*);
- Transnet's decision to convert the pre-dismissal arbitration into a disciplinary inquiry which Gama alleges was procedurally unfair (referred to hereinafter as the *"Second Issue"*);
- The appointment of Antrobus to chair the pre-dismissal arbitration (and subsequently the disciplinary inquiry) which Gama alleges constituted a breach of an agreement reached between Transnet and Gama which, in turn, rendered the disciplinary process and subsequent dismissal procedurally unfair (referred to hereinafter as the *"Third Issue"*); and
- An allegation that Gama's contract of employment makes a distinction between misconduct and serious misconduct which Gama alleges was not taken into account by Antrobus in recommending the sanction of dismissal. Gama asserts that his dismissal was therefore a violation of his employment contract which rendered such dismissal procedurally unfair (referred to hereinafter as the *"Fourth Issue"*).

The four procedural issues identified in the Statement do not rehash all of the procedural issues previously raised by Gama and his legal team during the disciplinary inquiry. Furthermore, the procedural issues identified in the Statement are not congruent with the issues pertaining to procedural fairness relating to Gama as set out in the Public Protector letter (Dec 2010).

Subsequent to his referral, Gama's legal representatives and Transnet's legal representatives have held a pre-arbitration meeting and concluded a minute of that meeting. That process has resulted in a further narrowing of the issues as a consequence of which the only issues pertinent to procedural fairness relating to Gama upon which Gama continues to rely are the Second, Third and Fourth Issues. The First Issue is no longer relied upon by Gama.

A further outcome of the pre-arbitration process referred to above is that Gama has admitted guilt on charges 1, 2 and 4. Such admissions, and their effect, are dealt with in our findings.

6.4 The framework for the identification of issues

The framework has to take into account that the issues raised in the Public Protector letter (Dec 2010) do not coincide with the procedural issues still relied upon by Gama in his referral to the TBC. Furthermore the scope of Transnet's forensic review as such pertains to procedural fairness and is wider than the procedural issues still relied upon by Gama.

The framework for reporting is as follows:

- Labour Law requirements in the conduct of a fair disciplinary process;
- Gama 's letter of appointment: its requirements (if any) regarding procedural fairness, and whether such were required to be followed and were followed;
- Transnet's disciplinary policy applicable to managers: its provisions and requirements, and whether such were required to be followed and were followed;
- The First Issue: Whether authority was properly delegated to Maharaj to suspend Gama and thereafter institute charges against him. High Court proceedings were instituted by Gama in September 2009 which resulted in a judgment by Spilg J on 7 October 2009, dismissing Gama 's application for relief;
- The Second Issue: the conversion of the pre-dismissal arbitration into a disciplinary inquiry;
- The Third Issue: the appointment of Antrobus, whether there was an agreement in regard to any such appointment, if so was such agreement breached, and if so the effect of such breach;
- The Fourth Issue: whether Gama 's dismissal was in violation of his employment contract, and if so did was such dismissal procedurally unfair;
- The objection raised with Antrobus regarding him presiding as Chairman of the disciplinary inquiry:
  - When the objection was first raised;
  - The form in which the objection was raised;
  - Whether the objection amounted to an application for a recusal, and whether such was properly raised by Gama; and
  - Antrobus' response to the objection;
- Alleged delays:
  - In investigating the alleged offences;
  - In suspending Gama;
  - In charging Gama; and

- In running the inquiry: first stage (on the merits of the charges): second stage (on appropriate sanction);

- The alleged dismissal by the former GCEO, Ramos, of charge 1 in October 2008;
- The alleged vagueness of the disciplinary charges; and
- The effect, if any, of Gama admitting guilt on charges 1, 2 and 4, specifically with regard to those procedural issues which remain alive.

The framework commences with a summary of labour law requirements, followed by an analysis of the First to Fourth Issues, since those were identified by Gama as the procedural issues he intends relying on at the TBC. Gama appears to have abandoned his reliance on the First Issue, but for purposes of completeness this issue is dealt with as well (as we do later with other procedural issues which Gama appears to have either abandoned or upon which he places no reliance). In the analysis of the First to Fourth Issues, the pertinent aspects of Gama 's letter of appointment and Transnet's disciplinary policy applicable to managers is dealt with.

6.4.1 Labour Law requirements

6.4.1.1 Legal basis of procedural fairness

Section 188 of the LRA provides that the dismissal of an employee will be unfair if the employer fails to prove that there was fair reason for the dismissal (ie that the dismissal was substantively fair) and that the dismissal of the employee was affected in accordance with fair procedure (ie that a fair process preceded the dismissal).

In terms of section 192 of the LRA, once the existence of a dismissal has been established, the onus rests on the employer to prove that the dismissal of the employee was fair.

The right to procedural fairness stems from the following principles of natural justice:

- *audi alteram partem* - translated as *"hear the other side"*; and
- *nemo iudex in sua causa* - translated as *"no one shall be a judge in his own cause"*.

Schedule 8 to the LRA, the Code of Good Practice: Dismissal ("the Code") provides guidelines for substantive and procedural fairness in various types of dismissals including dismissals for misconduct, incapacity and an employer's operational requirements.

6.4.1.2 Process preceding dismissal

Item 4 of the Code provides the following guidelines for the procedure to be followed prior to a decision being taken to dismiss an employee:

- Conducting of an investigation;
- Notifying the employee of the allegations against him; and
- Affording the employee an opportunity to present a case in response to the allegations.

Pursuant to this process and once a decision is made to dismiss an employee, the employer should communicate the decision taken to the employee (preferably in writing) and provide the employee with the reason for his dismissal. The employee should also be advised of his right to pursue dispute resolution procedures, if any, set out in a collective agreement or to refer the matter to the Commission for Conciliation Mediation and Arbitration ("the CCMA") or the relevant bargaining council, depending on which entity has jurisdiction.

6.4.1.3 The sanction of dismissal

The Code discourages the dismissal of an employee for a first offence and promotes the concept of corrective or progressive discipline in terms of which an employer endeavours to correct an employee's behaviour through progressive disciplinary measures. It is envisaged that dismissal should be considered a last resort and reserved for "*serious misconduct or repeated offences*".

The Code does, however, recognise that the dismissal of an employee for a first offence is appropriate where the misconduct committed is so serious that a continued employment relationship is intolerable. While each case should be judged on its merits, examples of serious misconduct include, *inter alia*, gross dishonesty.

In deciding whether or not to impose the penalty of dismissal, the Code provides that an employer should in addition to considering the gravity of the misconduct, consider mitigating factors such as the employee's circumstances, (including his length of service, previous disciplinary record and personal circumstances) as well as the nature of the job and the circumstances of the infringement.

Whilst length of service is a mitigating factor to be considered by the decision maker, the Labour Court has held that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal.

6.4.2 First Issue

Gama contends (at paragraph 4.1 of the Statement) that the decision taken by Maharaj to proceed with disciplinary action against him was unauthorised[3]. This is not an issue that the Arbitrator of the unfair dismissal proceedings is required to decide, since Gama has abandoned his reliance upon it.

It was argued on behalf of Gama that Wells' involvement in the process, however tangential, rendered the entire process tainted because of Wells' bias. This means that it was not the delegation per se that was problematic, according to Gama, but Wells' involvement in the delegation. Gama did not, in fact, dispute that the powers of delegation and sub-delegation were properly authorised in terms of a resolution. In dismissing the application, Spilg J found that the alleged bias of Wells did not detract from the fact that "*....reasonable and probable grounds exist for supporting the decision to institute disciplinary proceedings and to suspend [*Gama]".

Webber Wentzel found no reason to disagree with the finding of Spilg J. Gama appears to have accepted the finding, since he did not appeal the decision, and places no further reliance on this particular ground of alleged procedural unfairness.

6.4.3 Second and Third Issues

6.4.3.1 Application of the facts to the Second and Third Issues

Was agreement reached between BG and Langa regarding the appointment of Antrobus to chair the pre-dismissal arbitration process?

Having reviewed all of the relevant documentation, Webber Wentzel is of the view that:

- Having proposed Antrobus as one of the seven possible arbitrators, Langa was bound by BG's choice of him as the arbitrator and agreement was thereby concluded on the identity of the arbitrator; and
- Whether such agreement was concluded, or not, is in any event immaterial and does not render any part of the (different) process that was actually followed procedurally unfair. This will be expanded upon further below.

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[3] Refer Exhibit 1 – Statement by Gama

Did Transnet, after opting to proceed by way of a pre-dismissal arbitration process, thereafter *"unilaterally change its mind and impose a disciplinary hearing"* (Gama's words).

- Having initially decided to proceed by way of a pre-dismissal arbitration process, Transnet subsequently informed Gama's legal representatives that it would instead proceed by way of a disciplinary hearing. It took this decision based on its view that Gama had repudiated the agreement concluded on the identity of the arbitrator;
- Whether Transnet was correct in its view of the repudiation, or not (in Webber Wentzel's view it was correct), it was in any event entitled to proceed by way of a disciplinary inquiry instead of a pre-dismissal arbitration. As set out above it had the sole discretion to decide which route to follow; having opted initially for one process, there is nothing in the letter of appointment that binds it irrevocably to such choice. In Webber Wentzel's view, it would be entitled to change its option at any stage, at its sole discretion, prior to the institution of either proceeding, provided such change did not prejudice Gama in any manner. In this instance, not only was it justified in holding there was good reason for such change (when no reason was required), furthermore the change was to Gama 's benefit since he now has the ability to re-ventilate his dispute at the TBC, something he would not have been entitled to do after a pre-dismissal arbitration. Gama has taken advantage of the conversion to a disciplinary hearing, by referring his dispute to the TBC;
- Transnet's conduct was not procedurally unfair in opting to convert the pre-arbitration hearing to a disciplinary hearing; and
- Relevant legal principles relating to Second and Third Issues.

To the extent that it is argued that:

a) No agreement had been reached regarding the appointment of the chairperson; and/or

b) Transnet had unilaterally imposed a disciplinary inquiry on Gama; and/or

c) Transnet had given some sort of indication or undertaking to Gama's legal representatives regarding the qualifying criteria for the chairperson, the particular circumstances of this matter are such that none of these procedural issues can be said to have rendered the disciplinary process procedurally unfair.

The Labour Court accepts that the mere fact that parties to disciplinary proceedings may have agreed on a particular procedure to be followed, which is not then followed, does not in itself mean that the procedure which is, in fact, followed is unfair ie the test for procedural fairness is more properly focused on whether or not the actual procedure followed is fair as opposed to whether or not such procedure is not what was agreed between the parties. If one considers the accepted principles for determining whether or not a disciplinary process is procedurally fair (which are set out elsewhere in this report), in Webber Wentzel's view the disciplinary process that was followed by Transnet in respect of such issues was in all respects procedurally fair.

South African employment law does not impose any obligation upon an employer to seek the agreement of its employee to the appointment of a particular chairperson to preside over a disciplinary inquiry (or an agreement as to the qualifying criteria of such appointment). South African employment law requires that employers comply with certain (limited) procedural requirements in disciplining employees. In relation to the appointment of presiding officers, these procedural requirements are that such individuals must conduct the inquiry in an independent and objective manner. There is no indication that Antrobus conducted himself in any other manner. It is worth emphasising again that whilst there is no indication that Transnet agreed with Gama 's legal representatives that the presiding chairman should not have performed any work for Transnet prior to Gama 's disciplinary inquiry, any such agreement could only have been of application to the pre-dismissal arbitration process and not to the subsequent disciplinary inquiry.

6.4.4 The Fourth Issue

The Fourth Issue is contained within paragraph 4.4 of the Statement, as follows[4]:

"*My contract of employment allows for termination in the event that I am found guilty of serious misconduct, I was charged with misconduct. The presiding officer found me guilty of misconduct and not of serious misconduct and therefore I contend that Transnet, is in violation of its own contract of employment as it filed charges based on alleged misconduct and not serious misconduct as contemplated in the employment contract, and sought for my dismissal, which is in fact the wrong sanction as the contract can only be terminated if I have been charged and found guilty of serious misconduct, and not misconduct. It is procedurally unfair to be dismissed in a manner that violates my employment contract.*"

[4] Refer Exhibit 1 – Statement by Gama

6.4.4.1 Gama's letter of appointment

Gama 's letter of appointment (at paragraph 14), provides that Transnet may terminate Gama 's employment for reasons relating to his conduct or for any other reason that is recognised by law as being sufficient[5].

Notwithstanding the above, Transnet may terminate the agreement summarily if the reason for the termination relates to *serious misconduct* committed by Gama or *a gross failure to meet the performance standards* or any material breach of Gama 's obligations under the agreement or *gross negligence* on the part of Gama or for any reason recognised by law as being sufficient, provided that Transnet follows fair pre-dismissal procedures as and when required in terms of applicable legal principles and/or legislation.

Clause 15 of the agreement states that Gama will be subject to Transnet's disciplinary procedures, code of conduct and other policies that serve to regulate the employment relationship, and where conflict arises between any provisions contained in the agreement and a Transnet policy or procedure, the provisions of the agreement prevail.

6.4.4.2 Transnet's disciplinary code and procedure - the Transnet Code

The Transnet Code provides that it is applicable to all employees falling within Transnet's management category[6]. *"Management"* is defined in the Transnet Code to include supervisors, managers, senior managers and executives of Transnet.
The Transnet Code provides that:

- The nature and severity of an employee's transgression determines the nature and extent of the disciplinary action;
- Transnet has the right to decide when an employee's behavior is unacceptable and to institute appropriate action. Any employee who commits an act of misconduct may be subject to appropriate disciplinary action. Although the purpose of disciplinary action is corrective, the employer is not obliged to give any warnings in respect of misconduct that would justify summary dismissal, provided that the employer may only dismiss an employee after a fair hearing. At such a hearing and before the decision to dismiss is taken, consideration must be given to inter alia, circumstances of the misconduct itself;

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5 Refer Exhibit 2 – Employment contract of Gama
6 Refer Exhibit 3 – Transnet Code

- Where allegations of misconduct have been raised against an employee which if proven would carry the sanction of dismissal, Transnet is entitled at its sole discretion to decide whether or not to hold an internal disciplinary enquiry or to proceed with a pre-dismissal arbitration as contemplated in Section 188A of the LRA. However, if Transnet does not elect to proceed with the pre-arbitration dismissal, Transnet's disciplinary codes and procedures will apply;
- There are certain categories of disciplinary transgressions for which Transnet may take disciplinary action called Primary Offences. These offences are considered serious and may lead to the employee's summary dismissal. Gross insubordination or serious disrespect, breach of Transnet's Code of Ethics, Contravention of the Section 51(1) of the PFMA (contraventions that the Gama was found guilty of) are examples that fall under the category of Primary Offences; and
- The list of transgressions are not exhaustive and that an important factor in determining whether a particular act or failure to do something could be considered as unacceptable behavior is whether or not that behavior could be detrimental to the relationship between Transnet and its employees.

6.4.5 Findings of the disciplinary inquiry

Antrobus found Gama guilty of misconduct on three charges in terms of written findings handed down on 4 June 2010[7].

6.4.5.1 Charge 1

Briefly, Gama was charged with authorising the conclusion of a contract for the provision of security services by GNS on confinement in excess of his delegated authority. This, it was alleged, constituted a willful, or alternatively negligent, failure to carry out his duties in the manner expected of him, and resulted in breaches of the PFMA which constituted misconduct as contemplated in section 51(1) (e) of the PFMA.

[7] Refer Exhibit 4 – Findings of Antrobus

6.4.5.2 Charge 2

Briefly, Gama was charged for failing to comply with the terms of the Board Resolution of 26 April 2007 which approved the acquisition of 50 *"like new"* locomotives and which authorised him to conclude, sign and execute the contract. Specifically he failed to conclude the contract or to execute the contract in compliance with the condition established by the Board that TRE would carry out all engineering on assembly and maintenance. This, the charge stated, constituted a willful, or alternatively negligent, failure to carry out his duties in the manner expected of him, and resulted in breaches of the PFMA which constituted misconduct as contemplated in section 51(1) (e) of the PFMA.

6.4.5.3 Charge 4

This charge related to the unwarranted criticism of Transnet and its Executives.

Antrobus found on the charges viewed together that:

- In considering whether or not dismissal is the appropriate sanction it would be artificial to ignore the fact that Gama was found guilty of all three charges;
- It is therefore necessary to acknowledge that if a conclusion should be reached that he should not be dismissed; that would necessary entail that Gama return to work in circumstances where his employer in the form of the acting GCEO, other senior executives and the Board have all lost faith in Gama as a consequence of his misconduct in respect of all three charges; and
- In this sense the misconduct with which Gama was charged is unavoidably to be viewed as accumulative. When viewed accumulatively there can only be one conclusion which is that dismissal is the appropriate sanction.

Antrobus' recommendation:

- Antrobus was satisfied that the appropriate sanction in respect of each of the charges viewed in *isolation* was dismissal;
- Antrobus having regard to the fact that Gama was found guilty of all three charges and that having regard to nature the misconduct, it was to be viewed accumulatively, which serves only to emphasise that dismissal was the appropriate sanction; and

- Accordingly, Antrobus recommended summary dismissal of Gama to Transnet.

6.4.5.4 Conclusion

Gama alleges that Antrobus found him guilty of *misconduct* and not of *serious misconduct* and therefore contends that Transnet is in violation of its own contract of employment.

Antrobus found Gama guilty of misconduct on three charges in terms of written findings handed down on 4 June 2010.

The question which arose at the stage of the 4 June 2010 findings was whether or not Gama was guilty of misconduct. The question of the degree, or seriousness, of Gama's negligence became an issue to be decided at the findings on sanction stage. That was required to be considered at that stage because it is the seriousness and gravity of the misconduct which is central to the determination of sanction.

As discussed, Primary Offences are considered serious and may lead to the employee's summary dismissal in instances of, *inter alia*, gross insubordination or serious disrespect, breach of Transnet's Code of Ethics, and Contravention of the Section 51(1) of the PFMA all of which are contraventions in respect of which Gama was found guilty.

Antrobus found on Charge 1 that the failure of Gama as the gatekeeper to read the document can fairly be described as *gross negligence* and the resulting consequences of his negligent conduct rendered the negligent act as *serious*. His failure to properly consider what he was signing constituted very *serious negligence*.

On Charge 2, Antrobus found that the consequences of Gama's negligence in relation to the 50 *"like new"* contract were *severe and serious*. Remedying the situation rendered the negligence as being regarded as *gross negligence*.

On Charge 4, in the 4 June 2010 findings, Antrobus went so far as to remark that Gama's statements constituted *serious disrespect and gross insubordination* insofar as Gama's criticism related to Wells.

Finally, the misconduct with which Gama was charged was viewed as accumulative by Antrobus. When viewed accumulatively, Antrobus held, the misconduct was serious enough to warrant summary dismissal.

Gama's complaint is without merit. Not only does it ignore Antrobus' findings on sanction, it also does not relate to the very document upon which he places reliance viz. his letter of appointment. As is set out above, instances meriting dismissal include serious misconduct, gross negligence, gross failure to meet performance standards, or any reason recognised by law as being sufficient. Primary Offences include gross insubordination and serious disrespect. Gama was found guilty of all such instances.

6.5 Delays

6.5.1 Introduction

In his response to the charges, Gama contended that the delays experienced between the time Transnet became aware of the charges against him and the time he was charged are materially prejudicial to him and in breach of the Transnet Code. Gama contended that Transnet had been aware of the allegations against him in relation to the 50 *"like new"* locomotives contract two years prior to charging him and that it had been aware of the allegations in relation to the GNS contract as far back as September 2008 and had only charged him in August 2009.

In her letter to Transnet, the Public Protector set out as an allegation relating to procedural unfairness: *"The charges against* Gama *relate to events that occurred in 2007, yet he was only charged in 2009".*

Gama is no longer relying on this ground of procedural unfairness, although he did raise it during the disciplinary hearing.

Clauses 6.2.1 and 6.2.2 of the Transnet Code contain the following relevant provisions:

- *"a disciplinary hearing must be held as soon as possible after the commission of an alleged offence.*
- *Transnet must endeavour to hold the disciplinary enquiry as soon as possible after it has finalised its investigation into the conduct of the employee. While Transnet will make every effort to ensure that discipline is implemented contemporaneously with the offence allegedly committed by the employee, it is recognised that certain investigations will take longer to complete and that it is not always possible to bring disciplinary proceedings contemporaneously".*

Webber Wentzel have had sight of the tip-offs received by Transnet on the alleged irregularities with regard to both the 50 *"like new"* locomotives contract and the GNS contract, the internal communication thereafter leading to the two investigations, the disciplinary enquiry finding and the various opinions received by Transnet prior to charging Gama. Webber Wentzel set out below the sequence of events prior to Gama's dismissal.

6.5.2 Antrobus' finding on the delays

In his finding on this aspect, Antrobus summarised the evidence presented by the TIA investigators and Wells on behalf of Transnet and accepted it in its entirety.

Antrobus accepted Transnet's evidence that even though Transnet was aware that Gama had not complied with the Transnet Board resolution as early as April 2008, steps had not been taken to charge Gama at that stage as the full implications of Gama's failure to ensure that the 50 *"like new"* locomotives contract resulted in TRE performing the local work were not realised until much later. It was accordingly necessary to continue with the investigation.

He also accepted Oates' evidence that the TIA investigators had accepted Transnet legal team's advice that the Transnet Board resolution had been complied with and had in the earlier parts of the investigation focused on rectifying the problem. It was only after rectification had failed that they had started focusing on who was to blame for the failure to comply.

Further, Antrobus accepted Oates' evidence that the 212 locomotives investigation and the interdicts had kept the investigators occupied and away from the 50 *"like new"* contract investigation.

In addition, Antrobus stated that the GNS contract investigations had also played a role in the delays as it would not have been prudent to charge Gama separately.

Antrobus thereafter found that this was not a case where no explanation for the delay had been provided as a full explanation had been furnished and that there was nothing inherently wrong with the approach adopted by Transnet and the investigators. He made reference to section 6.2.2 of the Transnet Code (set out above) which envisages that an enquiry must be held as soon as possible after investigations had been finalised and found that it was arguable that investigations became complete after Wells received Gama 's response on 20 July 2009. Gama was charged in the following month.

He concludes that though there is something to be said about the over-cautious approach that Transnet had followed, Gama had been suspended on full pay on 1 September 2009 only and had not been prejudiced in any material way or in any manner that can be described as either unexplained or grossly unfair that it could preclude Transnet from taking disciplinary steps and that Transnet had in any event never waived its rights in that regard.

6.5.3 Conclusion

Webber Wentzel concludes that it is trite law that an employer should not allow excessive periods to pass between the time the commission of the offence comes to its attention and the time disciplinary action is commenced. If the employer is tardy in instituting disciplinary proceedings, the Court may well find that the employer has waived its right to do so or that the employer has reconciled itself to the continuation of the employment relationship and hence waived the right to dismiss the employee. This is particularly so in instances where an employer fails to furnish an explanation for the delay.

Clause 6.2.2 of the Transnet Code provides that Transnet must endeavour to institute disciplinary proceedings soon after the investigation has been finalised and not necessarily after the commission of the offence has come to its attention. Webber Wentzel are in agreement with Antrobus' finding that it can reasonably be argued that the investigation in this matter was finalised on 20 July 2009 when Wells received Gama's response. Soon thereafter, Gama was charged. There was no substantial delay in that period.

In any event, as stated by Antrobus, Transnet explained in detail the process followed by it from the date of receipt of the first tip-off to the date Gama was charged and the explanation is perfectly reasonable and reflects a cautious approach by Transnet prior to charging Gama. Webber Wentzel are of the view that though there were substantial delays in charging Gama, such delays were necessary for a thorough investigation to be completed and the delays are not so gross as to amount to a waiver of Transnet's right to proceed with action against. A delay will only vitiate dismissal where there is no reasonable explanation for the delay.

Gama was also not prejudiced in any manner by the delays as he was only suspended on 1 September 2009 after the investigations were completed and he had already been charged. The delays thereafter were occasioned by both parties in the course of preparing for the hearing. There is accordingly no substance to this objection.

6.6 Alleged dismissal of Charge 1 by Ramos

The second issue raised by the Public Protector in Item (B) of her letter is as follows:

"In October 2008, the former GCE, Maria Ramos, dismissed the allegations against Gama *as "baseless and utter rubbish", yet she raised them again in her last Board meeting."*

Gama is not relying on this issue as a ground of procedural unfairness, and he has admitted guilt on all three charges he was found guilty of at the disciplinary hearing. The combination of the two takes most of the sting out of the allegation, but Webber Wentzel nevertheless dealt with it for purposes of completeness.

Webber Wentzel concluded that Ramos could not have dismissed the allegations against Gama as *"baseless and utter rubbish"* in that:

- Ramos was unaware of the full facts of the alleged misconduct on Gama 's part (which had not yet been investigated), that she could have excused him consequently that charge could not have been waived by Ramos;
- Ramos sent the tip-off letter to Wells and Mr Vuyo Kahla requesting the allegations be investigated;
- Further, Ramos followed up on the progress of the investigation both with Wells and Oates on a regular basis;
- Gama accepted under cross-examination that Ramos had not dismissed as *'rubbish"* any charge in relation to his signing a confinement beyond his authority; and
- On 13 February 2009 Ramos, at her last Transnet Board meeting as GCEO, handed over the issues raised in the investigations relating to both the GNS contract and the 50 *"like new"* locomotive acquisitions to the Board.

6.7 Vagueness of the charges

In Gama's response to the disciplinary charges, he contended that the way the charges were formulated was impermissibly wide and vague and accordingly prejudiced him. This allegation was not persisted with at the disciplinary inquiry and has not been raised by Gama in his referral to the TBC. Webber Wentzel, has, however, dealt with it for the sake of completeness.

The disciplinary charges against Gama in respect of which Gama raised his complaint are Charges 1 and 2.

6.7.1 Antrobus' finding

In his finding, Antrobus first notes that Gama had not persisted with this ground at the disciplinary inquiry and then states that even though the charges were wide of the mark, particularly with hindsight, they were not so vague as to render Gama prejudiced in any way. He concludes that there is no merit to this objection.

6.7.2 Conclusion

Webber Wentzel point out that they have had sight of Gama's response to the disciplinary charges; Transnet's reply to Gama's response to the disciplinary charges, the DAF 2007, and the DPP and are in agreement with BG's response to Gama's first objection as set out below[8].

Transnet had delegated authority to Gama in terms of the DAF 2007 read with the DPP which gave Gama certain powers and duties in respect of procurement at TFR, which powers and duties fell under the provisions of section 50 and 51 of PFMA.

In addition, as set out above, the concept of procedural fairness obliges an employer to set out charges against an employee in a form and language that the employee can reasonably understand to enable the employee to respond accordingly. This simply means that the charges must give the employee enough information on the allegations that he/she has to meet to enable the employee to prepare a sufficient response.

In the circumstances, Webber Wentzel are of the view that the charges against Gama, though wide, were set out in a manner that was sufficient enough to give him an understanding of the matter he had to meet .The charge sheet sets out the two acts committed by Gama in detail and the alleged misconduct arising thereof in sufficient detail to enable Gama to understand the issues.

In any event, when Gama objected to the charges as being vague, BG sent him a detailed response furnishing him with further particulars on 30 November 2009. This alleged defect was accordingly remedied well before the disciplinary hearing commenced.

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[8] Refer Exhibit 5, 6, 17 and 7 – Gama's response to the disciplinary charges, DAF 2007, DPP and BG's response

Webber Wentzel also point out that Gama has subsequently admitted guilt to Charges 1, 2 and 3 which renders this particular ground of alleged procedural unfairness nugatory.

6.8 Findings and overall conclusion

Webber Wentzel's findings are contained, in each instance, at the conclusion of the analysis of each identified issue in the framework

Webber Wentzel found no merit in the procedural issues upon which Gama still relies - the so-called Second, Third and Fourth Issues, for reasons expressed above. The two allegations raised by the Public Protector do not disclose instances of procedural unfairness in relation to Gama either, for reasons expressed above. Webber Wentzel are satisfied, for reasons expressed above, that Gama has been fairly treated by Transnet in terms of its Human Resources Policies and Procedures and Labour Law requirements, and that the processes followed during the investigation phase, in charging Gama, and the disciplinary process itself were fair and objective.

7 Substantive fairness – consistency in the application of disciplinary action

7.1 Introduction

Much of the aspect of substantive fairness has been dealt with under the previous section. These aspects relate mainly to the following:

- That there has to be acceptable proof that an offence was committed and that the offence was of such a nature that it justifies the sanction that is being applied (in this case, the sanction being dismissal);
- The employee must have broken a rule of conduct in the workplace;
- The rule must have been valid and/or reasonable under the circumstances; and
- The employee knew or should have known of the rule before the sanction took place.

Another important aspect to consider in terms of substantive fairness is whether or not Transnet applied the rule consistently. In order to determine whether this was indeed so, we were required to determine common precedent at Transnet in respect of matters similar to those on which Gama was dismissed. Although this was not raised as an issue in Gama's dispute regarding his dismissal submitted to the TBC, we have deemed it important to nevertheless comment on the aspect of consistency as this was a matter raised in the Public Protector letter (Dec 2010), reference 7/2-18481/09[9]. On page 2, paragraph (iii) of this letter, it is stated that *"he (*Gama*) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges"*.

Based on this, and in order to determine the matter of consistency, we looked at similar fact matters dealt with through Transnet's disciplinary process, as well as other matters.

7.2 Similar fact matters dealt with through the disciplinary process

We understand that disciplinary hearings could be dealt with at the OD level by the OD's HR official or at Group level by Transnet Employee Relations. We were informed that disciplinary hearings involving senior officials were usually referred to Transnet Employee Relations.

[9] Refer Exhibit 8 – Public Protector Letter (Dec 2010)

In order to determine whether similar fact matters were dealt with in a consistent manner to the disciplinary matter of Gama, we enquired at the relevant OD, ie TFR, and at Group level as detailed further below:

- We requested Transnet Employee Relations and Human Resources to provide us with a list of similar fact matters[10]. Nine of the 16 disciplinary matters provided to us by Transnet Group appeared to relate to charges similar to those brought against Gama. The nine matters are summarised in Annexure B[11];
- We confirmed with Jane Putini from TFR HR that no employees in the OD had been disciplined for similar charges and that all senior management disciplinary matters were handled by Transnet Group; and
- We were further presented with a Tender Process Audit report, dated 10 October 2008 in TFR with findings on common contraventions which include confinement, lack of necessary approvals, etc. We consulted with Branford on 28 April 2011, who confirmed that a similar report was escalated to Group covering all the ODs. These contraventions were appropriately addressed according to Branford. He also confirmed that no employees were disciplined after the outcome of the report. Albertyn and De Lima confirmed that no disciplinary actions were taken as a result of the issues identified in the report. They indicated that the report itself only contained high level findings, as opposed to evidence of misconduct by specific individuals; hence no disciplinary action could be taken.

7.2.1 Conclusion

Our review of the similar fact matters handled by Transnet Group revealed that these matters, where they have been finalised, resulted in dismissals or resignations.

From the information provided to us it appears that a consistent approach is applied by Transnet during the disciplinary process.

It therefore appears that the disciplinary matter of Gama was treated in a consistent manner to other similar fact matters that were referred to disciplinary hearings.

[10] Refer Exhibit 9 – Synopsis of disciplinary cases of Senior Managers 2008, 2009 and 2010
[11] Refer Annexure B – Summary of disciplinary matters with charges similar to those brought against Gama

7.3 Similar fact matters not dealt with through the disciplinary process

The Public Protector letter (Dec 2010) refers to a complaint lodged on 3 December 2010 by Ms V Mentoor, a Member of Parliament and Chairperson of the Portfolio Committee on Public Enterprises, with the Public Protector[12]. In the Public Protector letter (Dec 2010), it was alleged that it was doubtful whether other employees, who had acted in a way similar to the way Gama had, had been charged for tender irregularities and therefore that there was selective bringing of charges in the case of Gama[13].

It is also alleged in the letter to the Public Protector that there is an internal procedure at Transnet for condoning the exceeding of limits in respect of transactions, which allows Transnet employees to confirm that services were actually delivered, and that transaction is then condoned[14]. It is alleged that in Gama's case, the internal auditors, E&Y, did not provide Gama an opportunity to apply for such condonation, but that the matter was merely escalated to Group level[15]. The letter also states that this allegation was not made by Gama himself.

The similar fact matters not dealt with through the disciplinary process noted hereunder include:

- Two matters dealing with alleged procurement irregularities, brought to our attention at the start of this investigation, namely VAE (a TFR matter) and Oliver Wyman (a Transnet Group matter) which also incorporates issues around the condonement process; and
- A review of condonations submitted and/or granted at TFR and TCP.

7.3.1 VAE

7.3.1.1 Background

During April 2006 approval was sought to enter into a five-year contract with VAE for the supply of rails, turnouts and rail manufactured components. A contract was concluded between Transnet and VAE during September 2006 (referred to as the VAE 2006 contract)[16].

The value of the VAE 2006 contract was not recorded in the contract itself. On various submissions for amendments to the contract, the original estimated value is recorded as R960 million and the total expenditure as R1 775 billion.

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12 Refer Exhibit 8 – Public Protector Letter – December 2010
13 Refer Exhibit 8 – Public Protector letter (Dec 2010)
14 Refer Exhibit 8 – Public Protector (Dec 2010)
15 Refer paragraph 7.3.3 of this report for a discussion on the Application of the condonation process
16 Referred to as the VAE 2006 contract throughout the report

During December 2009, a submission was tabled at TFRAC to extend the contract by a further three years. Since December 2009, the contract extension had not been approved and was tabled at TFRAC again during November 2010 for condonation.

The VAE 2006 contract that expired on 30 September 2009 was for the supply of turnouts, short and long rails, as well as welding services. It appears that extending the contract by 12 months would not yield the negotiated savings as opposed to extending it by a further three years. It was therefore agreed during the negotiation process that a new contract would commence on 1 April 2009, backdated for approximately six months, and concluded for a period of three years in order to increase the savings[17].

The condonation request was approved by the TFR CEO during February 2011, despite earlier requests having been tabled at TFRAC during 2009 and 2010.

It appears that VAE was paid R697 183 033.49 during the period from 1 October 2009 to 19 January 2011 on the VAE 2009 contract although the contract was not approved or signed at the time of these payments being made[18].

7.3.1.2 Procedures performed

The steps performed comprised the following:

- Consulted with the varies parties concerned;
- Reviewed documentation we considered necessary;
- Reviewed the applicable policies and procedures;
- Reviewed other investigation reports on the VAE matter;
- Requested VAE related data from SAP; and
- Performed analysis on data and documents received.

The documentation we reviewed included, *inter alia*, the following:

- The project file of VAE from TFR;
- Copies of invoices submitted by VAE to Transnet;

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17 Referred to as the VAE 2009 contract throughout the report
18 Refer Exhibit 11 – VAE 2009 contract

- Condonations in relation to VAE;
- The VAE contracts;
- Contract amendment documents;
- Internal audit reports;
- The accounting policy of Transnet to ascertain whether or not the acquisition of rails is considered an investment item or capital item, and
- The approved corporate budgets for TFR for the 2006, 2007, 2008 and 2009 with a view to ascertain whether or not VAE related purchases were included in therein.

7.3.1.3 Factual findings in respect of VAE

In September 2006 VAE and Transnet concluded a contract wherein VAE was contracted to supply and deliver Perway material to Transnet. The contract was signed by Ramos, the previous GCEO, on behalf of Transnet. The VAE 2006 contract was for a period of three years, with the right to renew it for a further two years, at Transnet's option. The copy of the contract reflects the effective date as 1 October 2006[19].

The value of the VAE 2006 contract that was signed by Ramos appears to have been estimated at R960 000 000 per various submissions. In terms of the DAF 2005, the GCEO was authorised to enter into contracts (OPEX/CAPEX) for amounts exceeding R400 million, with no maximum limit indicated[20].

In view thereof, Ramos appears to have had the necessary authority to sign the VAE 2006 contract. However, we have not been furnished with the submission/précis detailing the procurement process that was followed leading to the confinement of the services/goods procured from VAE and how the actual spend on the contract was approved.

During the course of the investigation we discovered and reviewed documentation which reflected that, prior to the conclusion of the VAE 2006 contract, Transnet was already purchasing rails, turnouts and other rail manufactured products from VAE[21].

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19 Refer Exhibit 10 – VAE 2006 contract
20 Refer Exhibit 12 – DAF 2005
21 Refer Exhibit 13 – Memorandum to Van Niekerk, dated 24 April 2006

However, we have not investigated the issue of purchases made prior to the conclusion of the VAE 2006 contract. We are only highlighting this issue to demonstrate the fact that VAE had a relationship with Transnet, even prior to the conclusion of the 2006 contract in the amount of R960 million.

At the time the VAE 2006 contract was entered into, the procurement section of Transnet and its ODs were situated at Head Office and as such were considered a corporate centre.

Approval of the capex and "Copex" spend.

We have requested and received the approved budget of TFR of 2006/2007 to ascertain whether or not the capital expenditure regarding VAE was included in the approved budget of TFR. Furthermore, we have also requested documentation to ascertain how the procurement process that was followed leading to the confinement of the services/goods procured from VAE was approved.

The approved budget of TFR for the year 2006/2007 did not reflect VAE as a stand-alone budget item. We then reviewed the accounting policies but it did not specify under what category the services/goods (to be) procured from VAE were classified. However, during the course of the investigation and in consultation with various officials in the finance departments of both the OD and Group, we discovered that the OPEX spend of VAE was included as part of the maintenance budgets wherein there would not be a specific allocation for VAE. However, within the maintenance budgets there would be an allocation for rails.

VAE CAPEX and *"Copex"* spend would be approved via warrants and such documentation was requested and received from Robert Anderson.

The reason for requesting the *"Copex"* spend of VAE, which is approved via warrants, and the maintenance budgets reflecting an allocation for rails, was to ascertain whether or not the budget was sufficient to cover the cost of the goods/ services procured from VAE. In the meeting with Nick Thompson, the CFO of TFR, on 31 March 2011 he showed us the 5 year approved budget of TFR which reflected, *inter alia*, R9.6bn budgeted for rails, maintenance, etc, thereby being more than sufficient to cover the amount spent on VAE since 2006 to date.

In view of the adequacy of the approved budget covering the costs of the goods/services procured from VAE, the GCEO would have had the delegated authority to approve the spend on VAE up to the approved the budget amount.

During the course of the investigation, we discovered and reviewed the submission to the then COO, dated 24 April 2006, compiled by a certain CF Mokoka[22]. The submission to the COO reflects, *inter alia*, the following:

- Seeking approval to enter into a five year contract with VAE for the supply of rails, turnouts and rail manufactured components; and
- Transnet be allowed to periodically test the markets and where deemed feasible, to purchase rails from alternative suppliers.

The submission was supported by Ryan Van Vuuren and approved by Van Niekerk. However, Van Niekerk approved the submission, subject to the contract period being for three years, renewable for two years at Transnet's option.

The review of the DAF 2005 reveals the following limits under a corporate centre:

- The COO was authorised to approve amounts up to but not exceeding R200 million for CAPEX in the approved budget/plan to commence projects; and
- The COO was authorised to approve amounts up to but not exceeding R100 million for unforeseen CAPEX, not included in the budget/plan.

Owing to the adequacy of the budget covering the costs of the goods/services procured from VAE, Van Niekerk would have been authorised to approve amounts up to but not exceeding R200 million.

In view thereof, it appears that Van Niekerk acted beyond his delegated authority by approving the CAPEX and *"Copex"* spend initially in the amount of R960 million and subsequently increased to approximately R1.775bn on VAE, due to amendments to the contract which have been approved by various officials as detailed in the table, *infra*. Van Niekerk has since left the employ of Transnet.

Conclusion on the approval of the Capex and Copex spend

The approved budget of TFR included an amount of approximately R9.6 billion for acquisition rails, maintenance thereof, etc, which, in any event, is more than sufficient to cover the R960 million contract of VAE.

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[22] Refer Exhibit 13 – Memorandum to Van Niekerk, dated 24 April 2006

However, in spite of the adequacy of the approved budget, it appears that Van Niekerk acted beyond his delegated authority by approving the capex and *"Copex"* spend in the amount of R960 million in that the DAF 2005 reveals that, under a corporate centre, the COO was authorised to approve amounts up to but not exceeding R200 million for CAPEX in the approved budget/plan to commence projects.

Subsequent increases in the VAE 2006 contract value

According to the submission to the Acting GCEO, dated 29 March 2010, at paragraph 1 thereof, it is stated that the value of the VAE 2006 contract was R960 million, but due to various amendments the contract value increased to R1 775 392 700.40 and the contract expired on 30 September 2009[23].

During the course of our investigation, we also discovered that during the period 26 October 2007 to March 2009 the total spend on VAE increased from the approved budget of R960 million to R1.775 billion which corroborates the increased contract value per the preceding paragraph[24].

Upon discovery of the above excesses, we met with Greeff of TFR procurement and enquired if prior approval from the relevant delegated authority was obtained for the excesses which increased the total spend on VAE to approximately R1.775 billion.

The table below details the various increases in the contract value of VAE from R960 million to R1 775 362 700.40.

Date	Amendments value	Approved by	Contract value
4 September 2006	Original contract	GCEO	960 000 000
26 October 2007	37 997 995.44	COO	997 997 995.44
18 December 2007	1 070 600.00	GM: SSM	999 068 595.44
18 December 2007	8 187 900.00	GM: SSM	1 007 256 495.44
19 May 2008	712 232.00	Acting GCEO	1 007 968 727.44
19 May 2008	475 547 053.00	Acting GCEO	1 483 515 780.44

[23] Refer Exhibit 14 – Submission to GCEO on 14 April 2010
[24] Refer Exhibit 15 – Submission in respect of amendment to contract, dated 1 October 2006

Date	Amendments value	Approved by	Contract value
July 2008	1 437 240.00	Acting GCEO	1 484 953 020.44
July 2008	1 001 191.70	Acting GCEO	1 485 954 212.14
August 2008	36 553 455.00	Acting GCFO	1 522 507 667.14
March 2009	252 855 033.26	Acting GCEO	1 775 362 700.40

Owing to the above amendments to the VAE 2006 contract, whose initial value was R960 million, we requested documentation detailing the approval process regarding the above amendments, in order to ascertain whether or not the approvals were within their respective DAFs.

Upon receipt of documentation detailing the approval process regarding the above amendments, we detailed it in the table below in order to highlight whether or not the individuals that approved the various amendments had the necessary delegation of authority.

Date	Amendments value	Cumulative effect/ Total exposure	Approved by	Compliance with DOA (Yes/No)
4 September 2006	Original contract	960 000 000	GCEO	Yes
26 October 2007	37 997 995.44	997 997 995.44	COO	No
18 December 2007	1 070 600.00	999 068 595.44	GM: SSM	No
18 December 2007	8 187 900.00	1 007 256 495.44	GM: SSM	No
19 May 2008	712 232.00	1 007 968 727.44	Acting GCEO	Yes
19 May 2008	475 547 053.00	1 483 515 780.44	Acting GCEO	Yes
July 2008	1 437 240.00	1 484 953 020.44	Acting GCEO	Yes
July 2008	1 001 191.70	1 485 954 212.14	Acting GCEO	Yes
August 2008	36 553 455.00	1 522 507 667.14	Acting GCFO	No
March 2009	252 855 033.26	1 775 362 700.40	Acting GCEO	Yes

The review of the above information reveals that, other than the GCEO, the individuals that approved the above amendments to the VAE 2006 contract did not appear to have had the necessary delegation of authority to approve amendments of the above values.

Furthermore, none of the above increases are within the allowed 10% escalation and as such, approvals for amendments should have been sought from the relevant delegated authority.

Upon discovering what appeared to be instances of non-compliance as detailed in the above table, we scheduled appointments with the officials that appeared to have approved the amendments to the VAE 2006 contract, outside of their delegated authority, with a view to interview them.

The then GM: SSM, Van Vuuren, and Van Niekerk, the then COO, who appear to have exceeded their delegated authority by approving amendments to the value of the VAE 2006 contract, have since left the employ of Transnet. In order to confine ourselves to our mandate, we are of the opinion that we should not pursue the issue of interviewing them regarding their approval of amendments to the value of the VAE 2006 contract.

According to an unsigned spread sheet obtained from TFR, the Acting GCFO (unknown who this was at the time) has also approved an amendment, in the amount of R36 553 455, thus increasing the contract value of VAE to R1 522 507 667.14. Although the amendment is within 10% of the previous contract value, the DAF states that the allowed 10% escalation can only be utilised by the governance structure or person that originally and properly approved the contract.

We have requested from the Human Resources Department and the Board Secretariat copies of the GCEO delegating her full authority to the COO and the COO delegating his full authority to the GM: SSM to amend the VAE 2006 contract value as detailed in the above table. The Human Resources Department and the Board Secretariat reverted to us and informed us that they did not have records of the GCEO delegating her full delegation of authority to the COO and likewise did not have any records of the COO delegating his full authority to the GM: SSM.

Documentation received subsequent to our last draft report submitted to client reflect that the increase of R36 553 455, whose process of approval was initiated in October 2008, was approved by Chris Wells, in his capacity as the CFO on 24 January 2009[25]. It therefore appears that the spread sheet that reflected the Acting CFO as having approved the increase of R36 553 455 in the contract value of VAE is incorrect and as such cannot be relied upon

[25] Refer Exhibit 182

Conclusion on increases in the contract value

Numerous amendments to the VAE 2006 contract occurred during the period 4 September 2006 to March 2009, thus increasing the total exposure from the R960 million to approximately R1 775 billion.

Other than the GCEO, it appears that the individuals that approved the above amendments to the contract did not have the necessary delegated authority to approve amendments of the above values, which increased the exposure of the contract from R960 million to approximately R1 775 billion.

Some of the above increases are within the allowed 10% escalation, while others are not. In spite thereof, approvals for amendments should have been sought from the relevant delegated authority that originally approved the VAE 2006 contract.

A meeting was held with the Acting GCFO (Singh) regarding the Acting GCFO's approval of the amendment to the value of the VAE contract which appears to be in excess of the Acting GCFO's delegated authority at the time. We also requested copies of the submission/ précis to ascertain the circumstances under which the Acting GCFO approved the amendment to the contract value of VAE and also the identity of the acting GCFO at the time. The reason for this was due to the fact that during the meeting with Acting GCFO (Singh), he could not confirm or deny that he approved the amendment as the documentation in our possession was not signed, despite reflecting that the amendment was approved by the Acting GCFO.

The submission/précis received subsequent to our last draft report submitted to client reflect that the increase of R36 553 455, whose process of approval was initiated in October 2008, was approved by Chris Wells, in his capacity as the CFO on 24 January 2009. It therefore appears that the spread sheet that reflected the Acting CFO as having approved the increase of R36 553 455 in the contract value of VAE is incorrect and as such can not be relied upon.

It appears therefore that the GCFO at the time, Wells, Van Vuuren and Van Niekerk have approved the amendments to the values of the VAE 2006 contract beyond their respective delegated authority.

Owing to the fact that Wells, Van Niekerk and Van Vuuren have since left the employ of Transnet, we would not pursue the issue of interviewing regarding their approval of the amendments to the values of the VAE contract.

Extension of the contract

Based on the documentation in our possession, it appears that, after TFRAC adopted the resolutions highlighted in the preceding paragraphs, no one implemented the resolutions of TFRAC.

The above statement is based on the fact that since 15 December 2009 there was an attempt to submit the condonation request for confinement and award of business to VAE on 14 April 2010[26]. However, it appears that the condonation request was not submitted to the Acting GCEO (Wells) in that there is no response by him.

The above statement is corroborated by the fact that the only feedback in our possession regarding the condonation request is the TFRAC minutes of the meeting held on 22 November 2010. We enquired from Greeff, the project manager at TFR in charge of, *inter alia*, VAE, where the response to the submission of 14 April 2010 to the Acting GCEO (Wells) was and he verbally informed us that at the time of our enquiry that the submission had not been forwarded to the Acting GCEO (Wells).

In the meeting of 22 November 2010, TFRAC resolved to support the condonation request, subject to it being sent to Acting GCEO (Wells) for signature[27].

The VAE 2006 contract that expired on 30 September 2009 was for the supply of turnouts, short and long rails, as well as welding services by VAE and had a renewal clause for a further two years[28].

During consultations with Greeff, Yogen Naidoo and Laher of TFR supply chain management section, we were informed that with the impending option/expiry date looming, an engagement process was initiated in May 2009 with the intention to re-negotiate more favourable pricing prior to exercising the option to extend the contract of VAE.

The review of the submission to the Acting GCEO (Wells) to seek condonation for confinement and award of business to VAE, reveal that during negotiations, referred to in the preceding paragraph, it became clear that extending the VAE 2006 contract by 12 months would not yield the negotiated savings as opposed to extending it by a further three years[29].

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26 Refer Exhibit 14 – Submission to GCEO on 14 April 2010
27 Refer Exhibit 16 – TFRAC minutes of 22 November 2010
28 Refer Exhibit 10 – VAE 2006 contract
29 Refer Exhibit 14 – Submission to GCEO on 14 April 2010, at paragraph 2.3 thereof

The review of the above submission further reveals during the negotiation process it was agreed that, in order to increase the savings value, the *"new"* contract will commence on 1 April 2009, ie backdated for approximately six months, and concluded for a period of three years[30].

A review of documentation in our possession reveals that the negotiations resulted in the proposed contract being split into the following[31]:

- A materials supply agreement (rails, turnouts and various components); and
- A welding services agreement (welding of rails).

In view of the negotiation process referred to above, TFR extended the contract of VAE for a further three years, back dated by six months to 1 April 2009, instead of commencing on 1 October 2009, owing to the previous contract having expired on 3 September 2009[32].

Our understanding of the procurement processes as detailed in the DPP and PPM is that when there is a scope change from the goods/services procured from a particular service provider under a contract that has expired but has an extension clause, and then a complete new process needs to be pursued instead of renewing the expired contract[33].

The extension of the contract (resulting in the VAE 2009 contract), via the confinement route, was effected even though no proper procurement processes were followed, thereby violating the provisions of the PPM and DPP of Transnet, in that:

- No prior authority to confine was obtained from the relevant delegated authority before procuring from VAE; and
- When there are major changes to a contract that has an extension option, the extension option falls away and new process entered into.

In an attempt to regularise the above non-compliance with provisions of the PPM and DPP, the SSM officials of TFR applied for condonation to confine and award business to VAE. This process took approximately one year to be tabled at and finally recommended by the division's AC, ie TFRAC, subject to, *inter alia*, the signature of Wells, the Acting GCEO at the time, being obtained[34].

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30 Refer Exhibit 14 – Submission to GCEO on 14 April 2010, at paragraph 2.4 thereof
31 Refer Exhibit 14 – Submission to GCEO on 14 April 2010, at paragraph 2.1 thereof
32 Refer Exhibit 10 – VAE 2006 contract
33 Refer Exhibits 17 and 18 – DPP 2006 and PPM
34 Refer Exhibit 16 – TFRAC minutes of 22 November 2010

The PPM Directive 03/2010 on condonations states that in terms of PPM paragraph 8.1.3.1(v)e, the DAC has the authority to condone non-compliance with laid down policies, procedures and directives provided that such non-compliance is submitted via the relevant line manager of the employee in the particular division[35]. However, condonations are not there for the asking. It should be borne in mind that, as a general rule, condonations should be given for relatively minor transgressions of procurement rules and procedures[36]. Non-compliance with material aspects of Transnet's policies and procedures will usually not be condoned as such lapses may have PFMA implications, which could result in civil, criminal or disciplinary steps being taken. Furthermore, condonation should be applied for within reasonable time from the occurrence of the non-compliance. So the VAE 2006 contract expired in September 2009 and the condonation request has since been signed by the Acting GCEO (Mkwanazi) during March 2011.

During our discussions with the staff of TFR in procurement section we were informed that when certain proposed service/goods are to be procured on a confinement basis the procurement thereof should go through the following two processes, before the CEO of TFR or GCEO could recommend/approve it:

- It must have gone through the TFR procurement processes; and
- It must have gone through the group procurement processes.

In the case of the first process above, the confinement request should bear the signatures of all parties involved in the TFR procurement processes including that of the chairman of TFRAC before it could be signed by the CEO of TFR.

In the case of second process above, the confinement request should have the signatures of all parties involved in the head office procurement processes including that of the chairman of the HOAC before it could be signed by the GCEO of Transnet.

Once the TFR CEO has signed the confinement request, signifying his approval thereof, subject to complying with his approval authority, the confinement can be executed. However, if it is in excess of his approval limit, his signature would signify his recommendation and then the confinement request would go to head office, ie Transnet Corporate Office for approval.

35 Refer Exhibit 19 – Condonation memorandum, dated 12 May 2010
36 Refer paragraph 7.3.3 of this report for a more detailed discussion on the Application of the condonation process

The confinement request would follow the group procurement processes, where it will be signed by all individuals involved in the head office procurement processes, including the chairman of the HOAC, whereafter it would be signed by the GCEO of Transnet. If the amount involved exceeds the approval limit of GCEO the confinement request would be referred to the Board of Transnet for approval.

In view of the foregoing, a confinement request will only be subjected to head office approval if the amount involved exceeds the OD's CEO's delegated authority and has been signed by all parties involved in the division's procurement processes, including the division's CEO. If it exceeds the approval authority of the CEO of the OD, it must be submitted to the GCEO for approval.

In the case of VAE, we discovered that when the contract expired on 30 September 2009, it appears that nothing was done during the period between expiry of the previous contract, ie 30 September 2009 and 15 December 2009.

It appears that it was only on 15 December 2009 that the matter of VAE was tabled at the TFRAC meeting, in that prior to that and subsequent to expiry of the previous contract, we have not found any documentation evidencing the submission to TFRAC.

In its meeting of the 15 December 2009, TFRAC resolved to raise the following concerns regarding the proposed extension of the VAE contract that was submitted to it for recommendation[37]:

- TFRAC objected to the fact that the contract had already expired when it was brought to TFRAC's attention;
- TFRAC did not also understand the reasons why this was not subjected to tender processes in order to test the market with a view of introducing new role players;
- TFRAC recommended a two year period, instead of three years proposed in the submission to TFRAC; and
- TFRAC recommended the contract be extended on condition that the project manager responsible for VAE at TFR takes full accountability of all the delays and a final approval being obtained from Transnet Group.

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37 Refer Exhibit 20 – Submission to TFRAC on 15 December 2009

Despite the absence of any evidence that the concerns of TFRAC were addressed, TFR continued to procure from VAE and paying its invoices, while there was no signed contract in place.

We are in possession of the condonation submission of VAE that was signed by, *inter alia*, the CFO of TFR and other officials of TFR, but it appears that it was never tabled in any of the TFRAC meetings that took place between the periods May 2010 to October 2010. This is due to the fact that during this period we have not discovered any evidence that the matter of VAE was tabled in any of the TFRAC meetings that took place during the period from May 2010 to October 2010.

We also made telephonic enquiries with Prudence Nkabinde, the secretariat of TFRAC, and she confirmed that the matter of VAE was never tabled in any of the TFRAC meetings that took place during the period from May 2010 to October 2010. It was only in the meeting of 22 November 2010 that the issue of VAE was tabled.

Despite the contract not being regularised, and the condonation to extend the contract by further years not approved, TFR continued to procure goods and services from VAE and paying for such services, ie from 1 October 2009 to 19 January 2011 is approximately R697,183,033.49[38].

In the minutes of TFRAC of 22 November 2010 it was recommended that the condonation request be approved subject to, *inter alia*, the condonation submission being signed by the GCEO[39]. During the course of investigation, we discovered purchase orders reflecting that the amount paid to VAE since expiry of the previous contract, ie from 1 October 2009 to 19 January 2011 is approximately R697 183 033.49[40].

During interviews held with staff of TFRAC, ie Greeff, Yogen Naidoo and Laher, we enquired why the matter of VAE was not resolved and we were informed that they needed to present to the condonation request together with the contract for approval by the GCEO.

We found it difficult to comprehend the explanation/reasons furnished in that negotiations to extend the contract of VAE appear to have been finalised in 2009 already, by which period the contract should have been drafted and furnished to the legal division for scrutiny. We are of the opinion that this process would not have taken in excess of a year to be submitted to the GCEO for approval.

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38 Refer Exhibit 21 – List of VAE purchase orders
39 Refer Exhibit 16 – TFRAC minutes of 22 November 2010
40 Refer Exhibit 21 – List of VAE purchase orders

The SSM unit of TFR reports to the CFO of TFR and the CFO of TFR signed the condonation request to confine and award business to VAE for the three year period commencing on 1 October 2009, backdated by six months to 1 April 2009. In addition thereto, the CFO of TFR is a member of TFRAC and we have been informed that he also chaired some of the TFRAC meetings.

Furthermore, as the CFO of TFR is a member of TFRAC he should have intervened when he realised that, subsequent to him, *inter alia*, signing the condonation request in May 2010, the matter of VAE was not tabled in any of the TFRAC meetings that took place during the period from January 2010 to October 2010.

During the course of our investigation, we have not discovered any evidence that the CFO of TFR did intervene in an attempt to regularise the issue of VAE, while VAE was being paid when the extension of the VAE 2009 contract and condonation to confinement and award business to VAE had not been approved by the GCEO.

Conclusion on the extension of the contract

It appears that the resolutions of TFRAC, adopted in a meeting held on 15 December 2009, were not implemented in that during the course of our investigation we have not discovered any evidence of TFRAC resolutions being implemented in order to regularise the contract of VAE.

In his submission to the Acting CEO of TFR to seek condonation for confinement and award of business to VAE, Thompson, the CFO of TFR, advised that with the impending option/expiry date of the VAE contract looming, an engagement process was initiated in May 2009 with the intention to re-negotiate more favourable pricing prior to exercising the option to extend the contract of VAE[41].

Furthermore, the review of the submission to the Acting GCEO, referred to in the preceding paragraph, to seek condonation for confinement and award of business to VAE, reveal that during negotiations it became clear that extending the contract of VAE by 12 months would not yield the negotiated savings as opposed to extending it by a further 3 years[42].

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41 Refer to Exhibit 21c – Submission to the Acting GCEO to seek condonation for confinement and award of business to VAE

42 Refer to Exhibit 21a – Submission, dated 7 February 2011, to Acting CEO of TFR

The negotiating team from Transnet comprised Fredericks, Steward Davidson (TFR Finance), Bertrand Du Plessis (TFR Finance) Greeff , Ryan) and Allan Cross (Transnet SSM)[43].

However, in page 6 of the submission to the Acting GCEO to seek condonation for confinement and award of business to VAE the negotiating team comprised the following members:

TFR leading of negotiations

- Fredericks;
- Du Plessis;
- Greeff; and
- Elmondo Paulse.

Group personnel supporting negotiations

- Pita;
- Ryan;
- Cross;
- Lyndsay McInnes; and
- McKinsey & Company.

It appears therefore that the negotiating team did not act in the best interest of Transnet in that it focused its negotiations with VAE on price rather than on procurement related processes as the contract was due to expire on 30 September 2009.

In view thereof the negotiating team involved in the VAE matter contravened section 2.5 of the PPM by confining the services of VAE without obtaining prior approval from the relevant delegated authority.

The SSM team under the leadership of Fredericks and the finance team, under the leadership of Thompson acted beyond their delegated authority by extending the contract to a further three year period without obtaining prior approval from the relevant delegated authority, because the VAE 2006 contract had a two year extension option. In view thereof the SSM team of the time, the finance team, under the leadership of Thompson and the negotiating team involved in the VAE matter appear to have contravened section 2.8 of the PPM.

[43] Refer to Exhibit 21b – Minutes of VAE negotiating meeting dated 15 May 2009

The expired VAE 2006 contract had the extension clause, however owing to the fact that the goods procured under the new agreement differed from those procured under the expired contract, the extension option should have fallen away and a new procurement process pursued. In view thereof the SSM team, of the time, the finance team, under the leadership of Thompson and the negotiating team involved in the VAE matter appear to have contravened the provisions of the PPM and DPP by extending the contract of VAE by pursuing the extension route when such was no longer an option.

The fact that more than one year has elapsed without the condonation request being tabled with the delegated authority for approval means that the requirement that it must be tabled within a reasonable time upon the occurrence of the non compliance has not been met. In view thereof SSM teamof the time, the finance team, under the leadership of Thompson and the negotiating team involved in the VAE matter appear to have contravened the provisions of the PPM Directive 03/2010 on condonations.

Owing to his involvement in VAE Pita, did not act in the best interest of Transnet by not ensuring that all procurement related issues regarding VAE were regularised, prior to procuring goods from VAE after the contract expired, in that to date this contract of VAE has not been signed by the GCEO, despite the contract having expired on 30 September 2009.

Owing to the fact that payment of VAE was processed at TFR, Thompson who is also member of TFRAC and knowing that he signed the condonation submission in May 2010 and yet the VAE matter remained unresolved for the period between May 2010 and November 2010, Thompson should have ensured that the matter of VAE is regularised, given the fact that the procurement section of TFR reports to him.

Furthermore, as the CFO of TFR is a member of TFRAC he should have intervened when he realised that the matter of VAE was not tabled in any of the TFRAC meetings that took place subsequent to him, *inter alia*, signing the condonation submission during October 2010. During the course of our investigation, we have not discovered any evidence that the CFO of TFR did intervene in an attempt to regularise the issue of VAE, while in the meantime VAE were being paid and yet there is no contract in place.

In an interview with the CFO of TFR, he verbally informed us that he was not made aware of the state of the VAE contract until this was tabled at TFRAC during November 2010. However, this is inconsistent with the documentation in possession which reflects that CFO of TFR signed the condonation submission during May 2010.

Payment of VAE invoices

We have reviewed the purchase orders and discovered that VAE was allowed to continue providing the service, subsequent to the expiry of the 2006 contract of VAE that was signed by Ramos, and the amount paid to them in terms of the VAE 2009 contract as at January 2011 is approximately R697 million.

We obtained a SAP printout, which reflects changes in the contract value and expiry date of the VAE 2006 contract. It has come to our attention that these changes were effected in order to process payments to VAE due to the fact that no signed contract was in place at the time, ie in 2009.

We then requested and received SAP transaction logs from Charles Kendall of TFR. The objective of this was to determine the user names that made the changes to the contract value and the expiry dates on the VAE contract as well as determine the authorisation for such amendments on SAP.

The SAP transaction logs that we received from Charles Kendall of TFR reflect the following:

Target value	Validity start	Validity end	Date value change	Old rand value	New rand value	User effecting change
767 624 000	1 April 2010	31 March 2011	14 February 2011	524 000 000	767 624 000	Chris van Vuuren, TFR Supply Chain Services

During interviews with staff of Transnet we were informed that the target value and the new rand value are similar to the contract value. We then telephonically enquired from Chris Van Vuuren, the buyer in the supply chain services of the Bloemfontein office of TFR, who effected the above changes, who gave him the authority to amend the contract details on SAP. He replied that it was Greeff and during the course of our investigation and in consultation with staff of TFR, Laher also furnished us a copy of e-mail from Greef authorising Chris van Vuuren to increase the contract value on SAP in order to be able process payments of VAE[44]. The e-mail by Greef to Chris Van Vuuren authorising him to increase the contract value of VAE on SAP in order to be able process payments of VAE, was sent on 2 May 2010.

[44] Refer to Exhibit 21d – E-mail from Greeff to Chris Van Vuuren

We enquired from Greeff whether or not he obtained the necessary approval from the delegated authority to at authorise Chris Van Vuuren to increase the contract value of VAE on SAP in to process payments. He informed us that the approval stemmed from the draft contract that was necessitated by the negotiations between Transnet officials and VAE, leading to the extension of the VAE contract by a further 3 years. Greeff further furnished us with a schedule of approval of various amendments to the contract value of VAE and he used that to authorise Chris Van Vuuren to procure the goods as the approval came from senior management **(refer approval of the capex and "Copex" spend *supra)***.

With the impending expiry looming, the negotiating team of Transnet engaged with VAE in May 2009 with the intention to re-negotiate more favourable pricing prior to exercising the option to extend the contract. Transnet's negotiating team decided to negotiate a new contract without obtaining the necessary delegation of authority and this led to the continued procurement of goods from VAE.

The decision taken by the negotiating team of Transnet resulted in the following short-comings:

- Authority was not obtained from the relevant AC to confine and award business to VAE;
- Prior authority to confine business to VAE was not obtained, as goods differed from those in the initial contract that had a 2 year extension option;
- Prior authority to conclude a contract in excess of 2 years was not obtained, in that the expired contract had a two year extension option; and
- Prior authority to effect material amendment to a contract was not obtained.

Despite the above non-compliance with PPM and DPP, TFR continued to procure goods from VAE and payments were made to VAE. This appears to confirm Greeff's allegation that it was generally acceptable to effect payments to VAE under the draft contract.

Conclusion on payment of invoices

The negotiating team did not act in the best interest of Transnet in that they focused their negotiations on price rather than on procurement related processes as the contract was due to expire on 30 September 2009.

The continued procurement of goods from and payment of VAE even after expiry of the 2006 contract and while no prior approval was sought from the delegated authority, constitutes a contravention of the provisions of PFMA, particularly Section 51(1) (b) (ii) which states, among others, that an Accounting Officer of a public entity must take effective and appropriate steps to prevent irregular expenditure.

Although in a memo to the Acting CEO of TFR, Thompson attempts to mitigate the non-compliance with policies with the perceived benefits to Transnet, we are of the opinion that a commercial rationale cannot be used to justify the flagrant disregard of policy and the law.

Furthermore, The SSM team of the time and the finance team, under the leadership of Thompson did not act in the best interest of Transnet in that knowing that the procurement processes relating to the extension of the VAE contract were not followed, they allowed TFR to continue procuring from and effecting payments to VAE.

In view thereof, it appears that the payments made to VAE, subsequent to the expiry of the contract on 30 September 2009 are irregular. Consequently, we are of the opinion that the continued rendering of the services by VAE to Transnet and the continued payments by Transnet to VAE appear to be a continuous breach of the PFMA, more particularly Section 51(1) (b) (ii) which states, among others, that an Accounting Officer of a public entity must take effective and appropriate steps to prevent irregular expenditure.

State of the contract

The minutes of TFRAC of 22 November 2010 state that TFRAC understood that the previous CPO's services were terminated in March 2010 and that Laher was appointed as the Acting CPO since[45]. The minute also stated that Greeff and some officials at Group were also involved or were meant to drive the process. It would appear that the regularisation of the VAE 2009 contract took an inordinate length of time to be resolved.

The condonation request was eventually signed on 8 February 2011 by the Acting CEO of TFR, Morwe, signifying his recommendation to the Acting GCEO (Mkwanazi)[46].

[45] Refer Exhibit 16 – TFRAC minutes of 22 November 2010
[46] Refer Exhibit 22 – Submission for condonation, dated 7 February 201

To date, even though the condonation was recommended by TFRAC during November 2010, subject to, *inter alia*, the condonation submission being signed by the GCEO, the Chairman of Transnet, who at the time was also Acting GCEO (Mkwanazi) of Transnet, only signed the condonation request on 2 March 2011[47]. This appears to have taken unreasonably longer to be tabled with the Acting Chairman, despite TFRAC having recommended on 22 November 2010 that the signature of the Acting CEO be sought and bearing in mind that the previous contract expired on 30 September 2009.

7.3.1.4 Conclusion with respect to VAE

The approved budget of TFR was more than sufficient to cover R960 million contract of VAE for the acquisition rails, maintenance thereof, etc.

However, in spite of the adequacy of the approved budget, Van Niekerk appears to have acted beyond his delegated authority by approving the Capex and *"Copex"* spend in the amount of R960 million as he was authorised to approve amounts up to but not exceeding R200 million for CAPEX in the approved budget/plan to commence projects.

The COO and GM: SSM did not have the necessary delegated authority to approve amendments of the VAE contract values. Van Niekerk and Van Vuuren have since left the employ of Transnet.

Resolutions of TFRAC, adopted in a meeting held on 15 December 2009, were not implemented.

The negotiating team did not act in the best interest of Transnet in that it focused its negotiations with VAE on price rather than on procurement related processes as the contract was due to expire on 30 September 2009, thereby contravening section 2.5 of the PPM by confining the services of VAE without obtaining prior approval from the relevant delegated authority.

The negotiating team and Thompson and his finance team acted beyond their delegated authority by extending the contract to a further three year period without obtaining prior approval, thereby contravening section 2.8 of the PPM.

The negotiating team, the SSM team of the time and Thompson and his finance team contravened the provisions of the PPM and DPP by extending the contract of VAE by pursuing the extension route when such was no longer an option.

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[47] Exhibit 23 – Submission to TFRAC, dated 22 November 2010, signed by Mkwanazi

The SSM team of the time thefinance team, under leadership of Thompson and the negotiating team did not table the submission for regularising VAE within a reasonable time upon the occurrence of the non compliance, thereby contravening the provisions of the PPM Directive 03/2010 on condonations.

Pita did not act in the best interest of Transnet by not ensuring that all procurement related issues regarding VAE were regularised, prior to TFR procuring goods from VAE after the contract expired.

Thompson, who is also member of TFRAC did not act in the best of Transnet in that he after he signed the condonation submission of VAE in May 2010 he did not ensure that the matter of VAE was regularised within reasonable period, given the fact that the procurement section of TFR reports to him. Since expiry of the contract in 2009, the confinement and award of business to VAE, has to date still not been signed by the GCEO, despite the resolution taken by TFRAC, which he sometimes chaired, in December 2009.

The statement by the CFO of TFR that he was not made aware of the state of the VAE contract until this was tabled at TFRAC during November 2010 is inconsistent with the documentation in possession which reflects that CFO of TFR signed the condonation submission during May 2010.

The negotiating team of Transnet did not act in the best interest of Transnet in that they focused their negotiations on price rather than on procurement related processes.

The continued procurement of goods from and payment of VAE even after expiry of the 2006 contract and while no prior approval was sought from the delegated authority, constitutes a contravention of Section 51 of the PFMA.

The mitigation of commercial benefit cannot be used to justify the flagrant disregard of policy and the law.

The SSM team of the time and the finance team under the leadership of Thompson did not act in the best interest of Transnet in continuing to procure from and effecting payments to VAE while the contract of VAE was procurement process was not approved by the delegated authority, thereby rendering the payment to VAE irregular.

7.3.2 Oliver Wyman

7.3.2.1 Background

On 7 February 2011, Mapoma provided us with documentation relating to a complaint received by Mkwanazi[48]. The complaint is set out in an email sent to Mkwanazi by a certain Manzi Jacob on 14 January 2011. The complaint relates to a company named Oliver Wyman, which was apparently appointed by Thomson and Wells in February 2010 to conduct certain work on the *"Coal Line Expansion"*. According to the allegations contained in the email, the contract value was in the region of R55 million.

The documentation received from Mapoma consisted of the following:

- *"Submission to the General Manager (Business Services) to seek **prior** Authority for Confinement"* submitted by MacDonald to Singh (dated 16 August 2010);
- Memorandum attached to the above submission from Pita to MacDonald;
- *"Submission to the General Manager (Business Services) to seek **prior** Authority for Confinement"* submitted by MacDonald to Singh (dated 2 September 2010); and
- Email correspondence between various Transnet employees.

Based on our review of the contents of the allegation email and related documentation, we identified the following specific matters requiring further investigation:

- Thomson apparently contracted Oliver Wyman bypassing the TFR Exco and going directly to Wells;
- TFR Exco was apparently *"greatly upset"* as it appeared as if a lot of money had been spent on the Coal Line Expansion in the past. TFR Exco was apparently also concerned that the expenditure on the Coal Line Expansion was *"wasteful and fruitless"* as it is alleged that they (Oliver Wyman) did not produce anything different from previous work performed on similar Coal Line Expansion studies;
- Thompson apparently gave feedback at a special TFR Exco, which was minuted;
- It is further alleged that Oliver Wyman was appointed without a proper tender process, which constituted a *"serious breach of governance"*;

[48] Refer Exhibit 24 – E-mail and supporting documentation

- Thomson and Wells apparently also appointed Oliver Wyman, without a proper tender process, to perform work on the Waterberg Coal Deposits;
- In December 2010, Sue Lund apparently appointed Oliver Wyman to perform work for Transnet on Regulatory Affairs; and
- A certain Transnet employee called Kgomotso Modise, was apparently not considered to work for Transnet on Regulatory Affairs, although she was supposedly knowledgeable on the matter.

7.3.2.2 Procedures performed and documentation reviewed

Based on our understanding of the matters requiring further investigation, we conducted the following procedures to date:

- Conducted initial company background searches through the CIPRO;
- Perused the above mentioned documentation received from Mapoma;
- Consultation with:
  - Pita;
  - Volmink;
  - Esterhuizen;
  - MacDonald;
  - Thomson;
  - Lund;
  - Govender;
  - Uys; and
  - Modise.
- Telephone discussion with Koen;
- Perused email correspondence between Mr Allan E. Kaulbach ("Mr Kaulbach"), Partner with Oliver Wyman and MacDonald, and between MacDonald and Pita; and

- Obtained a copy of the signed contract with Oliver Wyman[49].

7.3.2.3 Summary of relevant policies and procedures

We conducted our investigations incorporating the following relevant documentation, policies and procedures:

- Transnet PPM[50]:
  - PPM paragraph 2.14.1 – *"Authority to appoint a consultant and the DAC's involvement"* requires prior written approval to be obtained from the CEO or higher to appoint a consultant, regardless of the value of the business or the procurement mechanism used. The PPM defines CEO as the Chief Executive Officer at the head of a Transnet Division (core or non-core) or the Head of a Group Function;
  - PPM paragraph 2.5.2(ii) – *"Confined enquiries for proposals/quotations invited (or offers received) more than R2m in value (RFP/RFQ)"* provides for the confinement and award of a quotation or offer without prior consideration by the DAC of the actual award of the business;
  - PPM paragraph 8.1.3.1(1) - *"Functions of the DAC: Expenditure contracts"* provides for the DAC *"To consider all recommendations from its division with regard to the award of external contracts for the procurement of goods and services, or sale of surplus goods, where the total value of the business exceeds R2 million."*;
  - PPM paragraph 8.1.3.1(v)(e) – *"Functions of the DAC: Expenditure contracts"* provides for the DAC, when considering any tender/quotation or amendment thereto, to *"... condone the non-compliance with the laid down policies and directives provided such non-compliance is submitted via the relevant line manager of the employee in a particular Division."* Furthermore, the PPM provides the DAC with discretion to decide whether or not it reports such non-compliance to the CEO should the CEO not himself/herself chair the DAC; and
  - PPM paragraph 8.2- *"Roles and Functions of the TAC"* are said to be similar to the roles, functions and responsibilities of the DAC and will cater for the Group Corporate Head Office requirements.

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[49] Refer Exhibit 25 – Oliver Wyman contract signed by Moses
[50] Refer Exhibit 18 – PPM

- Transnet DAF 2010[51]:
  - DAF 2010 paragraph 1.24 – *"Specialist Units"* lists the supporting business units of Transnet and includes Transnet Properties, Transnet Foundation, TCP, Transnet Corporate Centre and Transnet Fuel Solutions. It further specifies the Group Exco member responsible for such Specialist Unit shall sub-delegate powers to the Specialist Unit CEO where the Specialist Unit CEO is not a member of the Group Exco;
  - DAF 2010 paragraph 5.4.1 – *"Appointment of Consultants"* provides for the CEOs of Specialist Units to authorise the appointment of consultants up to R10 million;
  - DAF 2010 paragraph 5.4.3 – *"Approval to approach the market for confined tenders: Confinement of tenders"* provides for Group Exco members of Specialist Units (ie Transnet Corporate Centre) to authorise confinement of tenders up to R5 million; and
  - DAF 2010 paragraph 5.5.1 – *"Enter into and Signing of Contracts/Agreements"* provides for the TCP CEO to sign contracts up to R300 million.

Directive and guidance notes on the confinement process

Memorandum *"PPM 04/2010 Confinement Directive & Guidance Notes"*, dated 12 May 2010, provides for the following[52]:

- Paragraph 2 - *"The role of Group SSM in reviewing applications for authority to confine"* requires all requests that exceed the delegated authority of the CE of the ODs for authority to confine to be referred to the SSM Procurement Policy Specialist (Esterhuizen) and Senior Legal Specialist (Volmink) en route to the GM: Business Services (Pita), GCFO and GCEO depending on the value of the transaction. In this regard, Esterhuizen and Volmink are tasked to review the applications and advising Pita and the GCFO accordingly; and
- Paragraph 8 – *"Condonation of a confinement"* where the process of confinement (as set out in paragraph 2.5 of the PPM) had not been followed. Confinement may have been the appropriate mechanism under the circumstances and authority for such confinement should have been sought from the relevant DAC or delegated authority.

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51 Refer Exhibit 26 – DAF 2010
52 Refer Exhibit 27 – Confinement memorandum, dated 12 May 2010

Directive and guidance notes on the condonation process

In an interview held with Volmink, he indicated that further guidance was needed around the application of paragraph 8.1.3.1(v)(e) of the PPM due to the business not fully understanding how to apply *"condonation"*. In this regard, a memorandum, dated 12 May 2010, under signature of Pita was issued[53]. In this memorandum, it is indicated that condonation of non-compliance with the laid down policy and procedures should be given for relatively minor transgressions, and that material aspects of Transnet's policies and procedures would not be condoned as such lapses could have PFMA implications, ie irregular or fruitless and wasteful expenditure, resulting in possible disciplinary, civil or criminal measures being implemented. The memorandum further states that a line manager may:

- Sign the condonation request (in which case he/she agrees there was non-compliance and recommends that the DAC condone such non-compliance); or
- In cases of serious non-compliance (this is not expanded on or guidance provided when the non-compliance will be considered serious), the line manager may choose to terminate the procurement process if a supplier has not yet been awarded the business (in which case the DAC must be approached to approve a non-award).

In addition, the memorandum sets out the role of the DAC indicating that the DAC has the discretion to grant condonations taking into account the following factors:

- The extent and cause of the non-compliance;
- The seriousness of the non-compliance;
- The reasonableness of the explanation for the non-compliance;
- The effect of the non-compliance on the fairness of the procurement process;
- Whether the matter would in all likelihood have been approved had the proper processes been followed; and
- Whether the DAC was approached for condonation as soon as possible after business became aware of the non-compliance.

53 Refer Exhibit 19 – Condonation memorandum, dated 12 May 2010

The DAC would only be able to condone matters which fall within their jurisdiction in the first instance. According to Esterhuizen, where a matter for which condonation is sought, falls outside the delegated authority of the DAC (limited to the authority of the CE of the relevant OD), the application for condonation can be referred directly to the person with the appropriate delegated authority.

The effect of this is that non-compliance may occur and be condoned or regularised, and prior to this memorandum, serious non-compliance may have occurred and condonation given.

7.3.2.4 Factual findings regarding allegations relating to the Oliver Wyman matter

Background search on Oliver Wyman

Our company background search through CIPRO revealed that no individual and/or company are registered in South Africa in the name of Oliver Wyman. The submission documentation however confirms that Oliver Wyman apparently operates from 200 Claredon Street, 11th Floor, Boston, Massachusetts, USA.

Thomson and MacDonald confirmed that Oliver Wyman is an American-based company.

Indications of prior interactions with Oliver Wyman

Thomson indicated that Transnet had dealt with Mercer since the 1990's when Transnet acquired the Multirail software. Mercer was later taken over by Oliver Wyman and when Transnet needed help with implementing the Multirail software, Patrick Dada (former TFR Senior Manager) requested Oliver Wyman to assist with the implementation.

During 2007/2008, Transnet learned that Oliver Wyman had been approached by the coal mining industry to advise them on the expansion of the coal lines. As the study required by the coal mining industry would also impact Transnet, a decision was taken for Transnet and the coal mining industry to jointly appoint Oliver Wyman. Oliver Wyman performed an assessment of Transnet's existing coal line capacity and made recommendations on various stages to increase the capacity of the coal lines. Oliver Wyman then facilitated discussions between the coal mining industry and Transnet to establish a holistic solution for the expansion of the coal lines. When the solution was approximately 70% complete, Transnet obtained legal advice from Edward Nathan Sonnenbergs and Cliffe Dekker Hofmeyr respectively, which recommended that Transnet stop the joint appointment of Oliver Wyman and that Transnet take ownership of the solution going forward.

Other demands for expansions to the coal lines arose from Eskom, Waterberg and Botswana. As a result of these additional demands to expand the coal lines, Transnet appointed Oliver Wyman during 2010 to validate the technical solution that had been developed further by Transnet. As the coal line expansion impacted a number of Transnet's ODs (TPT, TFR etc), MacDonald was responsible at Group level for the appointment of Oliver Wyman to address the requirements of Transnet across all ODs. The appointment of Oliver Wyman did not follow the TFR procurement processes and was dealt with at Group level.

Thomson confirmed that the TFR Exco did not have a special meeting regarding the expenditure on the ECIC study performed by Oliver Wyman. According to Thomson, TCP was monitoring the execution of work performed by Oliver Wyman; hence the TFR Exco would not be involved in the output of Oliver Wyman.

Thomson further recalled that the TFR Exco held a special meeting between September 2009 and November 2009 during which the expenditure on the coal line project was discussed. However, that meeting was prior to the appointment of Oliver Wyman during 2010 on the ECIC study. At the time of drafting this report, we had not been provided with a copy of the special TFR Exco meeting that was apparently held between September 2009 and November 2009.

Initial appointment of Oliver Wyman – 16 August 2010

- **Submission**

  The submission to seek prior authority for confinement, dated 16 August 2010, indicated that approval was sought to obtain bids via confinement, to close the bids at the Division Office and to award the business in the best interest of Transnet[54].

  Reference was made in the submission to PPM par 2.5.2 (ii) which provides for confinement in exceptional circumstances. The CE of the OD or his delegate may authorise that quotations close at the local department itself and/or that a quotation be accepted with the DAC first having considered the actual award of the business of the successful bidder. The request for confinement to the CE must be accompanied by a detailed motivation. Approval of the confinement would be evidenced by the signature of the CE.

[54] Refer Exhibit 24 – E-mail and supporting documentation

- **Request for Authority to confine**

  Pita indicated that he recorded comments in respect of condonation on the submission and the request for authority to confine because work might have commenced prior to the request for confinement, which in his view would have required condonation[55].

  In an e-mail from MacDonald to Pita, it was stated that Oliver Wyman commenced work on 10 August 2010[56]. MacDonald further confirmed that the approval required was actually a condonation of the confinement process, as the application for approval of confinement was submitted after Oliver Wyman had already commenced work.

  According to MacDonald, Oliver Wyman commenced work prior to the approval of the confinement due to time pressure.

  The existing Oliver Wyman team was finalising another project and would have been withdrawn from South Africa if they could not start with the work required by Transnet. According to MacDonald, Oliver Wyman was appointed to perform an assessment and consolidation of a number of existing studies, referred to as the *"Mobilisation Phase"*, in order to define the scope of further work required on the coal line expansion. MacDonald confirmed that there was no signed contract for this portion of work performed by Oliver Wyman.

  Further notes by Pita related to the cost estimate for the project. However, a second request for authority to confine was submitted for the remainder of the expenditure. Pita indicated that this submission related to the assembling and analysing of previous work performed.

  The motivation for appointing Oliver Wyman was said to be linked to the prior study performed by Oliver Wyman and therefore required the appointment of the same company to ensure alignment and consistency as well as their intimate knowledge of TFR and the industry.

  Pita further noted comments in respect of Oliver Wyman's apparent lack of BEE. It appears that the firm is based in America and does not have a presence in South Africa that would require BEE certification.

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55 Refer paragraph titled *"Authorisation"* later in this report for a discussion on the condonation
56 Refer Exhibit 28 – E-mail stating Oliver Wyman was instructed by MacDonald to commence work on 10 August 2010

- **Financial position**

  The request for authority to confine reflected the estimated value of the acquisition as R2.3 million.

- **Recommendation**

  MacDonald recommended that the confinement and award of the RFQ to Oliver Wyman to perform consulting services on the Mobilisation phase of the study.

- **Authorisation**

  MacDonald signed the request for authority to confine on 17 August 2010. In terms of paragraph 5.4.1 of the DAF 2010, MacDonald, as the Acting Group Executive: Commercial and Freight Corridors, had the authority to approve the appointment of consultants up to R10 million.

  In terms of paragraph 5.4.3 of the DAF 2010, MacDonald had the authority to approve the confinement of tenders up to an amount of R5 million.

  We noted that the request for authority to confine was further signed by Volmink and Pita.

  Pita recorded a handwritten note on the request for authority to confine stating that: *"Anoj [Singh] is not required to sign based on recently released DOA. Please ensure all consulting services are lodged with Rishana Sunderlall in the Governance office of the Group CPO. Mark can approve consultant spend up to R10m p.a."*

  Pita indicated that he viewed the submission as a condonation because Oliver Wyman commenced work prior to the date thereof. He further confirmed that his signature to the submission served as condonation for the confinement process. Pita was authorised to approve confinement up to R50 million in terms of a delegation of authority by Singh and therefore had authority to condone the confinement process[57].

[57] Refer Exhibit 29 – Delegation to Pita

Memorandum from Mr Pita – 1 September 2010

Our review of the memorandum prepared by Pita on 1 September 2010, revealed that he (Pita) approved the submission (dated 16 August 2010) subject to his following comments being addressed[58]:

- **Avoidance of duplication**

  Pita makes the comment that similar work might have been performed by three other entities named *"Letsema"*, TCP and *"Fever Tree Consulting"*. He raises concerns that there might be duplication and suggests that the previous work performed by the mentioned entities be reviewed.

  In an e-mail, dated 9 February 2011, MacDonald inserted responses to Pita's comments and stated that Socikwa confirmed that there was no duplication of work[59].

- **Foreign Exchange Forward Cover**

  Pita suggests that Transnet Treasury be contacted to ensure that foreign exchange forward cover is arranged as the fees (USD80 000/week totaling USD320 000) are denominated in US dollars.

  MacDonald stated in the e-mail, dated 9 February 2011, that Transnet Treasury had been involved and that forward cover was not applicable due to the short period.

- **Commencement of work prior to confinement authorisation**

  Pita raises the question whether the submission for confinement should not be regarded as a condonation as it appears if the work might have commenced on 10 August 2010 (per correspondence with MacDonald and Oliver Wyman), but the request for confinement was dated 16 August 2010.

  MacDonald confirmed that Oliver Wyman started working on 10 August 2010. He further confirmed that the approval required was actually a condonation of the confinement process, as the application for approval of confinement was submitted after Oliver Wyman had already commenced work.

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58 Refer Exhibit 24 – E-mail and supporting documentation
59 Refer Exhibit 30 – E-mail from MacDonald, dated 9 February 2011

- **Costing concerns**

  Pita raises value for money costing concerns, specifically referring to amounts of USD7,1 million and 30% expenses. It is our understanding that this specific costing concern was based on an unseen email dated 31 August 2010. There also seems to be additional concerns regarding the reasonableness of the quote and the scope. This costing, however, seems to be referring to the submission for the extension of the work rather than the initial submission costing totaling USD80 000 /week.

  MacDonald informed Pita in an e-mail, dated 11 September 2010, that he had engaged with Oliver Wyman and negotiated a reduction in the costs from USD7.1 million to USD6.67 million[60].

- **BBBEE concerns**

  Pita raises concerns that Oliver Wyman might not have any BBBEE accreditation and suggest that such certificate should either be obtained or steps should be taken to become accredited.

  MacDonald's response of 9 February 2011, he stated that Oliver Wyman was advised of the requirement.

Extension of Oliver Wyman appointment – 2 September 2010

- **Submission**

  A submission to seek authority for confinement, dated 2 September 2010, was submitted in order to confine the appointment of Oliver Wyman for the subsequent phases of the work. MacDonald recorded a handwritten note on the submission that refers to a quotation having been obtained by Oliver Wyman following the completion of the scope assessment.

- **Request for Authority to confine**

  The request for authority to confine again provided background to the services required and the previous study performed by Oliver Wyman. The motivation for Oliver Wyman's appointment was due to their knowledge of the project.

[60] Refer Exhibit 31 – E-mail, dated 11 September 2010, regarding reduction of fees

- **Financial provision**

  The estimated value was recorded as USD7,1 million (approximately R57 million).

- **Recommendation**

  MacDonald recommended confinement and the award of the RFQ to Oliver Wyman to perform the consulting services.

- **Authorisation**

  MacDonald signed the request for authority to confine on 3 September 2010.

The following individuals' signatures also appear as support to the request for authority to confine:

- Thomson;
- Morwe;
- Reddy; and
- Socikwa.

Volmink and Pita signed as recommendation for authority to confine.

Singh and Wells approved the request for authority to confine.

In terms of paragraph 5.4.1 of the DAF 2010, the appointment of consultants by Specialist Units for amounts exceeding R50 million had to be approved by the Group Exco or GCEO prior to obtaining quotes. Wells, the Acting GCEO at the time, approved the confinement and award of the contract to Oliver Wyman.

Paragraph 5.4.3 of the DAF 2010 provides for the approval of confinement for amounts up to R100 million by the GCFO. The request for confinement was approved by Singh.

According to MacDonald, the result of the mobilisation phase as well as the detailed scope for further work on the coal line expansion was presented by Oliver Wyman to Transnet[61]. Due to the nature of the further work and the value referred to in the second confinement, the project was referred to TCP who was then responsible for following the procurement procedures, which resulted in a signed contract. The contract was signed by Moses who had authority to sign contracts up to R300 million in terms of paragraph 5.5.1 of the DAF 2010.

[61] Refer Exhibit 32 – Oliver Wyman report following mobilisation phase

Govender is of the view that Transnet is not getting value for money and that there is duplicity of effort, as Oliver Wyman was using work previously produced by Transnet. She indicated that Oliver Wyman is fulfilling the role of project manager and is relying on Transnet staff to execute the project, while TCP has the capacity to act as the project managers. Govender further stated that she regarded the fact that Oliver Wyman did the scoping of the work themselves as a conflict because Transnet should determine what their needs are themselves. According to Govender, the project plan submitted by Oliver Wyman also had a number of gaps, where there is a difference of opinion between TCP and Oliver Wyman on the scope, milestones and deliverables.

Oliver Wyman performing work on Regulatory Affairs

Lund confirmed that Oliver Wyman was appointed to provide policy and regulatory services. Transnet needed an independent credible view of the policy and regulatory environment. According to Lund, only two firms could provide these services, ie Oliver Wyman and McKinsey.

Lund indicated that she obtained approval to confine the procurement process to Oliver Wyman and McKinsey. The terms of reference were sent to both entities. The proposals received from the two entities were presented to the TAC. Lund indicated that Oliver Wyman submitted the better proposal and budget.

Lund was of the opinion that Modise did not have the required expertise to perform the policy and regulatory services performed by Oliver Wyman.

Our consultation with Modise indicated that she was of the view that she had the necessary skills, although she acknowledged that she did not have relevant prior experience. She also informed us that she should have been given the opportunity to perform the relevant work with the assistance of an external consultant (such as Oliver Wyman), if and where required.

Conclusion

Involvement of TFR Exco in the appointment of Oliver Wyman

Thomson and MacDonald confirmed that it was not necessary for the appointment of Oliver Wyman to be approved by the TFR Exco, as the appointment was done by Commercial and Freight Corridors and therefore followed Group procurement procedures in accordance with the PPM (paragraphs 2.14.1, 2.5.2(ii), 8.1.3.1(1), 8.1.3.1(v)(e)) and DAF 2010 (paragraphs 5.4.1 and 5.4.2). We support this view based on the procedures set out in the PPM and the delegations as per the DAF.

Possible duplication of work by Oliver Wyman

According to MacDonald, the work performed by Oliver Wyman was not a duplication of previous work but rather built on previous work performed by Oliver Wyman for Transnet and the coal mining industry. Further needs identified by Eskom, Waterberg and Botswana were also included in Oliver Wyman's appointment. The review and consolidation of previous studies was therefore required to enable Oliver Wyman to further advice Transnet on the expansion of the coal lines to meet industry's needs.

Should Transnet deem it necessary to further confirm the statement by MacDonald that no duplication of work occurred, we recommend that Transnet consider the appointment of a third party with the relevant knowledge and technical expertise to assess the work previously performed in respect of the coal lines and the work currently being performed by Oliver Wyman.

Procurement processes followed in the appointment of Oliver Wyman

It appears that the appropriate procurement processes were not followed in the appointment of Oliver Wyman during August 2010. Although MacDonald, as Acting GCE: Commercial and Freight Corridors, was authorised to approve the confinement and appointment of consultants, this was done after Oliver Wyman commenced with the work. The confinement was condoned by Pita because it was noted that Oliver Wyman commenced work prior to the application for confinement. Pita was authorised in terms of a sub-delegation from Singh to condone the confinement of the procurement process. The condonation, in terms of paragraph 8.1.3.1(v)(e) of the PPM, therefore served to regularise the confinement process followed by MacDonald[62].

The further appointment of Oliver Wyman during September 2010 appears to have complied with the appropriate procurement procedures, as:

- Confinement and approval to award was sought, supported by the respective ODs and approved by Singh and Wells;
- Due to the nature and value of the contract as well as the fact that the work would be performed for a number of ODs, the contract was referred to TCP; and
- Moses, as CE of TCP, was authorised to sign the contract.

[62] Refer paragraph 7.3.3 of this report for a more detailed discussion on the Application of the condonation process

Work performed by Oliver Wyman on Regulatory Affairs

Our consultation with Lund indicated that Oliver Wyman was appointed to provide Transnet with specific policy and regulatory services. She was of the view that Modise did not have the appropriate skills and expertise to perform these services. Our consultation with Modise indicated that she was of the view that she had the necessary skills, although she acknowledged that she did not have relevant prior experience. She also informed us that she should have been given the opportunity to perform the relevant work with the assistance of an external consultant (such as Oliver Wyman), if and where required.

7.3.3 Application of the condonation process

In order to determine whether similar fact matters were dealt with in a consistent manner to the disciplinary matter of Gama, with specific reference as to the granting of condonations for procurement irregularities and the treatment of other procurement irregularities committed by staff members, we reviewed:

- TFR list of condonations rejected or granted by the TR Acquisition Council from 2007 to 2010[63];
- TCP list of condonations granted (2008 to February 2011) and minuted at TCP National Acquisition Council[64];
- Procurement irregularities reported in the Transnet Internal Audit report dated 10 October 2008 *"Tender process audit"* (Annexure 3); and
- Two matters dealing with alleged procurement irregularities, brought to our attention at the start of the Gama investigation, namely VAE (a TFR matter) and Oliver Wyman (a Transnet Group matter) which also incorporates issues around the condonement process are dealt with elsewhere in this report

The *review of condonations at TFR and TCP addresses* the issue of consistency on the following basis:

- Was the process of condonations consistently applied?

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63 Refer to Annexure C for TFR selected condonations for review
64 Refer to Annexure C for TCP selected condonations for review

- Should Gama also have been granted the opportunity and *"reasonable time"* to utilise this process before being disciplined?
- Was disciplinary action instituted against employees who were granted condonements by the acquisition council?

The *review of the TIA tender process report addresses* the issue of whether other procurement irregularities of a similar nature, ie where the procurement level of authority was exceeded, were identified and the management action taken on these matters. Specifically we identify whether any disciplinary action was mooted or instituted against employees.

The *VAE and Oliver Wyman matters deal* in detail with specific procurement irregularities identified, the condonement process and the management action taken to deal with the issues.

7.3.3.1 Background

According to Pita, paragraph 8.1.3.1(v)(e) of the PPM was based on the National Treasury Practice Note 4 of 2008/2009 that deals with the procedure to condone irregular expenditure, who may condone and obligations following condonation[65]. It appears that Transnet attempted to replicate paragraph 8.1.3.1(v)(e) in the PPM similar to the National Treasury Practice Note to allow for condonation of non-compliance with Transnet's policies and procedures as compared to the condonation of irregular expenditure that is permitted in terms of the National Treasury Practice Note.

Irregular expenditure is defined in Section 1 of the PFMA and refers to *"... expenditure, other than unauthorized expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation ..."*.

In the case of Transnet, the National Treasury Practice Note permits the Board to request condonation from National Treasury or the relevant authority if good reasons exist for condonation. Relevant authority is defined as *"... the person or institution whose approval would have been required prior to entering into that transaction or incurring such expenditure or the institution responsible for the relevant legislation"*. The National Treasury or relevant authority, whose approval was required in the first place, may condone irregular expenditure. Paragraph 3.3 of the National Treasury Practice Note provides further examples of the relevant authority that is permitted to condone irregular expenditure. The Transnet Board or the functionary to whom the power was delegated would be the relevant authority to condone the following categories of irregular expenditure:

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[65] Refer Exhibits 18 and 33 – PPM and National Treasury Practice Note

- *"Irregular expenditure incurred as a result of institutions procuring goods or services by means other than through competitive bids and where reasons for deviating from inviting competitive bids have not been recorded and approved by the accounting officer or accounting authority"*; and
- *"Irregular expenditure incurred as a result of non-compliance with a requirement of the institution's delegations of authority issued in terms of the PFMA"*.

The abovementioned categories of irregular expenditure therefore suggest that the Board or delegated functionary is required to condone non-compliance with its policies and procedures in respect of the confinement of tenders as well as non-compliance with its DAF.

It should be noted that the confinement memorandum, dated 12 May 2010, in respect of the condonation of a confinement does not provide further clarification on the process of condonation, except to state that prior authority for confinement should have been sought from the relevant DAC or delegated authority[66].

The PPM allows for the DAC to provide condonation where there was non-compliance with laid down policies and directives[67]. It was unclear which authority should be approached for condonation, ie the DAC or relevant delegated authority, as the PPM only refers to the DAC in this instance. The confinement memorandum refers to the DAC or delegated authority that may condone non-compliance[68].

Following condonation by the National Treasury or relevant authority, the Board must maintain an irregular expenditure register per year. The Board is further required to disclose *"... all irregular expenditure incurred by their respective institutions as a note to their annual financial statements"*.

7.3.3.2 Internal audit findings and reporting of non-compliance to policies and procedures

Edward Okaro and Hennie Human of E&Y indicated that the process of condonation was a Transnet management function. In the event that E&Y identifies non-compliance with Transnet's procurement policies and procedures during their normal internal audit procedures, such non-compliance would be reported to management through the internal audit reports.

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66 Refer Exhibit 27 – Confinement memorandum, dated 12 May 2010, at paragraph 8 thereof
67 Refer Exhibit 18 – PPM
68 Refer Exhibit 27 – Confinement memorandum, dated 12 May 2010

It is Transnet management's responsibility to review the internal audit findings, comment thereon and decide on the corrective action to be taken. E&Y would not instruct or suggest that condonation be sought, as it is management's responsibility to execute such decisions. Where management institutes a particular corrective measure, such as applying for condonation of the non-compliance, E&Y would not assess whether the corrective measure was the appropriate action to be taken in any instance. E&Y would merely assess whether such a condonation was done in line with Transnet's policies, procedures and directives in this regard.

Internal Audit report on the tender process audit at TFR

In 2008, Transnet Internal Audit (E&Y) conducted a tender process audit in terms of the 2008/9 Audit Plan as approved by the Transnet Audit Committee. The audit scope included the evaluation of the controls in respect of:

- Rationalisation and Approval (approval to spend funds, procurement strategy, confinement, establishment of evaluation criteria and timelines);
- Supplier selection;
- Evaluation;
- Acquisition Council Assessment;
- Post Tender Negotiation;
- Contract Acceptance; and
- Tactical Sourcing.

The scope did not consider tenders below R2 million and covered the period 1 April 2007 to 30 April 2008. A report dated 10 October 2008 was issued.

This audit revealed a significant number of failures to follow due process as prescribed by the DPP. Significant control failures were identified creating both a business and legislative risk for Transnet. The following root causes were identified as reasons for non-compliance:

- Governance: Requirements for approval before tender process is initiated, the establishment of evaluation committees, record keeping and declaration of interest are not clearly stated in the DPP;

- People: Responsible persons do not, at all times, adhere to the specific requirements of the DPP due to lack of accountability; Senior Management do not consider and adhere to the DPP in all decisions; General lack of knowledge regarding the requirements of the DPP; and
- Methods and Practices: Documentation does not provide evidence of compliance to the DPP; A standard process or central repository for management of contracts does not exist.

The overall report classification was *"Unsatisfactory"* which indicated that insufficient reliance could be placed on the design and operation of internal controls to mitigate inherent risks. There were six level 1 Observation Classifications indicated in this report, these Observations being those:

- Which could cause material financial, regulatory or reputational risk at a Group level; and
- That deviated from the Group's approved policies and Code of Ethics.

Specific findings highlighted by the internal audit report that appear to be similar in nature to those observed in the VAE and/or Oliver Wyman matters, include:

- No approval for confinement;
- Tenders not approved by AC;
- Contracts amended without AC approval;
- Delays in finalising contracts; and
- Payments without formal agreement.

We have not been made aware from Group HR, TFR and TCP that any disciplinary action was implemented against those responsible for the non-compliance as set out in this internal audit report.

7.3.3.3 Condonations granted at TFR and TCP

The review of condonations at TFR and TCP addresses the issue of consistency on the following basis:

- Was the process of condonations consistently applied?
- Should Gama also have been granted the opportunity and *"reasonable time"* to utilise this process before being disciplined?

- Was disciplinary action instituted against employees who were granted condonements by the AC?

In order to determine whether similar fact matters were dealt with in a consistent manner to the disciplinary matter of Gama, with specific reference as to the granting of condonations for procurement irregularities committed by staff members, we requested from TFR a list of condonations applied for and /or granted by the AC from 2007 to 2010[69]. We did not verify whether the list provided to us reflected all condonations approved by TFR. This list was reviewed and a judgmental sample selected for further investigation with reference to the condonation submission and the minutes of the AC[70].

We obtained a list of condonations from TCP (2008 to 2010)[71] and selected the condonation items relating to mega projects granted by the National Acquisition Council. The condonations reviewed were limited specifically to items that were condoned where costs were incurred in excess of the permissible 10% variance to the contract approved budget.[72]

7.3.3.4 *Overview of the condonation process*

In order to gain an appreciation for the condonement process that operates at Transnet we have included below information from the condonation memorandum issued by Pita[73]:

"Circumstances warranting condonation

In terms of PPM 8.1.3.1 (v) (e), the Divisional Acquisition Council has the authority to condone "non-compliance with the laid-down policy and procedures and directives provided such non-compliance is submitted via the relevant line manager of the employee in the particular Division". However, condonations are not there for the asking. It should be borne in mind that as a general rule condonation should be given for relatively minor transgressions of procurement rules and procedures. Non-compliance with material aspects of Transnet's policies and procedures will usually not be condoned as such lapses have PFMA implications which could result in civil, criminal or disciplinary steps being taken."

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69 Refer Exhibit 34 – List of TFR condonations from 2007 to 2010
70 Refer Annexure C – Sample of TFR condonations reviewed
71 Refer Exhibit 34 – List of TCP condonations from 2008 to 2010
72 Refer to Annexure C – Selected items of TCP condonations on mega projects
73 Refer Exhibits 19 – Condonation memorandum, dated 12 May 2010

And further:

"The DAC's role

The discretion which the DAC has to grant condonations must be carefully exercised, taking into account all relevant factors. These include the following:

- *the extent and cause of the non-compliance,*
- *the seriousness of the non-compliance,*
- *the reasonableness of the explanation for the non-compliance,*
- *the effect of the non-compliance on the fairness of the procurement process*
- *whether the matter would in all likelihood have been approved had the proper processes been followed,*
- *whether the DAC was approached for condonation as soon as possible (at the next DAC meeting) after business became aware of the non-compliance.*

It is important to note that the DAC may only condone matters which fall within their jurisdiction in the first instance.

For transactions above R2 million, the main DAC must consider the non-compliance. For transactions below R2 million, the Local Acquisition Council must consider all those transactions falling within as well as below its jurisdiction. The Local Acquisition Council will submit the condonations it receives to the main DAC for information purposes.

The following are examples where the DAC does not have the authority to condone non-compliance as it did not have the authority to approve the matter in the first instance:-

- *condone a confinement in excess of R10 million which had not been approved by Group - In this instance the DAC may merely support the recommendation for condonation by Group in terms of the DOA Framework;*
- *condone the placing of a supplier's name on the Transnet List of Excluded Bidders without following proper process - In this instance the DAC may merely recommend to Group SSM for consideration and onward transmission and final sign-off by the Group CFO as laid down in the PPM.*

- *condone the unauthorized appointment of a consultant - In this instance the DAC may merely recommend condonation to the Group CFO or the Group CE (depending on the value of the contract).*

Despite the DACs recommendation, the Group CFO or GCE will have the discretion as to whether or not to grant the necessary condonation.

Information to be contained in a condonation submission

At the very least, a submission to obtain condonation should contain the following information:

1. *When did the business first become aware of the non-compliance?*
2. *The nature of the non-compliance, including the provision of the PPM (or Construction Procurement Manual) that was not followed.*
3. *A full explanation for the non-compliance i.e. why was the process not followed?*
4. *What steps will be taken to ensure that the non-compliance will not occur again?*
5. *Has any person been reprimanded or has disciplinary action been instituted against any person because of the non-compliance (including details thereof)?"*

7.3.3.5 Our understanding of the condonation process as applied by Transnet

Non-compliance with material aspects of Transnet's policies and procedures will usually not be condoned as such lapses have PFMA implications, which could result in civil, criminal or disciplinary steps being taken. Transgressions having PFMA implications relates to instances where the company incurs irregular expenditure or excessive expenditure.

Based on the consultations held and the review of the documents regarding condonement it appears that the person transgressing will apply for condonation to the line manager who will in turn approve the condonation or submit the submission to the relevant authority, for example, the DAC, for approval as appropriate.

The line manager may:

- Decide to sign the condonation request (in which case he agrees that there was non-compliance and he recommends that the DAC condone such non-compliance);

- Or in cases of serious non compliance, the line manager may choose to terminate the procurement process if a supplier has not yet been awarded the business (in which case the DAC must be approached to approve a non-award); and
- May decide to institute disciplinary action against the employee/s involved. We note that whether the line manager decides to take action or not, the DAC also has the discretion to report the non-compliance to the CEO for further action.

7.3.3.6 Findings on the review of condonations at TFR (2007 to 2010)

For the purposes of our investigation on the condonement process in terms of the Transnet PPM and the condonation memorandum, dated 12 May 2010, we obtained a listing of condonations granted by TFR during the period January 2007 to December 2010[74].

The TFR list of condonations was reviewed and a judgmental sample selected for further investigation with reference to the condonation submission and the minutes of the relevant acquisition councils. Annexure C is a summary of the sample condonations and related supporting documentation reviewed and contains reference to the respective exhibit numbers per transaction reviewed[75].

The review of the condonations and the minutes revealed the following results.

Matters indicated as condoned whilst review of the minutes indicates that the application for condonations were referred back for resubmission

After inspection of the minutes of the meetings of AC, it was noted that the following matters, which were listed as condoned on the list of condonations provided to us, were referred back at the meetings for consideration or review in the subsequent minutes.

Date of application for condonation	Recommendation per the submission	Date of meeting approving the condonation	Contract value	Resolution as per the minutes of meetings
30 November 2007	Messrs Ericsson SA (Pty) Limited, Johannesburg, original contract value of R2.4 million and proposed amended contract value of R8.5 million. R6.1 million now for consideration	19 December 2007	R8.5 million	The matter was referred back

[74] Refer Exhibit 34 – List of TFR condonations from 2007 to 2010
[75] Refer Annexure C – Summary of sample condonations by TFR with reference to Exhibit numbers 35 to 75

Date of application for condonation	Recommendation per the submission	Date of meeting approving the condonation	Contract value	Resolution as per the minutes of meetings
29 November 2007	Messrs Ericsson SA (Pty) Limited Johannesburg, original contract value of R20.3 million and proposed amended contract value of R33.6 million. R13.3 million now for consideration	19 December 2007	R13.3 million	The matter was referred back
28 August 2007	The additional work performed by the contractor was essential and in Spoornet's best interest and the amount of R172 215.78 is considered to be fair and reasonable. If agreed to variation will be issued thereby increasing the value of the contract from R7 253 631 to R7 425 847 at non scheduled rates.	12 September 2007	R7.2 million	The matter was referred back

At the time of writing this report we have not received evidence that the matters mentioned above were subsequently resubmitted to the Head Office Acquisition Council for reconsideration and approval. In the absence of this evidence we conclude that the matters were never condoned and there is no evidence that any disciplinary action was taken.

Inconsistency of the application for condonations

From the sample of the condonations selected it is evident that there is lack of consistency in terms of the submissions made for condonations.

In some instances the submission made to the AC:

- Does not have appropriate details or the reasons for the application for condonation in terms of the PPM; and

- Is titled *"confinement and award"* and the reference in the minutes of meetings will relate to condonation. It is therefore not clear whether the application being made is for confinement and award or a request for condonation.

The following table illustrates a few examples of inconsistencies evident from the review of the sample used for the purposes of the investigation:

Date of meeting for approval	**Title of submission**	**Recommendation**	**Resolution per minutes**	**Notes**
28 August 2007	Supply and fit universal concrete turnouts sleepers to existing turnouts on all lines owned by Spoornet in North Zone	The extension of the contract completion date by a further period of twelve months will be in Spoornet's best interest to realise a further saving and it is recommended that it be granted.	Approval was given by the council to extend the value for Racec Rail (Pty) Limited, Brakpan for the amount of R10 140 886.32.	1
2 June 2010	Confine and award of business to Pandrol SA (Pty) Limited for the supply of rail fastners.	It is therefore recommended that the order for the confinement and award to Pandrol SA (Pty) Limited be approved for the supply of fastenings required for the planned shutdowns taking place over the next few months.	The council noted and condoned the above confinement as approved on a round robin and a resolution to award business to Pandrol SA (Pty) Limited at a contract value of R13 million subject to the CE's signature being obtained.	2

Date of meeting for approval	Title of submission	Recommendation	Resolution per minutes	Notes
12 September 2007	Amendment to contract - processing of data points collected through a GPS based LIDAR survey for use in IAMM system.	The additional work performed by the contractor was essential and in Spoornet's best interest and the amount of R172 215.78 is considered to be fair and reasonable. If agreed to variation will be issued thereby increasing the value of the contract.	On the minutes dated 03 October 2007, it was resolved that the matter was condoned and noted by the council. The council requested a letter of concern to line regarding an escalation of the price and proper channels which they have to follow before making payments to the suppliers.	3
22 November 2010	To seek condonation for the confining and award of business to VAE	1. Authority was not obtained from the relevant acquisition council to confine to VAE and to subsequently award business. 2. Prior authority for the award of the business as stipulated in PPM 8.1.3.1 has not been obtained.	There are significant commercial transactions which have taken place during the period of the negotiation post expiry of the original contract, as these commercial transactions were all in the best interest of the company, the council condone the transactions that took place in the absence of a formalised contract.	4

Date of meeting for approval	Title of submission	Recommendation	Resolution per minutes	Notes
		3. Prior authority for concluding a contract for a period in excess of two years as stipulated in PPM 6.1.4.1 has not been obtained.	The council condoned all previous and future transactions and up to the signing of the contract.	
		4. Prior authority for effecting a material amendment to a contract as stipulated in PPM 7.3.1 has not been obtained. (Price increases that came into effect as of 01 April 2010).		
28 August 2007	Supply and fit universal concrete turnouts sleepers to existing turnouts on all lines owned by Spoornet in North Zone	The extension of the contract completion date by a further period of twelve months will be in Spoornet's best interest to realise a further saving and it is recommended that it be granted.	Approval was given by the council to extend the value for Racec Rail (Pty) Limited, Brakpan for the amount of R10 140 886.32.	1
2 June 2010	Confine and award of business to Pandrol SA (Pty) Limited for the supply of rail fastners.	It is therefore recommended that the order for the confinement and award to Pandrol SA (Pty) Limited be approved for the supply of fastenings required for the planned shutdowns taking place over the next few months.	The council noted and condoned the above confinement as approved on a round robin and a resolution to award business to Pandrol SA (Pty) Limited at a contract value of R13 million subject to the CE's signature being obtained.	2

Date of meeting for approval	Title of submission	Recommendation	Resolution per minutes	Notes
12 September 2007	Amendment to contract - processing of data points collected through a GPS based LIDAR survey for use in IAMM system.	The additional work performed by the contractor was essential and in Spoornet's best interest and the amount of R172 215.78 is considered to be fair and reasonable. If agreed to variation will be issued thereby increasing the value of the contract.	On the minutes dated 03 October 2007, it was resolved that the matter was condoned and noted by the council. The council requested a letter of concern to line regarding an escalation of the price and proper channels which they have to follow before making payments to the suppliers.	3
22 November 2010	To seek condonation for the confining and award of business to VAE	1. Authority was not obtained from the relevant acquisition council to confine to VAE and to subsequently award business. 2. Prior authority for the award of the business as stipulated in PPM 8.1.3.1 has not been obtained. 3. Prior authority for concluding a contract for a period in excess of two years as stipulated in PPM 6.1.4.1 has not been obtained.	There are significant commercial transactions which have taken place during the period of the negotiation post expiry of the original contract, as these commercial transactions were all in the best interest of the company, the council condone the transactions that took place in the absence of a formalised contract.	4

Date of meeting for approval	Title of submission	Recommendation	Resolution per minutes	Notes
		4. Prior authority for effecting a material amendment to a contract as stipulated in PPM 7.3.1 has not been obtained. (Price increases that came into effect as of 01 April 2010).	The council condoned all previous and future transactions and up to the signing of the contract.	

Notes for the table above

1) *On the submission for the supply and fit of universal concrete turnouts sleepers to existing turnouts on all lines owned by Spoornet in North Zone no reference is made on the submission that the application is for condonement and the resolution on the minutes inspected do not show if the matter was condoned*[76]*. Whilst on the list of condonations made available to us the matter is indicated as condoned*[77]*.*

2) *The confine and award of business to Pandrol SA (Pty) Ltd for the supply of rail fasteners submission is showing that it is recommended that that the order for the confinement and award to Pandrol SA (Pty) Ltd be approved*[78]*. However, the minutes are indicating that the matter was noted and condoned thereby raising questions on whether the application was for confinement or condonation*[79]*.*

3) *Inspection of the submission for the amendment to contract for processing of data points collected through a GPS based LIDAR survey for use in IAMM system has indicated that the submission do not show if it is for a material amendment to a contract*[80]*. Upon inspection of the minutes showed that the matter was condoned and noted by the council and therefore implying that the amendment of the contract was not done accordingly and thus applying for condonation*[81]*.*

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76 Refer Exhibit 45 – Submission for condonation in respect of concrete turnout sleepers
77 Refer Exhibit 34 – List of TFR condonations from 2007 to 2010
78 Refer Exhibit 61 – Submission for condonation in respect of Pandrol SA (Pty) Ltd
79 Refer Exhibit 66 – Minutes, dated 2 June 2010
80 Refer Exhibit 38 – Submission in respect of the processing of data points
81 Refer Exhibit 41 – Minutes, dated 12 September 2007

4) *The submission to seek condonation for the confining and award of business to VAE clearly indicates the reasons for the application of condonement and the minutes approving the condonation are in line with the submission made*[82].

7.3.3.7 *Time to apply for condonations and the granting of condonation*

The condonation memorandum from Pita, dated 12 May 2010, states that the DAC, when approached for condonation, must consider, *"whether the DAC was approached for condonation as soon meeting) after business became aware of the non-compliance."* Our review of the sample of items selected revealed that there is no indication as to when the business became aware of the non-compliance. We also did not notice any consistent time as to when the condonations are prepared vs. for example the contract expiry date of contracts vs. the date the condonation approved by DAC. In certain instances:

- The time that the contract expired and the condonation submitted for the final approval of the condonation was more than two years;
- The time that the contract expired and the submission of the condonation and the final approval could be a few months;
- The time of the condonation submission and approval of the condonation is before contract expiry; and
- The time elapsed between the submission of the condonation and the approval of the submission could be as much as seven months where a contract expiry date is not relevant.

Based on the sample review we noted that the concept of *"reasonable time"* in terms of becoming aware of the potential irregularity, the submission of the condonation and the approval of the submission is not consistently applied.

7.3.3.8 *Instance where Acquisition Council resolution not adhered to*

For one of the submissions made on 8 September 2010 titled *"Condonement for Train Crew – To seek condonement for the non adherence of procurement and award processes for 'Book Off' accommodation supplies as per the PPM"*, the council raised the concern that the procurement process was flouted and was reluctant to condone this matter and furthermore that the contract was fraught with a myriad of irregularities[83].

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82 Refer Exhibits 75 and 23 – Submission in respect of VAE and Minutes, dated 22 November 2010
83 Refer Exhibits 70 and 71 – Submission in respect of train crew and Minutes, dated 8 September 2010

Based on the concerns raised by the council, the request to condone was declined and a forensic investigation was recommended subject to TFRAC approval or further recommendation to Group Head Office. At the date of preparing this report it was not clear if the council's recommendation was adhered to, as no evidence to that effect was made available upon request from TFR.

7.3.3.9 Disciplinary procedures subsequent to granting of condonement

Laher indicated that he does not have a list of disciplinary procedures taken against staff who transgressed as indicated per the approved condonations, as he is not aware of any disciplinary action taken on condonations granted by the AC.

However, it should be noted that we further confirmed the above with Jane Putini from TFR HR and she also referred us to Abdool Lutchka, the Senior Manager in Supply Chain for references on disciplinary action on condonements. Abdool Lutchka also confirmed that there was no disciplinary action taken in instances where condonements were approved.

7.3.3.10 Findings on condonations at TCP

We reviewed a list of condonations provided to us by TCP, the associated minutes of the TCP National Acquisition Council meetings for the period 2008 to February 2011 as well as the motivation for condonation submissions that support the minuted items.

The condonations for TCP reviewed relate mainly to the mega projects where we have noted that the contract approved budget has been exceeded by more than the permissible 10% variance as per the CPPPPM. This matter is dealt with more extensively under the *"Alleged irregularities and disregard of policies and procedures in respect of mega projects"* specifically the section (Ngqura Container Terminal "NCT") below as a possible area of governance flouting for cost management on the mega projects. Accordingly the conclusion on these condonations is presented here for completeness of review of similar fact matters specifically referring to condonations.

Findings on TCP condonations: The review has revealed *"6 cases relating to various mega projects, not only NCT, where certain irregularities occurred and the governance procedures were not complied with. Condonation was granted where the contract approved budget was exceeded by more than 10% without prior authorization. We have not found any evidence that any disciplinary action was taken against staff".*

7.3.3.11 Conclusion on Condonations

Condonements in relation to substantive fairness of the Gama matter

- In the context of TFR, the condonements were related to procurement irregularities including contracts not extended correctly, contracts amended without the appropriate authorisation, issuing of tenders for a five year contract contrary to the limited two year period per PPM, condonements to pay for the security services rendered without contracts in place and condonations for the confining and award of business;
- There is no prescribed period within which to apply for condonements as the *"reasonable time"* referred to in the DPP/PPM and Directive 3 – May 2010 is not precisely defined. Our review of TFR and TCP condonations has indicated that no specific time frame is applied in the application for and granting of condonation;
- For condonations reviewed at TFR and TCP we noted that no disciplinary action was taken against any of the staff members for the condoned procurement irregularities; and
- For the relevant procurement matters, of similar nature, as reviewed under the reported procurement irregularities by TIA we note that management responses under the management comment section of the report does not indicate any intention to investigate the matters and take the necessary disciplinary steps.

Given the above review of the condonations process and specifically matters on procurement irregularities we found no evidence that Gama was afforded the opportunity to submit a condonation before disciplinary actions were taken as there is no regulation of the concept of *"reasonable time"* to submit condonations nor is there application of disciplinary measures against employees granted condonations. In terms of the procurement memorandum dated 12 May 2010 a process in respect of condonation requires a line manager to submit a request for condonation to the relevant authority. The memorandum does not indicate that a person responsible for non compliance must be afforded the opportunity to apply. The memorandum appears to be silent on who the line manager is who may submit a request for condonation (the line manager of the person responsible for non compliance or the line manager himself/herself who is responsible for non compliance).

We would further submit that the condonation memorandum, dated 12 May 2010, issued by Pita is not applied to the extent of taking disciplinary action against employees. The practice at Transnet, in general, is more in line with the dictionary definition of the verb *"condone"*, as quoted below, in that irregularities on the part of personnel are treated as *"forgivable"* or *"disregarded without protest or censure"*.

The term *"condone"* in the dictionary is defined as:

"to regard or treat (something bad or blameworthy) as acceptable, forgivable, or harmless"[84] *To overlook, forgive, or disregard (an offense) without protest or censure....From Latin 'condonare', "refrain from punishing," it does not mean "approve of, endorse"; it means "let something pass without interference even though you probably disapprove," or "pardon, forgive, overlook." Thesaurus:* ***condone*** *- excuse, overlook, or make allowances for; be lenient with; "excuse someone's behaviour"*[85].

Accordingly we submit that with regard to the Gama matter and a review of similar fact matters that the disciplinary action instituted for the committed irregularities appear to be the exception rather than the rule. We further note that the disciplinary process is not consistently applied to all transgressions but rather that a process of condonation is consistently applied with no disciplinary action being taken against offenders. These observations are in line with Gama's view that *"he (*Gama*) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges"*.

General observations on the condonation process at TFR

There were inconsistencies in application of the condonement process as indicated per the list provided to us for review. These inconsistencies relate to:

- The list indicated matters were condoned, however our review of the minutes indicate that the matters were not noted in the minutes as having been condoned. The list therefore appears incorrect;

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84 Refer to http://www.merriam-webster.com/dictionary/condone
85 Refer to http://www.thefreedictionary.com/condone

- Certain condonement submissions that were *"referred back"* for amendment and revision for reconsideration at subsequent acquisition council meetings but no evidence provided to date that this resubmission ever occurred;
- Of the sample of the condonations selected it is evident that there is lack of consistency in terms of the submission of condonations. In most cases the submission made to the acquisition council did not detail the reasons for the application for condonation in terms of the Procurement Procedure Manual (PPM).The titles used for the submission for condonation was not consistent for example the submission is titled *"confinement and award"* whilst the treatment in the minutes indicate a condonement;
- In one instance we noted that the Acquisition Council declined a submission for condonation based on the concerns raised. The Council requested that either a forensic investigation be conducted with TFRAC approval or the request for condonation submitted to Group Head Office for consideration. To date there does not appear to be evidence of the matter having been rectified;
- Based on the consultations made it appears that no disciplinary actions were applied for matters granted condonation;
- The application of the condonement process is not clearly defined with potential for Transnet staff to ignore proper application of the process. The PPM and the 2010 Directive 3 – Condonement does not define what constitutes material non compliance. Considering that condonation should be given for relatively minor transgressions of procurement rules and procedures and that material non compliance will result and disciplinary action it would have been helpful to define or provide examples of material and minor transgression;
- Reference should also be made on what it means to *"become aware of non-compliance"* and the definition of the *"reasonable time"*: to respond as this will enable the timely corrective action to be implemented to address the transgression. It is not clear how the line manager or the person transgressing will become aware of the non compliance; and
- The condonement submission reviewed showed that applications for condonement are not done in the recommended format as per the condonation memorandum.

It appears that in the event that the relevant delegated authority provides condonation for non-compliance, the matter does not have to be referred to the DAC for information. This may lead to a practice where condonation is sought from a delegated authority without Transnet having the ability to monitor such instances of condonation via the DAC. The limited available documented guidance (in the form of the memorandum) leaves room for the interpretation of the condonation process.

The condonation by Transnet of non-compliance with its policies and procedures may lead to the condonation of confinement and non-compliance with the DAF, which constitute irregular expenditure. Condonations of this nature may therefore pose challenges in its application of good governance practices in respect of procurement matters as well as the Board's responsibility to maintain a register and disclose instance of irregular expenditure as prescribed by the National Treasury Practice Note.

8 Alleged irregularities and disregard of policies and procedures in respect of mega projects

8.1 Background

8.1.1 AG document

During our investigation, Transnet provided us with a letter, dated 26 January 2010, addressed to Everingham, Acting Chairman of Transnet at the time, from Hogan. Attached to the letter is a document from the AG called *"Procurement Irregularities at Transnet"*[86]. According to paragraph 4 of the AG document, it alleges certain instances of irregularities and flouting of governance rules at TCP.

8.1.2 Summary of Transnet's response to the AG

Everingham responded to Hogan in a letter, dated 15 February 2010, in which he stated that the detailed tables included in the AG documents are direct extracts from a presentation prepared for a workshop with Transnet Group called TCP Programme Strategic Alignment and Risk Review Workshop, which was held on 5 September 2008[87].

In Everingham's response, he further stated, amongst others, the following:

- *"The variances are not based on a comparison of the original budget to actual expenditure, but rather based on the difference between the original budget and the latest forecasted costs which change from time to time, due to range of factors, including additional facility requirements, unforeseen construction circumstances, agreed scope variations, increased escalations, foreign exchange fluctuations etc."*
- *"Transnet is satisfied that due process was followed and the necessary approvals were obtained through the relevant governance structures for any revisions to the originally approved budgets in accordance with the normal business processes."*
- *"It is clear from the above comments and tables that the party/parties making the allegations of procurement irregularities at TCP have little comprehension of the governance structures, control frameworks and project execution processes with the organization."*

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86 Refer Exhibit 76 – AG document named *"Procurement Irregularities at Transnet"*, dated 26 January 2010
87 Refer Exhibit 77 – Everingham's response to Hogan, dated 15 February 2010

8.1.3 Public Protector letters

TCP is responsible to provide ongoing monitoring of the mega capital projects undertaken by Transnet as part of its growth strategy through capital expansion. At the second bullet on page 5 of the Public Protector letter (Dec 2010) it was alleged that irregularities occurred and that governance was disregarded on five of these mega projects, namely NCT, DHEW, CTCT, NMPP and Phase 2 of the Orex feasibility study[88]. It was further alleged that variances on a number of projects amounted to R5.3 billion, including, *inter alia*, the following:

Project	Approved budget R	Final cost R	Variance R
NCT	8.7 billion	10.7 billion	2.0 billion
DHEW	3 billion	3.8 billion	800 million
CTCT	4.2 billion	4.9 billion	732 million
NMPP	11.6 billion	12.3 billion	700 million
Phase 2 – Orex feasibility	142 million	189 million	48 million
Total			**R4.28 billion**

The Public Protector letter (Feb 2011) stated that *"alleged tender irregularities"* referred specifically to the alleged invoicing greater than the approved budget in respect of the abovementioned five mega projects[89].

8.2 Potential irregularities and possible areas of flouting of governance

The allegations relate to potential irregularities and governance flouting in terms of the management of the costs on the mega projects including unauthorised variances in relation to the approved budget. In terms of the various applicable control manuals variances, irregularities and flouting of governance can occur in the management of costs where:

[88] Refer Exhibit 8 – Public Protector letter (Dec 2010)
[89] Refer Exhibit 78 – Public Protector letter (Feb 2011)

8.2.1 A mega project budget is not approved by CAPIC for referral to the Board

Per the Delegation of Authority Framework, *"DAF"*, 2010 and prior years that are similar state that, in note 1, 5.1 *"Capital expenditure may only be authorized if the project has been so approved by CAPIC or the relevant divisional CAPIC in accordance with the limits set out in this Delegation of Authority Framework and capital funds have been allocated in the annual Budget of the Company"*).

8.2.2 An increase in the project budget is not referred to CAPIC

Per DAF, 2010 and prior years that are similar state, paragraph 5.1.3.1 *"Any increase in excess of the annual approved capital investment budget must be submitted to Group CAPIC for approval"; prior year DAFs are similar*).

8.2.3 The Mega project budget is not approved by the Board

Per DAF, 2010 and prior years that are similar state that, in 5.1 *"Capital expenditure may only be authorized if the project has been approved and a warrant number has been issued by the relevant authority." and 5.1.3 states "Capital expenditure in excess of R700m must be approved by the Board"*.

8.2.4 A variance of 25% or R100m in the estimated total cost of the budget is not brought to the attention of CAPIC

Per DAF 2010 and prior years DAFs that are similar state 5.1.3 *"All cost increases in excess of 25% or greater than R100m of the approved budget for a project must be reported to Group CAPIC"*.

8.2.5 The expenditure or commitments of the project exceed the approved budget

Per DAF, 2010 and prior years that are similar state, per 5.5. note 6: *"In terms of the PPM all amendments to contracts must be approved by the Manager (i.e. a person with the relevant delegated powers) who originally signed the initial contract. For higher value contracts (i.e. those signed by the operating division's CEO, the GCFO or GCE), it is advisable to obtain a written mandate from that official empowering a delegate to administer such contract and to effect changes to such contract not exceeding 10% of the initially approved contract value.*

8.2.6 A contract approved budget may not be exceeded by more than the permissible 10% variance

Per DAF, 2010 and prior years that are similar, per 5.5 note 6; and the CPPPPM 4.13.2 "*The person delegated in terms of Transnet's Delegations and Commercial Responsibilities to award the contract shall approve any increase in the contract amount in excess of 10% of the Forecasted Final Cost with the approval of the Acquisition Council, where relevant.*" And section 7.6 states *Prepare a motivation to exceeding Final Forecast Cost in TEAR by more than 10%*, setting out the precise reasons for the increase in cost of goods services or works. *Obtain approval from Acquisition Council to exceed this amount*".

8.2.7 Packages and package budget elements expenditure and commitments exceed the package budget and package element's budget

Amendments of budget costs is effected, per TCP's Bierman and HMG JV's Hamilton, by budget transfer notices or project change notices to correct the package and package element variances are not authorised by the appropriate authority in the form of the owner's project director/manager.

8.3 Our approach on the mega projects

The approach adopted to verify whether there have been irregularities and/or flouting of governance in the mega projects' cost management involved the following:

- A - An overall review of the cost monitoring of the mega project;
- B - A review of the CAPIC and Board minutes to assess whether the mega project budget has been approved and a warrant or amended warrant has been issued by the Board for the mega project;
- C - A review of the monthly FFC, as an indicator of ETC, to verify whether it has increased by more than 25% of the original budget or by more than R100 million from month to month;
- D - A review of the monthly level 4 cost reports for the mega project concerned to verify if any variances have occurred in terms of the commitment and actual expenditure in relation to the:
  - Project overall totals;

- The package totals per package; and
- The package line items.

Where variances occur at package level or within package line items a verification that it is timeously corrected and with the approved budget transfer authority; and

- E - A review of the list of condonations and minutes of the TCP MPAC or National Acquisition Council (NAC) to highlight variances greater than 10% of contract approved budget. The review of the minutes and condonations determined whether there was adherence to the authorisation procedures as required by the DPP, PPM and CPPPPM to have any variances greater than 10% of the FFC/Original approved contract budget approved by the appropriate authority.

The review of the mega projects budget and actual cost variances excludes areas relating to:

- The tender process and all tender related issues;
- Procurement processes in relation to the mega projects and procurement of goods and services;
- Internal control issues not related to the cost and contract management of costs on mega projects;
- The accounting and financial disclosure for mega projects costs;
- Human resources and employment issues on mega projects; and
- Contractor and personnel performance management issues of mega projects.

8.4 Procedures performed and documentation reviewed

In terms of our response to the allegations from the Public Protector our understanding is that the alleged irregularities and variances occurred at contract or package level. Our overall approach comprised a detailed analysis of the variances that occur from month to month at a package level as well as a high level review of relevant documents and total costs:

- The more detailed procedures comprised the review of variances at level 4, which is on the package level where invoicing will take place. We reviewed the monthly cost reports, at level 4 detail as supplied by HMG JV, to ascertain the variances. Variances were firstly highlighted where the commitment and/or the actual expenditure exceeded the current approved budget at the time on a package line item level. Furthermore, a review of the minutes and condonations of the TCP mega projects acquisition council was performed to highlight variances greater than 10% of contract approved budget. These condonations were then correlated with the level 4 cost reports for the relevant packages. The review of the minutes and condonations was performed to determine whether there was adherence to the authorisation procedures as required by the DPP, PPM and CPPPPM for variances greater than 10% of FFC/Original approved contract budget to be applied by TCP for projects of this nature; and
- Our investigative approach further comprised a high-level review of projects to gain an understanding of the projects with reference to the CAPIC, Exco and Board minutes and the very high level monthly snapshot cost reports produced by TCP. Our initial procedures performed therefore focused on determining the initial approved budget (or warrant value), subsequent budget increases, whether the necessary approvals were obtained and comparison of the actual expenses per project per month in order to determine whether expenses were incurred in excess of the approved budget amounts.

We were provided with the following documentation relevant to the mega projects:

- CAPIC, Group Exco and Board minutes and relevant submissions;
- A sample monthly cost report in respect of CTCT, dated 25 November 2010;
- Samples of level 2 and 3/4 cost reports from IPAS (HMG's system), dated 24 November 2010;
- A sample of a change control motivation;
- The Capital Evaluation and Approval Policy;
- Various motivation submission documents related to applications for approval of budget increases;

- Electronic copies of the monthly Snapshot reports from 2006 (except December each year, as no reports are compiled during this month)[90];
- Cost level 2 and 3/4 reports;
- Minutes and condonations of the TCP mega projects acquisition council; and
- Detailed information and explanations from HMG regarding further enquiries.

We performed the following procedures to determine whether appropriate approvals were obtained for budget increases and whether expenses were incurred in excess of the approved budget amounts:

- Reviewed CAPIC, Group Exco and Board minutes to establish when budget increases were approved;
- Consideration of the submissions to the abovementioned governance structures in seeking such budget increase approvals;
- Compiled a timeline per project summarising budget increases and approvals;
- Compiled a trend analysis per project based on the information contained in the level 3/4 cost reports in order to determine whether:
  - The trend in the FFC over a period of time provided indications of budget increase approvals to be sought;
  - The budget increases reported in the monthly Snapshot reports correlated to the budget increases and approvals identified in the minutes of the relevant governance structures;
  - The actual expenditure for each project exceeded either the ETC or the FFC; and
  - Variances greater than 10% of the FFC/Original approved contract budget was appropriate authorised.
- Confirming whether warrant letters were issued based on submissions for budget increases approved by the Board;
- Consultations with the following Transnet officials:
  - Bierman;

[90] Refer to Exhibit 82 to 87 – Level 2 snapshot reports

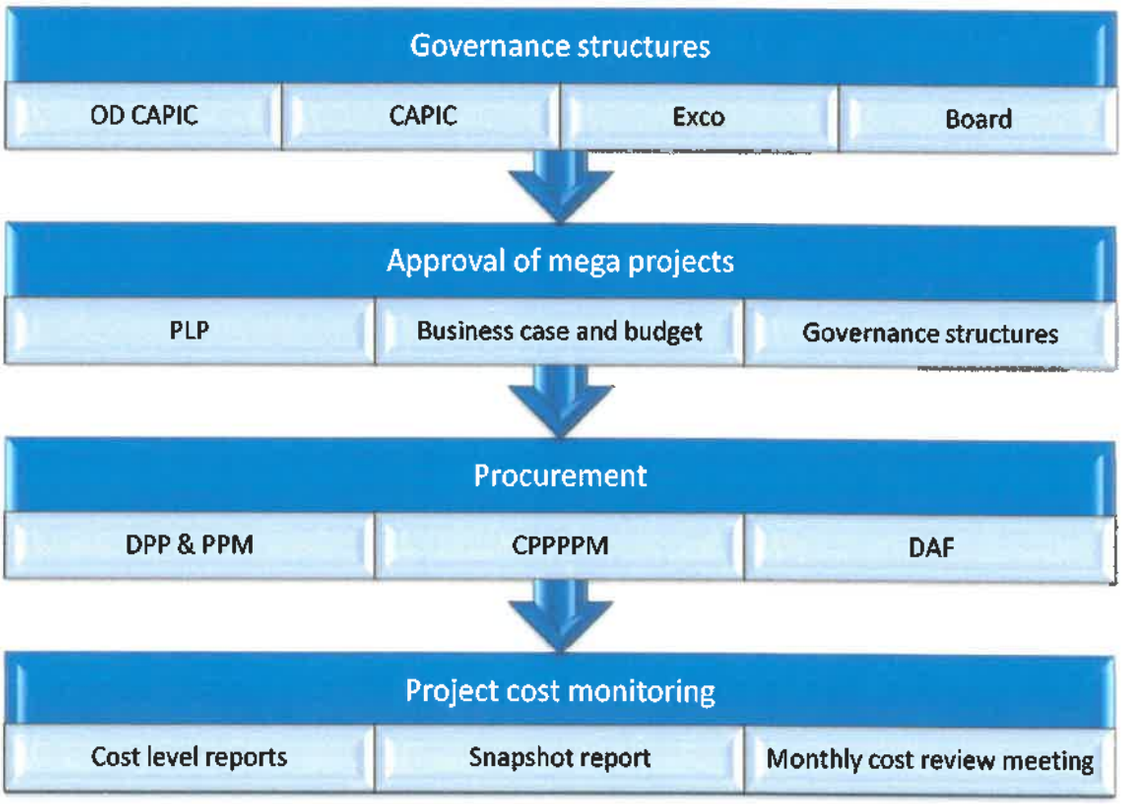
- Basson;
- Various project managers; and
- Budhai.

- Consultations with the following HMG officials, ie Hamilton.

8.5 Summary of relevant policies and procedures

The diagram below provides an overview of the fundamental components relevant to the mega projects in terms of the:

- High level processes for the development and ultimate approval of the mega projects' business cases and related funding by the respective governance structures; and
- Operational processes in respect of the procurement and monitoring of project expenditure to ensure compliance with Transnet's various policies and procedures.



The pertinent policy and procedural documents for the governance on the mega projects are:

- The PLP;
- The DPP;
- The PPM;
- The CPPPPM; and
- The DAF.

Bierman and Basson also described the processes followed by TCP in the monitoring of the project costs.

The discussion below provides further information on the respective processes depicted above as well as the relevant policies and procedures.

8.5.1 Governance structures

The relevant governance structures that would play a role in the approval of mega projects include the following:

- The OD CAPIC comprising the OD CFO and the OD's Exco members;
- Transnet CAPIC and Exco comprising the GCFO and selected Exco members; and
- Transnet Board comprising the Board members.

A capital project is approved via Transnet's DAF. Following the approval of the project (described later in this report), TCP takes responsibility for the execution thereof[91].

8.5.2 Approval of mega projects

The policies, procedures and processes relevant to the high level approval process for mega projects include the PLP, DPP and/or PPM and DAF[92]. A brief summary is provided of the PLP and the high level approval of mega projects by the respective governance structures described earlier.

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91 Refer paragraph 8.3.2.2 of this report for a discussion of the approval process for mega projects
92 Refer paragraph 8.3.3 of this report for a summary on the DPP, PPM and DAF

8.5.2.1 The PLP

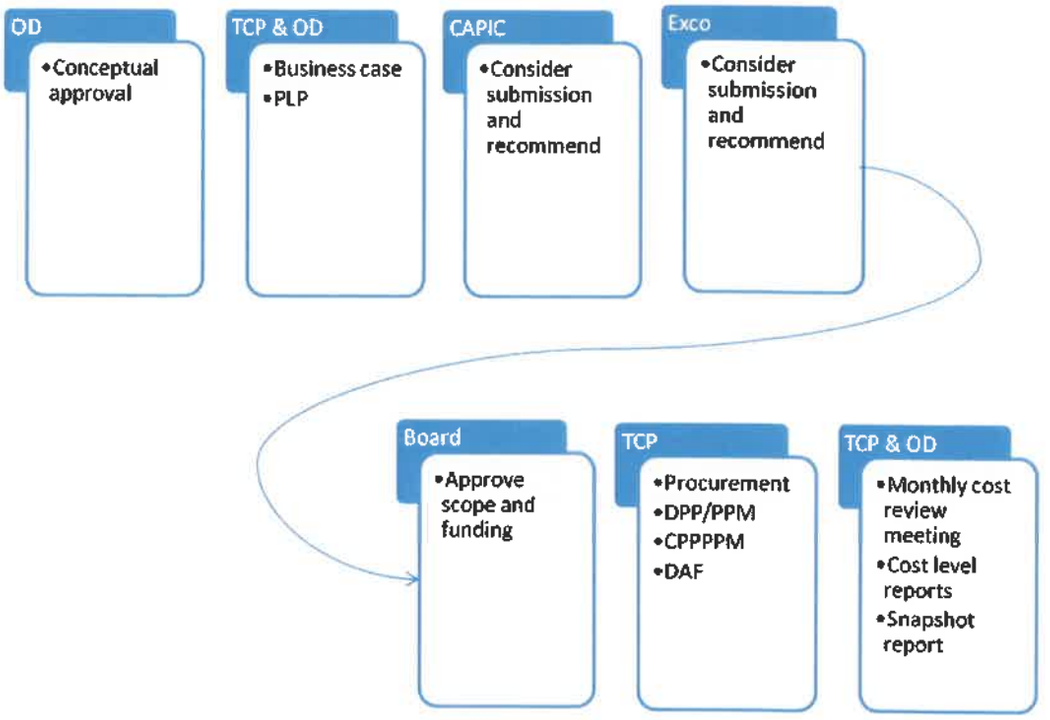
The PLP is the Transnet customised project life cycle management and project governance processes that seeks to minimise and mitigate risks, balance resource commitments, address the costs capital investment effectiveness, time lines, standardisation of methodology, gate approval processes, cost and time estimates as well as scheduling and procurement strategies.

The PLP has various activities and deliverables at each phase. These include at various phases and at differing levels of detail:

- Conceptual study (FEL-1), which includes the conceptual design, business planning and approval of the concept;
- Pre-feasibility study (FEL-2), which includes the alignment to strategy, environmental applications, high level cost estimates, high level business case and approval of feasibility;
- Feasibility study (FEL-3), which includes project plans, scope fixing, scheduling, project estimating, business cases, the project execution plans, project approvals, procurement strategy and project package plans as well as detailed costing;
- Execution (FEL-4), which includes detailed specifications, procurement, actual construction, management procedures and delivery of the completed project; and
- Finalisation, which includes OD project acceptance, financial closure and handover, documentation; and
- Close Out and post implementation reviews by stakeholders.

The PLP has various gate reviews at each phase. The gate review process should be applied after each step before FEL-4 in order to assess the project viability before full organisation resources are committed to the project. FEL is the front end loading concept that seeks to have key issues addressed with minimal resource commitment and maximum risk mitigation before full resource commitment to the project is made.

8.5.2.2 High level approval process for mega projects



The high level approval process for mega projects depicted above (in terms of the DPP, as it applies to mega projects and read together with the PLP and the DAF) would entail:

- Conceptual approval of a type of project at the OD based on strategic needs and strategic alignment. The OD would involve TCP at the appropriate stage of the process which in most cases would be the conceptual stage of the PLP;
- The PLP process will then be followed, with its various approval gates, and would have the OD and TCP working together to prepare a detailed business case with appropriate gate approvals for eventual submission and presentation to CAPIC;
- CAPIC would review the submission and approve, where appropriate, the submission for referral to Exco and onward to the Board;
- The Board would approve the scope, cost and funding of the CAPIC approved submission;
- Once approved by the Board, TCP would be mandated to execute on the project for eventual completion and handover to the OD (as client); and

- During the execution phase and even at earlier FEL levels TCP and the OD may be engaged in the tender processes in terms of the DPP.

8.5.3 Procurement

Apart from the overall approval of the mega project concepts, business plans and budgets by the relevant governance structures, the appointment of service providers, contractors and the procurement of goods and services in respect of the mega projects needs to be performed in accordance with Transnet's policies and procedures as detailed further below.

8.5.3.1 The DPP

The DPP has been issued in various versions from time to time. The DPP sets out the various detailed procurement procedures that govern the procurement processes of Transnet as a whole and includes, *inter alia*, various procurement mechanisms, issuing of tenders and quotations, lodging, opening, evaluation and recommendation of tenders, contract acceptance, contract administration, detailed functions of the governance structures and policy on BBBEE procurement.

The last version of the DPP, issued during November 2006, is relevant to the five mega projects included in our investigation[93]. This last version of the DPP was replaced by the PPM during May 2009[94].

Of importance for purposes of the investigation into the allegations regarding the five mega projects are the following:

- Section 8 of the DPP 2006, which details the functions of the various governance structures, which should be read together with the DAF applicable from time to time[95]. This section is relevant to the mega projects in that the overall project approval is dealt with at CAPIC level before recommendation to Exco or the Board for final approval as mentioned earlier[96]. The mega projects, by virtue of the large capital expenditure required, will be dealt with at the CAPIC level as the first overall project approval gate, after the PLP process has been applied up to the various levels. This assumes funding for feasibility studies have been approved by CAPIC and the Board where the likely overall cost impact requires Board approval in terms of the DAF;

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93 Refer Exhibit 17 – DPP 2006
94 Refer paragraph 8.3.3.2 of this report for a discussion of PPM
95 Refer paragraph 8.3.3.4 of this report for a discussion of the DAF
96 Refer paragraph 8.3.2.2 of this report for a discussion of the high-level approval process in respect of mega projects

- Section 6 of the DPP 2006 deals with contract acceptance and discusses the tender approval, acceptance, notices, delivery of tender acceptances, the types of contracts entered into, securities and guarantees and the delegated powers to conclude contracts after approval by the various governance structures. This section, for purposes of mega project management, is pertinent in that the various packages are indeed separate service provider or contractor contracts that are dealt with in the project package plans;
- Section 7 of the DPP 2006, which deals with contract administration and details the procedures around the management of the key aspects of the contract including, *inter alia*, the delivery of goods and services, material amendments to contracts and the required approvals, tenderer performance failures, exclusion of tenderers from further Transnet business and unlawful conduct by tenderers/contractors. This section therefore provides guidance on the management of the contracts and with respect to the mega projects and the various packages/contracts; and
- Section 2.17 of the DPP 2006 deals with the CIDB and NEC, which would pertain to the various contracts on the mega projects. Transnet fully subscribes to the CIDB and NEC provisions and methodology. The CIDB and the NEC seeks, amongst other things, to standardise various construction and engineering contracts for more effective and efficient procurement.

8.5.3.2 The PPM

The PPM is a refinement of the DPP 2006 and was issued with an effective date of 26 May 2009[97].

The PPM essentially deals with the same key processes as contained in the DPP 2006 and addresses certain issues not previously dealt with in the DPP 2006[98]. It is beyond the scope of this report to provide a detailed analysis of the differences between the PPM and the DPP 2006.

8.5.3.3 The CPPPPM

This latest effective version is dated 1 December 2008[99]. This manual incorporates a significant amount of what is contained in the PPM but deals specifically with construction and engineering procurement and the associated processes for TCP's purposes. It is our understanding that where the CPPPPM is silent the PPM would be applicable.

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97 Refer Exhibit 18 – PPM
98 Refer paragraph 8.3.3.1 of this report for a discussion of the DPP
99 Refer Exhibit 79 – CPPPPM

8.5.3.4 The DAF

The DAF indicates the various levels of delegated levels of authority to authorise transactions at organisational level and operational transaction level. For purposes of this investigation reference is made to the DAF at organisational level and not at transactional level, for example the DAF for the Accounts Payable section.

The DAF is revised by the Board from time to time. The applicable DAFs issued to date for purposes of this investigation are with effective dates:

- July 2005 (referred to as DAF 2005 throughout this report)[100];
- October 2007 (referred to as DAF 2007 throughout this report)[101];
- May 2009 (referred to as DAF 2009 throughout this report)[102]; and
- August 2010 (referred to as DAF 2010 throughout this report)[103].

The DAF indicates the rand amount limits to be approved by the various approval authorities at ODs and Specialist Units as defined in the DAF. (It should be noted that TCP is described as a Specialist Unit in the DAF.) The various levels of authority dealt with by the DAF include, *inter alia*, OD Exco/CE; CAPIC/GCFO; Exco/GCEO and the Board[104].

The relevant approval authorities and limits in respect of increases in the ETC remained the same in the abovementioned DAFs from 2005 to 2010 as summarised below:

- CAPIC/GCFO was authorised to approve increases in the ETC up to R400 million;
- Exco/GCEO was authorised to approve increases in the ETC above R400 million up to R700 million; and
- The Board was authorised to approve increases in the ETC above R700 million.

8.5.4 Project cost monitoring

According to Bierman and Basson, TCP monitors the costs on the mega projects on a monthly basis. This is done through the use of various reports and meetings as detailed further below.

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100 Refer Exhibit 12 – DAF 2005
101 Refer Exhibit 6 – DAF 2007
102 Refer Exhibit 80 – DAF 2009
103 Refer Exhibit 26 – DAF 2010
104 Refer paragraph 8.3.1 of this report for a discussion on the relevant governance structure related to mega projects

8.5.4.1 Monthly project cost monitoring

From a monthly cost monitoring perspective, Bierman indicated that the mega projects' budgets and expenditure is monitored at monthly project cost review meetings where monthly cost level reports are reviewed and examined on a package by package level (as evidenced by the sample monthly cost report provided to us by Bierman[105].) Furthermore, the packages are also reviewed to at least the cost level 3 detail in these monthly cost review meetings.

We understand that HMG provides TCP with the necessary cost level reports per project each month for purposes of the monthly project cost review meetings. The cost level reports are referred to as follows:

- Level 1 reflects a high level overview of the relevant project;
- Level 2 reflects a summary overview of the relevant project per total package;
- Level 3 reflects detail to a like package level; and
- Level 4 reflects further details of the relevant project per individual package plan or contract values.

During these monthly meetings, a detailed review is performed of the costs on a package level for each project. The following items are reported on and considered during these monthly meetings:

- The original budget amount approved will equal the original warrant amount;
- The current approved budget amount, also referred to as the ETC, will equal the current warrant amount;
- The FFC provides an indication of the potential final cost for the project at that point in time. The FFC is considered and a trend compiled over a period of approximately three months, as the trend would provide an indication for the potential need to apply for additional budget approval. Should the need for approvals of additional budget for a mega project be established, the business case and budget of the mega project is revised and submitted to the relevant governance structures for approval, which would result in a *"new"* ETC;

[105] Refer Exhibit 81 – Example of monthly cost report

- The risk fund, which provides for quantified risks translated into an estimated rand amount. In the event that these risks materialise, the PCN is used to reallocate budget amounts from the risk fund to the relevant package. (It should be noted that the PCN is only used to reallocate budget amounts between various package plans within a single project without resulting in an increase in the approved budget amount); and
- The contingency line item, which provides for unforeseen expenditure. Reallocation of budget amounts from the contingency line item to the relevant package is actioned through the completion of the PCN.

Bierman indicated that the respective OD representatives (on whose behalf TCP is managing the mega project) are required to attend these meetings.

Bierman indicated that TCP uses the cost level reports to compile a snapshot report, which is also used to report on the project status per month.

8.5.4.2 Description of the monthly snapshot reports

The snapshot report is a report generated on a monthly basis to determine the state of affairs of Transnet's mega projects at any given point when such a snapshot report is generated. The snapshot report is compiled from the monthly cost level reports from the IPAS System (a project management system used by HMG). Reports are created per project from cost level 1 to cost level 4 (cost level 4 being the most detailed reports). For our investigation purposes, we were initially provided with the snapshot reports compiled from level 1 and level 2 data to perform an overall assessment of the five mega projects identified (ie details of the project as a whole was obtained rather that obtaining the details of all packages included in the mega project). The snapshot reports are compiled by TCP.

We initially created a timeline report from the snapshot report to obtain a clear picture of when there were any changes in the FFC, approved warrants, actual expenditure and total commitments. We consolidated the data from each month's snapshot report was into a single worksheet. From these worksheets we determined whether appropriate approval for any increases was obtained, or whether there were any missing or outstanding information required for our investigation.

The following fields are included in the monthly snapshot reports:

Fieldname		Description
Current Approved Warrants		The name of the mega project
Project nr		Unique number allocated to each mega project
Project Phase		Current status of the mega project (distinguished between Proposed, Feasibility, Execution, Close Out)
Corridor		Indication of which major area the mega project relates to (distinguished between Capecor, Batcor, Oreline, Richcor, Oreline and NMPP)
Baseline		Indicates the amount on which the Current Approved Warrant is based before any changes are made
Current Approved Warrant		Amount of total expenditure approved by the Board for the specific mega project
FFC this period		The Final Forecasted Cost to complete the mega project based on the latest trends and calculations for the current month
FFC last period		The Final Forecasted Cost to complete the mega project based on the latest trends and calculations for the previous month
Variance this period		Movement between FFC this period and FFC last period
Planned progress up to end March		Indication of the % of the mega project to be completed by the end of the financial year
Cash Flow	Forecast this period	Forecasted cash outflow expected to be incurred in the current month
Cash Flow	Actual this period	Actual cash outflow incurred during the current month
Cash Flow	Variance this period	Difference between forecasted cash flow and actual cash flow for the specific period

Fieldname		**Description**
Actuals to date		Cumulative actual expenditure incurred up to date of the Snapshot Report
Cumulative Cash Flow	Planned value	Budgeted cash flow for the coming financial year
Cumulative Cash Flow	Actual value	Actual cash flow incurred in the current financial year
Cumulative Cash Flow	Variance value	Difference between planned Cumulative Cash Flow and Actual Cumulative Cash Flow for the financial year
Commitments to date		Amount of expenditure that is to be expended based on contractual agreement.
Cumulative Commitments	Planned value	Cumulative Budgeted cash flow for the coming financial year
Cumulative Commitments	Actual value	Cumulative Actual cash flow incurred in the current financial year
Cumulative Commitments	Variance value	Cumulative Difference between planned Cumulative Cash Flow and Actual Cumulative Cash Flow for the financial year
Planned Commitments up to end of financial year		Expenditure expected to be contracted up to the end of the current financial year
Planned Cash Flow up to the end of financial year		Budgeted Cash Outflow up to the end of the current financial year
Completion date		Current expected date of completion of the specific mega project

8.6 Observations regarding allegations relating to the mega projects

8.6.1 NCT

8.6.1.1 Background

The NCT project is a follow on from the initial Ngqura port development project.

Ngqura Port

The Ngqura port is situated at the Ngqura River mouth 20km from Port Elizabeth. The port development phase consisted of breakwater construction, dredging of the basin and channels, a sand bypass system, berths and back up areas, initial landside infrastructure, procurement of a plot boat and tugs and upgrade of the link-line from Ngqura to Gauteng.

The Ngqura port development was approved by the Board in December 2001 at an estimated total cost of R2.416 billion (per the business case submitted to CAPIC meeting dated 15 August 2005). A submission was made to and approved by CAPIC on 15 August 2005 to increase the original value of R2.416 billion by R806 million due to *"higher cost items for items included in the original scope."* This took the value of the port project to R3.222 billion.

Furthermore a submission for the same CAPIC submission of 15 August 2006 obtained an approval for Phase 1B (Creating a functional port) to the value of R554 million. This approval would take the total project cost to R3.776 billion. On 30 June 2006 the Board approved a further cost escalation of R362.7 million to bring the total value of the port project to R3.491 billion.

The Ngqura Container Terminal (NCT)

The NCT project was approved by CAPIC on 18 September 2006 for a total project value of R15.634 billion consisting of R11.113 billion for a 4 berth container facility and R4.521 billion for maintenance capital. The Board approved a total value of R7.886 billion on 28 November 2006 for capital expenditure from 2007 to March 2011 for a 4 berth container terminal and rail connectivity (but excluding rail infrastructure) of R6.604 billion and port functionality of R1.282 billion.

The submission as per the business case to the Board (28 November 2006) indicates a total estimated project value of R14.797 billion for periods up to March 2018 as follows:

- R1.283 billion (from 2011 up to March 2014);
- R1.212 billion (up to March 2016);
- R439 million (up to March 2018); and
- R3.977 billion costs to sustain capital after March 2018 (includes sustain CAPEX of R270 million before March 2018).

The NCT project commenced in January/February 2007 and was partially completed in October 2009 when the port opened for commercial operations.

The NCT project for the approved cost of R7.886 billion (up to March 2011) comprises the construction of the various components for the various parties, namely, NPA, SAPO, Spoornet as follows:

Total approved NCT project cost	**R7 886 million**
NPA	3 882
Port	1 282
NPA berth	2 540
SAPO	1 466
SAPO berths	258
Cranes	588
Rubber Tyred Gantry Cranes (RTGs)	318
Stackers	27
Other container infrastructure	275
Spoornet	2 598
Locomotives	1 062
Wagons	587
Rail infrastructure	949

8.6.1.2 Allegation

The NCT project is included in the list of five projects which apparently are examples where *"... the budget is exceeded by 10% (an allowable deviation) or allowable maximum of R100 mil without approval of Transnet Group."* [106]

Project Name	Approved budget R	Final cost R	Variance R	% Variance
Ngqura Container Terminal	8.7 billion	10.7 billion	2 billion	23%

8.6.1.3 Our approach on the NCT project for the period September 2006 to December 2010

A. Overall review of the project cost management

Snapshot reports & Level 4 detailed reports

Discussions with Bierman during the course of the investigation revealed the use of monthly snapshot reports for high level management reporting. The snapshot reports consists of cost totals for each mega project in terms of approved budget, FFC, commitments, actual expenditures and variances to budget. These high level monthly snapshot reports were provided initially by Bierman instead of the detailed level 4 reports that we requested.

An initial review of these snapshot reports proved fruitless in assessing the variances on the projects and did not add particular value in assessing the governance of costs on the mega projects. We noted that the management of costs on the mega projects occurs on the package level and the detailed level 4 reports were best suited to manage the costs. This was confirmed by Hamilton at a meeting on 11 May 2011, at TCP Building 17, that HMG JV manages the costs using the level 4 reports and level 3 reports would not provide much in terms of package detail.

In subsequently obtaining the level 4 reports, after significant delays and various correspondences, we compared the monthly totals per the snapshot reports to the detailed level 4 monthly totals and found differences on various columns. In various instances we found that:

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[106] Refer Exhibit 76 – AG document named *"Procurement Irregularities at Transnet"*, dated 26 January 2010 (at paragraph 4 thereof)

- The snapshot approved budget amount reported differed to that of the level 4 detailed report; and
- The actual costs, commitments and FFC amounts on the snapshot report differed from that of the level 4 detailed report.

For NCT the difference per the snapshot and the level 4 detailed report per the overall budget values are as follows:

Project name	**Budget per Level 4 report R billion**	**Budget per Snapshot report R billion**
Ngqura Container Terminal	8 766	7 866

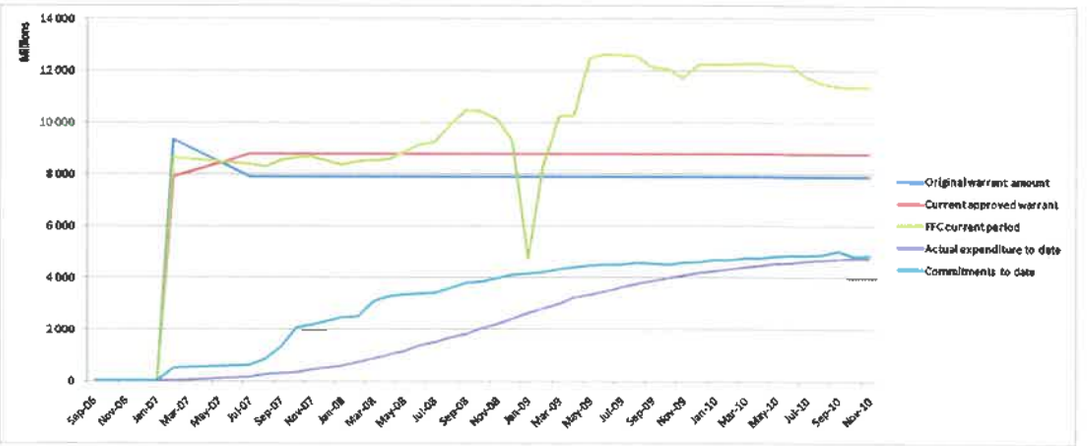
Notes

- The R8.766 billion depicted per the level 4 report consists of R7.866 billion for the new CAPIC and Board approved warrant and an amount of R879.5 million which, according to Greig Hamilton, the Quantity Surveyor from Mott MacDonald and Projects Control Manager for TCP NCT, relates to an existing warrant (C351) which was taken on board when the NCT project commenced. This existing warrant was apparently issued to Portnet in July 2000 for the Ngqura project, before the establishment of TCP, and was incorporated into the current project when TCP started managing the mega projects;
- From the snapshot reports previously reviewed we noted that the project is reported in the context of the R7.866 billion warrant and not the total current budget value of R8.766 billion as reported in the level 4 reports. For purposes of the detailed analysis and review of expenditure the level 4 reports have been utilised as reported against the R8.766 billion total current budget value. According to Hamilton (telephone conversation 15h30 on 23 May 2011) the R879.5 million is reported on a monthly basis in the snapshot reports by TCP under the Ngqura close out budget of R3.491 billion (500205). HMG on the other hand would report the total of R8.766 billion in the level 4 reports comprising the R7.866 billion and the R879.5 million;

- The difference between the snapshot report budget and the level 4 detailed report budget as explained by Hamilton and per the reconciliation provided also explains the differences in the actual costs, commitments and FFC totals; and
- Bierman, confirmed per email dated 24 May 2011, and another email from Basson of even date indicated that only part of the C351 warrant at about R700 million, is reported under project 500205. This project has a total warrant of R3.491 billion in the monthly snapshot report. The R700 million mooted as being reported under 500205 does not agree to the R879.5 million as indicated by Hamilton.

A graphic presentation of the high level costs for the NCT project for the period September 2006 to December 2010

We obtained copies of the level 4 reports from TCP and/or HMG JV for the NCT mega project for the period September 2006 to December 2010. We captured the information contained on the level 4 reports into an electronic worksheet and analysed the trends in the following graph:



Comments on the graph

- The graph depicts primarily level 4 costs as provided by TCP /HMG;
- The original warrant amount for September 06 consisted of R38 million attributed to the feasibility study;

- There were no level 4 reports available for the period February 2007 to June 2007 as, according to Hamilton; the information was not correctly loaded into the IPAS costing system. During this period HMG was apparently in the process of correctly base lining the project packages, creating the Facility Breakdown Structure (FBS) and confirming SAP allocations with TCP and the Transnet Operating Divisions. Accordingly for purposes of this graph we have input data for January to June 2007 from the snapshot reports provided to us by TCP's Bierman to ensure continuity of the graphic trend line to make the graph more readable; and
- The FFC, per the level 4 reports, takes a downward trend in January 2009 to some R4.738bn when compared to the December 2008 and February 2009 months. This is due to lower FFC amounts stated for the following packages in the report, namely Construction packages C001, C009, C016; HMG JV EPCM costs package 95 and the owner managed costs under the ZZ packages.

The practice by TCP of reporting to management based on the snapshot reports, given that the snapshot reports does not appear to reconcile to the level 4 detailed reports, is questionable and of concern in that Group Head Office management may not be properly informed of the costs on the mega projects.

It also appears strange that there should have been such a significant delay on the part of TCP to provide us with the detailed level 4 reports for review and the insistence that the snapshot reports should serve our purposes. This may be indicative of attempts to place a limitation of scope on the investigation.

B. Review of CAPIC and Board Approvals of the project budget

Our review revealed the following instances where the original warrant amounts were approved:

Date	Original warrant amount	Current approved warrant	Change in budget	CAPIC and Board approval obtained
September 2006 - Feasibility study	38 000 000	38 000 000	0%	Yes

Date	Original warrant amount	Current approved warrant	Change in budget	CAPIC and Board approval obtained
February 2007	9 334 068 916[1]	7 887 705 593	-15%	Yes
April 2009	7 887 705 593[2]	7 887 289 001	0%	In place

Notes

- Amount identified on snapshot report but not noted as the warrant value per the business case. No satisfactory explanation obtained from TCP for the use of this value of R9.334 billion in the snapshot report. There is approval on the Board minutes (28 November 2006) for the R9 334 068 916; only the R7.887 billion approved. In the May 2007 snapshot report the original warrant value column in the snapshot reports was eventually amended to reflect the R7 887 705 593 and not the R9 334 068 916 as originally reported in the snapshot report for February 2007;
- The snapshot report only amended in May 2010 to reflect the correct warrant value of R7 887 289 001;
- Approved as per CAPIC minutes dated 26 May 2006. The approval of the original budget for the feasibility study was agreed to the submission to CAPIC and the CAPIC minutes[107]. Board approval was not required, as CAPIC was authorised in terms of the DAF to approve increases in the ETC up to R400 million; and
- Approved as per Board minutes dated 28 November 2006 point 8.2[108].

The project was properly approved by CAPIC and the Board. The warrant value/overall project budget value of R7 887 289 001 was approved by CAPIC (May 2006) and the Board (November 2006) as noted per the respective minutes.

107 Refer Exhibit 88 and 89 – Submission to CAPIC and CAPIC minutes
108 Refer Exhibit 90 and 91 – Submission to Board and Board minutes

C. *Increases in the Current approved budget (ETC) by more than 25% or more than R100 million*

Should the original budget be amended by more than 25% or more than R100 million then CAPIC and Board approval is required to increase the costs by these amounts as per the DAF requirements.

In order to assess whether the costs will increase or change in future the FFC mechanism is used. The FFC is a trending mechanism that indicates the likely future trend of the project costs. Should this trend continue upward the project management must review the likelihood of the FFC level of costs becoming a reality. Should it become very likely that the project costs will tend toward the FFC costs and where it is likely that the change is more than 25% or more than R100 million then a submission must be made to CAPIC and the Board as appropriate per the levels of authority.

At December 2010 the FFC for NCT is greater than the original budget by more than R100 million and more than 25% but no submission has been made to CAPIC or the Board. Per discussion with Hamilton they have not yet deemed it necessary to approach CAPIC with an amendment for the budget to reflect the FFC value. The increased costs apparently primarily relate to the deferred scope portion of the project which has not yet been conceptually approved by the Operating Divisions.

The FFC as at December 2010 reflects at R 11 370 834 456 with the current budget at R8 766 829 794 which is an increase of R 2 604 004 662 (a variance of 30% above the original budget). A review of the March 2011 level 4 cost report indicates that the total FFC has been reduced to R10 057 875 080, a decrease from the December 2010 report but still higher than the current total budget of R8 766 829 794. The difference between the FFC at March 2011 and the total budget is R1 291 045 286. Hamilton provided a reconciliation of the variance of FFC to budget per the March 2011 report wherein the difference is attributed to the increased costs of the deferred scope of work net of potential savings on the TFR managed scope of R1.305 billion and R565.5 million for the TCP and/or HMG execution totals.

The current approved budget for NCT has not been increased by more than 25% or more than R100 million since the original approval in November 2006. The FFC has indicated an upward trend in total forecasted costs over the review period but the budget has not been amended nor has approval been sought to increase the budget value to the FFC total. We have not noted any submission to CAPIC to increase the budget value to the FFC value. In the case of the NCT project the latest FFC primarily to the deferred scope of the project.

D ***Unauthorised variances of Actual expenditure and Commitments to date vs. Current budget on level 4 detail reports***

A level 4 report indicates the total project budget, actual expenditure, commitment and FFC for the project as a whole. On a detailed level it also indicates the various cost categories and packages into which the project is divided into. The level 4 reports detail the various packages under the project divided into project categories that include inter alia (10) mechanical equipment supply, (20) electrical equipment supply, (30) instrumentation equipment supply, (50) major construction packages (90) project management (95) HMG JV services contract and (ZZ) Existing contracts managed by TCP. The project categories are further sub-divided into packages, each with their own unique reporting identifiers for example 10/M025 for mechanical equipment supply of marshalling yard building, and each package designates the specific supplier or contractor on the project. Each package also has further line descriptors/items that describes the work to be done and escalations where appropriate.

Our review of the level 4 reports (from 2009 to 2010 – being peak construction and commissioning– the Port opened in October 2009) at the package level revealed cases where certain individual line items commitments or actual expenditure in the package exceeded the current budget.

An example of variances on the line items is shown below. NOTE that this is NOT the TOTAL PACKAGE but individual line items within the total package.

Month	Pg	PBS Code	Description	Current budget	Cimmitment to date	Expenditure to date	FFC
30 June 2010	15	10C007/226A	CT Admin Building Mess & Ablution	85 392 329	86 029 339	85 992 936	86 044 787
		10C007/226A Count					
30 April 2009	3	10/M018/232A	Railway plate laying (incl. Sleepers)	10 183 155	19 806 950	10 849 756	22 912 481
30 April 2009	3		Railway plate laying (incl. Sleepers)	84 312 284	85 509 700	34 946 362	107 599 168
		10/M018/232A Count					
30 April 2009	3	10/M016/117z	Reefer structures – TNPA	2 094 831	2 686 944	988 440	988 004
		10/M016/117z Count					
31 December 2009	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	5 120 429	4 332 104	4 656 683
31 March 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 686 494	4 687 105	4 633 991
30 April 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 686 494	4 687 105	4 633 991
31 May 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 686 494	4 687 105	4 633 991
30 June 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 686 494	4 687 105	4 633 991
31 August 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 686 494	4 687 105	4 633 991

Month	Pg	PBS Code	Description	Current budget	Commitment to date	Expenditure to date	FFC
30 September 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 633 991	4 688 304	4 633 991
31 October 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 771 773	4 688 304	4 771 773
30 November 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 771 773	4 688 304	4 771 773
31 December 2010	6	10/M040/226A1	CT Admin Building Mess & Ablution	4 656 683	4 771 773	4 688 304	4 771 773
		10/M040/226A1 Count					

As the full list of package line items where the variances occurred are too voluminous for the body of this report, a full list of the affected packages where the line item variances occurred is attached as an Exhibit[109]. A synopsis of the package line items is attached as an Annexure[110].

Our findings with respect to the variances in package line items on the level 4 detailed reports are as follows:

- Whereas the commitments and actual expenditure for certain individual items within packages exceeded the actual budget allocated to that line the actual package budgets ie the package totals per se were not exceeded. The results are not contained in the body of this report as the data will result in the report body being too bulky;
- The packages, wherein the package line item variances occurred, were allocated to one specific contractor per the package plans and not to multiple contractors. In other words the variances did not occur across various contracts but within a line item of a contract package. This was verified by reference to the approved package plans. In addition we reviewed the respective final accounts submitted to close out these packages and noted that the package actual expenditure and package commitments were within the budgets for the packages;

[109] Refer to Exhibit 91a – A3 sheet of 10 pages of the detailed line items with explanations and detailed work performed

[110] Refer to Annexure D for a synopsis of the package line variances

- We noted for certain of the cases in (a) that it took a considerable time for the variances on the package line items to be corrected. Hamilton indicated there are various reasons for this including the time taken to approve budget transfer corrections, disagreement between the operating divisions as to who must pay for the costs, the budget allocation between the operating divisions is in dispute and there are times when there is a wait for the contractor to complete the work and finish the final accounts before the budgets per line items are corrected;
- In the case of HMG Retention Allowance (package 95/Z004) expenditure was incurred when there was no approved budget in place. At the time of the clarification meetings documentation received by HMG for the authorisation of amounts to be allocated to the retention scheme was an email from Bierman showing that he was in agreement with the use of contingencies to fund the retention bonuses. We later received authorised budget transfer for the allocation of budget from contingency and other packages, see below; and
- From the sample of budget transfer authorisations reviewed, that correct the variances on the package line items, we noted that these were only prepared after the IPAS report allocations were corrected as per the March 2011 report and were only authorised in May 2011 by the relevant authorities particularly the Project Director. The sample of budget transfers reviewed is contained below:

Sample of Budget transfers authorised - NCT

Number	Reference number	Form prep date	Transfer form	Transfer to	Budget before transfer	Budget after transfer	Value	Date signed cost engineer	Date signed TCP Porject Dir
1	16276	31 January 2011	50/C001/232A	SQ/C001/227A	16 287 896.33	16 298 497.32	10 600.99	2 May 2011	11 May 2011
2	16897	18 April 2011	50/C004/115Z	50/C004/112S	11 679 231.08	12 400 318.21	721 087.13	7 May 2011	11 May 2011
3	16300	31 January 2011	50/C005/135Y	50/C005/133Y	6 989 780.04	12 036 541.59	5 046 761.55	7 May 2011	11 May 2011
4	16920	19 April 2011	9999/Budg/142A	95/Z004/141A	-	20 519 756.30	20 519 756.30	8 May 2011	11 May 2011
5	16921	19 April 2011	999/Budg/142Z	95/Z004141Z	-	292 185.17	292 185.17	8 May 2011	11 May 2011
6	16925	19 April 2011	9999/Budg/142Z	95Z003/141Z	2 000 000.00	17 731 332.58	15 731 332.58	8 May 2011	11 May 2011
7	16924	19 April 2011	9999/Budg/142A	95Z003/141A	7 997 063.40	70 899 289.95	62 902 226.55	8 May 2011	11 May 2011
8	16926	19 April 2011	9999/Budg/242A	95/Z003/241A	993 068.40	8 804 208.95	7 811 140.55	8 May 2011	11 May 2011
9	16922	19 April 2011	9999/Budg/242A	95/Z004/241	-	2 587 698.45	2 587 698.45	8 May 2011	11 May 2011
10	16923	19 April 2011	9999/Budg/342A	95/Z004/341	-	5 750 360.22	5 750 360.22	8 May 2011	11 May 2011
11	16927	19 April 2011	9999/Budg/342A	95/Z003/341A	2 206 847.00	7 583 499.55	5 376 652.55	8 May 2011	11 May 2011

Note: These samples were agreed to the package line items variances as noted earlier

A review of the level 4 reports from 2007 to Dec 2010 has not revealed any unauthorised variances on the total project actual expenditure and total commitment vs. total overall project budget. In general at the package level totals we did not note any package total actual expenditure and package commitment exceeding the package budgets.

We did however note that there were no budget values for the Retention allowances and bonuses with the result that the actual expenditure and actual commitments exceeded the budget. We noted that the package line item variances were corrected as per the IPAS March 2011 level 4 detailed report after being long outstanding as requiring correction. Furthermore we note that whilst the IPAS level 4 detailed reports were corrected in March 2011 the budget transfer forms were only authorised in May 2011 by the relevant authorities including the Project Director. The Governance procedures to correct package line item and package variances (eg. HMG Retention Allowance) does not appear to be consistently applied.

On a micro level we did identify variances between the actual expenditure and commitments vs. the budgeted values of package line items. It should however be noted that this did not result in the package totals for those line items exceeding the package budgets. In the case of NCT the correction of these budget line items did not take place timeously and the package line items were left for long periods to remain uncorrected. These variances were corrected by means of authorised budget transfers in order to comply with governance requirements albeit it is not done timeously and is done ex post facto the correction of detailed IPAS reports.

E. Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorisation as required by the CPPPPM

The CPPPPM states the following in relation to the contract approved budget and the permissible variance of 10%.

- Page 10 on approval gate diagram, red circled 10 at the bottom of the diagram flow chart, states *"Obtain approval to exceed amount in Forecasted Final Cost by more than 10%"*;
- Pages 18 section 7 under 7.6 refers to *"Obtain approval to exceed amount in Forecasted Final Cost by more than 10%."The activity steps for the Procurement division indicates "Prepare a motivation to exceeding Final Forecast Cost in TEAR by more than 10%, setting out the precise reasons for the increase in cost of goods services or works. Obtain approval from Acquisition Council to exceed this amount."*

TEAR refers to Tender Evaluation and Recommendation Report as per the TEAR Document Routing Slip which again makes reference to contract value/package value measurement. Section 7.6 read in context of section 7 refers to "Administer Contracts and confirm compliance with requirements";

- Section 4.5.2.11, a subsection of section 4.5.2 which refers to Evaluation Panels refers to: *"The evaluations panel shall develop a Forecasted Final Cost which includes allowances for the effect on the likely final amount payable to the contractor in terms of the total of Prices for scope changes, price adjustment, currency fluctuations, identified risks, and other contingencies and provide a buildup of this cost in the evaluation report. NOTE: The Forecasted Final Cost is the estimate of the likely cost of completing the contract i.e. the approved amount. Approval to incur expenditure needs to be obtained should the final total of Prices exceed this amount by more than 10% (see 4.13.4.2)"*;
- Table 3 on page 25 *"Action to be taken by an Acquisition Council in terms of this document"* under the section *"Items for approval"* - Increase in the final contract amount refers to section 4.13 and states *"Review motivation for increase in final contract which exceeds the approved amount by more than 10%. Seek alternatives and approve/not approve cost overrun"*; and
- Section 4.13 titled *"Authorised increase in the final contract amount"* states as follows: 4.13.1 *"The Project Manager, Employer's Representative or Employer's Agent shall prepare a motivation to authorise expenditure in excess of 10% of the Forecasted Final Cost. Such a motivation shall clearly indicate the reasons for cost overruns and the risk mitigation measures that have been applied to the Package and a detailed estimate of the final projected cost."* 4.13.2 *"The person delegated in terms of Transnet's Delegations and Commercial Responsibilities to award the contract shall approve any increase in the contract amount in excess of 10% of the Forecasted Final Cost with the approval of the Acquisition Council, where relevant"*.

Our review process in this regard consisted of:

- Consultations with the procurement personnel of Transnet HQ and TCP on the 10% variance over contract approved budget;

- A request for the lists of condonations submitted to MPAC for approval to determine where the compensation events or PMIs (Project Management Instructions) were in excess of 10% of Original Contract Value or Contract Approved Budget. This list included items on all mega project as well as other procurement related matters; and
- A review of the MPAC minutes and the condonation submissions to establish which condonations were granted/approved where the contract approved budget on mega projects were exceeded by more than the permissible 10% variance.

Our findings for the 8 cases found[111], are as follows:

- 4 of the cases related to NCT; 2 cases related to DHEW, 1 to CTCT and 1 to NMPP;
- 2 of the 8 cases were not approved by MPAC and were referred back for correction or further substantiation. (Note: As at the time of writing we have not yet received confirmation whether these motivations have been subsequently resubmitted and/or approved);
- 6 of the 8 of the cases were condoned by MPAC and the submission for condonement approved;
- A review of the minutes revealed no instances where corrective action has been taken against the relevant parties for the unauthorised variances;
- The percentage variances, for those approved condonements, range from 18% to 140% of contract approved budgets; and
- From the above we note that there have been instances on the mega projects where the governance procedures on cost management have been flouted in that the compensation events or PMI's have been issued that resulted in that the original contract budgets have been exceeded by more than the permissible 10% variance. Prior authority was not sought to exceed the contract approved budget value by more than 10% as required by the procurement procedures in the CPPPPM.

[111] Refer to Exhibit 91c – Condonations list

The table below summaries the 8 cases in question:

	NAC meeting date	Reference number	Project number	Original contract value	Increase value	% decrease	Revised estimated contract value	Indication	Outcome	Supplier/ Contractor/ Service provider
1	28 October 2008	200/10/28/155	H500204-TEJ005 (NCT)	11 201 479	2 053 200	18%	2 053 200	Condonement and confinement	Approved	Spartan Technology Rentals
2	9 December 2008	2008/12/09/193	HQ/0101 (NMPP)	8 07 0 671	7 490 908	93%	28 234 285	Condonement	Approved	Zitholele Consulting (Pty) Limited
3	27 January 2009	2009/01/27/015	H500206-CPC046 (CTCT)	440 818	618 144	140%	1 100 000	Condonement	Approved	WBHO/C&C
4	23 February 2009	2009/02/23/024	H500204-CPC005 (NCT)	179 729 177	113 089 016	63%	350 065 857	Condonement	Approved	Concor Holdings (Pty) Limited
5	23 February 2009	2009/02/23/023	H500204-CPM018 (NCT)	82 732 837	65 091 088	79%	179 865 835	Condonement	Referred back matter reviewed and no further action was required; meeting 23/209	Lennings DEC Rail Services
6	27 October 2009	2009/10/27/172	H500204 (NCT)	52 763 906	1 162 968	2%	55 634 312	Condonement	Not approved (referred back)/matter resolved and moved from minutes (meeting 24/2/10)	TDS
7	30 May 2010	2010/03/30/072	H500203-CPC019 (DHEW)	2 660 200	470 127	18%	2 657 639	Condonement	Approved	Rerbcon Engineering
8	24 November 2010	2010/11/24/260	H500274 (DHEW)	10 287 174	3 808 160	37%	15 104 617	Condonement	Approved	HMGJV & PRDW

Note

Case no.6 shows a 2% variance, lower than the 10%, but has been included here as TCP itself viewed it as a variance requiring submission for condonement. The submission itself is very vague and does not state the full story behind the submission. It appears work was required for engineering consulting services under an existing package and the work awarded to TDS without proper procedure followed.

We identified 6 cases relating to various mega projects, not only NCT, where certain irregularities occurred and the governance procedures were not complied with. Condonation was granted where the contract approved budget was exceeded by more than 10% without prior authorisation. We have not found any evidence that any disciplinary action was taken against relevant employees.

Conclusions

- We were initially provided monthly snapshot reports which we were led to believe is a management reporting tool instead of the level 4 reports we requested. There were differences between the reports and explanations for the differences were only provided after significant delays. Our concern is that Transnet Head Office management may not be properly and or timeously informed of the proper monthly costs on mega projects;
- We reviewed the project budget approvals and noted that the overall project budget was properly approved by Board and a warrant issued. We noted that no change to the approved project budget was effected over the review period and no governance was flouted in terms of the project budget approval;
- Our review indicates that the project approved budget has not been increased by more than 25% or by an amount greater than R100 million from the original approved budget. The budget total is lower than the total FFC as at December 2010 with the FFC at R 11 370 834 456 with the current budget at R 8 766 829 794 which is an increase of R2 604 004 662 (a variance of 30% above the original budget). The HMG JV indicated that they will only apply for the increase in budget once they obtain approval from the operating divisions on the deferred scope for the project which make up the increased FFC. No governance was flouted in the FFC being greater than the budget;
- The review of the monthly level 4 reports revealed:

- Instances where the package line items commitments and actual expenditures exceeded the budget of the line items concerned but the package budget totals were not exceeded. These package line item variances, in itself, are not a flouting of governance as the package budget totals were not exceeded. What is of concern in terms of governance procedures is that the variances on the line items were not timeously corrected through authorised budget transfers to correct the package line items. The level 4 detailed reports on IPAS were corrected in the March 2011 reports for items dating back months before;
- That HMG retention bonus/allowance (package 95/Z004) commitment and expenditure amounts exceeded the budget for this package. The budget authorisations noted indicate that the authorisation of budget transfers were only signed off in May 2011 whilst the package line item variances were long outstanding and the line item budget corrections performed in May 2011. The budget authorisations therefore came long after the package line item variances were noted and after the level 4 detailed reports were corrected. Without timeous and proper authorised budget allocation it appears that governance was flouted in the management of these package line items; and
- We have noted 6 instances on the mega projects where the governance procedures on cost management have been flouted in that the Compensation Events or PMI's have been issued on certain packages/contracts that caused the original contract budgets to be exceeded by more than the 10% permissible amount. MPAC condoned the 6 cases where the original contract budget values were exceeded by more than the permissible 10% variance. There is no recommendation on the MPAC minutes that the appropriate persons be disciplined for these unauthorised activities.

8.6.2 DHEW

8.6.2.1 Background

The aim of the DHEW mega project is to widen and deepen the channel to improve current availability and accommodate vessels safely. The project comprises dredging, deepening the entrance channel, widening the channel on the north side with provision of a new north groyne, improving and strengthening the 50 year old south breakwater structure, alterations to aid navigation and finally the construction of a fixed sand bypass system. The project was proposed in 2005 with an initial cost estimate of R70.2 million. The budget was subsequently reassessed in 2006, 2007 and 2009 increasing the ETC to R244 million, R3.02 billion and R3.3 billion respectively.

8.6.2.2 Allegation

The DHEW project is included in the list of five projects which apparently are examples where *"... the budget is exceeded by 10% (an allowable deviation) or allowable maximum of R100 mil without approval of Transnet Group."* [112] Details relating to the DHEW project are depicted as follows:

Project Name	Approved budget R	Final cost R	Variance R	% Variance
Durban Harbour Entrance Widening	3 billion	3.8 billion	800 million	27%

8.6.2.3 Our analysis of the DHEW project for the period September 2006 to December 2010

A. Overall review of the project cost management

Snapshot reports & Level 4 detailed reports

The review of the snapshot reports and level 4 cost reports were discussed earlier in this report.

[112] Refer Exhibit 76 – AG document named *"Procurement Irregularities at Transnet"*, dated 26 January 2010 (at paragraph 4 thereof)

Overall costs

Overall costs relating to the DHEW project, as per the level 4 cost reports as at December 2010 are depicted as follows:

Project name	Approved budget R bn	Final cost R bn	Variance R bn	% Variance
DHEW	3 255	2 808	0.447	-13.7%

The allegation indicated that the approved budget amounted to R3 billion, after which the final cost was R3.8 billion, which indicated a variance of 27%, which was over and above the allowable variance of 10%. After our analysis of the level 4 cost reports it appears that the allegations were baseless. It is clear from the above that the final cost is less than the approved budget.

We further analysed the level 4 cost report on a package line level. We have identified several items where expenditure and /or commitment to date exceeded the budget at package line level. We queried these items with Hamilton, who indicated that although these items exceed the package line budget; the bottom line budget for the package was still higher than the commitments and expenditure. These line items were adjusted during 2009. Hamilton indicated that the adjustments were delayed as they were waiting for instruction from TCP to re-baseline the budget.

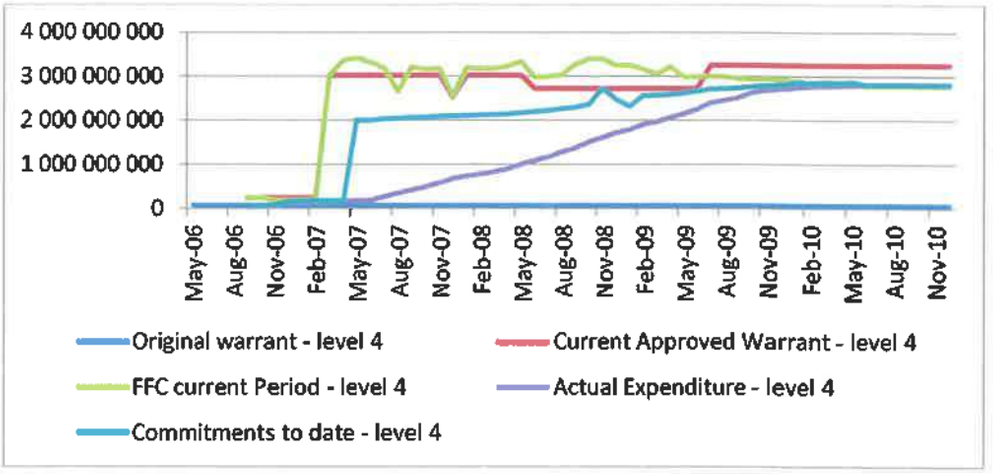
The item regarding HMG Retention allowance however has not been corrected. Hamilton indicated that the directive received from Project Controls manager was to capture the commitment and expenditure pending advice from TCP (as per the attached e-mail), however, the project was handed over to TCP prior to confirmation of funding for Retention allowance[113].

The total commitments to date have not exceeded the total actual expenditure to date in the December 2010 level 4 cost reports.

A graphic presentation of the high level costs for the DHEW project for the period September 2006 to December 2010

We obtained copies of the level 4 cost reports from TCP and/or HMG JV for the DHEW mega project for the period from September 2006 to December 2010. We captured the information contained on the level 4 cost reports into an electronic worksheet and analysed the trends in the following graph:

[113] Refer Exhibit 91b – Hamilton e-mail



Comments on the graph

- The graph depicts primarily level 4 costs as provided by TCP and/or HMG;
- The commitment to date has at no stage exceeded the approved warrant or the FFC;
- The actual expenditure has not exceeded the commitments to date; and
- The approved warrant was increased to exceed the FFC during May 2009 and has not been increased since.

The practice by TCP of reporting to management based on the snapshot reports, given that the snapshot reports does not appear to reconcile to the level 4 detailed reports, is questionable and of concern in that management may not be properly informed of the costs on the mega projects.

It also appears strange that there should be such a significant delay on the part of TCP to provide us with the detailed level 4 reports for review and insisted that the snapshot reports should serve our purposes. This may be indicative of attempts to place a limitation of scope on the investigation.

B. Review of CAPIC and Board Approvals of the project budget

Our review revealed the following instances where the original warrant amount was amended to the current approved warrant/ETC at a point in time:

Date	Original warrant amount R	Current approved warrant R	Change in budget	Board approval obtained
May 2006	70 200 000	244 000 000	248%	Not required
March 2007	244 000 000	3 022 000 000	1 139%	Yes
December 2010	3 359 500 000	3 359 500 000	0%	Yes

In order to determine whether the increase in the original warrant was properly authorised, we perused the relevant submissions to CAPIC, the CAPIC minutes, the submissions and/or presentations to the Board and the Board minutes to establish that the proper approval process was followed.

Our review of the abovementioned CAPIC Board submissions, presentations and confirmed the following:

- The approval of the original budget dated May 2006 was agreed to the submission to CAPIC (dated 25 May 2006) and the CAPIC minutes (dated 25 May 2006)[114]. Board approval was not required, as CAPIC was authorised in terms of the DAF to approve increases in the ETC up to R400 million;
- The increase in the original budget dated March 2007 was agreed to the submission to CAPIC (dated 8 January 2007) which reflects that approval was sought to increase the ETC to R2,752 billion, a presentation to CAPIC (dated January 2007), the CAPIC minutes (dated 22 January 2007), the submission to the Board (dated 13 February 2007) and the Board minutes (dated 13 February 2007) which reflect that the Board approved the increase in the ETC to R3,022 billion[115]; and
- The increase in the budget, dated August 2009 was agreed to the submission to CAPIC (dated 19 May 2009) and the CAPIC minutes (19 May 2009)[116]. Board approval was not required, as CAPIC was authorised in terms of the DAF to approve increases in the ETC up to R400 million.

[114] Refer to Exhibits 92 and 93 – Submission to CAPIC and CAPIC minutes
[115] Refer to Exhibits 94 to 98 – Submission to CAPIC minutes, submission to Board and Board minutes. TCP was not able to provide reasons for the difference in the amount of R2,7 billion submitted to CAPIC for approval vs the R3 billion submitted to the Board for approval
[116] Refer to Exhibit 99 to 100 – Submission to CAPIC and CAPIC minutes

C. Increases in the Current approved budget (ETC) by more than 25% or more than R100 million

Should the original budget be amended by more than 25% or more than R100 million then CAPIC and Board approval is required to increase the costs by these amounts as per the DAF requirements.

In order to assess whether the costs will increase or change in future the FFC mechanism is used. The FFC is a trending mechanism that indicates the likely future trend of the project costs. Should this trend continue upward the project management must review the likelihood of the FFC level of costs becoming a reality. Should it become very likely that the project costs will tend toward the FFC costs and where it is likely that the change is more than 25% or more than R100 million then a submission must be made to CAPIC and the Board as appropriate per the levels of authority.

When there is an increase in the FFC, you would expect there to be an increase in the ETC in the same proportion. Referring to the abovementioned graph, it is clear that this is in fact the case and that no significant variances could be identified.

D. Unauthorised variances of Actual expenditure and Commitments to date vs. Current budget on level 4 detail reports

Our review of the monthly level 4 cost reports revealed that the total actual expenditure and/or commitments for the project as a whole at no point exceeded the total current approved budget and/or the FFC. This is evident from the graph mentioned above.

Our review of the level 4 cost reports at the detailed package line level revealed that commitments or actual expenditure of certain line items had exceeded the current budget. However, the bottom line budget was still higher than the commitments and expenditure. These package line budgets were adjusted during the re-baselining of the budget according to Hamilton as mentioned earlier.

E. Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorisation as required by the CPPPPM

The list of condonations submitted to MPAC for approval in respect of the mega projects, were discussed under NCT *"E – Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorization as required by the CPPPPM"*.

8.6.2.4 Conclusion on DHEW

- The approved warrants were authorised by CAPIC and the Board. For DHEW there were no changes to the approved warrant value subsequent to May 2009;
- The review of the total current approved budget compared to the FFC has revealed that the budget is higher than the FFC at December 2010 and that no significant variances were recorded;
- The review of the monthly level 4 cost reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;
- At the time of writing this report, we identified certain package line items where the commitments and actual expenditure exceeded the current budget. These items were adjusted and corrected during the re-baselining of the budget. These items were addressed and corrected by HMG; and
- The line items of 95/Z009/1110, 95/Z009/1111, 95/Z009/1110 95/Z009/1112, 95/Z009/1113, 95/Z009/1114, 95/Z009/1115 and 95/Z009/1116 with reference to HMG Retention allowance, however, have not been corrected. Hamilton has indicated that they were waiting for instruction from TCP as to the budget for the HMG Retention allowance. However, during handover of the project, they have still not been advised. Thus a budget amount has not allocated as of yet by TCP at the date of writing the report. This line item indicates an expenditure of R4 804 231.

8.6.3 CTCT

8.6.3.1 Background

The capacity model analysis performed in June 2004 confirmed that the CTCT suffers from a severe lack of stacking capacity which relates to the annual storage capacity in Twenty-foot Equivalent Units (TEU's) per annum and berth capacity which is the total number of containers that can be landed or shipped per annum. It was proposed that the following development occur to alleviate the capacity concerns within the CTCT:

- Expand quay 600 of the CTCT 300 metres in the North Easterly direction through land reclamation. The expanded terminal would allow a total stack capacity of 1.6 million TEU's per annum, sufficient to meet demand till 2019; and

- Deepen existing berths 601 to 604 from present depth to 15.5 metres by constructing new quay face 10.4 metres of the existing quay wall. The deepened berths will allow CTCT to service new generation vessels.

The CTCT project was broken down into the following divisions:

- TPT – Warrant Nr P006 (*R598 million*)
  - For the acquisition of container handling equipment including 26 straddle carriers and 6 panamax sized ship-to-shore cranes.
- Transnet NPA – Warranty Nr C368 (*R1 859 million*)
  - For port expansion to increase stack capacity by means of reclamation and basin/berth deepening and quay upgrade.

8.6.3.2 Allegation

The CTCT project is included in the list of five projects which apparently are examples where *"... the budget is exceeded by 10% (an allowable deviation) or allowable maximum of R100 mil without approval of Transnet Group."* [117] Details relating to the CTCT project are depicted as follows:

Project Name	**Approved budget R**	**Final cost R**	**Variance R**	**Variance %**
Cape Town Container Terminal	4.2 billion	4.9 billion	732 million	17.4%

8.6.3.3 Our approach on the CTCT project for the period September 2006 to December 2010

A. Overall review of the project cost management

Snapshot reports & Level 4 detailed reports

The review of the snapshot reports and level 4 cost reports were discussed earlier in this report.

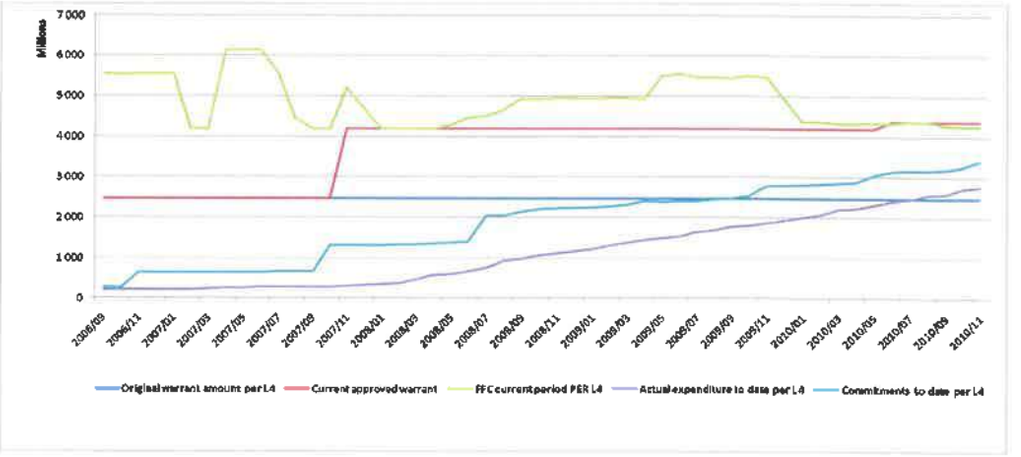
[117] Refer Exhibit 76 – AG document named *"Procurement Irregularities at Transnet"*, dated 26 January 2010 (at paragraph 4 thereof)

The actual costs, commitments and FFC amounts on the snapshot report differed from that of the level 4 detailed report. The following explanations were obtained for the difference between the level 4 and the snapshot reports:

- During April 2007 commitments were erroneously overstated on the snapshot report by R2.4 billion, however, they were reduced accordingly in the following month (May 2007);
- For the period July 2007 to November 2007 IPAS level 4 had actual expenditure for R3 127 867 which is related to operating divisions managed SOW and hence the level 4 report total expenditure exceed the snapshot reports;
- For the period June 2010 to November 2010, commitments were captured twice (duplicated) on the snapshot reports resulting in R82 million difference between the snapshot and level 4 report therefore these commitments needs to be adjusted accordingly; and
- Expenditure for the period May 2010 to December 2010 differs between the snapshot and the level 4 reports due to Adjudication cost captured in IPAS while not approved by Operating Divisions and therefore is not recorded on the snapshot report.

A graphic presentation of the high level costs for the CTCT project for the period September 2006 to November 2010

We obtained copies of the TCP level 4 reports for the CTCT mega project for the period September 2006 to December 2010 from Bierman and HMG. We captured the information contained on the level 4 reports into an electronic worksheet and analysed the trends in the following graph:



Comments on the graph

- The graph depicts level 4 costs as provided by TCP and/or HMG;
- The changes in the current approved budget were approved by the Transnet Board of Directors. Refer to Section B below for detailed review of CAPIC and Board Approvals of the project budget;
- The commitments were increasing since the inception of the project in line with the increase in actual expenditure as the project nears completion; and
- The FFC started very high and it is coming down towards the end of the project in order to be in line with the actual expenditure.

The practice by TCP of reporting to management based on the snapshot reports, given that the snapshot reports does not appear to reconcile to the level 4 detailed reports, is questionable and may be irregular in that management may not be properly informed of the costs on the mega projects.

It also appears strange that there should be such a significant delay on the part of TCP to provide us with the detailed level 4 reports for review and insisted that the snapshot reports should serve our purposes. This may have been indicative of attempts to place a limitation of scope on the investigation.

B. Review of CAPIC and Board Approvals of the project budget

Our analysis revealed the following instances where the original warrant amount was increased to the ETC at a point in time:

Date	Original warrant R	ETC R	Increase in budget R	Increase in budget (%)	Board approval
September 2006	-	2 457 039 047	2 457 039 047	100%	Yes
November 2007	2 457 039 047	4 202 337 458	1 745 298 411	71%	Yes
July 2010	4 202 337 458	4 374 565 845	172 228 387	4%	Yes

In order to determine whether the increase in the original warrant was properly authorised, we perused the relevant submissions to CAPIC, the CAPIC minutes, the submissions and/or presentations to the Board and the Board minutes to establish that the proper approval process was followed.

Our review of the abovementioned CAPIC and Board submissions, presentations and minutes confirmed the following:

- The approval of the original budget for the balance of R598 million was agreed to the submission to Exco (dated 28 November 2004) and the Exco minutes (dated 28 November 2004)[118]. To date we have been unable to locate the submission to CAPIC, CAPIC minutes. Board approval was not required, as Exco was authorised in terms of the DAF to approve amounts up to R700 million. The approval of the original budget for an amount of R1 859 million was agreed to the submission to CAPIC (dated 15 March 2005), CAPIC minutes (dated 15 March 2005) and Exco minutes (dated 17 March 2005)[119]. To date we have been unable to locate the submission to the Board and the Board minutes to confirm the Board approval of the R1 859 million;
- The original budget dated September 2006 was agreed to the submission to CAPIC, CAPIC minutes , submissions to Board and Board minutes for approval;

[118] Refer Exhibits 101 and 102 – Submission to Exco and Exco minutes
[119] Refer Exhibits 103, 104 and 105 – Submission to CAPIC, CAPIC minutes and Exco minutes

- The increase in the original budget dated November 2007 was agreed to the submission to CAPIC, CAPIC minutes, submission to Board and Board minutes for approval[120]; and
- The increase in the original budget dated July 2010 was agreed to the submission to CAPIC and the CAPIC minutes, submission to Board and Board minutes for approval[121].

The project was properly approved by CAPIC and the Board. The warrant value/overall project budget value of R4 374 565 845 was approved by CAPIC and the Board as noted per the respective minutes. No governance appears to have been flouted in respect of Board approvals for the project overall budgets.

C. *Increases in the Current approved budget (ETC) by more than 25% or more than R100 million*

Should the original budget be amended by more than 25% or more than R100 million then CAPIC and Board approval is required to increase the costs by these amounts as per the DAF requirements.

In order to assess whether the costs will increase or change in future the FFC mechanism is used. The FFC is a trending mechanism that indicates the likely future trend of the project costs. Should this trend continue upward the project management must review the likelihood of the FFC level of costs becoming a reality. Should it become very likely that the project costs will tend toward the FFC costs and where it is likely that the change is more than 25% or more than R100 million then a submission must be made to CAPIC and the Board as appropriate per the levels of authority.

The FFC as at December 2010 reflects R 4 248 615 405 with the current budget R 4 374 565 845, hence FFC is in line with the approved budget. During the course of the project execution the FFC was greater than the approved budget. For example in October 2007 the FFC was 71% higher than approved budget and an application to the CAPIC and Board was made during November 2007 to increase the approved budget. Comparison of the approved budget and the FFC has also shown that as from May 2009 until December 2009, there was an upward trend on the FFC, however the application to increase the approved budget was made during 2010 and was formally approved by the Board in July 2010.

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120 Refer Exhibits 106 to 109 – Submission to CAPIC, CAPIC minutes, Submission to Board and Board minutes
121 Refer Exhibits 110 and 111 – Submission to CAPIC and CAPIC minutes

The FFC has indicated an upward trend in total forecasted costs over the review period and the budget has been amended or approval have been sought to increase the budget value to the FFC total. The current approved budget for CTCT was increased by more than 25% or more than R100 million since the original approval in September 2006. This increase was appropriately approved by CAPIC and the Board and were referenced to Board minutes.

D ***Unauthorised variances of Actual expenditure and Commitments to date vs. Current budget on level 4 detail reports***

A level 4 report indicates the total project budget, actual expenditure, commitment and FFC for the project as a whole. On a detailed level it also indicates the various cost categories and packages into which the project is divided into. The level 4 reports detail the various packages under the project divided into project categories that include *inter alia* (10) mechanical equipment supply, (20) electrical equipment supply, (50) major construction packages (90) project management, (95) HMG JV services contract and (ZZ) Existing contracts managed by TCP. The project categories are further sub-divided into packages, each with their own unique reporting identifiers for example 10/M003 for straddle carriers, and each package designate the specific supplier or contractor on the project.

The review of the detailed level 4 reports shows that there are instances when the actual expenditure exceeded the current approved amount on the line items within the various packages. The budgets of the package totals, however, were never exceeded. Queries on variances were submitted to the Programme Controls Manager, Yvette Scholtz, for further investigation. Explanations for the variances were obtained and were supported by the necessary documentation.

- For package 10/M003/2112M – Straddle Carriers, the review of the detailed reports showed that the expenditure exceeded the approved budget by R2.164 million in July 2007. The budget on that line item was exceeded but the budget of the overall package was not exceeded. This variance within the package on the line item for Straddle Carriers was approved by means of a submission to increase the budget line item as per the revised business case approved in November 2009. It should be noted that it took a considerable amount of time (two year and three month) to correct the variances on the line item within the package;

- For Early Works Reconfig Stack Area (50/C008/1300), a line item within the package C008, the expenditure to date exceeded the budgeted amount by R3.786 million identified during the month of December 2010. The excess expenditure was only approved during the month of May 2011 by means of a budget reallocation from the budget from C008/1002 which is in the same package. It should be noted that the line item within the package was exceeded and not the total package itself; and

- In the case of HMG Retention Allowance (95/Z004/1151) expenditure was incurred when there was no approved budget in place. The only documentation received by HMG for the authorisation of amounts to be allocated to the retention scheme is an email from Bierman showing that he was in agreement with the use of contingencies to fund the retention bonuses. We received the authorised budget transfer for the allocation of budget from contingency. An additional concern within the mega project management is whether Bierman, as CFO, has the authority to reallocate budgets within the project when we have the TCP Project Manager/Director as Employer's agent to manage the mega project budget and sign contracts in relation to the contract as well as sign off on the payment certificates. From the budget transfer authorisations reviewed by us we did not notice Bierman's authorisation of these documents nor does it appear to be the acceptable procedure on major expenditure within the mega projects to first obtain Bierman's approvals. This lack of the appropriate approval of the retention allowance paid to HMG is also in line with the concerns raised on the work stream within the HMG investigation.

We also identified instances on line items within the packages where the commitments were more than the approved budget. Below is an analysis of the responses received from the HMG Programme Control Manager for the project:

- For the Ship to Shore Cranes (10/M004/2111M), Straddle Carriers (10/M003/2112M) and Rubber Tyre Grantries (10/M1010/2116) the difference was identified for the period January 2008 to November 2009. An approved Project Change Notice (PCN) 13, signed during 2008, was provided to us by HMG. This PCN was to correct the allocation of line items within the packages. The change was then subsequently incorporated into the revised business case approved in November 2009. The commitments of the total package did not exceed the total budgets for the package;

- On package 50/C009/1002 - Dredging/B S Basin Deepening, the difference noted on the line item of the package in March 2009 was corrected through a budget shift within the package during April 2010. Further review of the subsequent period indicated that the commitment was in line with the budgeted amount. At a package level the commitments did not exceed the budget. It should be noted that it took a considerable amount of time to correct the variances on the line item within the package;
- The response received on our review of the level 4 cost reports have also shown that the packages designated as number *"95"* packages were combined into HMG EPCM Cost 95/Z002 and based on the review of the March 2011 (latest report) neither the expenditure nor the commitment exceeded the budgeted amount in total for the package; and
- A review of the level 4 reports from 2007 to December 2010 has not revealed any unauthorised variances on the total project actual expenditure and total commitment vs. total overall project budget. In general at the package level totals we did not note any package total actual expenditure and package commitment exceeding the package budgets.

We did however note that there were no budget values for the HMG Retention allowances and bonuses with the result that the actual expenditure and actual commitments exceeded the budget. In addition at the time of writing we were not provided with adequate approvals to indicate that budget transfers have been affected to bring the actual expenditure and commitments in line with the budget.

On a micro level we identified variances between the actual expenditure and commitments vs. the budgeted values of package line items. It should however be noted that this did not result in the package totals for those line items exceeding the package budgets. In the case of CTCT the correction of these budget line items did not take place timeously and the package line items were left for long periods to remain uncorrected. These variances were corrected by means of authorised budget transfers in order to comply with governance requirements albeit it not timeously.

E. Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorisation as required by the CPPPPM

The list of condonations submitted to MPAC for approval in respect of the mega projects, were discussed under NCT *"E – Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorization as required by the CPPPPM"*.

8.6.3.4 KPMG Performance and Technology Project Advisory Services review

We are aware that KPMG Performance and Technology Project Advisory Services have performed work on the CTCT mega project, specifically relating to the review of the EPCM contract. The scope of the review was to perform an independent review on the cost and scope of work of the EPCM contractor on the CTCT project, including, amongst others, the quantum and structure of the EPCM fees, claims by the EPCM contractor and to evaluate the overall governance structures of the project.

We conducted consultation with the relevant KPMG representatives from Project Advisory Services on 18 April 2011 and 9 May 2011 respectively. Following our consultations, it is our understanding that the engagement is currently ongoing and also at a very early stage. We have also been informed that the abovementioned report (dated May 2010) is in draft phase and KPMG has not had the opportunity to discuss the report with Transnet in detail.

Our review of the aforementioned draft report revealed a number of aspects pertaining to our current mandate. It was reported that:

- The capital vote adjustment for certain PCNs (ie PCN 10 – dated 27 June 2008, for R48.8 million, PCN 13, dated 23 July 2008, for R113.5 million and PCN 15, dated 29 November 2009, for R512.9 million) was only approved during November 2009 after being implemented being used as early as January 2009 to commence with discussion of the capital vote adjustment. Furthermore, it was stated that formal approval of PCNs was required in a timely manner in terms of governance requirements. One of the root causes for the delay in approval of the capital vote adjustment was identified as being the lack of ownership and decision making on the CTCT project, as TCP indicated that the two ODs, TNPA and TPT, were consulted on the PCNs and were therefore responsible to obtain the necessary approvals from their respective CAPICs;

- Three of the top six PCNs in terms of highest financial costs and time impact were reviewed. The PCNs referred to delays and resulting increases in costs due to:
  - A 10 month delay in the approval of the environmental impact assessment (PCN 1 and PCN 2);
  - A six month delay as a result of the redesign of the quay wall and subsequent delays in the appointment of contractors (PCN 10); and
  - The delayed completion of quays 601 and 604 resulted in the delivery of equipment being delayed, which attracted additional foreign exchange costs, over and above the forward cover and contingency costs;
- Two broad categories of PCNs were identified, ie:
  - Errors, omissions and materialisation of identified risks as the design phase to be funded from the CTCT project contingency fund; and
  - Changes to the scope of work requested by the ODs, TCP or HMG to be funded by a business case application to the relevant OD CAPIC requesting funding.

8.6.3.5 Conclusions

- From our review of the project budget approvals we noted that the overall project budget was properly approved by the Transnet Board. The amendments to the original approved for the project were also properly approved and therefore no governance was flouted in terms of the project budget approval;
- The current approved budget for CTCT was increased by more than 25% or more than R100 million since the original approval in September 2006. This increase was appropriately approved by CAPIC and the Board;
- A review of the level 4 reports from 2007 to December 2010 revealed instances where the package line items actual expenditures and commitments exceeded the approved budget of the line items. The variances in the package line items however do not constitute a flouting of governance as the package budgeted totals were not exceeded on the project; and
- We noted that on the HMG retention bonus or allowance commitments were made and actual expenditure incurred without an approved budget as the authorisation of budget transfer note have shown that it was signed off in May 2011 whilst the package line item variance was outstanding for a long time.

8.6.4 NMPP

8.6.4.1 Background

The main aim for the NMPP is to replace the current pipeline between Durban and Johannesburg (DJP). There has arisen a need to establish a new refined Products Pipeline due to increased capacity needs and client demands. The DJP was Petronet's oldest pipeline – constructed in 1963 to 1965. The pipeline was commissioned in 1965 and effectively operated for 41 years before the NMPP project commenced in 2005.

The NMPP project was approved with an initial ETC of R3 billion. Subsequently there has been various increases in the approved ETC and FFC for this project. The amount of the current approved warrant is R23.4 billion as at the end of January 2011. The significant change is due to scope changes as well as increases in supplier costs. The initial plan was to build a 16 inch pipeline between Durban and Johannesburg. Due to the expected increase in demand in future periods it was decided that an additional 24 inch pipeline will also be built (main scope change in this project that resulted in the increased ETC). The project is expected to be completed in 2011.

During August 2007, it was resolved by CAPIC not to renew the engineering company's contract (Fluor's) on the basis of differences in engineering philosophies between Fluor and Transnet. In May 2008, the construction contract was awarded to Group Five to complete the NMPP Project.

8.6.4.2 Allegation

The NMPP project is included in the list of five projects which apparently are examples where *"... the budget is exceeded by 10% (an allowable deviation) or allowable maximum of R100 mil without approval of Transnet Group."* [122] Details relating to the NMPP project are depicted as follows:

Project name	Approved budget R	Final cost R	Variance R	% variance
Transnet Pipelines NMPP	11.6 billion	12.3 billion	700 million	Above R100 million

[122] Refer Exhibit 76 – AG document named *"Procurement Irregularities at Transnet"*, dated 26 January 2010 (at paragraph 4 thereof)

8.6.4.3 Our analysis of the NMPP project for the period September 2006 to December 2010

A. Overall review of the project cost management

Snapshot reports & Level 4 detailed reports

The review of the snapshot reports and level 4 cost reports were discussed earlier in this report.

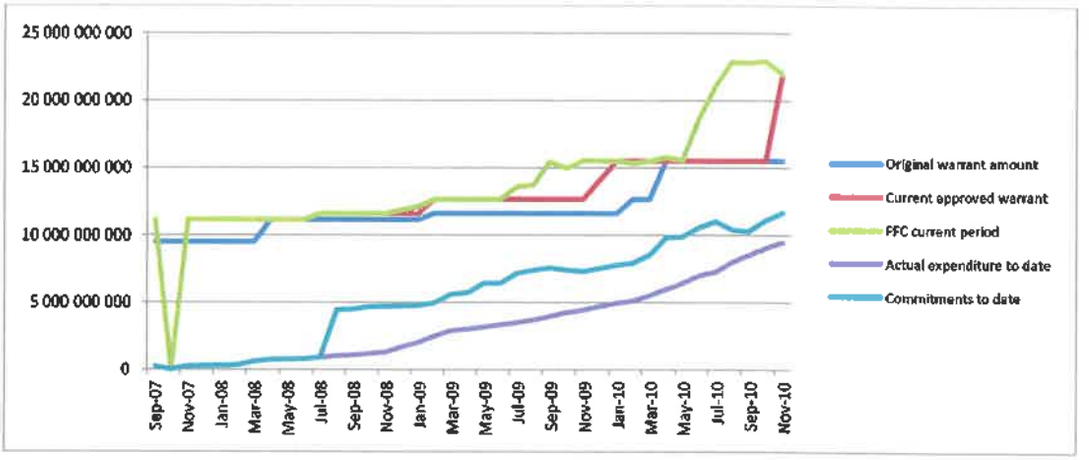
Overall costs

For purposes of our analysis, we obtained and used level 3 reports which are similar to the level 4 reports used in the other 4 megaprojects described in this report. The main reason for this difference is due to the different cost reporting systems utilised by HMG and Arup. Overall costs relating to the Transnet Pipelines NMPP project, as per the level 3 reports as at December 2010 are depicted as follows:

Project name	**Approved budget R bn**	**Final cost R bn**	**Variance R bn**	**% Variance**
Transnet Pipelines NMPP	21.987	9.456	-12.531	-57%

A graphic presentation of the high level costs for the NMPP project for the period September 2006 to December 2010

We obtained copies of the level 3 cost reports from TCP/HMG JV for the NMPP mega project for the period from September 2007 to December 2010. The level 3 cost reports for the period from September 2006 to August 2007 as well as October 2007 were not available as the current project managers (HMG) only participated in the project from September 2007. We captured the information contained on the level 3 cost reports into an electronic worksheet and analysed the trends in the following graph:



Comments on the graph

- The graph depicts primarily level 3 costs as provided by TCP/AWP; and
- There were no level 3 reports available for the period from September 2006 to August 2007 and October 2007.

The practice by TCP of reporting to management based on the snapshot reports, given that the snapshot reports does not appear to reconcile to the level 4 detailed reports, is questionable and of concern in that management may not be properly informed of the costs on the mega projects.

It also appears strange that there should be such a significant delay on the part of TCP to provide us with the detailed level 4 reports for review and insisted that the snapshot reports should serve our purposes. This may be indicative of attempts to place a limitation of scope on the investigation.

B. *Review of CAPIC and Board Approvals of the project budget*

Our review revealed the following instances where the original warrant amount was amended to the ETC at a point in time on a total basis:

Date	Original warrant R	ETC R	Increase in budget R	Increase in budget %	Board approval
November 2006	3 000 000 000	9 488 275 922	6 488 275 922	216%	Yes

Date	Original warrant R	ETC R	Increase in budget R	Increase in budget %	Board approval
March 2008	9 488 275 922	11 136 608 000	1 648 322 078	17%	Yes
August 2008	11 136 608 000	11 600 000 000	463 392 000	4%	Yes
February 2009	11 600 000 000	12 656 823 836	1 056 823 836	9%	Yes
January 2010	12 656 823 836	15 499 124 228	2 842 300 392	22%	Yes
November 2010	15 499 124 228	21987435771	7 900 875 772	51%	Yes

In order to determine whether the increase in the original warrant was properly authorised, we perused the relevant submissions to CAPIC, the CAPIC minutes, the submissions and/or presentations to the Board and the Board minutes to establish that the proper approval was obtained.

Our review of the abovementioned CAPIC Board submissions, presentations and confirmed the following:

- The increase in the original budget dated November 2006 was agreed to the submission to CAPIC (dated 13 November 2006), CAPIC minutes (dated 13 November 2006), the submission and business case submitted to the Board (28 November 2006) and the Board minutes (dated 28 November 2006) to confirm the Board approval[123];
- The increase in the budget dated March 2008 was agreed to the submission to CAPIC (dated 7 August 2007), the CAPIC minutes (dated 15 August 2007), the submission to the Board (dated 6 February 2008) and presentation and business case submitted Board (15 February 2008) and Board minutes (dated 15 February 2008) to confirm the Board approval[124];
- The increase in the budget dated August 2008 was noted in e-mail correspondence (dated 13 June 2008) between Budhai and one Carlos Galego (TCP Portfolio Executive: NMPP)[125]. Despite efforts by various Transnet officials to locate the necessary submissions and minutes reflecting this approval, the documentation could not be found;

[123] Refer Exhibits 112 to 116 – Submission to CAPIC, CAPIC minutes, Submission and business case to Board and Board minutes
[124] Refer Exhibits 117 to 122 – Submission to CAPIC, CAPIC minutes, Submission, presentation and business case to Board and Board minutes
[125] Refer Exhibit 123 – E-mail dated 13 June 2008

- The increase in the original budget dated February 2009 was confirmed to the CAPIC minutes (dated 9 February 2009), the submission to Board (dated 13 February 2009) and Board minutes (dated 13 February 2009) to confirm the Board approval[126]. Despite efforts by various Transnet officials to locate the submission to CAPIC, the documentation could not be found;
- The increase in the original budget dated January 2010 was agreed to the submission to Board (dated 27 November 2009) and the Board minutes (dated 27 November 2009) to confirm the Board approval[127]. Bierman indicated that the increase in budget was not submitted to CAPIC for approval; and
- The increase in the original budget dated November 2010 was agreed to the submission to CAPIC (dated 12 November 2010), the CAPIC minutes (dated 15 November 2010), the business case submitted to the Board (dated 26 November 2010) and the Board minutes (dated 26 November 2010) to confirm the Board approval[128].

Our review of the CAPIC minutes and related submissions confirmed that the increase requests and initial submissions were properly approved and referred to the Board. Our review of the Board minutes and related submissions confirm that the budget submissions were properly authorised.

C. *Increases in the Current approved budget (ETC) by more than 25% or more than R100 million*

Should the original budget be amended by more than 25% or more than R100 million then CAPIC and Board approval is required to increase the costs by these amounts as per the DAF requirements.

In order to assess whether the costs will increase or change in future the FFC mechanism is used. The FFC is a trending mechanism that indicates the likely future trend of the project costs. Should this trend continue upward the project management must review the likelihood of the FFC level of costs becoming a reality. Should it become very likely that the project costs will tend toward the FFC costs and where it is likely that the change is more than 25% or more than R100 million then a submission must be made to CAPIC and the Board as appropriate per the levels of authority.

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126 Refer Exhibits 124 to 127 – CAPIC minutes, Submission and presentation to Board and Board minutes
127 Refer Exhibits 128 and 129 – Submission to Board and Board minutes
128 Refer Exhibits 130 to 133 – Submission to CAPIC, CAPIC minutes, Business case to Board and Board minutes

During our consultations with Bierman, he informed us that TCP forecast the FFC for a period in time to determine the trend of future costs and then adjusts the ETC, if required.

Our review of the totals on the monthly level 3 cost reports for the period from September 2007 to December 2010 revealed that the FFC exceeded the ETC in January 2009 by R514 million. However, in February 2009, the ETC was increased to R12.7 billion which was equal to the FFC at that point in time.

The FFC also exceeded the ETC from July 2009 to November 2009 as well as from April 2010 to October 2010. In January 2010 and November 2010, the ETC was then increased to match the FFC at that point in time and is not seen as material.

At December 2010, the ETC and FFC were the same at R22 billion.

D. Unauthorised variances of Actual expenditure and Commitments to date vs. Current budget on level 4 detail reports

Our review of the monthly level 3 cost reports for the period September 2007 to December 2010 revealed that the actual expenditure and/or commitments to date at no point exceeded the ETC on a total basis.

Our review of the monthly level 3 cost reports on a package level revealed some instances where actual expenditure and/or commitments to date exceeded the current budget. It was also found that over the three-year period there were a number of changes to the presentation of the reports due to presentation improvements and the fact that different administrators had been responsible at various stages. As a result, our analysis was summarised at the total package level to allow as much comparison as possible.

On a total package level, our review revealed that commitments to date exceeded current budget in the following instances:

Month	Description	Current budget	Commitment to date	Commitment to date - current budget
September 2009	Pipelines	5 417 459 582	5 424 103 979	6 644 397
October 2009	Contingencies, escalation and forex	-257 408 613	-	-257 408 613

Month	Description	Current budget	Commitment to date	Commitment to date - current budget
November 2009	Pipelines	4 164 644 082	5 035 344 026	870 699 944
November 2009	HV supply	-	34 873 812	34 873 812
November 2009	Mac	476 544 051	493 662 708	17 118 657
December 2009	Pipelines	4 164 644 082	5 035 344 026	870 699 944
December 2009	HV supply	-	34 873 812	34 873 812
December 2009	Mac	476 544 051	493 662 708	17 118 657
December 2009	EPCM services	751 000 000	765 522 474	14 522 474

On a total package level, our review revealed that actual expenditure to date exceeded current budget in the following instances:

Month	Description	Current budget	Expenditure to date	Expenditure to date - current budget
November 2009	HV Supply	-	34 873 812	34 873 812
November 2009	Sunken costs	208 628 687	221 174 776	12 546 089
December 2009	HV Supply	-	34 873 812	34 873 812
December 2009	EPCM services	751 000 000	765 522 474	14 522 474

During our consultations with the current administrators, the following were noted in relation to the variances above:

- PCN 022 was issued which authorised the budget change of R463 million to the Direct Materials budget to address the shortage for Pipelines in September 2009[129];
- PCN 023 was issued which authorised the budget change of R2 053 million to the Contingency, Escalation & Forex budget to reduce the budget October 2009[130];

[129] Refer Exhibit 133a – PCN 022
[130] Refer Exhibit 133b – PCN 023

- PCN 023 was issued which authorised the budget change of R3 012 million to the Direct Materials budget to address the budget shortage for Pipelines, HV supply and MAC in November 2009[131];
- December cost reports were not officially submitted and were supplied to us for information purposes; and
- The Sunken Cost variance in November 2009 is due to a capturing error.

E. Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorisation as required by the CPPPPM

The list of condonations submitted to MPAC for approval in respect of the mega projects, were discussed under NCT *"E – Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorization as required by the CPPPPM"*.

8.6.4.4 KPMG Performance and Technology Project Advisory Services review

We are aware that KPMG Performance and Technology Project Advisory Services have performed work on the NMPP mega project, specifically relating to a Prudency review of the NMPP capital cost expenditure. The objectives of the review were, amongst others, to classify capital costs in terms of the Regulated Asset Base ("RAB") per a certain NERSA document (ie *"Tariff Methodology for the Petroleum Pipelines Industry"*).

We conducted consultation with the relevant KPMG representatives from Project Advisory Services on 18 April 2011 and 9 May 2011 respectively. Following our consultations, it is our understanding that the engagement is currently ongoing and also at a very early stage. We have also been informed that the abovementioned report (dated November 2010) is in draft phase and KPMG has not had the opportunity to discuss the report with Transnet in detail.

Our review of the aforementioned draft report revealed a number of aspects pertaining to our current mandate. It was reported, based on an initial analysis, that R15.3 billion of the R22 billion estimate was found allowable cost from a NERSA perspective. It was further reported that R6.6 billion was identified as subject to further investigation through the provision of additional supporting documentation. The balance of R166 million was identified as being disallowed costs from a NERSA perspective.

[131] Refer Exhibit 133b – PCN 023

8.6.4.5 Conclusion on NMPP

- The approved warrants were authorised by CAPIC and the Board. For NMPP, the increase in the budget, dated August 2008, was noted in e-mail correspondence as the necessary submissions and minutes reflecting this approval could not be found;
- The review of the total current approved budget compared to the FFC has revealed that the budget was equal to the FFC as at December 2010;
- The review of the monthly level 3 cost reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget; and
- The review of the package line items' commitments and actual expenditure against the current budget has revealed instances where the current budget has been exceeded. The budgets were subsequently increased and approved through Project Change Notices.

8.6.5 Phase 2 of the Orex Feasibility Study

8.6.5.1 Background

Transnet was requested by Industry (Kumba and Assmang) to undertake a feasibility study. The study relates to the Sishen-Saldanha Iron Ore corridor, between the mines of Sishen and Beeshoek in the Northen Cape Province and Saldanha Port. It comprises of a joint rail, port and marine study. The Transnet divisions in the total logistics chain that are involved are TPT, TNPA and TFR. The scope of the pre-feasibility study is based on the potential future expansion of the current design from 63mtpa to 93mtpa. The study is to ensure that the current design is not constrained when future decisions are made to ramp-up to 93mtpa.

8.6.5.2 Allegation

The Orex Feasibility Study (Phase 2) is included in the list of five projects which apparently are examples where *"... the budget is exceeded by 10% (an allowable deviation) or allowable maximum of R100 mil without approval of Transnet Group."* [132] Details relating to the Orex Feasibility Study (Phase 2) are depicted as follows:

[132] Refer Exhibit 76 – AG document named *"Procurement Irregularities at Transnet"*, dated 26 January 2010 (at paragraph 4 thereof)

Project name	Approved budget R	Final cost R	Variance R	% variance
Orex Feasibility Study (Phase 2)	142 million	189 million	48 million	34%

8.6.5.3 Our analysis of the Orex Phase 2 feasibility (43-93mtpa) project for the period September 2006 to December 2010

A. Overall review of the project cost management

Snapshot reports and Level 4 detailed reports

The review of the snapshot reports and level 4 cost reports were discussed earlier in this report.

Overall costs

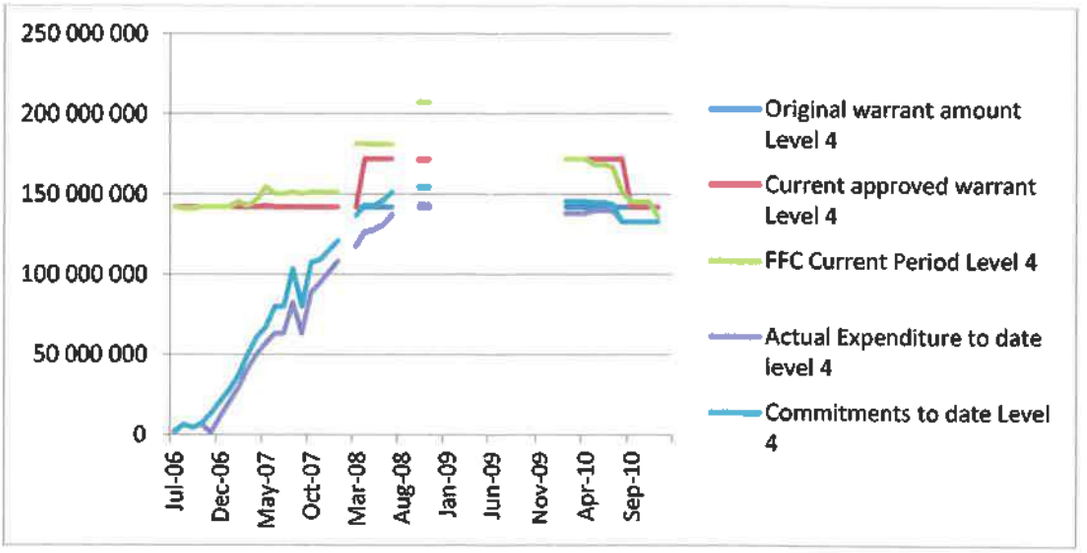
Overall costs relating to the Phase 2 of the Orex Feasibility Study project, as per the level 4 report as at Dec 2010 are depicted as follows:

Project name	Approved budget R	Final cost R	Variance R	% Variance
Phase 2 of the Orex Feasibility Study	142 million	132 million	10 million	(7%)

A graphic presentation of the high level costs for the Phase 2 of the Orex Feasibility Study project for the period September 2006 to December 2010

We obtained copies of the cost level 4 reports from TCP and/or HMG JV for the Orex mega project for the period from September 2006 to December 2010. We captured the information contained on the cost reports into an electronic worksheet and analysed the trends in the following graph[133]:

[133] It should not be noted that no level 4 cost reports were available for the period from January 2009 to January 2010. Hamilton confirmed that no such reports were prepared due to the low activity on the project and therefore only Excel spreadsheets were used during this period



Comments on the graph

- The above graph depicts the information contained in a combination of level 1 to level 4 costs reports as provided by TCP /HMG;
- The original warrant amount for July 2006 consisted of R142 million attributed to the feasibility study. The original study started in July 2006 and ended in March 2008;
- R30 million interim funding was approved in July 2008 for the environmental requirements for Phase 1C. However this amount was later removed and funded under Phase 1C with project number H500121 with reference to the Optimisation study. The inclusion thereof originally in the Phase 2 Orex Feasibility study was incorrectly done under mega project number H500107;
- There were no reports for the period September 2008 to November 2008;
- There were no level 4 reports available for the period from January 2009 to January 2010 as, according to Hamilton, due to the low activity on the project only Excel spreadsheet were used, these unofficial reports were mostly on a level 4 Excel spreadsheet basis and spanned the period from January 2009 to January 2010;
- The above-mentioned unofficial reports indicated only Budget, FFC and payments to date with the accompanying forecast cashflow;

- During this period, Project Reports were being issued as Quarterly Dashboards;
- During January 2010, the Cost reconciliation indicated the commitments as well as payments to date were within the approved budget of R141.9m although at the time of the Cost reconciliation certain outstanding payments were still to be processed;
- From February 2010 onwards the Project Cost Control/Reporting was managed within iPAS system;
- In December 2010 a final Close-out Report was issued by the Project Manager and accepted by the TCP Project Director Oreline. We were informed that the closing out of the project was only finalised in December 2010, although the project deliverables were primarily completed in March 2008. The project resources were thereafter primarily focused on the set-up and the execution of Phase 1C, which caused the delay in finalising the close-out of Phase 2; and
- The Estimated Forecast Final Cost of R136.2m was within the Approved Budget of R141.9m.

The practice by TCP of reporting to management based on the snapshot reports, given that the snapshot reports does not appear to reconcile to the level 4 detailed reports, is questionable and of concern in that management may not be properly informed of the costs on the mega projects.

It also appears strange that there should be such a significant delay on the part of TCP to provide us with the detailed level 4 reports for review and insisted that the snapshot reports should serve our purposes. This may be indicative of attempts to place a limitation of scope on the investigation.

B. Review of CAPIC and Board Approvals of the project budget

Our review revealed the following instances where the original warrant amount was amended to the ETC at a point in time:

Date	Original warrant amount	Current approved warrant	Change in budget	Board approval obtained
June 2006	141 926 814	141 926 814	0%	Not required
July 2008	141 926 814	171 926 814[134]	21%	Not required

[134] Although the R30 million increase in the budget was approved, it was allocated incorrectly to Phase 2 and later reallocated to Phase 1C under project number H500121

In order to determine whether the approval for the original warrant was properly authorised, we perused the relevant submission to CAPIC, the CAPIC minutes, the submission and/or presentation to establish that the proper approval process was followed.

Our review of the above mentioned CAPIC and Board submissions, presentations and minutes confirmed the following:

- The approval of the original budget dated June 2006 was agreed to the submission to CAPIC (dated 12 June 2006) and the CAPIC minutes (dated 12 June 2006)[135]. No Board approval was required, as CAPIC was authorised to approve the budget up to R400 million; and
- The increase in the original budget dated January 2009 was agreed to the submission to CAPIC (dated 18 July 2008) and the CAPIC minutes (dated 18 July 2008). However, the snapshot reports only reflect the increase from January 2009[136]. No Board approval was required, as CAPIC was authorised to approve increases in ETC up to R400 million.

C. *Increases in the Current approved budget (ETC) by more than 25% or more than R100 million*

- During the life of the Project, the Forecast Final Cost fluctuated between the approved budget of R141.9m and R219.9m;
- The variance of R78,0m, was mainly due to the inclusion of the following:
  - R47.0m due to the Additional Interim Funding required to address growth in the environmental (EIA) requirements for Phase 2. We were informed that this was removed and later funded under project number H500120 from savings that were achieved;
  - R30.0m for Phase 1C Interim Funding which was then removed and reported on under project number H500121; and

[135] Refer Exhibits 134 and 135 – Submission to CAPIC and CAPIC minutes
[136] Refer Exhibits 136 and 137 – Submission to CAPIC and CAPIC minutes

- Another FFC impact during 2007/2008 was the inclusion of R9 million to allow for the incorporation of the re-estimate of the shared services costs up to March 2008. We were informed by HJ Pelser that this was later negated because a decision could not be reached where to charge the costs to.

D. *Unauthorised variances of Actual expenditure and Commitments to date vs. Current budget on level 4 detail reports*

Our review of the monthly cost reports revealed that the total actual expenditure and/or commitments for the project as a whole never exceeded the total current approved budget.

Conclusion

- The approved warrant was authorised by CAPIC and further increased by R30 million, which was also approved, however this amount was later removed due to its incorrect allocation;
- The review of the monthly level 4 reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;
- The package line items' commitments and actual expenditure included in the close-out report of December 2010 revealed that it never exceeded the current approved budget;
- We did not identify instances where the packages in the approved budget exceeded the 10% allowable variances without appropriate authorisation;
- In December 2010 a final Close-out Report was issued by the Project Manager and accepted by the TCP Project Director Oreline[137]; and
- The Estimated Forecast Final Cost of R136.2m was within the Approved Budget of R141.9m.

E. *Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorisation as required by the CPPPPM*

The list of condonations submitted to MPAC for approval in respect of the mega projects, were discussed under NCT *"E – Review of Condonations for exceeding the Contract Approved Budget in excess of 10% without prior authorization as required by the CPPPPM"*.

[137] Refer to Exhibit 137a and 137b – Close out report and final cost report

8.6.5.4 Conclusion

- The warrants were approved by CAPIC. No further approvals were necessary;
- The review of the monthly level 4 reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;
- The review of the total current approved budget compared to the FFC has revealed that the budget is higher than the FFC at December 2010 and that no significant variances were recorded; and
- The project was finalised within budget.

9 Allegations of preferential treatment of HMG by Transnet

In the Public Protector's letter (Dec 2010) one of the allegations which required further investigation is the one relating to an EPCM contract between Transnet and HMG.

The allegation is as follows:

"That HMG received preferential treatment from Transnet in that it started working for Transnet before authorisation by the Board. It is further alleged that the senior manager who has now retired, Bernard Smith, had signed the R800 million HMG contract without the necessary authority to do so. Further, that the said contract was drafted by HMG themselves and merely signed by Transnet. A perusal of the contract indicates that the contract is drafted on a Transnet letterhead, but is stated to be prepared by HMG. It was signed on 8 March 2006, yet the starting date on the contract is stipulated as 16 January 2006. The contract stipulates that the "Consultant incurs a penalty if the actual cost is above the definitive estimate", but it is not clear whether HMG incurred any penalties given the allegations of variances in terms of what was costed and budgeted for vs. the invoices that were submitted."

Scope of work

The scope of work for our investigation is guided by the allegations and is augmented by additional findings uncovered during the course of the investigation.

The allegations and this section of the report, in relation to the HMG matter, have been categorised as follows:

- Preferential treatment received by HMG from Transnet including, inter alia, that HMG commenced work before authorisation by the Board and prior to the signing of the contract;
- Smith signed the contract without the necessary authority to do so;
- HMG drafted the contract; and
- The contract provides for penalties in the event that the actual expenses exceeded the budget.

For ease of reference, in relation to the HMG matter, we report the findings under these broad categories even though some of the issues are interlinked across some of the categories.

We performed the review by:

- Requesting and reviewing appropriate documentation,
- Performing analyses of information and documentation received,
- Conducting interviews with various personnel and service provider,
- Establishing instances where irregularities occurred,
- Quantifying the magnitude of irregularities,
- Detecting any non compliance with policies and procedures,
- Collating corroborative evidence in respect of the identified irregularities, and
- Identifying responsible parties involved in irregularities.

9.1 Preferential Treatment of HMG JV by Transnet

9.1.1 Introduction

During the course of investigating the allegation "*That HMG received preferential treatment from Transnet in that it started working for Transnet before authorisation by the Board*" we uncovered further issues that highlight the preferential treatment afforded to HMG by Transnet including irregularities permitted in management of the contract that point to preferential treatment. Accordingly this section of the report is set out, in terms of the findings, as follows:

- Background to TCP and the EPCM tender process;
- Preferential treatment at tender stage;
- Discrepancies between the terms of tender offer and contract;
- HMG commenced work prior to receiving appropriate authorisation;
- Retention and completion bonuses paid to HMG JV;
- Payment of interest to HMG JV for late payment of accounts;
- Mark up on rental on office accommodation for TCP;
- Charging of overheads by HMG JV;
- Granting of work to HMG JV outside of EPCM contract;

- Unreasonableness of hours charged by HMG JV;
- The *"cash neutral position"* concept;
- The option G contract between HMG JV and Transnet;
- Waiver of payment by HMG JV for Professional indemnity insurance and payment thereof by Transnet;
- Preferential terms in the HMG JV EPCM contract in relation to the AWP EPCM contract; and
- Overall conclusion on the preferential treatment.

Note: Additional information to be considered in evaluating the report findings under the above headings

- The reader is made aware that subsequent to the issuing of the Draft report dated 1 August 2011 TCP management issued a response [138] ("the response") dated 29 September 2011 to the draft report in which the findings of the report, specifically in relation to the HMG findings, were rejected by TCP management;
- Given the aforementioned a prudent approach was adopted to deal with the response and its contents in that the response and the investigator comments to the response has been provided as an exhibit [139] to this report rather than take the issues raised by the response and allocate them to the specific sections of this report. This approach serves the following purposes:
  - The overall thrust of the response is not lost;
  - There is no attempt to introduce bias by selectively extracting sections of the response and place them in the various sections of the report; and
  - There is an appreciation of the statements made in the response, when read in its context that is deemed to be either superfluous, misleading or not addressing the thrust of the allegations and the findings.

[138] Exhibit 173 TCP management response dd 29 Sep 11
[139] Exhibit 172 Comments on TCP response dd 29 Sep 11

9.1.2 Background to TCP and the EPCM tender process

TCP was created as a Specialist Unit within Transnet during 2005 to allow for the central management of all Transnet's capital projects across the various ODs. Due to the nature of the capital projects and the lack of internal capacity, the need was identified to appoint third party managing contractors.

Due to the lack of capacity within TCP it necessitated the engagement of a third party managing contractor to manage, initially, the following projects:

- Durban Harbour Project; and
- Saldanha Orex Line Project.

The HMG JV, an unincorporated joint venture consisting of Hatch, Mott MacDonald and Goba, was appointed as Engineering Procurement Construction Management (EPCM) contractors during January 2006. HMG, as EPCM, was responsible for the management of a number of capital projects on behalf of TCP.

9.1.3 Preferential Treatment received by HMG in terms of the contract

9.1.3.1 Preferential treatment at tender stage

Initially the tendering process was confined to four tenderers, namely:[140]

- Bateman Engineered Technologies;
- Hatch Africa (Pty) Limited;
- Fluor SA (Pty) Limited; and
- Murray & Roberts Engineering Solutions.

In investigating the issues at tender stage we reviewed Transnet procurement policies and manuals and held consultative meetings with Transnet procurement personnel that were involved at the EPCM tender stage. We also requested supportive documentary evidence to corroborate the information that came out of those consultative meetings. Furthermore we were also given access to an E&Y HMGJV forensic file of evidence for purposes of gaining an overview and background on the HMG issues.

[140] Refer to Exhibit 138 – Letter of invitation to tenderers, dated 4 November 2005

Findings

In an email, dated 18 November 2005, Bateman Minerals and Metals Limited declined the invitation to bid for the services due to workload experienced by the company[141].

Bateman Africa (Pty) Limited fell out of the selection because in a meeting they had with Carlo Belletti, they indicated that without the support of Bateman's parent company, Bateman Africa, did not have technical competence required[142].

On 13 December 2005, Fluor SA (Pty) Limited declined to bid citing the reason that the inclusion of rail and port engineering expertise was beyond their current ability to provide the global and domestic resources required[143]. They indicated that they would rather focus their attention and resources on the securing of the Petronet Pipeline Project.

Hatch formed a joint venture with Mott MacDonald and Goba and tendered as an unincorporated joint venture named HMG JV. They were competing against Murray & Roberts.

On 9 January 2006, there was a Bid Clarification Meeting and both companies were invited for a session for purposes of evaluation. It seems Murray & Roberts had presented the relevant personnel suitable for face-to-face interviews. These persons were, however, not available for the meeting of 9 January 2006 and therefore requested for another session to be held on 11 January 2006.

On informing Transnet that they were ready for the next interaction and requesting them to indicate a suitable time to meet, Transnet (Rudi Brand) informed them in an email dated 12 January 2006[144], that *"Due to pressure we have completed the evaluation of your tender based on the original document submitted by you and the information provided at the Bid clarification meeting. In particular, candidates for the key positions not available at the meeting were evaluated on the basis of the CV's supplied by the M&R Joint venture. The need for further interviews has therefore fallen away."*

Although Murray & Roberts were allowed to prepare the outstanding information and present their overseas resources, Transnet carried on with the evaluation despite Murray & Roberts not being able to have their resources available for interviews, in and proceeded to finalise the evaluation:

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141 Refer to Exhibit 139 – Email dated 18 November 2005 from Bateman Minerals
142 Refer to Exhibit 140 – Letter from Bateman Africa letter dated 22 November 2005
143 Refer to Exhibit 141 – Letter of decline from Fluor
144 Refer to Exhibit 142 – Email from Rudi Brand dated 12 January 2006

- Transnet prevented HMG's competitor from presenting their candidates on 11 January, thus making HMG JV the guaranteed winners of the tender and Transnet also lost the opportunity of selecting the best bidder. By this action of Transnet HMG JV became the only bidder; and
- Murray and Roberts were denied an opportunity to bring in their candidates for evaluation on 11 January 2006, and yet the finalisation of the evaluation and the final decision was communicated on 17 January 2006. It does not seem, likely, therefore that giving Murray and Roberts a chance would have had a negative impact on the timing of the decision.

On 16 January 2006, a letter of instruction[145] was issued to the HMG JV indicating that they should start work on *"one or two"* projects. The letter further made reference to the following:

"Pending issue of a formal order/contract (targeted to be finalized before end January 2006) the work to be carried out and all costs relating thereto will be remunerated/reimbursed on the basis as set out in your tender dated 22 December 2005..." and further:

"The validity of this Letter of Instruction will lapse on 31 January 2006 unless extended by mutual consent."

On 17 January 2006, a day after being issued with a letter of instruction, HMG JV was informed, by Bernard Smith (General Manager Capital Projects), as the successful tenderer[146].

Conclusion

Based on our findings HMGJV was given preferential treatment at tender stage as Transnet prevented their only remaining competitor of the confined tender process, Murray and Roberts, from presenting before issuing the final evaluation. It is submitted that there was sufficient time for Transnet to allow Murray and Roberts to do the requisite presentation before finalisation of the tender evaluation. Transnet's actions positioned HMG JV as the sole bidder and therefore as the guaranteed winner of the Transnet EPCM contract.

[145] Refer to Exhibit 143 – HMG Letter of instruction to commence work
[146] Refer to Exhibit 144 – Notification of preferred bidder

9.1.3.2 Discrepancies between the terms of HMGJV tender and contract terms

Transnet entered into an Option E contract no. CPPSCE001[147] with HMG JV. This contract which is the basis of the contractual and commercial relationship between Transnet and the joint venture was prepared by the successful tenderer HMG. It was drawn up based on the NEC3 PSC template which is widely used for a time based reimbursable contract.

This contract is the document where Transnet was supposed to specify what the tenderer is expected to deliver and what the tenderer's specific obligations are.

We have reviewed the HMG JV Option E contract in comparison to the request for proposal terms and conditions and also the HMG JV's proposal in response to the tender in order to identify discrepancies between the offer HMG JV made to Transnet and the terms and conditions of the contract entered into.

Findings

The terms and conditions from the signed Option E contract between Transnet and the HMG JV are listed in the table. These terms as identified from the signed contract are in conflict with the corresponding terms and conditions in the NEC3 PSC template and/or with the offer made by HMG JV to Transnet in their response to the tender bid. We are of the view that the arrangement, as stipulated in the signed contract, is compromising Transnet's position in the relationship as is apparent from the paragraphs that follow.

Issue	Explanation
Contract effective date	This agreement was drafted to come into effect **not** on acceptance of offer by Transnet but after the tenderer has received back a copy of the offer and acceptance form signed by Transnet. Further, after receipt of the signed copy of offer and acceptance form, the tenderer had five (5) working days from such receipt to decide whether or not it accepted the contents of the agreement. *[Page 4 of Contract No. CPPSCE 001]*

[147] Refer to Exhibit 152 – Option E contract no. CPPSCE001 between Transnet and HMGJV

Issue	Explanation
Professional Indemnity	The tender form, tender no. 312-0415.1[148], provides for an undertaking by the tenderer to the effect that, in the event of the tenderer's tender being accepted, the tenderer shall provide Transnet with professional indemnity, with a value to be negotiated. In its proposal in core clause 8 on page 8, HMG undertook to take out professional indemnity insurance. However, *the contract, contrary to the provisions of the request for proposal and the proposal by HMG provides for taking by Transnet of insurance for professional indemnity.* The contract includes a provision which stipulate that Transnet will take insurance to cover for claims arising out of failure by the joint venture to use the care and skill normally used by professionals providing services similar to the services provided by the joint venture. This provision is in conflict with the corresponding provision in the template. The normal practice is that a professional takes out insurance on his own to cover for claims arising out of his professional negligence. Further, amendment number 1 to the contract provides for blanket provision of insurance by Transnet. The amendment did not comply with the provisions of the Detailed Procurement Procedures, 28 November 2006 ("DPP") which enjoins a manager to submit a recommendation for consideration by Divisional Acquisition Council, where any material provision needs to be amended. There is no evidence that the amendment was effected after a recommendation had been submitted for consideration by the Divisional Acquisition Council in terms of clause 7.3.4 of DPP.

[148] Refer to Exhibit 155 - Tender no. 312-0415.1 from HMG to Transnet

Issue	Explanation
	The above provision is also in *conflict with the corresponding provision in the tender document where the tenderer undertakes to provide Transnet with professional indemnity.* Also in core clause 8 of the proposal in page 8, the joint venture undertakes to take out insurance for professional indemnity. Reviewing of the magnitude of insurance cover would be approved by the tenderer. *[page 7 of the contract; page 18 of the template; page 3 of the tender document; proposal – core clause 8 page 8]* TCP has indicated that Transnet has provided for PI insurance for HMG as a matter of policy. This was not evidenced by a policy document stating the same but is indicated by a PI policy schedule (policy #01247[149],) that indicates HMG as one of the insured parties. We noted however that the AWP NEC3 contract indicates that AWP should have PI insurance as per clause 81.1 of the contract[150]. A clause not contained in the HMG contract. TCP however, despite the clause 81.1 in the AWP contract, also provides for PI insurance to cover AWP and / or Fluor as per the policy schedule (PO1665 Nov 2007[151]). Even though Transnet eventually paid PI insurance for both these service providers there is a contractually binding obligation for Transnet to take out PI insurance for HMG which does not exist for AWP.
Staff provided by Transnet to joint venture team	The agreement is silent on how secondment of its staff members by Transnet to the joint venture team will affect the fees due to the joint venture. Such secondment should have an effect of reducing the fees due to the joint venture. *[page 22 of the agreement]*
Bonuses and penalties	On the contract is *not specified as to how the bonuses and penalties would be computed.*

[149] Exhibit 174 (Part 7) policies 1247 and 1665
[150] Exhibit 168 AWP contract with Transnet
[151] Exhibit 174 (Part 7) policies 1247 and 1665

Issue	Explanation
Amendment No 1 to Transnet[152]	HMG JV Contract Number CPPSCE 001 dated 18 December 2006 brought about very serious changes to the original agreement, which changes impact negatively on Transnet's rights. The original agreement is silent on what has to be done if Transnet disputes the invoice submitted by the joint venture. The template on the other hand provides in clause 51.3 amongst other things that, *"if the Employer (Transnet) does not accept the Consultant's (joint venture's) assessment of the amount due, he notifies the Consultant of his reasons and the amount which he assesses is due before the payment becomes due. He pays the amount of his assessment".* The amendment specifically excludes Transnet's power to pay amount of its assessment if joint venture's invoice is disputed. Clause 8 in the original agreement provides for taking and maintaining of insurance to cover the parties against claims that may be lodged on happening of specified events. Clause 81 1 in the original agreement specifies *"the amount of insurance and the periods for which the Consultant (joint venture) maintains insurance".* The amendment to clause 81.1 provides as follows, *"Employer to provide insurance"*, which in our view means that *Transnet would be paying for and maintaining the insurance* referred to in that clause, taking over from the joint venture as provided for in the original agreement. The provisions and changes brought about by the *amendments were not part of the proposal by HMG.* Our view is that the *amendments to the contract create unfair advantage in favour of HMG* as against other tenderers at tendering stage. The information amending the contract and that thus got incorporated into the contract was not weighed against proposals by other tenderers.

[152] Refer to Exhibit 156 – Amendment No.1 of Transnet and HMGJV Option E contract

Issue	Explanation
HMG Contract Amendments	In terms of amendment number 1 as stated above, *Transnet had to provide for insurance even where the insurance was to be provided by HMG* in terms of the original contract. Further, in terms of amendment number 2, the definition of key persons was amended to *increase the number of key persons* from nine (9) to thirty four (34) with *resultant increase in fees payable to HMG.* The *provisions and changes brought about by the amendments were not part of the proposal by HMG.* Our view is that the amendments to the contract create unfair advantage in favour of HMG as against other tenderers at tendering stage. The changes which were incorporated into the contract were not weighed against proposals by other tenderers.
Retention Procedure	Entering into the Retention Procedure HMG–HR–P–010 agreement between Transnet and HMG also *resulted in increased fees payable by Transnet to HMG*[153]. Further, in our view Retention Procedure contract is *not linked to and does not stem from the RFP by Transnet* and proposal by HMG. Its introduction therefore ought to have complied with the provisions of DPP in so far as it amends the original contract
Professional Services Contract Number CPPSCE 002 (Option G)[154]	In our view, there is no link between tender no. 312-0415-1 issued by Transnet and Professional Services Contract Number CPPSCE 002 (Option G). This is *a new agreement entered into between Transnet and the joint venture.* Points worth mentioning relating to this agreement are:

[153] Refer to Exhibit159 – HMG-HR-P-010
[154] Refer to Exhibit – 158 Option G Contract No. CPPSCE 002.

Issue	Explanation
	• *It does not seem there was any tender, open or closed, before the joint venture was selected to be the service provider under the Option G contract.* In this regard it will be necessary to establish the projects and their magnitude, which projects the joint venture carried out on behalf of Transnet pursuant to this contract so as to establish whether or not provisions of Public Finance Management Act number 1 of 1999, as amended and Transnet's Procurement Policies have been contravened.
	• The fact *that acceptance in respect of Option G contract was signed on behalf of Transnet by Ms. Moira Moses before the offer was made* is, in our view irregular and is in contravention of the common law principles relating to law of offer and acceptance. However, whether or not the irregularity goes to the root of validity of this agreement can be established by interrogating the circumstances that lead to the occurrence of the irregularity. • Option G is a new separate agreement entered into between Transnet and HMG. In terms of clause 2.14.1.1 of the Detailed Procurement Procedures, 28 November 2006, *written approval by the CEO or higher authority ought to have been received prior to appointing HMG and entering into the Option G contract.*

Conclusion

Based on the review of the Option E contract as drafted by HMG and entered into by Transnet with the HMG JV, we submit that Transnet was prejudiced and put at a disadvantage. The terms and conditions of the contract and the subsequent amendments are in conflict with the corresponding terms and conditions in the NEC template, the tender conditions and the terms on HMG JV's proposal. The contract terms and subsequent amendments have the effect of increased fees paid to HMG JV as the EPCM contractor to the prejudice of Transnet as the terms and conditions of the contract were favourable to HMG JV.

Furthermore we submit that the additional and subsequent Option G, professional services contract, entered into by Transnet with HMG JV is irregular and outside of a confined or open tender process and has not been properly approved by the appropriate authority.

9.1.3.3 HMG commenced work prior to receiving appropriate authorisation from the Board

It is alleged that HMG commenced work prior to receiving appropriate authorisation by the Board. In investigating this allegation we focused our review on sub-allegations which we discovered to be as follows:

- The commencement of work by HMG prior to receiving the appropriate authorisation to commence work is an issue by itself with reference to the appointment date and the date work was commenced;
- The lack of authority by Bernard Smith to appoint HMG JV as EPCM contractor with reference to the scope of delegation authority framework;
- The absence of authorisation of the Board to appoint HMG JV as the EPCM contractor given that the contract type – appointment of a consultant – and the value of the consulting work within the Board's scope of delegated authority; and
- Other possible non-compliance with procurement procedures in appointing HMG JV as EPCM contractor.

Transnet policy requires that an authorised, fully signed contract be issued before work can commence. Where a formal contract is not concluded, the acceptance in writing of a tender[155], setting forth all material terms agreed upon (ie exchange of letters of agreement) shall be sufficient.

We held consultative meetings with the following personnel to establish the period HMG commenced working of Transnet and whether there was appropriate authorisation prior commencement, namely Joe Pereira from HMGJV and Rudi Basson from TCP.

Furthermore we reviewed invoices for the period January to May 2006 for purposes of establishing the period they relate to and requested for copies of letters instructing HMG to commence work.

[155] Refer Exhibit 151 – Transnet DPP clause 4.6

Findings

In a consultation with HMG JV, held on 21 February 2011, Pereira confirmed that they started work in January 2006 without a fully signed contract. Pereira further confirmed that HMG JV had never received a contractually binding letter of instruction to commence work. In a separate consultation it was corroborated by Basson at a meeting on 21 February 2011 that HMG JV did commence work in January 2006.

On 16 January 2011, Bernard Smith issued HMG with a letter of instruction[156]. Further, on 17 January 2011 Bernard Smith issued HMG with a notification of preferred bidder[157].

The letters issued by Smith to the HMG JV, on 16 and 17 January 2006, ie the letter of instruction and notification of preferred bidder, merely advises HMG to start work on *"one or two"* projects and that they are the preferred bidder. Although the letter does not set forth all material terms agreed upon by both parties, it makes reference to the tender as being the basis for work to commence and fees to be recovered.

The letter of 16 January 2006 refers to a telephone conference call on Friday, 13 January 2006, between Ben Nel, Stuart Thompson and Neville Searle during which it was agreed that work should start on *"one or two projects"*. It appears that, during this call, it was further agreed that projects would be managed centrally and that capital projects would propose to the businesses an organogram and key personnel that would be associated with the projects.

Documentary evidence, as per TCP Monthly Report No. 1 for month ending January 2006, the section entitled *"Feasibility studies activities for month ending January 2006"* indicates that the HMG joint venture had commenced working as early as January 2006[158].

The first invoices paid on 6 June 2006 for HMG also indicates a claim for work done from January 2006 to May 2006[159].

Conclusion

Based on the review of the available documentation including the contract that was signed only on 8 March 2006 and from the consultations with the relevant HMG JV and TCP officials, there is sufficient evidence to conclude that HMG started working from January 2006.

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156 Refer to Exhibit 143 – HMG Letter of instruction to commence work
157 Refer to Exhibit 144 –Notification of preferred bidder
158 Refer to Exhibit 145 – Monthly Report No. 1 for month ending January 2006
159 Refer to Exhibit 160 – Sample of invoice for work done in January 2006

The commencement of the work was prior to a valid letter of instruction setting out the salient terms and conditions and also prior to the signing of a valid contract from Transnet. Therefore HMG JV did receive preferential treatment in that they started working, and earning fees as and EPCM contractor, before signing of a valid contract or authorisation to contract by the Board contrary to Transnet's procurement policy. Refer also the sections below for further insight into the matter.

9.1.3.4 Bernard Smith lacked authority to appoint HMG JV as EPCM contractor

Bernard Smith appointed HMG JV by signing the contract between Transnet and HMG on 8 March 2006 in his capacity as General Manager Capital Projects. A delegation of authority from Louis van Niekerk supposedly gave Smith powers to enter into any financial or commercial contracts within financial limits. This delegation of powers was signed by the former GCOO, Van Niekerk, on 22 March 2006[160].

We reviewed the HMG JV's EPCM contract to establish the signatures and reviewed in relation to the delegation of authority framework to establish whether Smith was within his authority limits when he signed the contract. Furthermore we obtained and reviewed the delegation of authority from former GCOO Louis van Niekerk to determine the extent of the authority granted and its relation to the GCOO's authority limits as per Delegation of Authority Framework applicable in 2006.

Findings

In terms of the reporting structure on the HMG matter the issue of Bernard Smith's authority to appoint HMG as EPCM contractor is dealt with extensively under section 9.2 of this report.

We submit however for purposes of this section that Bernard Smith, in his capacity as General Manager of TCP, did not have the appropriate authority to appoint HMG as a consultant in terms of the Delegation of Authority Framework (DAF) of 2005[161]. Bernard Smith's authority to appoint consultants was limited to R10m in terms of the DFA and we submit that the value of the HMG JV contract was from the outset deemed to be more than the R10m limit of authority.

[160] Refer to Exhibit 153 – Delegation of Authority from van Niekerk to Smith.
[161] Refer to Exhibit – 12-Delegation of Authority Framework

Furthermore it is submitted that the supposed delegation of authority by Louis van Niekerk, then Group Chief Operations Officer (GCOO), to Bernard Smith to contract still did not give Bernard Smith the authority to appoint HMG. The delegation of authority was given after the fact and this delegation of authority was confined to a value not exceeding R400m. It is submitted that the value of the HMG JV contract exceeded this value of R400m. Furthermore a reading of the delegation of authority reveals that it does not have retrospective authority but applied to future transactions.

Whereas Louis van Niekerk conferred his authority to Bernard Smith to contract we submit that Louis van Niekerk also did not have the authority to appoint consultants to the value of the HMG JV EPCM contract as this value, in excess of R800m, could only be conferred on an official by the Transnet Board.

Conclusion

The HMG JV letter of appointment and the contract with HMG JV, as signed by Bernard Smith, was irregular as Bernard Smith did not have the appropriate authority to contract on behalf of Transnet within the delegated authority framework and within the delegation granted to him by Van Niekerk. We submit based on the above that neither Bernard Smith nor Louis van Niekerk had the authority to appoint HMG as a consultant.

9.1.3.5 Lack of Board authorisation for the appointment of HMG JV

The allegation indicates that there was a lack of Board authorisation to appoint the HMG JV. In order to evaluate the allegation we need to be cognisant of the fact that there are two issues namely, the authorisation to appoint a supplier/contractor and the authorisation to enter into a contractual agreement. The authorisation to appoint a supplier/contractor is stipulated in the DPP, PPM or CPPPPM whichever is relevant at the time. The authorisation to enter into a contractual agreement is governed by the DAF which sets out the limits of individuals to enter into contract.

Dealing firstly with the authority to contract it is stated in terms of the DAF 2005 that the GCE has full authority to sign contracts above R20 million for the appointment of consultants and we submit that the HMG JV are consultants. Therefore the GCE would have had authority to enter into this contract with HMG JV based on the authority limits of the DAF.

However before the contract can be entered into the HMG JV would have had to be appointed by the delegated authority, DAC or another body, in the first place as per the proper procurement procedures as per the DPP. The DAC would've at one point or the other has had to evaluate the contractor as the value was in excess of R2million.

We submit that the appointment of HMG JV as a consultant, before being engaged on a specific capital project, presents Transnet with a several issues, namely:

- The costs of the EPCM would be included in a multi billion capital project and would be capitalised as capital expenditure;
- At the time the mooted capital projects, foreseen but not yet budgeted for as no definitive cost estimates had been prepared, had not been approved by the Board and warrant values issued. (The cost estimates would've been prepared by the EPCM);
- The EPCM is a supplier and specifically a consultant engaged for the capital projects and the costs attributable to the EPCM would've been managed through the capital project budget;
- The magnitude of the EPCM could've been estimated based on preliminary work and previously approved warrants and the value would definitely have been in excess of R2 million and more in the region of hundreds of millions;
- It was also not specifically budgeted for in the corporate plans as approved by the Board; and
- The EPCM concept was strategically important, of significant cost to Transnet and would be over a prolonged period.

We submit that the appointment of the EPCM consultant, in terms of DPP and DAF procedures, should have been:

- Properly confined;
- Subjected to the relevant DAC evaluation and the recommendation forwarded to CAPIC and the Board for approval; and
- Approved by the Board.

Based on the above we submit that there would have been a requirement for approval by the Board:

- Firstly according to the DAF unforeseen capital projects in excess R700m must be approved by the Board. We submit that the EPCM costs would eventually constitute capital expenditure and the EPCM costs at the time would reasonably be estimated to be in excess of R700m; and

- Secondly the circumstances and concept of the EPCM was unusual and of such importance and of such a strategic nature, with significant cost implications, that the appointment should have been forwarded to the Board for approval.

We reviewed Transnet OPCO minutes for November 2005 to January 2006, as it was purported by Bierman that OPCO approved the appointment of HMG. We also reviewed Board Minutes for the period June 2005 to April 2006 to establish if the Board had authorised the appointment of HMGJV. From the review of the Board minutes we were unable to obtain confirmation of the Board authorisation of the appointment of HMG JV as purported by Gerhard Bierman, CFO of TCP.

Findings

Our review of the Transnet OPCO minutes of 24 November 2005, submitted by Transnet in response to the Public Protector's letter, confirms that the approval in principle the concept of Centralised Projects management for major projects[162]. The minutes of 24 November 2005 nowhere states or authorises the appointment of the HMG JV as the EPCM contractor. We submit that the OPCO approved the concept of centralised projects management and not the appointment of a specific service provider.

Our review of the OPCO minutes of 16 January 2006 revealed that Smith informed the OPCO that HMG has been selected as EPCM contractors[163]. We submit that this does not constitute tacit or explicit, approval by the OPCO of HMG's appointment.

Through a review of the Board minutes from 07 October 2005 to 24 April 2006, there is no evidence that the Transnet Board approved the appointment of an EPCM services provider. A presentation by Smith to the Board during February 2006 makes reference to the following[164]:

[162] Refer to Exhibit 146 – Opco minutes of 24 November 2005
[163] Refer to Exhibit 147 – Opco minutes of 16 January 2006
[164] Refer to Exhibit 148 – Presentation by Smith to the Board in February 2006

"TCP has appointed Hatch Mott MacDonald and Goba (HMG) as the Managing Contractor" and *"HMG has started mobilization for the following projects:*

- *Iron Ore Corridor*
- *Durban Harbour (Entrance Channel and Pier 1)*
- *Cape Town Container Terminal*
- *Ngqura Port Study"*

Despite the abovementioned presentation that appears to have been made to the Board with reference the HMG appointment, the minutes of the Board meeting held on 24 February 2006, does not make reference to the HMG appointment or the approval of the contract [165]. The Board therefore did not approve the appointment of HMG as the EPCM contractor.

There is also no evidence for authority to confine the tender process for the appointment of the EPCM contractor and that authority to award the contract was obtained from the GCE

Conclusion

The evidence reviewed indicated that neither OPCO nor the Board authorised the appointment of HMG JV as EPCM contractor. We submit that the appointment of HMG JV bypassed the governance structures, for instance the DAC, of Transnet in approving HMG as EPCM contractor. We further submit based on the value of the capital projects in which the EPCM contractor would be involved ie in excess of R700m, the magnitude of the potential EPCM fees, the importance of the EPCM concept and the strategic nature of the EPCM involvement in capital projects that the Board should have approved the appointment of the EPCM contractor. Should a case for Board approval not be accepted it is submitted that the EPCM contractor appointment bypassed the necessary governance structures within Transnet in case. It appears therefore that the HMGJV did receive preferential treatment as they were allowed to commence work in January 2006 without proper authorisation from governance structures, contrary to Transnet procurement policies.

[165] Refer to Exhibit 149 – Board minutes of 24 February 2006

9.1.3.6 Possible non-compliance with Procurement Procedures

During the review of the commencement of work by HMG prior to receiving appropriate authorisation our attention was drawn to the fact that other procurement processes may have been compromised and the appointment of HMG is therefore irregular aside from the lack of appropriate authorisation.

We reviewed the Detailed Procurement Procedures for purposes of establishing whether the appointment of HMGJV complied with procedures. We also obtained documentary evidence supporting the process followed in procuring an EPCM service provider.

Findings

The HMG JV was appointed following a confinement process. In an e-mail, dated 2 November 2005, from Bernard Nel (TCP Program Manager), he informs Carlo Belletti (Senior Project Manager: Project Services) that he had a brief from Smith to carry on with the tender for Project Services to be introduced at Transnet[166]. On the same e-mail string, Belletti instructed Hennie Beukes to *"...register a project for the tender which is confined as shown below"* with reference to the four entities, ie Hatch Africa, Murray & Roberts, Bateman and Fluor. A handwritten note on the e-mail states the following: *"Confinement as per above and verbally by Belletti"*. However, the approved confinement document could not be obtained after various inquiries to TCP.

According to the DPP 2003 (at paragraph 7.5 thereof), confinements should be fully motivated to the relevant Divisional Tender Board[167]. The Divisional Tender Board would, if it agrees with the reasons provided, recommend the motivation for the proposed confinement of business to one or more contenders only, for approval to the Group Executive or CEO of the OD or SU who has been granted authorisation in terms of the DAF. The relevant delegated authority may grant prior authority to confine quotations or to consider an offer, provided that it is in the best interest of Transnet, subject thereto that the quotation should close at Group Tendering or Policy Office if the value exceeds R300 000. The matter would then be submitted to the Divisional Tender Board once quotations have been obtained and evaluated, for prior consideration before business is awarded.

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[166] Refer to Exhibit 150 – Email dated 2 November 2005 from Bernard Nel to Carlo Belletti.
[167] Refer to Exhibit 151 – Detailed Procurement Procedures 2003

The appointment of HMG JV in terms of general procurement procedures therefore appears irregular in that:

- The confinement procedure was never performed in the appropriate manner nor was appropriate approval obtained for confinement. We submit that an email does not constitute appropriate form of motivation for confinement;
- The appointment of HMG had not been submitted to any Transnet Acquisition Council (AC) for approval. The only governance structure that was informed of the appointment of HMG was OPCO; and
- The appointment of HMG was not in accordance with Transnet's procurement and governance policies as Bernard Smith nor Louis van Niekerk had the appropriate authority to appoint the consultants to the extent of the HMG contract and the Board, who had the appropriate authority for this large value consulting contract, at no point approved the appointment of HMG as EPCM consultants.

Our investigation of this allegation has further revealed that the procurement processes were contravened in respect of:

- Inappropriate confinement - An expression of interest was issued to the four potential bidders without the necessary business case, request to confine to the four companies and finally the authorisation to confine;
- Bypassing of the Acquisition Council – the EPCM contract was confined and awarded to HMGJV without involvement of any Acquisition Council; and
- Bypassing of governance processes – as the appointment of HMGJV was not in line with Transnet's procurement and governance policies. Bernard Smith and Louis van Niekerk did not have the appropriate authority to appoint the consultants to the extent of the HMG contract and the Board, who had the appropriate authority for this large value consulting contract, at no point approved the appointment of HMG as EPCM consultants.

Conclusion

Based on our findings in the course of investigating the allegation that relates to non-compliance authorisation procurement procedures we conclude that there were procurement irregularities in the appointment of HMG in that:

- There was no authority to confine;
- Bernard Smith and Louis van Niekerk did not have authority to appoint consultants in excess of R10m;
- Appointment of the EPCM service provider bypassed the Divisional Acquisition Council;
- Appointment bypassed the Group Chief Executive; and
- Appointment bypassed the Board.

The fact that the contract had been deliberately left without a value, with no estimates of contract value, may have allowed the persons concerned to bypass the governance structures. Given the nature of the contract, its value, based on the project costs could reasonably have been foreseen to be in excess of a R1billion.

9.1.3.7 Preferential treatment: Retention and completion bonuses paid to HMG

During the course of investigation we have been made aware that HMG was paid retention and completion bonuses. The indicated amount is R185,432,806 in retention and completion bonuses in respect of assignees with effective service dates from 16 January 2006 to December 2010. This is composed of amounts paid to local HMG assignees as retention bonuses and to HMG international assignees as completion bonuses.

We reviewed the matter by reference to:

- Whether it was in line with best business practice;
- Whether TCP had the necessary authority to offer and pay HMG JV retention bonuses in principle and of this magnitude;
- Whether it was offered to AWP as the other similar EPCM service provider at Transnet;
- The amendments of the contract to establish if implementation of retention bonuses was catered for on the contract;
- The authorisation of the retention bonuses and backdating of the payments of retention bonuses; and
- Implementation of the scheme and comparison to the other EPCM contractor, AWP, to assess if bonuses were also paid to them on the same terms.

In order to investigate the above issues we held consultative meetings with the following Transnet senior employees:

- Gerhard Bierman, CFO at TCP; and
- Pradeep Maharaj, General Manager Human Resources.

We reviewed the following documents:-

- The signed Retention Bonus agreement;
- The correspondence between AWP and TCP on the retention bonus; and
- The amendments to the main HMG JV contract to create allowance for the Retention Bonus.

We also requested for and analysed corroborating documentary evidence.

Findings

- **Payment of Retention Bonuses against Industry Best Practise**

  The payment of Retention Bonuses to HMG JV is an abnormal practice as the responsibility to retain the consultant's staff is never that of the Transnet, but that of the service provider, in this case HMG JV.

- **Lack of authorisation of payment of retention bonuses, by Transnet to HMG, by an appropriate governance structure within Transnet**

  The Retention Incentive Scheme HMG-HR-P-010 was prepared by HMG JV and approved on 10 October 2008, by TCP CE, Moira Moses[168]. Gerhard Bierman indicated that the Retention Scheme was presented to Remco. We have a copy of this unsigned memorandum from Moira Moses to Remco dated 28 May 2008[169], motivating for retention scheme in HMG JV to ensure that critical skills needed in project delivery are retained. We also have an unsigned draft submission to Transnet Board entitled *"Transnet Projects Mega Projects Expansion Programme, HMG Personnel Retention Incentive Scheme"*[170].

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168 Refer to Exhibit 159 – Retention Incentive Scheme HMG-HR-P-010.
169 Refer to Exhibit 161 – Copy of an unsigned memo from Moira Moses to Remco.
170 Refer to Exhibit 162 – draft submission to Transnet Board entitled Transnet Projects Mega Projects Expansion Programme, HMG Personnel Retention Incentive Scheme

During the course of the investigation we enquired from Bierman the approval process involved in finalising this matter, and were informed that this matter was tabled at Remco. We then requested evidence thereof and Bierman gave us a copy of emails. An email dated 3 June 2008, indicates a certain Frans Malan enquired from Pradeep Maharaj (Group Executive Human Resource) whether the submission from Moira Moses of TCP regarding the HMG bonus scheme, was discussed at Remco the previous day. Pradeep's response was that it was discussed and noted[171].

At the consultation meeting we had with Pradeep, in April 2011, regarding the Retention and Completion bonuses, he indicated that this matter was never discussed at Remco.

Through review of Remco minutes for the period 08 October 2007 to 10 February 2010 we did not find any evidence that the issue of Retention bonuses was discussed at any of the Remco meetings for the period mentioned above.

We have also reviewed the Remco pack of 02 June 2008 and we did not find any evidence that this matter was due for discussion in that meeting. Furthermore, it was also not on the agenda.

In addition to Remco minutes we also reviewed Board minutes and these did not reflect any instance where the issue of retention incentive scheme was presented and discussed.

It therefore appears the assertion from Bierman that the retention and bonus scheme was tabled at Remco and approved by Remco is not supported by evidence and is not acceptable. We submit that there was never an approval of the scheme by Remco or the Board but that the scheme was effectively approved by Bierman and Moses (refer also to the implementation discussed below).

- **Irregular implementation of the Retention Scheme**

  A Retention Procedure implementation document, HMG-HR-P-010, in respect of the retention scheme was approved by Moira Moses on 10 October 2008[172]. The original contract between HMG JV and Transnet did not cater for payment of retention bonuses by Transnet to HMG JV. Therefore TCP regularised the implementation of the Retention Scheme on 20 May 2009 through Amendment No.4 to Transnet-HMG JV Contract number CPPSCE001. On this amendment the *"Retention Scheme"* paragraph was added to the main contract. The amendment was authorised by Neville Eve, General Manager Project Development and Execution[173].

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171 Refer to Exhibit 171 – Email from Frans Malan to Pradeep
172 Refer to Exhibit 159 – Retention Procedure implementation document, HMG-HR-P-010
173 Refer to Exhibit 163 – Amendment 4 to Transnet-HMG JV Contract number CPPSCE001

Another highly irregular aspect was that the Retention Bonus Scheme was backdated to 16 January 2006 to cover assignees in the employ of HMG JV at the time.

Further, Neville Eve did not have authority to amend the HMG contract although he had been delegated authority as an Employer Agent on HMG contract on 25 June 2008 by Moira Moses. This derives from the fact that the HMG contract value was not within Moira Moses' limit of authority to approve.

In consultation with Pradeep we established that it is not normal for Transnet to pay Retention bonuses to the staff of its service provider, nor is it normal industry practice.

Arup Worley Parsons JV had submitted a proposal to Transnet regarding application of NMPP Alliance Retention Bonuses Scheme[174]. According to a memorandum sent by Gerhard Bierman on 18 August 2010, signed by Gerhard Bierman and Moira Moses, the application was submitted to Strategic Steering Group Meeting held on 27 July 2010[175]. It was at that meeting that the application was not approved. The reason for rejecting was that:

"Having taken into account our current position with regards to status of and sensitivity around NMPP Project, compounded by the funding challenges faced by Transnet (not only on the NMPP project), it would not be appropriate to introduce such a retention scheme on this project".

The above statement, taken with the fact that neither the Remco nor the Board, authorised this retention scheme, indicates that Gerhard Bierman and Moira Moses acted outside of their levels of authority to approve and implement this retention and bonus scheme of HMG JV.

Not only was the HMG JV bonus scheme signed by Moses and Bierman irregular but HMG JV was given preferential treatment as the Retention Bonus Scheme was:

- Approved and backdated to 16 January 2006;
- It did not form part of the terms of reference of Tender No 312-0441.1;
- It did not form part of the response or tender proposal from HMG Alliance; and
- The other EPCM contractor was not afforded the same terms.

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174 Refer to Exhibit 164 – Retention Scheme submission from AWP to Transnet
175 Refer to Exhibit 165 – Memo from Gerhard dated 18 August 2010

During numerous consultations with staff of Transnet, it has been confirmed that HMG is the only service provide that has been paid retention bonuses.

- **Irregular amendment to an EPCM contract**

  The original EPCM contract between Transnet and HMG JV signed in March 2006 was amended by Neville Eve on 20 May 2009, which is seven months after the implementation document was approved by Moira Moses.

  "In terms of the PPM all amendments to contracts must be approved by the Manager (ie a person with the relevant delegated powers) who originally signed the initial contract.

  For higher value contracts (i.e. those signed by the operating division's CEO, the GCFO or GCE), it is advisable to obtain a written mandate from that official empowering a delegate to administer such contract and to effect changes to such contract not exceeding 10% of the initially approved contract value".

  As this was a high value contract Neville Eve did not have the authority to amend the contract.

  Para 7.3.1 of the PPM states that:

  No material provisions of any contract which arises out of a tender/quotation which falls within the DAC's jurisdiction, irrespective of whether the DAC considered the initial award of the business or whether it was merely submitted for information in view of exceptional circumstances, (paragraph 2.5) shall be amended in any way without the concurrence of the relevant DAC, except as stipulated in paragraph 7.3.1.1, 7.3.1.2 and 7.3.2 hereof.

  The Amendment No.4 to Transnet-HMG JV Contract number CPPSCE001 was not submitted to the Divisional Acquisition Council which is a structure designed to ensure that fair competition, both in the eyes of Transnet and the public at large, prevails and that optimal value for money is obtained within the ambit of Transnet's Procurement Policy, the Public Finance Management Act (PFMA) and other relevant regulatory requirements.

  The amendment to HMG JV Option E contract was also effected without following proper procedure as set out in the Detailed Procurement Procedures, 28 November 2006 and without obtaining prior legal advice from relevant legal division.

This amendment benefited HMG at the expense of Transnet. Entering into the Retention Procedure HMG–HR-P– 010 agreement between Transnet and HMG resulted in increased fees payable by Transnet to HMG. The amendment to the contract creates unfair advantage in favour of HMG as against other tenderers at tendering stage. The information amending the contract and thus got incorporated into the contract was not weighed against proposals by other tenderers.

Entering into the said contract and the amendment on behalf of Transnet point to possible contravention of provisions of section 57(b) and (c) of the Public Management Act by the concerned officials.

Section 57(b) of the Act provides that an official in a public entity is responsible for effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility.

Based on the above implementation of the retention and completion bonuses by Moira Moses resulted in irregular and wasteful expenditure by Transnet.

Although Neville Eve had been assigned Employer Agent by Moira Moses, on HMG, he did not have authority to amend the HMG contract. This is because HMG contract value exceeded the approval limit of Moira Moses.

The original EPCM contract between Transnet and HMG JV signed in March 2006 was amended by Neville Eve on 20 May 2009,[176] which is seven months after the implementation document was approved by Moira Moses. The Amendment was not submitted to the divisional council for approval. This amendment unjustly benefited HMG at the expense of Transnet.

Conclusion

Based on our findings payment of retention bonuses in respect of staff of a service provider is not in line with best business practice.

At no stage was the Retention Incentive Scheme presented to an Acquisition Council whether at TCP or Transnet Group, for authorisation. The TCP and Transnet governance structures were bypassed.

[176] Refer to Exhibit 166 – Amendment 3 to HMGJV contract

The contract was irregularly amended by Neville Eve, who did not have the necessary authority, to pay Retention bonuses to the staff of its service provider, which is not Transnet's normal practice nor normal industry practice.

Further indication that HMGJV was given preferential procurement is that the retention incentive scheme was not extended to AWP who were awarded the NMPP EPCM contract. When AWP requested for retention bonuses to be offered to their staff Moira Moses declined (in August 2010) to pay AWP the retention bonus citing reasons of sensitivity on the NMPP project and funding challenges facing Transnet. Yet at the same time Moira Moses pays HMG JV R185.4m (per an agreement in 2008, payment commencing January 2009) in bonuses without taking cognisance of any funding challenges which makes the reasons for decline of the bonus to AWP doubtful.

The retention bonus scheme was implemented retrospectively, which is highly irregular.

The Retention Incentive scheme was purportedly submitted to Remco for authorisation but our understanding and also having confirmed with Pradeep Maharaj, that such a matter would not be submitted at Remco when it had nothing to do staff of Transnet.

Despite Bierman confirming that this issue was discussed at Remco, he is still yet to provide us with evidence that it was approved by Remco. The documentation provided to us by Moira Moses purporting to be submission to Board and Remco for approval of Retention Incentive Scheme, is a draft document which is not signed by Moira Moses.

9.1.3.8 Preferential Treatment: Interest paid to HMG in lieu of late payment of accounts

According to the HMG JV (Option E) main contract, section 51.5, interest is chargeable at "*0% per annum above the prime rate of Standard Bank of South Africa Ltd*".

We obtained HMG statements from TCP in order to establish the period from which Transnet was charged and paid for interest. We also requested a list of all payments made to HMG JV from the SAP Centre of Excellence to understand the amount of interest paid to the HMG JV.

Findings

HMG JV supposedly enforced the levying of interest in terms of clause 51.5 as from June 2009 and indications were that prior to that interest was not charged by HMG to Transnet. However invoices dating back to 2006 indicate that an amount of R901 560 was charged and paid for the whole of 2006.

Upon analysing the HMG statements for the period 30 November 2009 to 25 March 2010 and the HMG payments data from the SAP Centre of Excellence we discovered that HMG had charged Transnet about R11million due to late payment of the invoices from inception of the contract. The table below depicts the breakdown of the interest charged by HMGJV.

Date	Invoice number	Description	Amount	Sub-total
27 November 2006	SA3633	Interest paid - External	252 335	
27 November 2006	SA3632	Interest paid - External	491 551	
27 November 2006	SA3634	Interest paid - External	139 905	
27 November 2006	SA3631	Interest paid - External	17 768	**901 560**
5 January 2009	HMG0308	Interest	81 151	**81 151**
4 June 2009	HMG0257	Interest	719 025	
4 June 2009	HMG0258	Interest on overdue invoices at 29 May 2009	777 888	
5 June 2009	HMG0266	Interest on overdue invoices at 26 May 2009	225 155	
29 June 2009	HMG0267	Interest	430 539	**2 152 608**
22 September 2009	HMG0271	Interest on overdue invoices	134 009	
22 September 2009	HMG0269	Interest on overdue invoices	285 692	
22 September 2009	HMG0268	Interest on overdue invoices	290 058	
22 September 2009	HMG0270	Interest on overdue invoices	432 253	**1 142 015**
30 October 2009	HMG0284	Interest	157 062	
30 October 2009	HMG0283	Interest	294 016	
30 October 2009	HMG0285	Interest	358 054	
30 October 2009	HMG0286	Interest	657 716	
30 October 2009	HMG0287	Interest	598 992	**2 065 842**
16 November 2009	HMG0289	Interest	137 652	
16 November 2009	HMG0288	Interest	315 057	
16 November 2009	HMG0290	Interest	899 196	**1 351 787**
4 December 2009	Hmg0305	Interest	219 550	
4 December 2009	Hmg0307	Interest	113 090	**2 641**

Date	Invoice number	Description	Amount	Sub-total
5 January 2010	HMG0306	Interest	126 201	**126 201**
5 February 2010	HMG0317	Interest	83 813	
5 February 2010	HMG0318	Interest	83 671	**167 484**
26 March 2010	HMG0322	Interest	75 702	
26 March 2010	HMG0323	Interest	73 880	**149 582**
13 May 2010	HGM0326	Interest	27 036	
13 May 2010	HMG0327	Interest	88 714	
13 May 2010	HMG0331	Interest	85 889	
13 May 2010	HMG0332	Interest	83 028	**284 668**
8 June 2010	HMG0336	Interest	144 808	
9 June 2010	HMG0337	Interest	115 079	**259 887**
21 July 2010	HMG0344	Interest	227 155	
21 July 2010	HMG0345	Interest	129 488	**356 643**
19 August 2010	HMG0350	Interest	186 493	
19 August 2010	HMG0351	Interest	128 538	**415 031**
15 September 2010	HMG0357	Interest	111 824	
15 September 2010	HMG0358	Interest	214 455	**326 279**
18 October 2010	HMG0366	Interest	3 154	
18 October 2010	HMG0367	Interest	287 411	**290 565**
13 January 2011	HMG0397	Interest	3 584	
13 January 2011	HMG0398	Interest	3 944	
13 January 2011	HMG0399	Interest	4 313	
13 January 2011	HMG0400	Interest	287 168	
13 January 2011	HMG0401	Interest	184 783	
13 January 2011	HMG0402	Interest	210 103	**693 899**
25 February 2011	HMG0423	Interest	4 313	
25 February 2011	HMG0424	Interest	229 525	**233 839**

Date	Invoice number	Description	Amount	Sub-total
23 March 2011	HMG0426	Interest	3 896	
23 March 2011	HMG0429	Interest	214 059	**217 955**
Total interest				**11 549 738**

Based on the information we had received from TCP, from June 2009 to March 2011 and from the SAP Centre of Excellence, of the R11million charged by HMG to Transnet R6 326 031.08 has been paid. We submit that it may only be a matter of time before the balance of interest, at some R5.2m, is paid by Transnet as it has been charged and can be construed as a due and payable liability in terms of the contract.

It is imperative to note that the above interest payment determination has been verified to actual invoices. Information provided by TCP management in a response dated 29 September 2011[177]. indicates efforts made to address the interest issue. During our review of the response we requested additional information to substantiate the claims made in the response one of which was the issue of the interest paid. In an Excel spreadsheet provided by TCP there is detail of the total payments made to HMG[178] . It is indicated that HMG were paid an amount of R20 175 975 in interest from 4 June 2009 to 21 April 2011. We have not had opportunity to verify this list safe to say that it is in excess of the amounts that we have verified.

In terms of the efforts made by TCP management to reduce the interest payments to HMG we submit the following from our inspection of documents supplied after evaluating the TCP response of 29 September 2011:

- No evidence produced by the response to nullify the draft report's contention that interest was charged in 2006 (see response statement - last sentence before section 3.1.8.1 on page 20);
- Evidence in the form of Emails/minutes of meetings indicating the interest issue was discussed with the ODs was reviewed and appears to indicate that the matter was addressed with the ODs[179];

[177] Exhibit 173 – TCP response dd 29 Sep 11 to draft report
[178] Exhibit 181 – Total HMG fees (Excel Spreadsheet)
[179] Exhibit 178 – (Part 17) Emails on discussion with OD on interest

- Evidence provided from TFR appears to indicate that the vendor was loaded as *"30 days from statement"* instead of as 30 days from invoice on the SAP system. (Response 1st bullet, page 21)[180];
- Evidence was provided indicating the E&Y turnaround of 4 to 6 months on bonus payment that resulted in R3.8m interest (Response 1st bullet, page 22)[181]; and
- Not yet approved revised SLA (4th paragraph, page 22) that would govern the responsibilities of the various parties which include the issue around billing and who is responsible for various aspects of the project administration[182].

Conclusion on interest payments to HMG for late payment of accounts

Section 57(c) of the PFMA provides that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due.

Moira Moses, in her capacity as the CEO of TCP failed to put controls in place in order to avoid irregular and wasteful expenditure in the form of retention and completion bonuses and interest on late payments to HMG. From the documents provided subsequent to the 29 September 2011 TCP management response it appears that there were however efforts made on the part of TCP management to address the issue of delayed payments on HMG invoices with the operating divisions.

9.1.3.9 Preferential treatment: Mark up on rental for office accommodation for TCP

HMG JV Option E Contract, section 8.1, provides that the Employer (Transnet) will make available at no cost to the Consultant (HMG JV) fully equipped and serviced offices for the assigned personnel, in line with and compatible with Hatch's offices in Woodmead. The Employer will directly reimburse the Consultant for all mobilisation and demobilisation costs related to establishing, operating and maintaining a separate Project Office (if applicable), as an expense stated in the Contract Data.

We reviewed the HMG contract to establish the provisions on Transnet providing HMG with accommodation and how it would be charged.

[180] Exhibit 177 – (Part 15) 30 days from statement TFR
[181] Exhibit 179 – (Part 19) E&Y took 4 to 6 months
[182] Exhibit 180 – (Part 22) Revised SLA

Findings

During our investigation we found that HMG JV leased office buildings at Harrowdene office park and Johannesburg Country Club for purposes of accommodating staff working on their EPCM contract.

At the same time HMG JV rented office accommodation on behalf of TCP. These are Buildings 9 at Harrowdene Office Park and Building 8CC at Johannesburg Country Club in Woodmead. These were invoiced to TCP as a disbursement at cost plus 10% mark-up.

Instead of TCP directly leasing office space from the lessor it is done via HMG JV. However instead of paying cost for the lease rental they are paying at cost plus 10%. The 10% in this case goes to HMG JV, not the lessor, and therefore we submit that this resulted in unjust income to HMG JV.

Conclusion on mark up on office accommodation for TCP

We submit that this arrangement of charging TCP rental at cost plus 10% is an irregular, fruitless and wasteful expenditure. The mark up on this office accommodation resulted in unjust enrichment of HMG. The 10% mark up could have been avoided right from the start should TCP had taken up the lease on their own, if this was necessary.

Preferential Treatment: Overheads charged by HMG already covered by multiplier

The HMG, Option E Contract, provides that a multiplier of 1.8 will be applied to the base staff rate for each assignee working from offices provided by the employer and a multiplier of 1.9 will be applied to the base staff rate for each assignee working from offices provided by consultant. These multipliers, which are markup on the base staff rate, cover the contractor's general overheads and make a provision for a 10% profit margin to the EPCM contractor as per the guidelines of the NEC templates[183].

We reviewed the HMG contract to establish what it provides regarding HMG charging Transnet overheads.

[183] Refer to Exhibit 152 HMGJV Option E contract (multiplier)

Finding

The contract provides that all office costs are reimbursable at cost plus 10% mark-up. This is over and above the multipliers which catered for overheads and profit. This, we stress, is bearing in mind that the multiplier is a factor multiplied to staff rates in order to recover overheads and to cater for profit for a reasonable profit margin.

Furthermore in terms of the contract HMG also charged Transnet for office accommodation and furniture at cost plus 10% markup.

Conclusion

Based on our findings, HMG charged Transnet for overheads over and above that which are catered for in the multiplier that is added to the base staff rates. Transnet was, therefore, being double charged by HMGJV for overhead costs because overheads and profit were provided for on the multipliers and HMGJV charged Transnet for all disbursements at cost plus 10%. We recommend that Transnet takes action to explore recovery of the amounts by which Transnet was double and unreasonable charged.

9.1.3.10 Preferential treatment: Additional work to HMG JV in respect of work outside of EPCM Contract (Option E) Scope

The HMG JV in terms of the Option E contract was appointed, properly or not properly approved, to provide EPCM services in respect of the mega projects. During the investigation we noted that HMG JV performed work for Transnet by way of issued task orders outside of the scope of the Option E contract.

We requested HMG JV invoices submitted to Transnet to ensure that they are in respect of the EPCM project and analysed the invoices received to establish what they were in respect of.

Findings

During the course of the investigation we noted the following payments made to HMG.

Date	Invoice number	Amount R
21 July 2006	SA3502 2006-07	802 821.97
21 July 2006	SA3503 2006-07	403 726.90

Date	Invoice number	Amount R
19 October 2006	SA3503 2006-07	211 454.36
Total		**1 418 003.23**

The invoices on the table above are in respect of **Project H-500003 – Transnet R20m-R300m Project Review**. This project relates to review of major capital projects undertaken by Transnet during 2006.

This project is not within the EPCM contract scope of work which included only the following:

- Durban Container Terminal and Habour Entrance Widening;
- Salisbury Island Container Terminal;
- Cape Town Container Terminal;
- Port of Ngqura;
- Saldanha Orex line;
- Majuba Coal Line; and
- Coal Line Infrastructure.

The statement for these invoices which amounted to R1 418 003.23 was approved for payment on 2 March 2007, by former GCOO, Louis van Niekerk[184].

In order to accommodate project awarded to HMGJV outside the EPCM contract, Transnet entered into an option G contract on 30 September 2008. This allowed Transnet to issue task orders to HMGJV to a value of more than R200million for the period of September[185].

Conclusion

Transnet afforded HMGJV an unfair advantage of providing them work outside the EPCM contract without conducting proper tender and procurement procedures in order to give opportunity to potential service providers to bid competitively.

184 Refer to Exhibit 167 – Statement approved by L van Niekerk
185 Refer to Exhibit 170-Option G Task Order Register

Further, this R20m-R300m project review was paid for under the EPCM whereas it did not form part of the EPCM scope.

9.1.3.11 Preferential Treatment: Unreasonable hours charged by HMG JV assignees

The HMG JV contract provides for a 45 hour week which includes 5 hours of overtime which does not require approval by the project manager. We became aware during the course of our investigation, as we perused invoices, that the hours charged on some invoices by individuals appeared excessive in relation to an ordinary work month.

We reviewed invoices for accuracy for the period of January 2006 to May 2006 and reasonableness of hours charged.

Finding

During the course of our investigation it came to our attention that hours charged by HMG JV assignees were not properly scrutinised. We selected a sample of invoices submitted by HMG to verify the hours charged for assignees.

According to BCEA an employer may not allow the employee to work more than 10 hrs a week of overtime unless there is an agreement with a union. On the invoices below, we noted the consultants exceeded the reasonable amount (25%) of overtime that can be put in per month. This may possibly lead to inflation of invoices.

Date	Invoice	Name	Period	Hours	Rate	Amount	% hours worked for the months
4 April 2006	SA3386 2006-04 NPA	Chinn-Browning, Beverly	6 March	309	532	164 388.00	185%
4 April 2006	SA3388 2006-04 NPA	Byrne, Kelly	6 March	290	852.52	247 230.80	174%
22 April 2006	SA3410 2006-05 SAPO	Wessels, Frank	6 March	341	636.19	216 940.79	204%
22 May 2006	SA3414 2006-05 SAPO	Steyn, Johan	6 March	229.50	665	152 617.50	137%

Date	Invoice	Name	Period	Hours	Rate	Amount	% hours worked for the months
22 May 2006	SA3417 2006-05 SAPO	Hall, Craig	6 March	350	760	266 000.00	210%
22 May 2006	SA3419 2006-05 SAPO	Hong, Sean	6 March	270	665	179 550.00	162%

Some of the hours charged by HMG JV do not seem reasonable. In a month one is expected to work for 167 hours excluding overtime. On HMG contract Clause 1.9 Overtime it is stated that *"If circumstances arise where overtime is required, then overtime may be approved by the employer. If overtime is approved, it will be paid and reimbursed in accordance with the time charge rates. No approval shall be required for casual overtime not exceeding 5 hours per week in respect of any individual"*.

Conclusion

Based on our findings from the sample investigated hours charged by HMG JV and its assignees seem unreasonable as they are in excess of a normal work month hours. Further detailed work may be required by TIA in this regard.

9.1.3.12 Preferential Treatment: Cash neutral position

The HMG JV contract mentions the concept of a *"Cash neutral position"* under clause Z1[186].

From our inquiries this cash neutral position means that HMGJV will invoice Transnet a month in advance based on estimated hours to be spent on a project. This advance would then be reconciled with the actual. If it was more a credit note will be passed, if less, the difference will be included on the following month's invoice.

We compared HMG JV contract with NEC3 PSC option E template to establish if the contract is in line with the template on which it is based.

[186] Refer to Exhibit152 – HMGJV Option contract

Finding

In comparing the HMGJV contract and NEC3 PSC we found that the assessment of the amount due (invoicing) on the HMG JV contract is not in line with the NEC-PSC3 which is a template utilised to draw up contracts.

NEC3-PSC PRO-FAT-0219 OPTION E template requirement on assessing the amount due is as follows:

"*The amount due is*

- *the Price for Services Provided to Date,*
- *the amount of the expenses properly spent by the Consultant in Providing the Services and*
- *other amounts to be paid to the Consultant less amounts to be paid by or retained from the Consultant.*

Any tax which the law requires the Employer to pay to the Consultant is included in the amount due."

The Price for Services Provided to Date is the Time Charge for the work which has been completed.

HMG JV contract, clause Z1, page 8 of Option E contract indicates that the assessment of the amount due will be as follows:

"*Invoices submitted by the Consultant include amounts due based on a forecast of persons to be deployed for the following month using the Schedule of Rates contained in Part 2.2. At the next assessment of an amount due the total of the previous forecast is compared with the total of the staff for persons employed during the month. The difference is added to or subtracted from the assessment.*"

This arrangement places HMG in a one month cash neutral position (advance payments) as they would be paid for estimate of work which will be performed on the next assessment period.

Conclusion

Based on our finding Bernard Smith – General Manager Capital Projects disadvantaged Transnet by entering into such an agreement with HMG JV whereby the concept of a cash neutral position is applied. This cash neutral position is effectively payments in advance for work still to be completed based on estimates. This arrangement was not part of HMG JV's offer to Transnet at tender stage.

9.1.3.13 Preferential Treatment: Introduction of Option G contract between HMG JV and Transnet

Transnet initially entered into an EPCM Option E contract with HMG in terms of the NEC framework. With time Transnet requested the HMG JV to work on other smaller contracts which were not part of the scope of the Option E contract. To provide for these odd jobs Transnet entered into an Option G contract with HMG JV. This meant that Transnet would issue task orders to HMGJV without advertising by way of tender nor obtaining of quotes.

We obtained and reviewed the Option G Task Orders register in respect of HMGJV for the period of November 2008 to March 2011.

Findings

In September 2008, on behalf of Transnet, Moira entered into an Option G contract with HMG JV wherein the HMG JV was to provide ancillary professional services relevant to the capital expansion program which will be identified by the Employer from time to time as per separate Task Orders issued.

The list of task orders we have reviewed so far amounted to R202million.

By entering into this contract TCP gave an unfair advantage to HMG. It meant that each of those task orders which were treated as standalone projects were not going to be advertised but issued to HMG without following proper procedure as set out in the Detailed Procurement Procedures[187] manual of 28 November 2006. This further entrenched HMGJV's position at Transnet and also does not allow for competitive bidding on capital expansion work.

Option G is a new separate agreement entered into between Transnet and HMG. In terms of clause 2.14.1.1 of the Detailed Procurement Procedures[188], 28 November 2006, written approval by the CEO or higher authority ought to have been received prior to appointing HMG and entering into the contract.

The table below is a sample of task orders issued to the HMG JV by TCP for the period of November 2008 to March 2011 under the Option G contract.

[187] Refer Exhibit 17 for DPP
[188] Refer to Exhibit 17 for DPP

T.O. number	Description	Estimated costs R	Compensation event number
1	Carry out Safety Awareness Training	210 474.00	Not provided
4	Management of TDS	20 056 740.00	H500000-CE-H500013.T004
6	Transnet visit to Australia	222 076.80	H500000-CE-H500013.T006
11	TCP/HMG Office park consolidation	756 000.00	H500000-CE-H500013.T011
12	Risk analysis of Kamfersdam	756 000.00	H500000-CE-H500013.T012
13	MECA	1 736 537.45	H500000-CE-H500013.T013
17	Direct Staff Planning Support services	3 407 135.94	Not provided
19	Secondment of Rob Ferguson to NMPP	3 541 580.80	H500000-CE-H500013.T019
20	Secondment of Trevor Hyam	662 075.00	H500000-CE-H500013.T020
22	Secondment of Dave Bent	1 250 440.00	H500000-CE-H500013.T022
23	81Mtpa and Beyond - One Vision	5 000 000.00	H500000-CE-H500013.T023
26	Secondment of John Maynard to NMPP	4 786 384.50	H500000-CE-H500013.T026
27	Secondment of Health and Safety Staff to NMPP	7 295 581.24	H500000-CE-H500013.T028

T.O. number	Description	Estimated costs R	Compensation event number
029Rev2	Secondment of Staff to assist Conveyor packages	21 978 169.22	H500000-CE-H500013.T029Rev2
30	NATCOR Risk Assessment	1 055 226.40	H500000-CE-H500013.T030
37	Engineering Support on NMPP	967 079.00	H500000-CE-H500013.T037
39	PD & E Programme Support to NMPP	10 441 582.66	H500000-CE-H500013.T039
40	Independent Opinion for Signal Failure	99 534.00	H500000-CE-H500013.T040
41	NMPP Terminal 1 Setup and Execution Kick-off	20 000 000.00	N/A
43	30/60/90 Day NMPP Project Management (E &CM) Owners Team	17 901 425.00	N/A
043 Rev 1	30/60/90 Day NMPP Project Management (E &CM) Owners Team	7 190 943.06	N/A
043 Rev 2	30/60/90 Day NMPP Project Management (E &CM) Owners Team	7 503 326.10	N/A
043 Rev 3	30/60/90 Day NMPP Project Management (E &CM) Owners Team	3 238 232.95	N/A
44	Review of Tippler Operation - Majuba Power Station	183 343.50	N/A
45	TCP feedback to Transnet Capic	130 246.00	N/A

T.O. number	Description	Estimated costs R	Compensation event number
46	BOI - Derailment Investigation	311 260.03	N/A
48	Durban Airport Site Expansion Phase 1	108 948.60	N/A
50	Bakspruit Bridge	1 064 675.25	CE H500013.TO50
H500512-TO3	Cato Ridge - Bluff Rail Alignment Study	243 978.93	N/A
H500512-TO6	Waterberg FEL 1	6 652 200.00	H500000-CE-H500512.T006
Sample total		**148 751 196.43**	

Conclusion

Moira Moses entered into an irregular contract with HMG when she authorised the Option G contract. By entering into this contract she eliminated the process of tendering and complying with other procurement procedures and eliminated fair competition amongst service providers as *"ancillary work"* not related to the Option E EPCM contract was done by HMG. HMG JV was therefore afforded favourable treatment by Transnet.

9.1.3.14 Preferential Treatment: Waiver of requirement to have HMG pay indemnity insurance and paying it on their behalf

The tender form, tender no. 312-0415.1, provides for an undertaking by the tenderer to the effect that, in the event of the tenderer's tender being accepted, the tenderer shall provide Transnet with professional indemnity, with a value to be negotiated.

In its proposal in core clause 8 on page 8, HMG undertook to take out professional indemnity insurance.

We reviewed HMGJV contract in conjunction with the terms of reference to the request for proposal and HMGJV's tender response to the proposal.

Finding

During our investigation we discovered that, contrary to the provisions of the request for proposal and the proposal by HMG provides for taking by Transnet of insurance for professional indemnity. Due to the fact that HMG drafted the contract, Transnet had been prejudiced.

Under Indemnity, Insurance and Liability clause on the NEC3 PSC template the requirement is that the Consultant will maintain insurance for failure of the Consultant to use the skill and care normally used by professionals providing services similar to the services.

Further, amendment number 1 to the contract provides for blanket provision of insurance by Transnet. The amendment did not comply with the provisions of the Detailed Procurement Procedures, 28 November 2006 ("DPP") which enjoins a manager to submit a recommendation for consideration by Divisional Acquisition Council, where any material provision needs to be amended. There is no evidence that the amendment was effected after a recommendation had been submitted for consideration by the Divisional Acquisition Council in terms of clause 7.3.4 of DPP.

Conclusions

HMGJV was given preferential treatment in that Transnet undertook to take professional indemnity insurance on HMG's behalf whereas the terms of reference of the request for proposal, HMG's response to proposal and NEC3 PSC template all require that the service provider shall maintain insurance for failure of the Consultant to use the skill and care normally used by professionals providing services similar to the services.

9.1.3.15 Preferential Treatment: HMG contract relative to AWP contract – a comparison of selected terms and conditions

During the course of the investigation we were made aware of the retention bonuses paid to HMG JV. This appeared unusual and irregular and we inquired whether Transnet paid any retention bonuses to other suppliers, more specifically to other EPCM contractors. We were alerted that AWP had an EPCM contract with Transnet for the NMPP project. Our inquiries led us to compare the two contracts starting with the issue of the bonuses and retention allowances.

We reviewed the HMG JV contract in comparison with AWP's contract[189] for purposes of establishing whether HMG received preferential treatment compared to AWP.

Finding

Comparison of terms of conditions of HMG and AWP contracts

We discovered the following differences between HMGJV and AWP contract which supports the allegation that HMG JV was given preferential treatment which are listed on the table below.

Area	HMG Contract	AWP Contract	Ref
Contract Type	Professional Services Contract (time based option) of the NEC suite of contracts	Professional Services Contract (time based option) of the NEC suite of contracts	
Insurance	**HMG contract provides for taking of insurance by Transnet as cover in favour of HMG as well as in favour of Transnet for claims arising out of failure by HMG** to use the care and skill normally used by professionals providing services similar to the services provided by HMG.	**AWP contract provides for taking of insurance by both Transnet and AWP in favour of AWP as well as in favour of Transnet for claims arising out of failure by AWP** to use the care and skill normally used by professionals providing services similar to the services provided by AWP.	*[clause 81.1 page 6 of HMG contract; clause 81.1 page 7 and clause 81.1page 8 of AWP contract]*
Total Liability	HMG contract provides for consultant's total liability to Transnet for all matters arising under or in connection with the contract to **be limited to the higher of R11 million or 10% of the total invoiced time charge in the preceding twelve- month period.**	AWP contract on the other hand provides for consultant's total liability to Transnet for all matters arising under or in connection with the contract to be limited to **10% of the total time charge.**	*[clause 82.1 page 7 of HMG contract; clause 82.1 page 9 of AWP contract]*

[189] Refer to Exhibit 168 – AWP NEC3 PSC contract

Area	HMG Contract	AWP Contract	Ref
Liability	HMG contract provides that the **consultant would not be liable to Transnet for a matter in respect of any project unless the consultant is notified of such matter before the end of defects** date in respect of that project. Defects date is defined as **52 weeks after completion of the whole of the services** in respect of a particular project.	AWP contract provides that the consultant **would be liable to Transnet for defects found** even after the defects date. The liability of the consultant in this regard is limited to 10% of the total time charge paid to the consultant by Transnet for EPCM but limited to consultant's re-performance. Further, the end of liability date as provided for in AWP contract is **102 weeks after completion of each section** of the services in this regard.	*[clause 41.1 page 6 read with clause X 18.3 page 8 of HMG contract; clause X18.2 Page 11 of AWP contract read with clause X18.3 Page 5 of amendment no. 2 of AWP contract]*
Monitoring Tool	HMG contract **did not incorporate clause X5** or any other monitoring tool in this regard.	AWP contract **incorporated clause X5 of the template which deals with sectional completion (monitoring)** and thus stipulates time frames within which certain portions of work should be completed.	*[clause 12 – X5.1 page 10 of AWP contract]*
Monitoring	As part of monitoring HMG contract provides for **submission of programme for acceptance and quality policy statement within 6 weeks from starting date.**	AWP contract provides that the consultant should **submit a first programme for acceptance and quality policy statement within 4 weeks from starting date.**	*[clauses 31.1 and 40.2 page 6 of HMG contract; clause 31.1 page 6 and clause 40.2 page 7 of AWP contract]*

Area	HMG Contract	AWP Contract	Ref
Retention bonuses and increase in salaries to retain services.	HMG contract provide for **payment by Transnet of retention bonuses to consultants' employees** or of extraordinary increases in salaries to retain services of consultants' employees. However, payment of retention bonuses in terms of Retention Procedure HMG –HR – P – 010 was to operate retrospectively from 16 January 2006, more than two years back.	**AWP's request for retention bonuses was declined by Moira Moses.** Further, payment of extraordinary increases in salaries to retain services of AWP's employees does not operate retrospectively.	*[clauses 5.2 and 5.3 page 3 retention Procedure HMG – HR – P – 010 document; clause 6 (3) page 6 section C2.2 of amendment no. 2 to AWP contract dated 21 April 2010]*
Increase in scope	**Option G contract effectively extended the scope of work to be done** for Transnet by HMG, in our view, without following Transnet's proper tendering and procurement procedures.	On the other hand section C3.1 of amendment no. 2 to **AWP contract on page 1 provides for reduction in scope of work** to be done by AWP for Transnet.	

Conclusion

Based on the table above which compares HMGJV contract and AWP contract we can conclude that HMG JV was given preferential treatment in respect of the issues highlighted in the above table, *inter alia*, bonuses, scope of work, insurance, monitoring, extent of EPCM contractor and length of retention period.

Overall Conclusion on Preferential Treatment of HMG JV

Our findings on the aforementioned issues lead us to conclude that HMG has received preferential treatment in the following areas of the overall contract from the tender stage up to the contract management phase.

- Preferential treatment at tender stage;
- Discrepancies between the terms of tender offer and contract;
- HMG commenced work prior to receiving appropriate authorisation;
- Retention and completion bonuses paid to HMG JV;
- Payment of interest to HMG JV for late payment of accounts;
- Mark up on rental on office accommodation for TCP;
- Charging of overheads by HMG JV;
- Granting of work to HMG JV outside of EPCM contract;
- Unreasonableness of hours charged by HMG JV;
- The *"cash neutral position"* concept;
- The option G contract between HMG JV and Transnet;
- Waiver of payment by HMG JV for Professional indemnity insurance and payment thereof by Transnet; and
- Preferential terms in the HMG JV EPCM contract in relation to the AWP EPCM contract.

9.2 Factual findings on Smith signing the contract without authority

Our review of the contract indicated that Smith signed the EPCM services contract with HMG on 08 March 2006 on behalf of Transnet[190].

We obtained and reviewed the Delegation of Authority Framework applicable in 2005 for limits regarding appointment of consultants. We also reviewed the Delegated Authority given by the GCOO to Smith.

We attempted to establish the estimated value of the contract at appointment of HMGJV to establish whether a reasonable person who have anticipated the value of the HMG contract.

We also analysed the total payments made to HMG to evaluate the actual cost of the HMG JV contract to Transnet.

[190] Refer to Exhibit 152 – Extract of the EPCM contract signed by Smith on 08 March 2006

Findings

In terms of the DAF 2005, the General Manager had no powers to appoint consultants as the delegation of authority starts with the Business Unit CEO, with a limit of up to and not exceeding R10 million[191].

Therefore, in his capacity as General Manager at TCP, Smith did not have the authority to enter into contracts/sign contracts for the appointment of consultants, in terms of the DAF that was applicable at the time.

On 8 March 2006, Smith did not have the necessary authority to sign a R800 million HMG JV contract.

We have established that Smith has since retired and thus we were unable to interview him.

Delegation of Authority form dated 22 March 2006

On the dossier file to the AG in 2010, we noted a delegation of authority form that was signed by the then GCOO, Van Niekerk, on 22 March 2006 in terms whereof he delegated authority to Smith to, *inter alia*, enter into any financial or commercial contracts within financial limits detailed in Annexure A to the delegation form[192]. Firstly, the delegation form was signed after the signing of the HMG contract on 8 March 2006 and did not apply retrospectively. Secondly, in terms of the DAF 2005, the GCOO's authority was confined to contracts not exceeding R400 million and not exceeding R20 million for appointment of consultants. As HMG's contract value is referred to as R800 million, the GCOO himself could not delegate powers and/or authority he did not have as this HMG's R800 million contract far exceeded the R20 million authority he had.

Therefore the GCOO did not have the authority to sub-delegate, to Smith, powers he did not have. According to the DPP 2006 paragraph 6.12.2, *"A manager may not delegate more than that to which he/she has been authorized"*.

The value of the HMG contract

Upon perusing the contract signed by Smith between Transnet and HMG on 8 March 2006, we noted that there was no contract value stipulated on the contract. Instead Clause 1.12 of Section 6(2.1) Pricing Instructions Option E, only stipulates the hourly rates to be charged for different levels of team members to be utilized.

[191] Refer to Exhibit 12 – DAF 2005
[192] Refer to Exhibit 153 – Annexure A to the delegation form

The question we have to answer is whether a reasonable person of Mr. Smith's caliber would have reasonably expected the contract value of the HMG contract to be above his limit.

In a meeting with Bierman, he indicated that a reasonable Percentage of Cost of Works (EPCM excluding disbursements) ranges between 10% and 15% of the total value of the projects managed.

HMG JV had tendered to contract to manage two projects. Our review of the initial invoices in 2006 revealed that they did work on Ngqura and Durban Harbour Entrance Widening. We noted however that the initial business case cost estimates for these projects did not clearly indicate what the EPCM costs were going to be. We used the initial approved warrant values from the snapshot reports to estimate the EPCM costs at 10% and 15% respectively assuming that it included the EPCM costs*. Refer to the table below.

Mega Project	**Project budget R bn**	**Project budget R bn**
Ngqura Container Terminal	7 886	7 886
Durban Harbour Entrance Widening	3 022	3 022
Total	**10 908**	**10 908**
	At 10% of project budget	**At 15% of project budget**
EPCM Estimated Cost of total value of the projects	991.6 million	1 433.8 million

** EPCM cost estimated calculated at x%/(100 +x%)*

Based on that percentage range, value of the EPCM contract would at least be estimated to range between R991 million and R1,422 million at the initial stage based on the information in the table above.

Although the HMG JV contract was a time based contract, it was clear from the initial stages that it is a high value contract and was not within the GCOO and Smith's mandate, as the minimum value could have reasonably be calculated to be far in excess of the authority he did not have.

According to Gerhard Bierman, in his presentation to the Board an amount of R4.5bn was paid to HMG from the inception of the contract in 2006 to November 2010[193]. During the course of our investigation we also noted from the external audit report by Deloitte, for the year end 31 March 2011, indicating that R4.77bn was paid to HMG from inception to date. The Deloitte report did not provide a breakdown of the amount but indicated that TIA is investigating the HMG contract appointment.

During the course of the investigation before the issue of the draft report numerous requests were made to Gerhard Bierman to provide the necessary detail of that constitute the total amount of R4.5bn. The requests for the detail was not honoured at the time which required the investigators to compile an analysis from information obtained from the Transnet Centre of Excellence which total some R5.8bn. Needless to say the amount was contested by TCP in its management response dated 29 September 2011. Subsequent to the management response of 29 September 2011, Mr Bierman provided the necessary schedules and the table below indicates the total amounts paid to HMG from inception to 31 March 2011.

HMG billing-inception to 31Mar2011		**Exclusive of VAT R**	**Inclusive of VAT R**
EPCM fees and disbursements	TPT	1 199 385 242	1 367 299 176
EPCM fees and disbursements	TNPA	1 417 477 948	1 615 924 861
EPCM fees and disbursements	TFR	1 396 362 737	1 591 853 520
EPCM fees and disbursements	TCP	150 812 415	171 926 153
Sub-total EPCM	**Total**	**4 164 038 342**	**4 747 003 710**
Rental/accommodation charges		45 428 962	51 789 017
Interest charges		20 175 975	20 175 975
Retention and completion bonuses	TPT	52 475 552	59 822 129
Retention and completion bonuses	TNPA	66 380 632	75 673 920
Retention and Completion bonuses	TFR	57 970 473	66 086 339

[193] Refer to Exhibit 154 Background to information of TCP and HMGJV (Bierman's presentation to Board).

HMG billing-inception to 31Mar2011		**Exclusive of VAT R**	**Inclusive of VAT R**
Retention and completion bonuses	TCP	7 203 273	8 211 731
Retention and completion bonuses	TPL	1 346 462	1 534 967
Sub-total bonuses		**185 376 392**	**211 329 087**
Total all HMG JV billings		**4 415 019 671**	**5 030 297 788**
Total by category			
EPCM fees and disbursements		4 164 038 342	4 747 003 710
Rental/accommodation charges		45 428 962	51 789 017
Interest charges		20 175 975	20 175 975
Retention and completion bonuses		185 376 392	211 329 087
		4 415 019 671	**5 030 297 788**

Therefore the contract signed by Smith, with hindsight, was worth at least R5 030 297 788 including VATwhich is some R4billion above the alleged amount of R800 million.

Any possible attempts to rectify this with GCOO's delegated authority could not be valid as GCOO himself did not have authority to sign contracts in excess of R400 million or to appoint consultants with contract value exceeding R20 million.

HMG JV had started work in January 2006 and on 6 June 2006 Transnet paid them R24m for the period of 16 January 2006 to 31 May 2006. Bernard Smith, in his capacity as the General Manager, at this point, would have known that the appointment of HMG JV and signing of the contract was not within his delegated power of authority.

Conclusion

Based on our findings and in relation to the allegation that Smith signed the contract without the necessary authority to do so on 8 March 2006, we conclude that Bernard Smith did not have the appropriate authority to appoint the HMG JV as consultant as the value of the contract was beyond his limits in terms of Delegation Authority Framework.

Further, Louis van Niekerk did not have the authority to delegate to Smith, as this was also above his level of authority, and you cannot delegate an authority you do not have. Both Smith and van Niekerk exceeded their delegated level of authority. We also submit that the delegation of authority given by Van Niekerk to Smith was after the signing date of the contract and does not apply retrospectively.

9.3 Factual findings regarding the allegation that HMG drafted the contract

In order to investigate the allegation that HMG drafted the contract (Option E) with no input from Transnet we referred to the HMG contract as our reference. However with reference to the other issues we uncovered in the course of investigating the HMG matter we were curious to establish whether Transnet was not prejudiced by this arrangement.

We accordingly subjected the terms and conditions of this contract (Option E), its amendments and the Option G contract to a detailed legal review and compared the terms and conditions to the relevant NEC templates and evaluated the general implications of the various terms.

Finding

With respect to this allegation we obtained the initial NEC3 PSC between HMG JV and Transnet. On the contract between HMG JV and Transnet signed on 08 March 2006 it is indicated that the *"Documentation prepared by: HMG JV"*[194]. On the face of it this would confirm the allegation that HMG drafted the contract.

We submit, however, that this could have been mitigated by having the contract reviewed by TCP or Transnet Group legal division, but we did not obtain evidence, nor were we provided any upon inquiry, that it was reviewed by TCP legal division or Group legal division. Nic Uys, procurement specialist at TCP, indicated that the contract had been reviewed by Gerhard Bam, who had since passed away. Nic Uys did not produce any documentary evidence that corroborated his statement that Gerhard Bam had in fact reviewed the contract. Review by different divisions, e.g. Policy, Legal, etc, within Transnet would be evidenced by the relevant personnel signing a routing slip attached to the contract. In addition to that there would comments sent email from the reviewer to the contract administrator. None of those could be obtained from TCP.

[194] Refer to Exhibit 152 – Option E contract between HMG and Transnet

Based on the above, we conclude that HMG JV did in fact prepare the contract themselves and there is no evidence that Transnet Legal reviewed the contract in order to protect Transnet's interest and prevent any prejudice to Transnet.

In consideration of the fact that HMG prepared the contract we submit, based on a review of the HMG JV-Transnet contract, that Transnet may have been prejudiced as a result of this action.

The issues from the detailed legal highlighted the following issues with respect to the implications of the terms and conditions for Transnet:

- The *terms and conditions are extraordinary* and/or are in conflict with the corresponding terms and conditions in the NEC template:
  - This agreement was drafted to come into effect **not** on acceptance of offer by Transnet but after the tenderer has received back a copy of the offer and acceptance form signed by Transnet. Further, after receipt of the signed copy of offer and acceptance form, the tenderer had five (5) working days from such receipt to decide whether or not it accepted the contents of the agreement;
  - Period for retention is three years following completion or earlier termination. This seems unjustifiable especially when compared to only one year (52 weeks) allowed within which to report defects;
  - Taking of insurance by Transnet as cover for claims arising out of failure by the joint venture to use the care and skill normally used by professionals providing services similar to the services provided by the joint venture. The above provision is extraordinary and in conflict with the corresponding provision in the template. The normal practice is that a professional takes out insurance on his own to cover for claims arising out of his professional negligence; and
  - The above provision is also in conflict with the corresponding provision in the tender document where the tenderer undertakes to provide Transnet with professional indemnity. Also in core clause 8 of the proposal in page 8, the joint venture undertakes to take out insurance for professional indemnity. Reviewing of the magnitude of insurance cover would be approved by the tenderer.

- *Amendment No.1* to Transnet – HMG JV Contract Number CPPSCE 001 dated 18 December 2006 *brought about very serious changes to the original agreement*, which changes impact negatively on Transnet's rights.
  - The original agreement is silent on what has to be done if Transnet disputes the invoice submitted by the joint venture. The template on the other hand provides in clause 51.3 amongst other things that, "*if the Employer (Transnet) does not accept the Consultant's (joint venture's) assessment of the amount due, he notifies the Consultant of his reasons and the amount which he assesses is due before the payment becomes due. He pays the amount of his assessment*";
  - The amendment specifically excludes Transnet's power to pay amount of its assessment if joint venture's invoice is disputed;
  - Clause 8 in the original agreement provides for taking and maintaining of insurance to cover the parties against claims that may be lodged on happening of specified events. Clause 81 1 in the original agreement specifies "*the amount of insurance and the periods for which the Consultant (joint venture) maintains insurance*"; and
  - The amendment to clause 81.1 provides as follows, "*Employer to provide insurance*", which in our view means that Transnet would be paying for and maintaining the insurance referred to in that clause, taking over from the joint venture as provided for in the original agreement.
- *Amendment No.2* to Transnet – HMG JV Contract Number CPPSCE 001 dated 18 December 2006 amended the definition of key persons in clause 22.1 of the original agreement to effectively increase the number of key persons from nine (9) as at 8 March 2006 to thirty four (34) as at 18 December 2006. The change should have had a huge impact on the fees paid to the joint venture in the ordinary course of carrying out the projects and on the retention fees and bonuses provided for in a later amendment;
- *Professional Services Contract Number CPPSCE 002 (Option G)*. This is a new agreement entered into between Transnet and the joint venture. Points worth mentioning relating to this agreement:

- *It does not seem there was any tender, open or closed before the joint venture* was selected to be the service provider. In this regard it will be necessary to establish the projects and their magnitude, which projects the joint venture carried out on behalf of Transnet pursuant to this contract so as to establish whether or not provisions of Public Finance Management Act number 1 of 1999, as amended and Transnet's Procurement Policies have been contravened; and
- *The form of offer and acceptance* in terms of the contract was signed on behalf of Transnet by Ms Moira Moses, the TCP Chief Executive on 16 September 2008 before the offer was made by the joint venture on 29 September 2008.

- *Retention Procedure* HMG–HR–P–010. The agreement relating to the retention procedure was prepared by the joint venture. It is drafted in such a way that Transnet is burdened with cost of retaining personnel of the joint venture which provision was not part of the joint venture's original proposal to Transnet in response to the tender. Further, the agreement relating to the scheme was entered into on 10 October 2008 and was made to operate retrospectively from 16 January 2006.

Conclusion

Based on our findings in the review of this allegation that HMG prepared the contract we conclude that the contract favours the HMG Joint Venture to the prejudice of Transnet. Further, in our view the amendments to the contract create unfair advantage in favour of the joint venture as against other tenderers at the tendering stage. This is so because had the information amending the original contract been there in the joint venture's proposal, the joint venture's proposal might not have been selected as the most suitable one by Transnet.

It is our prima facie view that the contracts entered into between Transnet and HMG Joint Venture and the amendments thereto are, in contravention of the provisions of section 50(1)(b) of the Public Finance Management Act, Act No. 1 of 1999 ("the Act"), not in the best interests of Transnet.

Entering into the said contracts and the amendments on behalf of Transnet point to possible contravention of provisions of section 57(b) and (c) of the Act by the concerned officials.

Section 57(b) of the Act provides that an official in a public entity is responsible for effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility.

Further, section 57(c) of the Act provides that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due.

It is also our view that the amendments to the original agreement, Retention Procedure contract and Option G contract had been effected and or entered into without following proper procurement procedures as set out in the Detailed Procurement Procedures, 28 November 2006.

9.4 Factual findings on HMG contract penalties where budget exceeded

The introductory paragraph to the below captioned statement, on page 23, of Transnet and HMG JV contract under the heading *"Discussion parameters for Project Alliance"* states, with emphasis added:

"It is recorded that the Parties may employ different contracting options on the basis of a Project Alliance for the execution of the scope of work as and when there is sufficient definition of the scope activities; this will require the conclusion of a new contract, incorporating the parameters set out below with all the obligations and rights as contained in this contract being transferred in their entirety to the new contract.
Should the Parties decide to implement a Project Alliance incorporating the principle of shared gains and losses, the new contract to be concluded may incorporate some or all of the parameters listed hereafter."

With specific reference to the issue of penalties the HMG JV Option E contract, on page 23 and 24, signed 8 March 2006 states with emphasis added:

"b) Capital Cost

The Consultant receives a bonus if the definitive estimate (-5% to +15%; ANSI Standard Z94.0) is less than the mutually agreed budget estimate (-15% to +30%; ANSI Standard Z94.0).

The Consultant earns a percentage of each Rand by which the actual cost is less than the definitive estimate and incurs a penalty if the actual cost is above the definitive estimate."

"c) Schedule

The Consultant earns a bonus if "Key Milestone Dates" are achieved sooner than the established target date and will incur a penalty for not meeting the target date."

In light of the above we reviewed the HMG JV contract to establish the provision for penalties and also held consultative interviews with Bierman, and Basson to establish how the gains and penalties clause was implemented. We also reviewed payments to HMGJV to establish if they had been paid bonuses

Findings

Our review of the above clauses leads us to conclude that:

- The paragraphs relate to issues of discussion, in relation to penalties and bonuses, and do not constitute enforceable clauses in terms of the contract; and
- The option to amend the contract to incorporate these penalty clauses is at the option of the parties even though there was more detailed definition of the scope of work, in terms of the affected projects, after the contract was signed.

Further discussions with Gerhard Bierman (TCP CFO) and Rudie Basson (Project Director) revealed that at one time or another the issue penalties was considered and discussed, but to their knowledge never implemented.

Based on the review and discussions with management the issue of penalties was never reviewed and the contract amended as envisioned by the above quoted paragraphs. Our other reviewed work, as noted under the section on preferential treatment, has however revealed that TCP did pay HMG bonuses and retention allowances without due consideration of penalties. Furthermore the issue of bonuses was dealt with as an amendment to the contract (referred to as amendment 4) without regard to penalties and the clause 11 as quoted above that "*the conclusion of a new contract, incorporating the parameters set out below with all the obligations and rights as contained in this contract being transferred in their entirety to the new contract*"

We submit that the payment of bonuses without due regard for the issue of penalties for the HMG JV EPCM contract is not necessarily in the best interest of Transnet.

Conclusion

Based on our findings that HMG prepared the contract we conclude that the gains and penalties clause was never implemented based on the provisions of the original contract. Instead HMG was paid bonuses by an amendment to the original contract without any reference to determine penalty clauses. We submit that Transnet has been prejudiced in this arrangement.

9.5 Overall Conclusion on the allegations concerning HMG

The allegations with respect to HMG, based on our categorisation, state:

- Preferential treatment was received by HMG from Transnet including, *inter alia*, that HMG started work before authorisation by the Board and prior to the signing of the contract;
- Smith signed the contract without the necessary authority to do so;
- HMG drafted the contract; and
- The contract provides for penalties in the event that the actual expenses exceeded the budget.

Our review and findings have revealed in terms of:

- Preferential Treatment to HMG.

(i) Preferential treatment at tender stage

- HMGJV was given preferential treatment at tender stage as Transnet prevented their only remaining competitor of the confined tender process, Murray and Roberts, from presenting as agreed before issuing the final evaluation in favour of HMG. It is submitted that there was sufficient time for Transnet to allow Murray and Roberts to do the requisite presentation before finalisation of the tender evaluation. Transnet's actions positioned HMG JV as the sole bidder and therefore as the guaranteed winner of the Transnet EPCM contract.

(ii) Discrepancies between the terms of HMGJV tender and contract terms

- Based on the review of the Option E contract as drafted by HMG and entered into by Transnet with the HMG JV, we submit that Transnet was prejudiced and put at a disadvantage. The terms and conditions of the contract and the subsequent amendments are in conflict with the corresponding terms and conditions in the NEC template, the tender conditions and the terms on HMG JV's proposal. The contract terms and subsequent amendments have the effect of increased fees paid to HMG JV as the EPCM contractor to the prejudice of Transnet as the terms and conditions of the contract were favourable to HMG JV; and

- Furthermore we submit that the additional and subsequent Option G, professional services contract, entered into by Transnet with HMG JV is irregular and outside of a confined or open tender process and has not been properly approved by the appropriate authority.

(iii) Factual findings regarding the allegation that HMG commenced work prior to receiving appropriate authorisation from the Board

- There is sufficient evidence based on documentary evidence to conclude that HMG started working from January 2006. HMG commenced work prior to a valid letter of instruction setting out the salient terms and conditions and also prior to the signing of a valid contract with Transnet. Therefore HMG received preferential treatment in that they earned fees as EPCM contractor contrary to Transnet's procurement policy.

(iv) Bernard Smith lacked authority to appoint HMG JV as EPCM contractor

- The HMG JV letter of appointment and the contract with HMG JV, as signed by Bernard Smith, was irregular as Bernard Smith did not have the appropriate authority to contract on behalf of Transnet within the delegated authority framework nor within the delegation granted to him by Van Niekerk. We submit that neither Bernard Smith nor Louis van Niekerk had the authority to appoint HMG as a consultant.

(v) Lack of Board authorisation for the appointment of HMG JV

- We submit that the appointment of HMG JV bypassed the governance structures, for instance the DAC, of Transnet in approving HMG as EPCM contractor. We further submit based on the value of the capital projects in which the EPCM contractor would be involved ie in excess of R700m, the magnitude of the potential EPCM fees, the importance of the EPCM concept and the strategic nature of the EPCM involvement in capital projects that the Board should have approved the appointment of the EPCM contractor. Should a case for Board approval not be accepted it is submitted that the EPCM contractor appointment bypassed the necessary governance structures within Transnet in any case. It appears therefore that the HMGJV did receive preferential treatment as they were allowed to commence work in January 2006 without proper authorisation from governance structures, contrary to Transnet procurement policies.

(vi) Possible non-compliance with Procurement Procedures

- We conclude that there were various procurement irregularities in the appointment of HMG in that: there was no authority to confine, neither Smith nor Van Niekerk had authority to appoint consultants in excess of R10m, the DAC was bypassed in the appointment, the GCE and the Board was also bypassed; and
- We submit that the contract had been deliberately left without a value, with no estimates of contract value, which may have allowed the persons concerned to bypass the governance structures. Given the nature of the contract, its value based on the project costs, could reasonably have been foreseen to be in excess of R1billion.

(vii) Preferential treatment: Retention and completion bonuses paid to HMG

- The agreement and implementation of a retention scheme for HMG is irregular and indicates preferential treatment to the HMG JV. The payment of retention bonuses in respect of staff of a service provider is not in line with best business practice or with the policies of Transnet. Furthermore the retention bonus scheme was implemented retrospectively, which is highly irregular;
- At no stage was the Retention Incentive Scheme presented to an Acquisition Council whether at TCP or Transnet Group, for authorisation. The TCP and Transnet governance structures were bypassed. The retention scheme was purportedly submitted to Remco for approval which transpired to be non-existent and also not in the scope of Remco to adjudicate on bonuses for non Transnet staff;
- The contract was irregularly amended by Neville Eve, who did not have the necessary authority, to pay Retention bonuses to the staff of its service provider; and
- Further indication that HMGJV was given preferential procurement is that the retention incentive scheme was not extended to AWP who were awarded the NMPP EPCM contract. In August 2010 Moira Moses declined to pay retention bonuses to AWP citing reasons of sensitivity on the NMPP project and funding challenges facing Transnet. Yet at the same time Moira Moses paid HMG JV R185.4m (agreement in 2008, paid commencing January 2009) in bonuses without taking cognisance of any funding challenges which makes the reasons for decline of the bonus to AWP doubtful.

(viii) Preferential Treatment: Interest paid to HMG in lieu of late payment of accounts

- Moira Moses, in her capacity as the CEO of TCP failed to put controls in place in order to avoid irregular and wasteful expenditure in the form of retention and completion bonuses and interest on late payments to HMG. This could have been avoided by TCP by adhering to governance structure and avoid a possible PFMA contravention and unnecessary financial loss to Transnet; and
- Section 57(c) of the PFMA provides that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due.

(ix) Preferential treatment: Mark up on rental for office accommodation for TCP

- We submit that this arrangement of the HMG JV charging TCP rental of office buildings at cost plus 10% is an irregular, fruitless and wasteful expenditure. The mark up on this office accommodation, which HMG leases on behalf of TCP at Building 9, Harrowdene and Building 8CC Johannesburg Country Club, Woodmead, resulted in unjust enrichment of HMG. The 10% mark up could have been avoided right from the start by TCP had taking up the lease on their own.

(x) Preferential Treatment: Overheads charged by HMG already covered by multiplier

- Based on our findings, HMG charged Transnet for overheads over and above that which are catered for in the multiplier that is added to the base staff rates. Transnet was/is being double charged by the HMG JV for overhead costs because overheads and profit were provided for on the multipliers whilst the HMG JV charged Transnet separately for all disbursements at cost plus 10%.

(xi) Preferential treatment: Additional work to HMG JV in respect of work outside of EPCM Contract (Option E) Scope

- Transnet afforded HMGJV an unfair advantage of providing them work, to the value of R1 418 003, outside of the Option E and G EPCM contracts. This work granted to HMG JV consisted of review work (on TCP projects in the budget range of R20m-R300m) not related to the EPCM work under Option E or G and was granted to HMG JV without proper tender and procurement procedures which would have given the opportunity to potential service providers to bid competitively; and

- Further, this review of projects within the budget range of R20m-R300m was paid for under the EPCM whereas it did not form part of the EPCM scope.

(xii) Preferential Treatment: Unreasonable hours charged by HMG JV assignees

- Based on our findings from the sample investigated hours charged by HMG JV and its assignees seem unreasonable as they are in excess of a normal work month hours. Further detailed work may be required by TIA in this regard.

(xiii) Preferential Treatment: Cash neutral position

- Based on our finding Bernard Smith – General Manager Capital Projects disadvantaged Transnet by entering into an agreement with HMG JV whereby the concept of a cash neutral position is applied. This cash neutral position is effectively payments in advance for work still to be completed based on estimates. This arrangement was not part of HMG JV's offer to Transnet at tender stage.

(xiv)Preferential Treatment: Introduction of Option G contract between HMG JV and Transnet

- Moira Moses entered into an irregular contract with HMG when she authorised the Option G contract. By entering into this contract she eliminated the process of tendering and complying with other procurement procedures and eliminated fair competition amongst service providers as *"ancillary work"* not related to the Option E EPCM contract was done by HMG. HMG JV was therefore afforded favourable treatment by Transnet.

(xv) Preferential Treatment: Waiver of requirement to have HMG pay indemnity insurance and paying it on their behalf

- HMGJV was given preferential treatment in that Transnet undertook to take professional indemnity insurance on HMG's behalf whereas the terms of reference of the request for proposal, HMG's response to proposal and NEC3 PSC template all require that the service provider shall maintain insurance for failure of the Consultant to use the skill and care normally used by professionals providing services similar to the services.

(xvi) Preferential Treatment: HMG contract relative to AWP contract – a comparison of selected terms and conditions

Our comparison between the HMGJV contract and AWP indicates that HMG JV was given preferential treatment, relative to AWP and other suppliers, in respect of the certain issues, *inter alia*,

- Retention bonuses granted to non-Transnet staff retrospectively to 2006;
- Scope of work – HMG has Option G in addition to Option E; AWP contract states a reduction in scope of work;
- Insurance by Transnet only for HMG and Transnet , whereas AWP and Transnet both pay in the AWP contract; and
- Length of retention period – HMG 156 weeks and AWP 102 weeks.

- **Factual findings regarding the allegation that Smith signed the contract without the necessary authority to do so on 8 March 2006**
  - Both Smith and van Niekerk exceeded their delegated level of authority. Bernard Smith did not have the appropriate authority to appoint the HMG JV as consultant as the value of the contract was beyond his limits in terms of Delegation Authority Framework. Further, Louis van Niekerk did not have the authority to delegate to Smith, as the HMG contract was also above his level of authority. We also submit that the delegation of authority given by Van Niekerk to Smith was after the signing date of the contract and does not apply retrospectively.

- **Factual findings regarding the allegation that HMG drafted the contract**
  - Based on documentary evidence we submit that HMG prepared the Option E contract. This contract prepared by HMG favours the HMG Joint Venture to the prejudice of Transnet given the terms contained therein;
  - Furthermore it is our view that the subsequent amendments to the contract create unfair advantage in favour of the joint venture as against other tenderers at the tendering stage. We submit that had the information amending the original contract been included in the joint venture's proposal, the joint venture's proposal might not have been selected as the most suitable one by Transnet;

- It is our prima facie view that the contracts entered into between Transnet and HMG JV and the amendments thereto are, in contravention of the provisions of section 50(1)(b) of the Public Finance Management Act, Act No. 1 of 1999 ("the Act"), not in the best interests of Transnet;
- Entering into the said contracts and the amendments on behalf of Transnet point to possible contravention of provisions of section 57(b) and (c) of the Act by the concerned officials. Section 57(b) of the Act provides that an official in a public entity is responsible for effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility. Further, section 57(c) of the Act provides that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due; and
- It is also our view that the amendments to the original agreement, Retention Procedure contract and Option G contract had been effected and or entered into without following proper procurement procedures as set out in the Detailed Procurement Procedures, 28 November 2006.

- **Factual findings regarding the allegation that the contract provides for penalties in the event that the actual expenses exceeded the budget**
  - Based on our findings that HMG prepared the contract we conclude that the gains and penalties clause was never implemented based on the provisions of the original contract. Instead HMG was paid bonuses by an amendment to the original contract without any reference to determine penalty clauses. We submit that Transnet has been prejudiced in this arrangement.

10 Conclusions

10.1 Fairness regarding the dismissal of Gama

The Public Protector's letters to Transnet dated 22 December 2010 and 7 February 2011 refers to the fairness regarding the dismissal of Gama. In considering the aspect of fairness, two areas were focused on, namely procedural and substantive fairness.

10.1.1 Procedural fairness regarding the dismissal of Gama

The overall conclusion from Webber Wentzel's findings as contained in this report is that no merit was found in the procedural issues upon which Gama relied - the so-called Second, Third and Fourth Issues, for reasons expressed in this report. The two allegations raised by the Public Protector do not disclose instances of procedural unfairness in relation to Gama either, for reasons expressed in our report. Webber Wentzel are satisfied, that Gama has been fairly treated by Transnet in terms of its Human Resources Policies and Procedures and Labour Law requirements, and that the processes followed during the investigation phase, in charging Gama, and the disciplinary process itself were fair and objective.

10.1.2 Substantive fairness regarding the dismissal or Gama - Similar fact matters reported and dealt with through the disciplinary process

Our review of the similar fact matters revealed that the matters that had been dealt with through the disciplinary process had been finalised, and the persons found responsible for the misconduct have been dismissed or have resigned.

From the information provided to us it appears that a consistent approach is applied by Transnet during the disciplinary process. It therefore appears that the disciplinary matter of Gama was treated in a consistent manner to other similar fact matters.

10.1.3 Substantive fairness in relation to the dismissal of Gama - Similar fact matters not dealt with through the disciplinary process

In respect of similar fact matters *not dealt* with through the disciplinary process, there is evidence of a number of projects where non-compliance with procurement procedures were condoned (as allowed by the procurement process) and persons responsible for non-compliance were not subjected to the disciplinary process. In this regard, reference is made to the matters concerning VAE and Oliver Wyman, condonations granted at TFR (2007 to 2010), TCP (2008 to 2010) and an internal audit report of Oct 2008 dealing with the tender process at Transnet.

10.1.3.1 VAE

Approval of the Capex and Copex spend

The approved budget of TFR was more than sufficient to cover R960 million contract of VAE for the acquisition rails, maintenance thereof, etc. However, in spite of the adequacy of the approved budget, Van Niekerk appears to have acted beyond his delegated authority by approving the Capex and *Copex* spend in the amount of R960 million as he was authorised to approve amounts up to but not exceeding R200 million for Capex in the approved budget/plan to commence projects.

Increases in the contract value

The then COO (Van Niekerk) and then GM:SSM (Van Vuuren) did not have the necessary delegated authority to approve amendments of the VAE contract values

Extension of the contract

- Resolutions of TFRAC, adopted in a meeting held on 15 December 2009, were not implemented;
- The negotiating team did not act in the best interest of Transnet in that it focused its negotiations with VAE only on price rather than also ensuring that procurement related processes were complied with as the contract was due to expire on 30 September 2009. The team contravened section 2.5 of the PPM by confining the services of VAE without obtaining prior approval from the relevant delegated authority;
- Laher and the SSM team, Thompson and his finance team acted beyond their delegated authority by extending the contract to a further three year period without obtaining prior approval, thereby contravening section 2.8 of the PPM;
- Laher and the SSM team, Thompson and his finance team contravened the provisions of the PPM and DPP by extending the contract of VAE by pursuing the extension route when such was no longer an option;
- Laher and the SSM team, Thompson and his finance team and the negotiating team did not table the submission for regularising VAE within a reasonable time upon the occurrence of the non compliance, thereby contravening the provisions of the PPM Directive 03/2010 on condonations;

- Laher and Gary Pita did not act in the best interest of Transnet by not ensuring that all procurement related issues regarding VAE were regularised, prior to TFR procuring goods from VAE after the contract expired;
- Thompson, the CFO of TFR, who is also member of TFRAC did not act in the best of Transnet in that he after he signed the condonation submission of VAE in May 2010 he did not ensure that the matter of VAE was regularised within reasonable period, given the fact that the procurement section of TFR reports to him. Since expiry of the contract in 2009, the confinement and award of business to VAE, has to date still not been signed by the GCEO, despite the resolution taken by TFRAC, which he sometimes chaired, in December 2009; and
- The statement by the CFO of TFR that he was not made aware of the state of the VAE contract until this was tabled at TFRAC during November 2010 is inconsistent with the documentation in possession which reflects that CFO of TFR signed the condonation submission during May 2010.

Payment of invoices

- The continued procurement of goods from and payment of VAE even after expiry of the 2006 contract and while no prior approval was sought from the delegated authority, constitutes a contravention of Section 51 of the PFMA;
- The mitigation of commercial benefit cannot be used to justify the flagrant disregard of policy and the law; and
- Laher and the SSM team and Thompson and his finance team did not act in the best interest of Transnet in continuing to procure from and effecting payments to VAE while the contract of VAE was not approved by the delegated authority, thereby rendering the payment to VAE irregular.

10.1.3.2 Oliver Wyman

Involvement of TFR Exco in the appointment of Oliver Wyman

We support the view of Messrs Thomson and MacDonald that it was not necessary for the appointment of Oliver Wyman to be approved by the TFR Exco, as the appointment was done by Commercial and Freight Corridors and therefore followed Group procurement procedures in accordance with the PPM.

Possible duplication of work by Oliver Wyman

According to MacDonald, the work performed by Oliver Wyman was not a duplication of previous work but rather built on previous work performed by Oliver Wyman for Transnet and the coal mining industry. Further needs identified by Eskom, Waterberg and Botswana were also included in Oliver Wyman's appointment. The review and consolidation of previous studies was therefore required to enable Oliver Wyman to further advice Transnet on the expansion of the coal lines to meet industry's needs.

Procurement processes followed in the appointment of Oliver Wyman

It appears that the appropriate procurement processes were not followed in the appointment of Oliver Wyman during August 2010. Although MacDonald, as Acting GCE: Commercial and Freight Corridors, was authorised to approve the confinement and appointment of consultants, this was done after Oliver Wyman commenced with the work. The confinement was condoned by Pita because it was noted that Oliver Wyman commenced work prior to the application for confinement. Pita was authorised in terms of a sub-delegation from Singh to condone the confinement of the procurement process. The condonation, in terms of the PPM, therefore served to regularise the confinement process followed by MacDonald.

It should be noted that the confinement memorandum, dated 12 May 2010, in respect of the condonation of a confinement do not provide further clarification on the process of condonation, except to state that prior authority for confinement should have been sought from the relevant DAC or delegated authority.

Work performed by Oliver Wyman on Regulatory Affairs

Our consultation with Ms Lund indicated that Oliver Wyman was appointed to provide Transnet with specific policy and regulatory services. She was of the view that Modise did not have the appropriate skills and expertise to perform these services. Our consultation with Modise indicated that she was of the view that she had the necessary skills, although she acknowledged that she did not have relevant prior experience. She also informed us that she should have been given the opportunity to perform the relevant work with the assistance of an external consultant (such as Oliver Wyman), if and where required.

10.1.3.3 Substantive fairness in relation to the dismissal of Gama - Similar fact matters dealt with through the disciplinary process

Our review of the similar fact matters revealed that the matters in respect of which were referred to disciplinary procedures and were finalised, have resulted in dismissals or resignations. From the information provided to us it appears that a consistent approach is applied by Transnet during the disciplinary process. It therefore appears that the disciplinary matter of Gama was treated in a consistent manner to other similar fact matters which had been referred to a disciplinary procedure.

10.1.3.4 Substantive fairness in relation to the dismissal of Gama - Similar fact matters not dealt with through the disciplinary process

Application of the condonement process

During the course of our investigation we noted that the process of applying for and the granting of condonations has been an accepted practice at Transnet and its operating divisions for many years. We evaluated the application of the condonation process against a directive (May 2010) issued by Gary Pita at Transnet Group entitled "*PPM Directive 3 – 2010 Condonements*" which is the most extensive written source on the practice of condonement we found at Transnet. This directive, we submit, even though written in May 2010 would give a fair view of the condonation practice prior to 2010. This directive address *inter alia* matters relating to the format of a condonation application; the possible action for non compliance including the line managers role, the role of DAC in the condonation process, the discretionary role of the Group CFO and CE in granting the condonation; reasons the condonations is applied for; time to apply for condonations and the possible instituting of disciplinary actions against staff members.

Condonations at TFR (2007 to 2010) and TRCP (2008 to 2010)

Our findings, in summary:

- In the context of TFR, the condonements comprised procurement irregularities *inter alia* contracts not extended correctly, contracts amended without the appropriate authorisation, issuing of tenders for a five year contract contrary to the limited two year period per PPM, condonements to pay for the security services rendered without contracts in place and condonations for the confining and award of business;

- From our review of TFR and TCP condonations we noted that there is no prescribed period within which to apply for condonements due to the fact that a *"reasonable time"* concept is not defined in the DPP/PPM and Directive 3 – May 2010. We further noted that no specific time frame is applied in the application for and granting of condonations;
- For condonations reviewed at TFR and TCP we noted no instances of disciplinary action taken against any of the staff members for the condoned irregularities; and
- For the relevant procurement matters, of similar nature, as reviewed under the reported procurement irregularities by TIA we note that management responses under the management comment section of the report does not indicate any intention to investigate the matters in order to take the necessary disciplinary steps.

We would submit that the practice on condonation at Transnet in general is more in line with the dictionary definition of the verb *"condone"* in that irregularities on the part of personnel are treated as *"forgivable"* or *"disregarded without protest or censure."*

Accordingly we submit that with regard to the Gama matter and a review of similar fact matters, the disciplinary action instituted for the committed irregularities appear rather to be the exception rather than the rule. We further note that the disciplinary process is not consistently applied to all transgressions but rather that a process of condonation is consistently applied with no disciplinary action being taken against offenders. These observations are in line with Gama's view that *"he (*Gama*) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges"*.

The dismissal of Gama

The facts regarding the dismissal of Gama indicate the following:

- Certain whistle-blowing reports regarding the matters for which Gama was dismissed was received by senior management within Transnet;
- Ramos, the line manager of Gama, referred the matters for investigation;
- After the investigation reports were issued, the matters were addressed through the implementation of a disciplinary process;

- There is no evidence of Ramos, as the line manager of Gama, having requested for a condonation in terms of the condonation memorandum as described above regarding the matters which were subject to investigation; and
- There is evidence that these matters were actioned in terms of Transnet's disciplinary procedures.

Based on the above, one may conclude that condonement was not requested by Ramos (Gama's direct line manager) as these matters were considered serious enough to warrant the implementation of disciplinary action, as indicated in the condonation memorandum. Gama has, however, made the claim that there are other senior persons within Transnet who have also contravened Transnet's procurement policy and procedures, and they were provided with the opportunity to apply for condonation in accordance with the PPM and Directive, with no disciplinary action being taken.

We found no evidence that Gama was afforded the opportunity to submit a condonation before disciplinary actions were taken as there is no regulation of the concept of *"reasonable time"* to submit condonations nor is there application of disciplinary measures against employees granted condonations. In terms of the procurement memorandum dated 12 May 2010 a process in respect of condonation requires a line manager to submit a request for condonation to the relevant authority. The memorandum does not indicate that a person responsible for non compliance must be afforded the opportunity to apply. The memorandum appears to be silent on who the line manager is who may submit a request for condonation (the line manager of the person responsible for non compliance or the line manager himself/herself who is responsible for non compliance).

The VAE and Oliver Wyman matters suggest that this claim by Gama does have merit and that his matter was not consistent to similar matters where non-compliance with procurement procedures were evident, and where delegations of authority were exceeded. These two matters are supported by the HMG matter where non-compliance to procurement procedures and delegations of authority were exceeded resulting in HMG receiving preferential treatment and no disciplinary action has been taken. This is further supported by the E&Y Internal Audit Report on the Tender Process followed at Transnet Freight Rail, issued during October 2008, where audit findings highlighted senior employees having not complied with procurement procedures and no evidence was provided that the employees responsible for non-compliance were subjected to Transnet's disciplinary procedures.

10.2 Mega projects

With reference to the allegation that governance was flouted and irregularities having occurred in respect of payments made being in excess of the approved budget on five mega projects, our analysis of the level 4 detailed reports revealed the following:

10.2.1 NCT

- Our review raised a concern that management may not be properly and or timeously informed of the proper monthly costs on mega projects due to the fact that the snapshot reports initially provided did not reconcile with the level 4 reports and explanations for the differences were only provided after significant delays;
- Our review of the project budget approvals indicated that the overall project budget was properly approved by CAPIC and the Board. We noted that no change to the approved project budget over the review period and no governance were flouted in terms of the project budget approval;
- The review of the monthly level 4 reports revealed a flouting of governance in the following areas:
  - Instances where the package line items commitments and actual expenditures exceeded the budget of the line items concerned but the package budget totals were not exceeded. These package line item variances, *per se*, are not a flouting of governance as the package budget totals were not exceeded. The variances on the line items were not timeously corrected through authorised budget transfers. The level 4 detailed reports on IPAS were corrected in the March 2011 reports for items dating back months before;
  - The HMG retention bonus/allowance (package 95/Z004) commitment and expenditure amounts exceeded the budget for this package. The budget authorisations noted indicate that the authorisation of budget transfers were only signed off in May 2011 whilst the package line item variances were long outstanding and the line item budget corrections performed in May 2011. The budget authorisations therefore came long after the package line item variances were noted and after the level 4 detailed reports were corrected; and

- We have noted 6 instances on the mega projects condonations where Compensation Events or PMI's have been issued on certain packages/contracts that caused the original contract budgets to be exceeded by more than the 10% permissible amount. NAC/MPAC condoned the 6 cases where the original contract budget values were exceeded by more than the permissible 10% variance. There were no recommendations on the MPAC minutes that the appropriate persons be disciplined for these unauthorised activities.

10.2.2 DHEW

- The approved warrants were authorised by CAPIC and the Board. For DHEW there were no changes to the approved warrant value subsequent to May 2009;
- The review of the total current approved budget compared to the FFC has revealed that the budget is higher than the FFC at December 2010 and that no significant variances were recorded;
- The review of the monthly level 4 cost reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;
- At the time of writing this report, we identified certain package line items where the commitments and actual expenditure exceeded the current budget. These items were adjusted and corrected during the re-baselining of the budget. These items were addressed and corrected by HMG; and
- The line items of 95/Z009/1110, 95/Z009/1111, 95/Z009/1110 95/Z009/1112, 95/Z009/1113, 95/Z009/1114, 95/Z009/1115 and 95/Z009/1116 with reference to HMG Retention allowance, however, have not been corrected. Hamilton has indicated that they were waiting for instruction from TCP as to the budget for the HMG Retention allowance. However, during handover of the project, they have still not been advised. Thus a budget amount has not allocated as of yet by TCP at the date of writing the report. This line item indicates an expenditure of R4 804 231.

10.2.3 CTCT

- From our review of the project budget approvals we noted that the initial overall project budget and subsequent increases, of more than 25% or more than R10m of the original budget, were properly approved by CAPIC and the Transnet Board and therefore no governance was flouted in terms of the project budget approval;
- A review of the level 4 reports from 2007 to Dec 2010 revealed instances where the package line items' actual expenditures and commitments exceeded the approved budget of the line items. The budget transfers to correct these variances were properly approved. It should be noted that the variances in the package line items however do not constitute a flouting of governance as the package budget totals were not exceeded on the project; and
- Our review revealed that on the HMG retention bonuses or allowances, commitments were made and actual expenditure incurred without an approved budget. The authorisations of budget transfers were only signed off in May 2011 whilst the package line item variance was outstanding for a long time. Governance was therefore flouted in this area.

10.2.4 NMPP

- The approved warrants were authorised by CAPIC and the Board. For NMPP, the increase in the budget, dated August 2008, was noted in e-mail correspondence as the necessary submissions and minutes reflecting this approval could not be found;
- The review of the total current approved budget compared to the FFC has revealed that the budget was equal to the FFC as at December 2010;
- The review of the monthly level 3 cost reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget; and
- The review of the package line items' commitments and actual expenditure against the current budget has revealed instances where the current budget has been exceeded. The budgets were subsequently increased and approved through Project Change Notices.

10.2.5 Phase 2 of the Orex feasibility study

- The warrants were approved by CAPIC. No further approvals were necessary.

- The review of the monthly level 4 reports revealed that at no point did the total project commitment and total actual expenditure exceed the total current approved budget;
- The review of the total current approved budget compared to the FFC has revealed that the budget is higher than the FFC at December 2010 and that no significant variances were recorded; and
- The project was finalised within budget.

10.3 HMG

- **Preferential Treatment**

  There is sufficient evidence to conclude that HMG has received preferential treatment from the appointment as successful bidder up to and including the management of the contract and also subsequent amendments to the initial contract. The preferential treatment of HMG occurred in the following areas of the overall contract:

  - *Preferential treatment at tender stage* – Transnet prevented the sole remaining HMG competitor Murray and Roberts to make presentations as agreed and finalised the tender evaluation without this representation. Transnet effectively eliminated the HMG competition and allowed HMG to be the sole bidder;
  - *Discrepancies between the terms of tender offer and contract* – our review indicates that the terms and conditions of the contract and the subsequent amendments are in conflict with the corresponding terms and conditions in the NEC template, the tender conditions and the terms on HMG JV's proposal;
  - *HMG commenced work prior to receiving appropriate authorization* – there is sufficient evidence to indicate that HMG commenced work in January 2006 prior to a valid letter of instruction setting out the salient terms and conditions and also prior to the signing of a valid contract with Transnet. HMG therefore earned EPCM fees prior to a proper appointment;
  - *Bernard Smith lacked authority to appoint HMG JV as EPCM contractor* - We submit that neither Bernard Smith nor Louis van Niekerk had the authority to appoint HMG as a consultant;

- *Lack of Board authorisation for the appointment of HMG JV* - We submit that the appointment of HMG JV bypassed the governance structures of Transnet. No evidence exists that the DAC, OPCO or the Board authorised the appointment of HMG;

- *Possible non-compliance with Procurement Procedures* – Based on evidence we submit that there were various procurement irregularities in the appointment of HMG including lack of authority to confine, lack of authority of Smith and Van Niekerk to appoint consultants in excess of R10m, the bypassing of the DAC, the GCE and the Board. We submit that the contract had been deliberately left without an estimated contract value, which would have allowed the persons concerned to bypass the governance structures;

- *Retention and completion bonuses paid to HMG JV* – Based on evidence we submit that the agreement and implementation of a retention scheme for HMG, to the value of some R185.4 million, is irregular. The payment of retention bonuses in respect of staff of a service provider is not in line with best business practice or with the policies of Transnet. No other Transnet suppliers, including AWP the other EPCM contractor, were offered the same bonus scheme. No evidence was found that this scheme was ever approved by any of the Transnet governance structures like DAC or the Board. Furthermore the retrospective implementation of the retention bonus scheme from 2006 is highly irregular;

- *Payment of interest to HMG JV for late payment of accounts* – we submit that the R11.5 million in interest charged by HMG that has been verified to invoices from June 2009 and for 2006, under the Hatch name, was a preventable occurrence. Of the R11.5 million some R6.3 million has actually been paid to date. Furthermore TCP has provided a schedule that indicates the total interest to 21 April 2011 amount to R20.1m. We submit that the Section 57(c) of the PFMA may have been contravened in that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

- *Mark up on rental on office accommodation for TCP* – based on evidence we submit that the office rental charge by HMG JV to Transnet, for office buildings rented on Transnet's behalf, at cost plus 10% is an irregular, fruitless and wasteful expenditure. We submit that Transnet could have entered into a lease by itself and pay the lease at the agreed cost with the lessor;

- *Charging of overheads by HMG JV* – Evidence suggests that HMG charged Transnet for overheads over and above that which was catered for in the multiplier that is added to the base staff rates when invoicing occurs. Transnet was/is being double charged by the HMG JV for overhead costs because overheads and profit are provided for in the multipliers whilst the HMG JV charged Transnet separately, and in addition to the multipliers, for all disbursements at cost plus 10%;
- *Granting of work to HMG JV outside of EPCM contract* - Transnet afforded HMGJV an unfair advantage by providing them review work, to the value of R1 418 003, outside of the EPCM contract. This work consisted of reviewing aspects of projects in the R20m to R300m budget range as managed by TCP. This work was granted to HMG JV without following proper tender and procurement procedures which would have given the opportunity to other potential service providers to bid competitively;
- *Unreasonableness of hours charged by HMG JV* - Based on evidence from a sample of hours charged by HMG JV it appears that hours in excess of a normal work month hours were charged. Further detailed work may be required by TIA in this regard to verify the overall extent of the problem;
- *The "cash neutral position" concept* – Evidence suggests that Bernard Smith disadvantaged Transnet by entering into an agreement with HMG JV whereby the concept of a cash neutral position is applied. This cash neutral position is effectively payments in advance for work still to be completed based on estimates. This arrangement was not part of HMG JV's offer to Transnet at tender stage;
- *The option G contract between HMG JV and Transnet* – Evidence suggests that Moira Moses entered into an irregular contract with HMG when she authorised the Option G contract whereby additional work is granted to HMG by means of task orders. By entering into this contract she eliminated the process of tendering and complying with other procurement procedures and consequentially eliminated fair competition amongst service providers;
- *Waiver of payment by HMG JV for Professional indemnity insurance and payment thereof by Transnet* – Evidence suggests that Transnet undertook to take out professional indemnity insurance on HMG's behalf whereas the terms of reference of the request for proposal, HMG's response to the proposal and NEC3 PSC template all require that the service provider shall incur the cost of its own insurance; and

- Preferential terms in the HMG JV EPCM contract in relation to the AWP EPCM contract - Evidence suggests that in our comparison between the HMGJV contract and the AWP contract indicates that HMG JV was given preferential treatment, relative to AWP. The issues include, *inter alia*, *retention bonuses* granted to non-Transnet staff retrospectively to 2006 with no bonuses offered to AWP or other suppliers; *scope of work* – HMG has Option G in addition to Option E; AWP contract states a reduction in scope of work; *insurance paid* for by Transnet (and not HMG) for HMG and Transnet, whereas AWP and Transnet both pay for the insurance; *length of retention period* with HMG 156 weeks and AWP 102 weeks.

- Factual findings regarding the allegation that Smith signed the contract without the necessary authority to do so on 8 March 2006.

  - Evidence suggests that both Smith and van Niekerk exceeded their delegated level of authority. Bernard Smith did not have the appropriate authority to appoint the HMG JV as consultant as the value of the contract was beyond his limits in terms of Delegation Authority Framework. Further, Louis van Niekerk did not have the authority to delegate to Smith, as the HMG contract was also above his level of authority. We also submit that the delegation of authority given by Van Niekerk to Smith was after the signing date of the contract and does not apply retrospectively.

- *Factual findings regarding the allegation that HMG drafted the contract*

  - Based on documentary evidence we submit that HMG prepared the Option E contract. This contract prepared by HMG favours the HMG Joint Venture to the prejudice of Transnet given the terms contained therein;

  - Furthermore it is our view that the subsequent amendments to the contract create unfair advantage in favour of the joint venture as against other tenderers at the tendering stage. We submit that had the information amending the original contract been included in the joint venture's proposal, the joint venture's proposal might not have been selected as the most suitable one by Transnet;

  - It is our prima facie view that the contracts entered into between Transnet and HMG JV and the amendments thereto are, in contravention of the provisions of section 50(1)(b) of the Public Finance Management Act, Act No. 1 of 1999 ("the Act"), not in the best interests of Transnet;

- Entering into the said contracts and the amendments on behalf of Transnet point to possible contravention of provisions of section 57(b) and (c) of the Act by the concerned officials. Section 57(b) of the Act provides that an official in a public entity is responsible for effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility. Further, section 57(c) of the Act provides that an official in a public entity must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due; and
- It is also our view that the amendments to the original agreement, Retention Procedure contract and Option G contract had been effected and or entered into without following proper procurement procedures as set out in the Detailed Procurement Procedures, 28 November 2006.

• Factual findings regarding the allegation that the contract provides for penalties in the event that the actual expenses exceeded the budget

- Based on our findings that HMG prepared the contract we conclude that the gains and penalties clause was never implemented based on the provisions of the original contract. Instead HMG was paid bonuses by an amendment to the original contract without any reference to determine penalty clauses. We submit that Transnet has been prejudiced in this arrangement.

KPMG Services (Pty) Limited **Nkonki Inc**

Per: Kevin West **Per: Sindi Zilwa**

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MINUTES OF SPECIAL MEETING NO. /1 OF THE BOARD OF DIRECTORS OF TRANSNET LIMITED HELD ON 25 JANUARY 2011 AT 13:42 AT KLOOI 'ICHT LODGE, KROMDRAAI ROAD, MULDERSDRIFT, JOHANNESBURG

Resolution No/ For Attention

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER**

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. He welcomed all the new appointees to the Board, and wished them well in the execution of their fiduciary duties for the Company.

1.1 **Present**

Mr ME Mkwanazi	Chairman
Mr MA Fanucchi	Non-Executive Director
Mr HD Gazendam	Non-Executive Director
Ms NBP Gcaba	Non-Executive Director
Mr MP Malungani	Non-Executive Director
Mr BD Mkhwanazi	Non-Executive Director
Ms T Mnyaka	Non-Executive Director
Ms N Moola	Non-Executive Director (Partial attendance)
Mr MP Moyo	Non-Executive Director
Mr IM Sharma	Non-Executive Director
Ms E Tshabalala	Non-Executive Director
Ms DLJ Tshepe	Non-Executive Director
Prof JE Schrempp	Non-Executive Director (Partial attendance)
Mr IB Skosana	Non-Executive Director
Mr A Singh	Acting Chief Financial Officer

1.2 **In attendance**

Ms ANC Ceba	Group Company Secretary

1.3 **Apologies**

Ms NR Ntshingila	Non-Executive Director

1.4 **Adoption of Agenda**

The agenda was adopted with the following re-arrangements and additions under Item 4 and 5:
4.1 Public Protector matters;
4.2 Branch Line Concessions;
4.3 Joint Venture for the Port of Ngqura;
4.4 TSDBF Bonus;
4.5 Appointment of members to the TSDBF;
4.6 Board Committee Mandates;
4.7 Proposed Article amendments;
4.8 Appointment of members to the Board Committees;
4.9 Dig out port; and
5.1 Ethics and Spokesperson on Board matters.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures for the venue were conducted earlier in the day.

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3 **DIRECTORS' DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

The Chairman requested Mr Singh to give the Board a report on the Funding Plan and the Neotel matter.

3.1 **Funding Plan**

3.1.1 Mr Singh advised the Board on the Company's funding strategy in the last three years and the projections for the next five years. He stated that the Company's credit rating was A3/BBB+. He took the Board through the Company's Funding Strategy.

3.1.2 He stated that the Company had secured PFMA approvals for all the financial borrowings. He informed the Board that most of the Company's debt will mature in 2015, and added that the Company will then re-finance the debts during the 2014/15 financial year.

3.1.3 Mr Singh indicated that the funding requirements for the next three years were approximately R41 billion. He advised the Board that the Company will seek approval to increase the Domestic Medium-Term Note from R30 billion to R60 billion.

3.1.4 Ms Moola advised the Company to consider listing in other markets, e.g. Middle East, Asia and Japan. Mr Sharma requested the Company to consider establishing a fund as the current cost of capital is too high. Mr Singh

The Board noted the presentation.

3.2 **Neotel matters**

3.2.1 Mr Singh advised the Board that Neotel had a service level agreement to host the Company's signalling network and the email services. He indicated that Neotel had been rendering poor services to Transnet, and this had necessitated Neotel to be placed on notice to improve its service levels to the Company.

3.2.2 Mr Singh advised the Board that Neotel's contract is due for renewal in April 2011. He indicated that Neotel will be afforded the right of first refusal, and further stated that the Company will consider other available options and make recommendations to the Board.

The Board noted the report.

Ms Stephen and Mr Mapoma joined the meeting.

4 **MATTERS FOR DISCUSSION/APPROVAL**

4.1 **Public Protector matters**

4.1.1 The Chairman welcomed Ms Stephen and Mr Mapoma to the meeting, and requested feedback post the Corporate Governance and Nominations Committee on 7 January 2011. Ms Stephen introduced Mr Mapoma to the Board. She further confirmed that the amended brief went out to Deneys Reitz post the Corporate Governance and Nominations Committee on 7 January 2011.

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4.1.2 Mr Mapoma took the Board through a presentation on the Public Protector matters and highlighted, amongst others, that complaints were received on 22 December 2010 on the alleged unfairness of the disciplinary proceedings against Mr Siyabonga Gama, over-expenditure on TCP projects and the process of allocation arbitrators for the Bargaining Chamber.

4.1.3 Mr Mapoma stated that Group Legal was in the process of compiling the required documentation for the Public Protector. He advised that the Company had engaged the services of a law firm, Deneys Reitz, and two independent audit firms (Nkonki and KPMG) to assist in investigating the allegations against Transnet. He indicated that both teams were still reviewing the documentation submitted to them. He confirmed that Deneys Reitz was handed over transcripts of Mr Gama's case and all related documentation.

4.1.4 He advised the Board that there was also a document on "*Procurement Irregularities at Transnet*" and gist of the allegations contained within those documents was that there had been serious instances of project budget overruns, flouting of good corporate governance, and irregularities regarding tenders, including the renewal of the Ernst & Young contract.

4.1.5 Ms Mnyaka stated that "*fairness in treatment of Executives*" can only be determined by investigating what sanctions were imposed on other executives that commit similar offences to Mr Gama's offence. Mr Mapoma stated that information that was given to Deneys Reitz was supplemented with information from Human Resources on allegations against other Executives.

4.1.6 The Chairman stated that he was currently occupied with more than 30 cases with similar allegations as those levelled against Mr Gama by the Company. He indicated that there was evidence that there is a culture of condonation of exceeding delegated authority within the Company.

4.1.7 Mr Malungani requested the Board to engage on the Public Protector issues once verification of the allegations had been completed. Mr Skosana added that the Company must submit the requested information to the Public Protector. Mr Mkhwanazi cautioned that the Company should be as transparent as possible when dealing with the Public Protector.

4.1.8 The Chairman assured the Board that the Company was co-operating fully with the Public Protector. He informed the Board that he had a discussion with Mr Gama on 22 January 2011 on a proposed settlement agreement. He advised the Board that the matter will be deliberated on at the Corporate Governance and Nominations Committee, and then recommended to the Board for approval on 16 February 2011.

4.1.9 Ms Tshabalala stated that the Board needed a presentation on Mr Gama's disciplinary proceeding from its inception, outlining the process followed to-date. — Ms Stephen/ Mr Maharaj

4.1.10 Mr Mapoma informed the Board that the Public Protector matter on the Bargaining Council had been finalised and the response was submitted to the Public Protector on 15 January 2011.

4.1.11 Ms Tshepe stated that the Internal Auditors would be conflicted if they were to investigate allegations against their firm. Ms Stephen indicated that the work done by Ernst & Young was being verified by the appointed independent audit firms. She further added that it will be difficult to procure services of auditors that have not rendered services to Transnet in the past. She also confirmed that the lawyers and auditors that were working on the Public Protector matter were not conflicted and had never worked on the matter

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previously.

4.1.12 Mr Mapoma stated that extracts from the Group Audit Committee meetings on the renewal of the Audit Contract in 2009 were submitted to the independent audit firm for consideration. Mr Sharma requested the Company to investigate the individuals that made the decision to extend the Ernst & Young Contract in 2009.

4.1.13 Mr Singh indicated that he was part of the Ernst & Young renewal process in 2009. He took the Board through the provisions of the Master Agreement indicating the clause that stated the requirement to negotiate an extension to the contract 18 months before the end of the contract. He stated that a proposal to extend the contract was submitted to the Group Audit Committee for consideration, and added that a mandate was secured. He took the Board through the process that was followed, including, amongst others, preparing a motivation for a confinement process, which was approved. Mr Singh indicated that the contract was renewed on the same terms and conditions as the initial contract except for the rate.

4.1.14 Ms Tshabalala requested that Mr Singh be recused from the Board discussions on the Ernst & Young renewal process as he was part of Management that participated in the renewal process. She indicated that Mr Singh can be interviewed by the investigators to give perspective to the case.

4.1.15 Mr Skosana requested that Mr Singh should not be recused from the Board discussions on the Ernst & Young renewal process as he was a Director of the Company. Ms Mnyaka indicated that Mr Singh was conflicted on the matter. Mr Malungani requested the investigators to expedite the matter as the Board needed to deliberate on the report.

4.1.16 Mr Mapoma requested additional time from the Board to respond to the allegations fully. He indicated that a report will be submitted to the Corporate Governance and Nominations Committee at its next meeting. Ms Stephen

The Board noted the presentation.

Mr Mapoma was excused from the meeting.

4.2 **Branch Line Concessions**

4.2.1 Ms Stephen took the Board through the presentation. She informed the Board that the Shareholder Minister had requested three lines be considered for concessioning before the end of the 2010/11 financial year in support of the New Growth Path. She informed the Board that an Expression of Interest exercise was conducted on different lines to determine interest.

4.2.2 Ms Stephen sought the Board's approval for the clustering of three lines, namely Kroonstad/Klerksdorp Branch Line Cluster (consolidated), the Douglas – Belmont Branch Line and the Empangeni – Nkwalini Branch Line.

4.2.3 Mr Skosana indicated that the submission lacked detail on the impact that the proposed concession will have on TFR employees. Ms Stephen informed the Board that none of the TFR employees will be concessioned, and added that the affected employees will be re-absorbed into the Company. She informed the Board that there was currently no policy on the concessioning arrangement, and at this point, the Company was uncertain whether the interest parties would provide their own rolling stock for the activity.

4.2.4 Mr Gazendam cautioned the Board on the potential labour issues that may emanate from the proposed concession plan. Mr Mkhwanazi enquired if the Company had conducted a feasibility study that indicated whether cargo will move from road to rail.

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4.2.5 Ms Mnyaka stated that it was difficult for the Board to make a decision as the Company has not provided sufficient detail on the impact that the proposed concessions will have on TFR's operations.

4.2.6 Mr Malungani requested the Board not be hasty in taking the decision and that it should be empowered with the Expression of Interest that details the Company's requirements from the private operators for concessioning.

4.2.7 The Board requested Ms Stephen to provide more detail on the following:

- The proposed operating model for the lines that were proposed for concessioning;
- Funding implications to get the proposed lines ready for concessioning;
- Interfaces that the proposed concession lines will have with the TFR network;
- The impact that the interfaces will have on the core network;
- Reports on the Feasibility studies that were conducted in relation to the proposed concession; and
- A presentation on the process that was undertaken up to the issue of the Expression of Interest.

The Board **RESOLVED** that the Branch Lines will be resubmitted on 16 February 2011 after submission to the Group Acquisition and Disposal Committee. 11/1/1

Ms Stephen was excused from the meeting.

4.3 **Joint Venture for the Port of Ngqura**

4.3.1 Mr Singh took the Board through the submission as contained in the Board Induction pack that was discussed during the Board Induction session earlier in the day.

4.3.2 He took the Board through the background and stated that the Port of Ngqura was created as a transhipment hub. He indicated that the Company was at a stage where it is comfortable to issue an Expression of Interest on the proposed Joint Venture for the Port of Ngqura. Mr Singh confirmed that PFMA approval will be sought on the matter. Mr Singh

The Board **RESOLVED** that it approves the Joint Venture for the Port of Ngqura. 11/1/2

4.4 **Proposed Articles amendments**

4.4.1 Ms Ceba took the Board through the submission as contained in the pack. The submission was taken as read. She gave the Board background on the matter, and indicated that DPE was in the process of standardising the Articles of Association for all its SOEs. She stated that the proposed wording was chosen from the SAA Article of Association that was circulated by DPE for consideration when reviewing the Articles of Association.

4.4.2 The Chairman stated that the proposed amendment was a hybrid situation that existed in the past (interaction between Shareholder Minister and the Board before the appointment of the GCE). He confirmed that the Board will not be required to "*rubber-stamp*" the process.

4.4.3 The Chairman stated that the Board, through the Corporate Governance and Nominations Committee, will do the leg-work in the succession process and will rank the preferred candidates in order of preference, for consideration by the Board. He stated that the succession process information will then be submitted to the Shareholder Minister for approval, and the Shareholder Minister will have a full right to interview the three proposed candidates, if he so wished.

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4.4.4 Mr Moyo enquired as to what will happen if the Shareholder Minister did not support the Board recommendation. Ms Moola encouraged the Chairman to ascertain the process, and Mr Malungani emphasised the importance of clarifying where the decision to appoint the GCE will be taken.

4.4.5 Prof Schrempp indicated that it will not be a challenge if the Shareholder Minister appointed the GCE, but he added that the Articles of Association needed to be clear on where the power to appoint the GCE resided.

Ms Moola and Prof Schrempp were excused from the meeting at 16:04.

4.4.6 Mr Moyo indicated that the proposed Articles of Association did not promote the spirit of the Guideline that was issued by the Shareholder Minister in December 2010. He further made a counter proposal for the amendment reading "*The Shareholder Minister appoints the GCE after recommendation from the Board*", which was seconded.

4.4.7 Ms Gcaba was of the view that to submit "three names" as proposed in the Guideline was not necessarily appointing the GCE, and Ms Mnyaka indicated that the Board will then need to endorse the Shareholder Minister's preferred candidate. Mr Skosana indicated that in his view, the substance of the proposed Article 69(b) was a joint activity by the Board and the Shareholder Minister. He urged the Board to consider the proposed pipeline carefully.

4.4.8 Mr Malungani did not support that the two proposed motions be subjected to a vote. Mr Gazendam advised the Board to endorse the proposed wording for Article 69(b), and further request an engagement with DPE on appropriate wording for Article 69(b). Ms Ceba

4.4.9 Mr Mkhwanazi indicated that the Board was unanimous that the Shareholder Minister will appoint the GCE, however, the proposed amendment for Article 69(b) did not reflect the Board's sentiments.

4.4.10 Mr Moyo withdrew his counter proposal as stated in paragraph 4.4.6 above.

4.4.11 The Chairman stated that he was in communication with DPE, and the indication was that DPE wanted to revert to the pre-June 2010 Article 69(b).

The Board **agreed** that it supports the proposal as contained in the pack subject to the Board assisting DPE with appropriate wording for Article 69(b).

The Board **RESOLVED** that it approves the following:

1 That the existing Article 69(b) of the Articles of Association of the Company be deleted in its entirety and be replaced with the following new Article 69(b):

Article 69(b)
"*For so long as the State is the sole or majority shareholder in the Company, and subject to the provisions of the Companies Act (including, without limitation, section 228 thereof), the Public Finance Management Act, 1 of 1999 and Applicable State Owned Enterprise Legislation, the Company shall not, without the prior approval of the Minister appoint or dismiss any Group Chief Executive of the Company.*"

2 That the existing Article 69(c) of the Articles of Association of the Company be deleted in its entirety and be replaced with the following new Article 69(c) :

Article 69(c)
"*The Board of Directors shall appoint the Chief Financial Officer in consultation with the Shareholder Minister. The Shareholder Minister shall appoint the Chief*

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Financial Officer as a member of the Board of Directors."

3 **Article 91**
That the words "*at least one-half*" be deleted and replaced with the words "*50% plus 1*". 11/1/3

4.5 **TSDBF Bonus**

4.5.1 Mr Singh took the Board through the submission as contained in the pack. The submission was taken as read. Mr Singh gave the Board background to the creation of the TSDBF and stated that two funds were created to deal with Transnet employees. He stated that all employees that were on SATS were moved and housed in the TSDBF. He indicated that the Fund was closed and the benefits were defined in the employment contracts.

4.5.2 Mr Singh advised the Board that Company had identified the TSBDF as a significant focus area as the Fund had been in significant deficit since inception. He stated that a cash flow matching exercise was done to allow the pensioners to get more than a 2% annual increase.

4.5.3 Mr Singh reported that a large number of pensioners within the Fund qualify for a State pension grant and if the bonus is made an increase, the "means test" would disqualify them from receiving the State pension grant.

4.5.4 Mr Singh informed the Board that Transnet, DPE and National Treasury had a meeting to consider the solution for the historic imbalance, and they came to the conclusion that 75% of the CPI was a good figure to address the historic imbalances. He further stated that to increase the base for the pensioners, an injection of R4.2 billion was required, and there was a current deficit of R1.9 billion. Mr Singh advised that there were discussions on how the R1.9 billion deficit issue will be secured.

The Board **RESOLVED** that it approves that the payment of the TSDBF's February 2011 bonus, to the value of 8.33% of individual annual pension be paid to pensioners at a total cost to the TSDBF of R180 million. 11/1/4

4.6 **Board Committee Mandates**

4.6.1 Ms Ceba took the Board through the submission as contained in the pack. The documents were taken as read. The Chairman requested the respective Committees to review the respective Committee mandates and adopt them for approval by the Board.

4.6.2 Mr Malungani requested the Group Secretariat to ensure that all the mandates had a provision that deals with the accessibility of Group Executives for the Board and its Committees. Ms Ceba

4.6.3 Mr Singh indicated that the Company will ensure that there is a clear delegation of authority between the Group Acquisition and Disposal Committee and the Transnet Acquisition Council.

The Board noted the draft mandates and **agreed** that the Board will submit proposed amendments to the mandates to the Group Secretariat for consideration by the Board on 16 February 2011. It was further **agreed** that the mandates will be reviewed within the respective Committees and submitted to the Board for approval. Ms Ceba

4.7 **Appointment of members to the Transnet Second Defined Benefit Fund ("TSDBF")**

4.7.1 Mr Singh took the Board through the submission as contained in the pack. The submission was taken as read and noted.

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4.7.2 Mr Singh stated that the Rules of the TSDBF provided for four Trustees plus a Chairperson (who is not a Trustee) to be appointed by the Company. He indicated that the current Board of Trustees of the TSDBF comprised of Ms Matyumza, Ms Gcaba, Dr Abedian and Messrs Ramsamy and Louw. He indicated that there were two vacant positions due to the retiring of Ms Matyumza and Dr Abedian from the Transnet Board.

4.7.3 Mr Moyo stated that he was keen on taking up the election, and further disclosed that one of his companies was active in the pension fund space. Mr Gazendam requested Mr Moyo to accept the election, and declare the appropriate disclosures to the Board from time to time.

The Transnet Board **RESOLVED** that it approves that :

(i) Mr MP Moyo be appointed Chairperson of the Board of Trustees of the TSDBF with immediate effect;

(ii) Ms NBP Gcaba be retained as Trustee given her knowledge of the TSDBF and to provide continuity; and

(iii) Mr HD Gazendam be appointed to the Board of Trustees of the TSDBF. 11/1/5

4.8 **Appointment of members to the Board Committees**

4.8.1 The Chairman confirmed that the Board had appointed Corporate Governance and Nominations Committee members. A document on *"Guidelines for appointment of Directors to Board Committees"* was circulated in the meeting.

4.8.2 He stated that the Secretariat had developed and circulated proposed mandates for the Committees and requested Members to indicate Committee preference. He advised that draft "*Guidelines for appointment of Directors to Board Committees*" were considered by the Corporate Governance and Nominations Committee on 23 January 2011 and generated proposals. He emphasised the importance of ensuring that all the Committees are balanced in terms of gender. He further indicated that other than for the Group Audit Committee, he will be a member to all the other Committees.

4.8.3 **Group Audit Committee**

4.8.3.1 The Chairman indicated that the Corporate Governance and Nominations Committee proposed that Mr Moyo be elected as the Chairman, and further nominated Messrs Skosana, Fanucchi, Ms Moola and Ms Tshabalala as members. He indicated that Ms Moola was reluctant to be appointed on this Committee. The proposed nominees, other than Ms Moola, accepted the nomination.

4.8.4 **Group Risk Committee**

4.8.4.1 The Chairman indicated that the Corporate Governance and Nominations Committee proposed that Ms Mnyaka be elected as the Chairman, and further nominated Messrs Moyo, Malungani, Mkhwanazi and Ms Moola as members. The proposed nominees accepted the nomination.

4.8.5 **Group Remuneration Committee**

4.8.5.1 For continuation purposes, the Chairman advised the Board that the Corporate Governance and Nominations Committee proposed that Ms Ntshingila be elected as the Chairman, and she had agreed. He indicated Ms Gcaba and Messrs Skosana, Gazendam, and Malungani were nominated as members. The proposed nominees accepted the nomination.

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4.8.6 **Group Social and Ethics Committee**

4.8.6.1 The Chairman stated that the Corporate Governance and Nominations Committee proposed that Ms Gcaba be elected as the Chairman, and nominated Messrs Fanucchi, Sharma and Ms Tshabalala to serve as members on the Committee.

4.8.6.2 The Chairman informed the Board that Mr Sharma withdrew his initial preference for the Committee. The proposed nominees, other than Mr Sharma, accepted the nomination.

4.8.7 **Group Acquisition and Disposal Committee**

4.8.7.1 The Chairman indicated that the Corporate Governance and Nominations Committee proposed that Mr Mkhwanazi be elected as Chairman of the Committee, and nominated Ms Tshepe, Ms Tshabalala and Mr Gazendam as members.

4.8.7.2 Mr Gazendam stated that he was prepared to swap Committees with Mr Sharma unless there were objections from the Board. Ms Tshepe enquired if Ms Tshabalala will not be overloaded as she was elected to serve on three Committees. Ms Tshabalala stated that the load was manageable.

4.8.8 Mr Malungani requested that the quorum for the Committees be reduced to 50%. He also requested approval for non-Committee members to attend any Committee meeting, and requested the Group Secretariat to copy the Board when Committee meeting notices were circulated. Ms Ceba

4.8.9 Mr Gazendam requested that the Corporate Calendar be re-issued.

4.8.10 The Board **agreed** that all the Directors of the Board were allowed to attend any of the Committee meetings.

The Board **RESOLVED** that it approves the following nominations for the Group Audit Committee :

- Mr MP Moyo - Chairman;
- Mr FA Fanucchi - Member;
- Ms N Moola - Member;
- Mr IB Skosana - Member; and
- Ms E Tshabalala - Member. 11/1/6

The Board **RESOLVED** that it approves the following nominations for the Group Remuneration Committee :

- Ms NR Ntshingila - Chairman;
- Mr HD Gazendam - Member;
- Ms NBP Gcaba - Member;
- Mr MP Malungani - Member; and
- Mr IB Skosana - Member. 11/1/7

The Board **RESOLVED** that it approves the following nominations for the Group Risk Committee :

- Ms T Mnyaka - Chairman;
- Ms N Moola - Member;
- Mr MP Malungani - Member;
- Mr BD Mkhwanazi - Member; and
- Mr MP Moyo - Member. 11/1/8

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The Board **RESOLVED** that it approves the following nominations for Group Social and Ethics Committee :

- Ms NBP Gcaba - Chairman;
- Mr FA Fanucchi - Member;
- Mr HD Gazendam - Member; and
- Ms E Tshabalala - Member. 11/1/9

The Board **RESOLVED** that it approves the following nominations for the Group Acquisition and Disposal Committee :

- Mr BD Mkhwanazi - Chairman;
- Ms E Tshabalala - Member;
- Ms DLJ Tshepe - Member; and
- Mr IM Sharma - Member. 11/1/10

4.9 **Dig out port**

The matter was deferred to the Board meeting scheduled to be held on 16 February 2011.

5 **GENERAL**

5.1 **Ethics and Spokesperson on Board matters**

5.1.1 The Chairman stated that the Board will deal with a variety of confidential issues. He indicated that he was the only spokesperson on Board matters.

Ms Ceba and Mr Singh were recused from the meeting.

6 **CLOSED SESSION**

There was a closed session held by the Board. There is no record for the session as the Group Company Secretary was not part of the meeting.

7 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 18h30.

CHAIRMAN
DATE: 22/02/2011

GROUP COMPANY SECRETARY
DATE: 17 FEBRUARY 2011

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MINUTES OF MEETING NO. 11/4 OF THE BOARD OF DIRECTORS OF TRANSNET LIMITED HELD ON 16 FEBRUARY 2011 AT 12:30 IN THE ROYAL ELEPHANT CONFERENCE CENTRE, CENTURION, PRETORIA

Resolution No/ For Attention

1 WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. He thanked the Board for their contribution and commitment during the Corporate Plan Workshop from 14 to 16 February 2011.

1.1 Present

Mr ME Mkwanazi	Chairman
Mr A Singh	Acting Chief Financial Officer
Mr MA Fanucchi	Non-Executive Director
Mr HD Gazendam	Non-Executive Director
Ms NBP Gcaba	Non-Executive Director
Mr MP Malungani	Non-Executive Director
Mr BD Mkhwanazi	Non-Executive Director
Ms T Mnyaka	Non-Executive Director
Mr MP Moyo	Non-Executive Director
Mr IM Sharma	Non-Executive Director
Ms E Tshabalala	Non-Executive Director
Ms DLJ Tshepe	Non-Executive Director
Mr IB Skosana	Non-Executive Director

1.2 In attendance

Ms Z Stephen	Group Executive: Legal, Corporate and Public Affairs
Ms ANC Ceba	Group Company Secretary

1.3 Apologies

Ms N Moola	Non-Executive Director
Ms NR Ntshingila	Non-Executive Director
Prof JE Schrempp	Non-Executive Director

1.4 Adoption of Agenda

The agenda was adopted as tabled.

1.5 Partial attendance

Mr M Gregg-Macdonald	Acting Group Executive: Commercial and Freight Corridors
Mr M Descoins	Portfolio Manager - Coal: Transnet Freight Rail
Mr N Thomson	Chief Financial Officer: Transnet Freight Rail

2 SAFETY BRIEFING AND EVACUATION PROCEDURE

The Chairman took the Board through the Safety Procedures for the conference room.

The Chairman requested that Item 8.14, 8.11 and 8.12 be dealt with next. These minutes reflects the order of the meeting.

Messrs Gregg-Macdonald, Descoins and Thomson joined the meeting.

8.14 81mt coal contracts and business case

8.14.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. The following matters, amongst others, were highlighted to the Board :

- The history of the coal line including the proposed expansion to 81mt;
- The significance of the coal line's contribution to TFR's turnover; and
- The significance of the proposed coal expansion project.

8.14.2 Management indicated that the required capital will elevate the asset to the required

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throughput, and further sustain the coal line at 81mt.

8.14.3 The following questions, amongst others, were raised by the Board:

- Why is the expansion below the readily available 91mt RBCT capacity?
- Will the emerging miners be considered and how will it be ensured that they benefit from the expansion?

8.14.4 Management indicated that to expand to 91mt required additional planning and feasibility studies to determine the costs. The Board was informed that the Company intended to seek approval for 91mt in the next few years.

8.14.5 **Commercial contracts**

8.14.5.1 The Board was informed that the current commercial contracts will expire on 25 March 2011, except for the Anglo Coal contract.

8.14.5.2 The following questions, amongst others, were raised by the Board:

- How will the Company ensure that the emerging miners get capacity allocation at RBCT?
- Will the Maputo Corridor accommodate the emerging miners?
- What is the way forward on the facilitation of the Maputo expansion?
- When will the new entrants come into the system?
- Why is it challenging to allocate the available 2.5mt capacity to the emerging miners?

8.14.5.3 The Board was of the view that the new entrants will need to wait longer to come into the system, and were concerned that the current allocation quota was reinforcing the status quo. The Board had extensive discussions on the allocation of capacity and the RBCT and the implications thereof. The Board was advised that the allocation of capacity was conducted by RBCT and not the Company. Management was requested to investigate its potential liability on RBCT's competition issues as soon as possible, and the Board requested a legal opinion on the matter. Management was requested to ensure that the Company is not seen to be colluding with RBCT on capacity allocation. Mr Molefe/ Ms Stephen

8.14.5.4 Management indicated that the potential risk on the proposed ramp-up will be the availability of locomotives and wagons, and further indicated that critical capital was needed during the current financial year to procure jumbo wagons.

8.14.5.5 Management indicated that the 81mt "Take or Pay contracts" will be tabled for approval at the Board meeting on 20 April 2011. Mr Molefe

The Board requested TFR to report back on a quarterly basis on the progress with regard to capacity allocation issues at RBCT. Mr Molefe

The Board **RESOLVED** that it approves the following :

(i) The R5. 118 billion expansion capital required to support the capacity ramp-up;

(ii) The required sustaining capital spend for the next three financial years i.e. 2011/12 – R1. 54 billion, 2012/13 – R1. 75 billion and 2013/14 – R2. 10 billion. 11/4/1

Messrs Thomson, Gregg-Macdonald and Descoins were excused from the meeting.

8.11 **Presentation of Mr Gama's disciplinary proceedings**

Mr Singh, Ms Stephen and Ms Ceba were recused from the meeting.

8.11.1 The matter was extensively discussed.

The Board **RESOLVED** that it supports the acting GCE in his endeavours to settle Mr Gama's matter and mandates the Company to finalise Mr Gama's Settlement Agreement. 11/4/2

8.12 **Public Protector matters**

The Chairman indicated that the matters had been referred to the Corporate Governance

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and Nominations Committee for deliberation.

Ms Mnyaka was excused from the meeting at 16:32.
Mr Singh, Ms Stephen and Ms Ceba re-joined the meeting.

3 **DIRECTORS' DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

4 **APPROVAL OF THE MINUTES OF THE MEETINGS HELD ON 26 NOVEMBER 2010, 15 DECEMBER 2010, 25 JANUARY AND 1 FEBRUARY 2011 RESPECTIVELY**

4.1 The minutes of the meetings held on 26 November and 15 December 2010, 25 January and 1 February 2011 respectively, were corrected and approved. The Chairman requested Ms Ceba to capture minutes without referring statements to specific members. He enquired on the management of the audio recordings from the meetings.

The Board **agreed** that the audio recordings be kept in the Group Secretariat's Office.

5 **MATTERS ARISING**

5.1 **Update on the legal action against Thyssen Krupp regarding Shiploaders in Saldanha**

Feedback was given to the Board on the matter, indicated that the parties had agreed to enter into settlement negotiations. The Board was informed that the settlement agreement was drafted by the Company and sent to Thyssen Krupp's Head Office Germany for consideration. It was indicated that a response on the matter is awaited. — Ms Stephen

5.2 **New Multi-Product Pipeline (NMPP)**

5.2.1 **Implement a 70-Day Plan to bring the project back onto track**

5.2.1.1 The Chairman informed the Board that the NMPP Team had confirmed that the project had been de-risked, except for *force majeure* events.

5.2.1.2 The following matters, amongst others, were highlighted by the Board:

- There was a sense of discomfort with the management of the project as most of the questions that were posed to the NMPP Team were not fully answered.
- Clarity was sought on commitments that had been made to third parties post the approval of the R23. 4 billion in November 2010.

5.2.1.3 The Board was taken through the NMPP Streams. The NMPP Streams were extensively discussed. Management reported that the NMPP has a benchmarking stream which had been requested to review the costs of the NMPP against international benchmarks. It was indicated that the report from the benchmarking stream will be table at the Board meeting on 20 April 2011. — Mr Singh

5.2.1.4 The Board requested the Chairman to engage the Shareholder Minister on the role that is envisaged for the Board in the NMPP forensic investigation. The Board **agreed** that it needed a report on the NMPP activities, and further requested the Company to secure the Terms of Reference for the forensic investigation as soon as possible. — Chairman / Ms Ceba

5.3 **Stream 1 : Governance, Prudency and Assurance Review**

5.3.1 Findings of TIA and KPMG

It was indicated that TIA had assured the Board Audit Committee that the awaited report will be submitted by the end of February 2011. — Mr Moyo

5.4 **Conclusion on the NMPP**

5.4.1 Thorough review of the EPCM costs and the Owner's costs

It was indicated that the matter will be finalised at the next meeting. — Mr Singh

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5.5	**Feedback from Corporate Governance and Nominations Committee**	
5.5.1	Engage the Minister and advise on the proposed executive appointments and to seek a way forward in the light of the likely timing of changes to the Board	Mr Molefe
	It was indicated that the matter is work-in-progress.	
5.6	**Transnet Board Mandate**	
5.6.1	Transnet Board Mandate to be reviewed to ensure that it is consistent with the recent amendments to the Articles of Association	
	It was indicated that the matter had been finalised.	
5.7	**Appointment of members to the Corporate Governance and Nominations Committee**	
5.7.1	Review the composition of the other Committees once all the Board members have settled into Committees	
	It was indicated that the matter had been finalised.	
5.8	**Annual Corporate Calendar for 2011**	
5.8.1	The proposed dates will be reviewed at a later stage once the Corporate Governance and Nominations Committee has finalised the process for Committee composition	
	The matter was discussed under Item 8.6 below.	
5.9	**Public Protector matters**	
5.9.1	Submit a presentation on Mr Gama's disciplinary proceedings from its inception, outlining the process followed-to-date	
	It was confirmed that the requested information had been submitted to the Board.	
5.9.2	Submission of the Company's response on the allegations from the Public Protector (to be submitted to the Corporate Governance and Nominations Committee)	
	It was indicated that the matter has been transferred to the Corporate Governance and Nominations Committee for consideration.	
5.10	**Joint Venture for the Port of Ngqura**	
5.10.1	*PFMA approval to be sought on the issuing of an Expression of Interest on the proposed Joint Venture for the Port of Ngqura*	
	Management reported that the application was forwarded to the Shareholder Minister. Ms Stephen was requested to follow up.	Ms Stephen
	Management indicated that matters arising on the Transnet Foundation and the Reputation Management Strategy had been transferred to the Board Social and Ethics Committee for consideration.	
5.11	**Proposed Articles amendments**	
5.11.1	Proposed wording for Article 69(b) be endorsed and DPE to be engaged on appropriate wording for Article 69(b)	
	It was indicated that the matter had been finalised.	
5.12	**Board Committee Mandates**	
5.12.1	To ensure that all the mandates have a provision that deals with the accessibility of Group Executives for the Board and its Committees	
	It was indicated that the matter had been finalised.	

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5.12.2 Proposed amendments to the draft Board Committee Mandates by the Board be submitted to the Group Secretariat for consideration by the Board

It was indicated that the matter had been finalised.

5.12.3 The quorum for the Committees be reduced to 50%

It was indicated that the matter had been finalised.

5.12.4 Non-Committee Members requested approval to attend any Committee meeting

It was indicated that the matter had been finalised.

5.12.5 Copy the Board when Committee meeting notices are circulated

It was indicated that the matter had been finalised.

6 **GROUP CHIEF EXECUTIVE'S REPORT**

The Report was taken as read. It was indicated that there was nothing particular to highlight, but poor volume performance at TFR.

The Report was noted.

7 **FINANCIAL REPORT**

7.1 Management took the Board through the Financial Report as contained in the pack. The Report was noted.

7.2 The Board was advised that there was a possible PFMA contravention in relation to a contract with VAE Perway to provide railway sleepers to TFR. Management reported that the contract expired in September 2009, and the Company continued procuring the railway sleepers since then without a signed contract in place. The Board was informed that Management was in the process of regularising the irregular expenditure of an approximate value of R711 million.

7.3 There was extensive deliberation on the matter and where it had to reside for consideration. It was **agreed** that since the Board Audit Committee was already aware of the matter, the oversight on the VAE Perway matter will reside there.

7.4 **Transnet Internal Audit**

Management took the Board through the Report as contained in the pack. The Report was taken as read. Management was requested to table all the forensic matters under Section 2 of the Report to the Board Audit Committee for finalisation. Mr Singh

7.5 **Dynamic Reporting process**

7.5.1 Management took the Board through the Dynamic Reporting process as circulated in the meeting. The Board was given background on the purpose of the document indicating, amongst others, that the report tracked the major revenue drivers of the business on a weekly basis. Based on performance, the report also provides remedial actions that need to be taken by Management.

7.5.2 Mr Singh and his team were commended for the Report.

8 **MATTERS FOR DISCUSSION/APPROVAL**

8.1 **Management Report Back**

8.1.1 **Results to 31 December 2010**

8.1.1.1 Mr Moyo took the Board through the submission as contained in the pack. The submission was taken as read. It was indicated that the Board Audit Committee had extensively examined the financial results and was satisfied with the report.

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The Board **RESOLVED** that it approves the Financial Results to 31 December 2010. 11/4/3

8.1.2 **Management Representation Letter**

8.1.2.1 Mr Moyo took the Board through the Management Representation Letter as contained in the pack. The submission was taken as read. It was indicated that the Board Audit Committee had examined the Management Representation Letter, and Management was comfortable with the contents thereof.

The Board **RESOLVED** that it approves the Management Representation Letter and that the Chairman and Acting Chief Financial Officer are authorised to sign it. 11/4/4

8.1.3 **Going concern assertion**

8.1.3.1 Mr Moyo took the Board through the Going concern assertion as contained in the pack. The submission was taken as read. He indicated that the Board Audit Committee was satisfied with the Company's ability to continue as a going concern.

The Board **RESOLVED** that it approves the Going Concern Assertion in the preparation for the interim period ended 31 December 2010. 11/4/5

8.2 **Corporate Plan for the 2011/12FY**

8.2.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. The following, amongst others, were highlighted:

- The iron ore volumes had been aligned downwards and this had an impact on the EBITDA; and
- The cash interest cover had been adjusted accordingly.

8.2.2 The Board suggested that BEE should be captured under "Cash Management". Management was requested to interrogate its internal policies on BEE. Ms Tshabalala indicated that she will advise Mr Singh of her inputs. Further, the Board advised Management that it would be commercially realistic for Transnet Pipelines to move with its debt, if it were to be corporatised. Mr Singh Mr Singh

8.2.3 Management stated that a covering letter will be prepared for the Shareholder Minister detailing the changes that may arise on the proposed 2011/12FY Corporate Plan.

The Board **RESOLVED** that it approves the budget, business plans, funding plan, risk management plan, fraud plan and KPIs for inclusion in the 2011/12FY Corporate Plan. 11/4/6

The Board further **RESOLVED** the following:

- That a sub-committee of the Board made up of Messrs Moyo, Sharma and Singh, Ms Tshabalala and the Chairman be mandated to finalise the 2011/12FY interim Corporate Plan for submission to the Shareholder Minister and to National Treasury.
- That a covering letter that outlines the transitional issues within the Company will be enclosed with the interim 2011/12FY Corporate Plan. 11/4/7

8.3 **Revised Shareholder's Compact for the 2010/11FY**

8.3.1 Management took the Board through the submission as contained in the pack. The submission was taken as read.

8.3.2 The Board sought clarity as to the rationale behind the proposed amendments to the targets so late in the financial year. The Board **agreed** that the matter be referred to the Remuneration Committee for deliberation. Ms Ceba

The Board **RESOLVED** that it approves the revised 2010/11FY Shareholder's Compact targets as reflected in the submission and that the Chairman is mandated to seek approval from the Shareholder Minister for the revised 2010/11FY Shareholder's Compact targets. 11/4/8

		Resolution No/ For Attention
8.4	**Proposed Shareholder's Compact for the 2011/12 financial year**	
	The Chairman indicated that the matter will be tabled to the Board for approval once there is agreement on the proposed targets between DPE and the Company.	Chairman
8.5	**Committee Mandates**	
8.5.1	**Draft Board Audit Committee Mandate**	
8.5.1.1	The Chairman took the Board through the submission as contained in the pack. The submission was taken as read.	
8.5.1.2	There were concerns on the Board's IT competency to fulfil its mandate in relation to the IT strategy and oversight. The Board **agreed** that the matter of IT competency in the Board be referred to the Corporate Governance and Nominations Committee for consideration.	Ms Ceba
	The Board **RESOLVED** that it approves the Board Audit Committee mandate.	11/4/9
8.5.2	**Draft Remuneration Committee Mandate**	
8.5.2.1	The Chairman took the Board through the submission as contained in the pack. The submission was taken as read.	
	The Board **RESOLVED** that it approves the Remuneration Committee mandate as contained in the pack.	11/4/10
8.5.3	**Draft Board Risk Committee Mandate**	
8.5.3.1	The Chairman took the Board through the submission as contained in the pack. The submission was taken as read. It was indicated that the Chairman of the Board Audit Committee should be a member of the Committee.	
	The Board **RESOLVED** that it approves the Board Risk Committee mandate as contained in the pack.	11/4/11
	The Board further **RESOLVED** that it approves that the Chairman of the Board Audit Committee be appointed as a member of the Board Risk Committee.	11/4/12
8.6	**Annual Corporate Calendar**	
8.6.1	The Chairman took the Board through the Annual Corporate Calendar as contained in the pack. The submission was taken as read.	
	The Board **RESOLVED** that it approves the Annual Corporate Calendar.	11/4/13
8.7	**Written Resolution No. 2011/P1**	
	The Board noted Written Resolution No. 2011/P1 as contained in the pack.	
8.8	**Transnet ZS-SAZ Aircraft Financing Transaction**	
8.8.1	Management took the Board through the submission as contained in the pack. The submission was taken as read. It was indicated that the matter related to a legacy transaction on the disposal of SAA to DPE.	
8.8.2	The following matters, amongst others, were highlighted: • In terms of Rabobank Letter of Credit which was issued on behalf of ZS-SAZ 1, the Company was required to provide back-to-back security to Rabobank by means of either a Letter of Credit or a guarantee from Transnet, should the Letter of Credit be evoked. • The Company was able to convince Rabobank to accept a standby letter of credit from ABSA until the end of February 2011, due to the changes happening at Transnet at that time (December 2010), and the time pressure from Rabobank to conclude the transaction within the approvals granted by their Credit Committee. • The Company could not provide a guarantee and opted to have a standby Letter of	

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Credit issued by ABSA to secure Rabobank's participation until the end of February 2011 when Rabobank will approach their Credit Committee again to get approval to extend the validity of the Letter of Credit to December 2011.

8.8.3 Management reported that the tax risks of dissolving the structure were considered and that the matter will be recorded as a note in the balance sheet. Management undertook to review the Power of Attorney prior to issuing it to the Attorneys. Ms Stephen/ Mr Singh

The Board **RESOLVED** that it approves that the Chairman or his duly authorised alternative is authorised to :

(i) Approve and sign a guarantee to be issued by Transnet on behalf of ZS-SAZ in the amount of $25 million (R200 million) in the favour of Rabobank, should it be required;

(ii) To sign any and all legal documents to effect the conclusion of the transaction, including the Re-imbursement Agreement and transferring the required titles of the aircraft; and

(iii) To issue and sign a power of attorney to Edward Nathan Sonnenbergs Inc to allow them to discharge the aircraft mortgages in terms of International Recognition of Rights in Aircraft Act. 11/4/14

8.9 **Rotation of external auditors**

8.9.1 The Board was given background to the matter. The matter was extensively discussed.

The Board **RESOLVED** that it recommends that the Company present a proposal on the rotation of external auditors to DPE. 11/4/15

8.10 **Change in accounting policy – Deferred Tax**

8.10.1 Mr Moyo took the Board through the submission as contained in the pack. The submission was taken as read. The Board was informed of the new standard on the deferred tax. It was decided that since the Company was active in international markets, it was more acceptable to move towards a commonly recognised international standard. The Board was assured that the change in accounting standard had no cash flow implications for the Company.

The Board **RESOLVED** that it approves the changing of the accounting policy, with immediate effect, on deferred taxation on re-valued assets, by accounting for the deferred taxation on the full revaluation, both the portion up to original cost and above original cost. 11/4/16

8.13 **Export Development Canada ("EDC") Participation in AfDB ("African Development Bank") B-Loan Syndication**

8.13.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. The Board was given background on the matter. The Board was informed that EDC sought to participate in the AfDB B-Loan Syndication, on the same terms and conditions as the AfDB facility. The Board was advised that the full facility will be R1.1 billion.

8.13.2 The Board was assured that the loan will not negatively impact on Transnet's weighted average cost of funding.

The Board **RESOLVED** that it approves the EDC funding of USD 100 million to be concluded in parallel and in addition to AfDB facility. 11/4/17

8.14 **DMTN increase from R30 billion to R60 billion**

8.14.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. The Board was given background on the matter. It was

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indicated that the programme was established with a R30 billion limit. The Board was advised that the previous Board had approved the increase to R60 billion in August 2010, and DPE was requested to approve the transaction with the concurrence of National Treasury, however, DPE had sent correspondence seeking that the Board concur with the recommendations of the previous Board.

8.14.2 The Company was requested to be careful when crafting its response to DPE in relation to the impact of the NMPP's increased costs on Transnet's funding requirements, and in particular, the loan covenant ratios.

The Board **RESOLVED** that it approves the following :

(i) Increase the DMTN size to R60 billion;
(ii) Execute the Euro 50 million SACE Untied Loan Facility;
(iii) Execute the A (USD 400 million ZAR equivalent) and B Loan (up to USD 600 million ZAR equivalent) with AfDB; and
(iv) Execute the funding for the acquisition of the 100 locomotives, which funding will be backed by US Exim. 11/4/18

9 **STANDING ITEMS**

9.1 **IT Governance Report**

9.1.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. A document, highlighting the risks that are inherent in the IT system currently, was handed out in the meeting. The Board was informed that mitigation plans were in place for all the risks that had been identified.

The Board **RESOLVED** that the matter be managed by the Board Audit Committee and that the Board Audit Committee will present the matter to the Board. 11/4/19

9.2 **Compliance Report**

9.2.1 The Chairman requested Management to compile a summary of its legislative risks for the Board's consideration. He also requested Management to ensure that all its legal risks are reported upon at Board Risk Committee. Ms Stephen

10 **NOTING OF MINUTES AND REPORT BACK FROM BOARD COMMITTEE MEETINGS**

10.1 **Corporate Governance and Nominations Committee of 7 January and 3 February 2011**

The Chairman indicated that most items from the Corporate Governance and Nominations Committee were dealt with at the Board meeting, and these were particularly on the GCE's selection process. Ms Tshepe indicated that the draft Corporate Governance and Nominations Committee minutes that had been included in the pack have not yet served at the Committee.

The Board noted the update.

10.2 **Board Risk Committee of 3 February 2011**

Mr Moyo took the Board through the minutes as contained in the pack. He highlighted, amongst others, the following :

- The Committee had recommended that a policy be implemented to assist the families of employees that are fatally injured whilst on duty; and
- The Committee was proposing that the Risk Management Plan should be submitted to the Shareholder Minister with an option to review later taking into consideration the appointment of the new Board.

The Board noted the update.

10.3 **Board Audit Committee of 9 February 2011**

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10.3.1 Mr Moyo took the Board through the minutes as contained in the pack. He highlighted, amongst others, the following :

- SATS matters;
- Allocation of work to Ernst & Young's BEE partners; and
- Reviewed the NMPP Engagement Letter.

10.3.2 Background was provided to the Board on the SATS matter. It was reported that an opinion was received from Senior Counsel stating that SATS members should not be regarded as members of Transmed as they had retired prior to corporatisation of Transnet, and accordingly, liability should have been assumed by the Government Employees Medical Scheme and not Transnet. DPE has obtained legal advice on the matter which is contrary to that obtained by Transnet. Transnet has requested that a workshop be convened between representatives from Transnet and the DPE together with their legal representatives to understand the complexities of the matter. The Board was informed that a response to this request is awaited from the DPE. In the interim, Transnet will continue to provide for this liability on its balance sheet until agreement is reached with the DPE.

10.3.3 The Board was advised that the percentage of work allocated to Sekela Incorporated and Xabiso Incorporated as Ernst & Young's BEE partners is 15% in total to both firms.

10.3.4 From the External Auditors Report, it was reported that there was no significant matter to report to the Board other than the view of an overstatement.

The Board noted the update.

Mr Mkhwanazi was excused from the meeting at 19:40.

10.4 **Remuneration Committee of 1st and 14 February 2011**

10.4.1 Ms Gcaba took the Committee through the minutes as contained in the pack. The Board was advised of a Special Committee meeting that was held on 1 February 2011 to deliberate of the proposed GCE's remuneration package.

10.4.2 **Proposed GCE's remuneration package**

10.4.2.1 The Board was advised that the motivation for the proposed GCE's remuneration package was based on an independent remuneration survey. The Board adopted the Committee's proposal that the GCE's remuneration package be negotiated within the mandate approved by the Remuneration Committee.

10.4.3 **Remuneration of the Chairman as the Acting Group Chief Executive**

The Chairman recused himself from the meeting at 20:12.

10.4.3.1 The Board was requested to address the Chairman's remuneration as Acting Group Chief Executive. The Board agreed that it will be fair and proper to compensate the Chairman for the acting period. Ms Gcaba was requested to report back to the Chairman on the deliberations of the Board.

Ms Gcaba

10.4.3.2 The Board stated that the envisaged Chairman's executive role and the potential governance issues that may emanate therefrom will be an issue for the deliberation of the Corporate Governance and Nominations Committee.

The Board **RESOLVED** that the matter of the Chairman's remuneration as Acting Group Chief Executive be referred to the Remuneration Committee for deliberation and finalisation.

11/4/20

The Chairman re-joined the meeting at 20:20.

10.4.4 **Remuneration Committee of 14 February 2011**

10.4.4.1 Ms Gcaba gave feedback from the Remuneration Committee meeting held on

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14 February 2011 highlighting, amongst others, the following approvals that were granted:

- Transnet Reward Philosophy and Interventions for 2011;
- The Wage mandate for the 2011/12FY;
- The Management increases for the 2011/12FY year; and
- The vesting of the 2007/08 LTI Conditional Grant.

10.4.4.2 **Vesting of the 2007/08 Long-Term Incentive Conditional Grant**

The following views, amongst others, were highlighted by the Board:

- Request that the vesting of the 2007/08 LTI grants be suspended until there is clarity on the NMPP forensic investigation.
- The Company was cautioned to guard against penalising the wrong employees, who were not part of the NMPP activities, as the act may demoralise the employees.
- Uncertainty on whether or not the vesting can be withdrawn.
- The Company should consider reputational risk it may be exposed to when bonuses are paid without proper prudency.

10.4.4.3 The Board had extensive deliberations on the matter, including taking guidance on whether an external process can be used as a trigger to suspend the vesting of the grant. The Board **agreed** that TCP's vesting should be isolated and the matter be further investigated. Chairman

10.4.4.4 Board members requested Management to consider an internal investigation on elements of impropriety, poor planning, incompetence, etc. The Board was advised to await the outstanding reports from TIA and KPMG, and then apply its mind to the issues at hand.

10.4.4.5 The Board was informed that the essence of the outstanding reports from TIA and KPMG was that there have been no irregular proceedings on the NMPP process. The Board was further advised that the investigation scope excludes any criminal investigation.

10.4.4.6 On the R10 billion overrun for the NMPP, the Board proposed that :

- The former Acting GCE and Ms Moses with her Team should take accountability;
- There should be an investigation on how the TCP employees were performance-rated in the previous two years;
- The role of the Group Exco in the NMPP activities should be investigated ; and
- The vesting of the 2007/08 LTI Conditional Grant should be temporarily suspended until there is further clarity on the NMPP forensic investigation.

The Board **agreed** that the matter will be managed through the Corporate Governance and Nominations Committee, Remuneration Committee and Board Audit Committee.

11 **TRANSNET BOARD MANDATE**

11.1 The Board **RESOLVED** that it approves the Board Mandate as contained in the pack. 11/4/21

12 **GENERAL**

12.1 **Role of a SOE in a developmental state**

12.1.1 Management was requested to arrange a presentation on the role of a SOE in a developmental for the Board. The Chairman indicated that the presentation will be prepared once the GCE has settled into the Company. Mr Molefe

12.2 **Resignation of Prof JE Schrempp from the Board**

12.2.1 The Chairman informed the Board of Prof Schrempp's email indicating his intention to retire from the Board. The Chairman read out Prof Schrempp's email to the Board. The Board requested Management to learn from the incident and implement a system that will ensure that Board members that were not in attendance in the meetings get timely

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feedback on the deliberations and decisions that were taken.

13 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 21:18.

CHAIRMAN
DATE: 21/04/2011

GROUP COMPANY SECRETARY
DATE: 21 APRIL 2011

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TRANSNET

Memo for the Remuneration Committee of the Board

4 April 2011

MR SI GAMA – LONG TERM INCENTIVE SCHEME ARRANGEMENTS

1 PURPOSE

The purpose of this memorandum is to obtain approval from the Remuneration Committee of the Board for specific arrangements regarding the long term incentive scheme for Mr Siya Gama and more specifically:

1.1 The vesting of the 2007/08 conditional award; and
1.2 The conditional award for 2009/10.

2 BACKGROUND

Mr Gama was suspended during September 2009 pending the outcome of a disciplinary enquiry. He was dismissed at the end of June 2010, but was subsequently reinstated since the date of termination with full employment benefits.

Clause 3.2 in respect of the terms and conditions of his settlement agreement determines as follows: "Any employment benefits that were due to him for the intervening period of 30 June 2010 to 23 February 2011 in terms of his employment contract shall be deemed to be fully restored"

3 DISCUSSION

The conditions of Mr Gama's settlement agreement further implies that he will qualify for the vesting of the 2007/08 conditional award as well as the conditional award for the 2009/10 financial year that he did not receive during October 2010 when the grant letters were issued to selected participants.

3.1 Vesting of Conditional Grant 2007/08

Mr Gama received a conditional award in 2007/08 in respect of the long term incentive scheme. The banking period will lapse at the end of March 2011 and the grant is due to vest at the end of April 2011, provided that specific performance conditions have been met. The ground rules determine as follows:

"As soon as reasonably practicable after the end of the Banking Period in relation to a Grant, the Remuneration Committee shall review the Participants' Individual Performance Targets to determine whether their Conditional Awards Vest."

Mr Gama's prolonged absence from Transnet implies that he did not have individual performance targets for 2010/11.

3.2 Conditional Grant 2009/10 Financial Year

Mr Gama must receive a conditional grant in respect of the 2009/10 conditional grant. He was not included in the list of selected participants that were approved by the Remuneration Committee of the Board during September 2010 as he was out of service at the time.

It is proposed that Mr Gama be paid the amount that is due to him in respect of the 2007/08 when it becomes due and payable to all the other participants to the scheme.

The table below depicts the value of the vesting amount in respect of the 2007/08 conditional grant:

Table 1 – Vesting Amount in Respect of 2007/08 Conditional Grant

Conditional Award 2007/08	Interest over the banking period	Total
3,655,410.00	1,129,337.02	4,784,747.02

It is further recommended that he be granted a conditional award in respect of the long term incentive scheme for the 2009/10 financial year. The rand-value of the grant amounts to R 2,974,882.50 and is based on the short term incentive amount payable as at the end of June 2010 in respect of the 2009/10 financial year.

4 RECOMMENDATION

It is recommended that the Remuneration Committee of the Board takes note of the content of this document and grant approval for the following:

4.1 The vesting of the 2007/08 conditional award to the value of R 4,784,747.02 at the end of April 2011 when it becomes due and payable to all the other participants to the scheme; and

4.2 That a conditional award be granted to him in respect of the long term incentive scheme for the 2009/10 financial year amounting to R 2,974,882.50.

P MAHARAJ
GROUP EXECUTIVE – HUMAN RESOURCES
TRANSNET LIMITED

NG10

23 February 2011

Transnet statement on Mr. Gama

The Board wishes to announce that Mr. Siyabonga Gama has been reinstated to the executive committee of Transnet Limited following a review of his dismissal for certain governance breaches. He returns to the company with effect from 23 February 2011 and will be based in the chairman's office until the new group chief executive finalises the makeup of his executive team.

The terms of the agreement are confidential. This is in line with Transnet's policies governing employer/employee relations.

Mr Gama's reinstatement is subject to a final written warning given the fact that Mr Gama was not found guilty of corruption and/or dishonesty. The Board is of the view that such an agreement is in the best interest of the company.

The Board believes the settlement brings finality to this matter and would bring to an end the harmful publicity surrounding it.

As a result of the agreement, Transnet management can focus all its time and efforts in keeping Transnet a world class operation.

Finally, the Board mandated Mr Mafika Mkhwanazi, the chairman of the Board, to handle the Gama matter to its conclusion. This includes facilitating the cultivation and maintenance of cordial relations between Mr. Gama, his colleagues in the executive committee and the rest of Transnet's employees

Finally, the Board mandated Mr Mafika Mkwanazi to handle Mr Gama's matter to its conclusion. This includes facilitating the cultivation of cordial relations between Mr. Gama, his colleagues in the executive committee and the rest of Transnet's employees.

Mr Gama has affirmed his support to the management of Transnet under the leadership of the new group chief executive, Mr Brian Molefe.

Issued on behalf of the chairman of the Board of Directors.

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TRANSNET

TRANSNET SOC LTD

BOARD ACQUISITIONS AND DISPOSALS COMMITTEE MANDATE

1. PURPOSE

1.1 To ensure that the Board's composition and structure enables it to fulfill the obligations of the Board mandate and advance and maintain the Group's acquisition and disposal policies.

2. COMPOSITION

2.1 The Board Acquisitions and Disposals Committee ("the Committee") is constituted as a committee of the Transnet SOC Ltd Board.

2.2. At least four Directors of the Company shall be members of this Committee, the majority of whom must be independent non-executive directors. The Chairman of the Board shall be a member of this Committee.

2.3 The members of the Committee as a whole must have sufficient qualifications and experience to fulfill their duties.

2.4 The Secretary shall be the Group Company Secretary or her designate.

2.5 The remuneration of the Chairman and Committee members will be determined by the Remuneration and Human Resources Committee and approved by the Board in accordance with the fee structure approved by the Shareholder Minister.

2.6 The following shall attend by invitation:

2.6.1 The other non-executive directors; and

2.6.2 Such other persons determined by the Committee, who may include, where deemed necessary by the Committee, members of senior management and independent acquisition and disposal experts.

3. ROLES AND RESPONSIBILITIES

3.1. The Committee has an independent role, operating as an overseer and a maker of recommendations to the Board for its consideration and final approval.

3.2. The Committee does not assume the functions of management, which remain the responsibility of the executive directors, officers and other members of senior management.

4. QUORUM

4.1 The quorum will be 50% of the members of the Committee.

5. TERM

5.1 The Board will elect the Chairman and all members of the Committee at the Board meeting following the Transnet SOC Ltd Annual General Meeting: Provided that the Corporate Governance and Nominations Committee may, if it deems such appointment so urgent as not to wait for such Annual General Meeting, exercise such power.

Approved on 31 August 2011

5.2 The Board shall have the power, at all times, to remove any member from the Committee and to fill any vacancies created by such removal.

6. REPORTING RESPONSIBILITIES

6.1 The Committee reports to the Board through its Chairman.

6.2 Minutes of the Committee meetings must be submitted to the Board.

7. AUTHORITY

7.1 The Committee has authority to-

7.1.1 have access to any information it needs to fulfill its responsibilities.

7.1.2 seek independent advice, through the Group Company Secretary's Office, at the Group's expense.

7.1.3 have direct access to any executive of the Group or its subsidiaries.

7.1.4 make amendments to the mandate subject to approval by the Transnet SOC Ltd Board.

7.2 The Committee may form, and delegate authority to, committees and may delegate authority to one or more designated members of the Committee.

7.3 The Committee shall make the recommendations to the Board that it deems appropriate on any area within the ambit of its terms of reference where action or improvement is required.

7.3.1 Direct access to the Chairman of the Board, Group Chief Executive, Chief Financial Officer and members of the Group Executive Committee.

8. TERMS OF REFERENCE

The Committee shall-

8.1. Oversee the review of and recommend for approval by the Board policies and procedure manuals that are legally compliant (where applicable) and provide for an appropriate procurement and provisioning system which is fair, equitable, transparent, cost-effective;

8.2. General Transactional Limit (budgeted/and pre- approved):

8.2.1 Approve tenders and contracts up to the maximum of investment decision/budget. This includes acquisition and disposal of movable and immovable property, capital investments operational expenditure, the provision and acquisition of services approval for establishing infrastructure, maintenance, refurbishment, and purchasing fuel, and excludes guarantees, indemnities and securities;

8.3. Monitor trends in procurement spend and compliance and advise the Board of potential risks in irregular and fruitless and wasteful expenditure emanating from procurement practices;

8.4. Monitor trends in supplier development spend and progress on plan (includes support of government's economic policies, Competitive Supplier Development Programme, local supplier development and BBBEE (preferential procurement and enterprise development);

8.5. Consider strategic acquisitions and disposals and make recommendations to the Board;

8.6. Consider, for recommendation to the Board, potential private sector participation models;

8.7. The Committee may approve, where so delegated by the Board of Directors, the following in accordance with the Company's Delegation of Authority Framework:

8.7.1 Capex Delegations

Ref Existing DOA	Specific Delegation	Approval by Board Acquisitions and Disposals Committee
5.1.1	Capex included in annual Corporate Plan and budget of the company: - To commence with a project	>R500m but ≤R1bn
5.1.2	Capex not included in annual Corporate plan and budget of the company : - To commence with the project	>R250m but ≤R700m
5.1.3	Increase in Estimated Total Cost (ETC) of existing/approved projects	>R500m but ≤R700m
5.1.4	Asset Write-off/Scrapping: Moveable Assets	>R250m to ≤R700m
5.1.5	Disposal of moveable assets	> R 250m to ≤ R700m
5.1.6	Condonement : • Commencement of capital spending without approval in terms of 5.1.1 and 5.1.2	>R250m but ≤R500m
5.1.7	Asset write-off/scrapping/demolition: • Immovable assets (excl land) e.g. buildings, structures	>R250m to ≤R300m
5.1.8	Disposal/acquisition of immovable assets (land ,buildings and servitudes)	>R350m to ≤R500m

8.7.2 Procurement Delegations

Ref Existing DOA	Specific Delegation	Approval by Board Acquisitions and Disposals Committee
5.4.1	Appointment of Consultants	>R50m to ≤R300m
5.4.2	Approval to approach the market for Open Tenders	Tenders >R500m up to ≤R1bn
5.4.3	Approval to approach the market for confined tenders: Confinement of tenders	Tenders >R250m to ≤R1bn
5.4.4	Establishing Procurement policy (Opex, Capex and disposals)	

8.7.3 Contract Delegations

Ref Existing DOA	Specific Delegation	Approval by Board Acquisitions and Disposals Committee
5.5.1	Approval of Tenders Enter into and signing of contracts/agreements (including TCP)	>R500m up to R1bn
5.5.2	Property and Lease Agreements as well as expenditure leases	Special delegation to CEO of TNPA from Board (Ports Act) >R500m and > 15 Years all divisions/specialist units

8.7.4 The Committee's Delegated Authority is subject to:

8.7.4.1. A schedule of all tenders approved to be submitted to the Board of Directors for information only.
8.7.4.2. The Committee may approve modifications where the cumulative value of the contract plus the modification does not exceed the limits of the above delegations of authority.

8.8. When considering any tender, quotation or offer, or any amendments thereto, the Committee may -
(a) investigate any activity within its Terms of Reference;
(b) ask questions and request information or advice from any person;
(c) request any employee to appear before the Committee;
(d) refer the submission back for reconsideration;
(e) note matters presented to it for information, and/or offer comments; and
(f) reserve a decision pending further information or clarification of a specific matter.

9. RECUSAL

9.1 Before every meeting of the Committee, the Group Company Secretary or her designate is required to obtain a declaration of interest from, duly signed by each member present at the proceedings.

9.2 Where a member of the Committee has been or can be deemed to have a conflict of interest he/she shall recuse him/herself from taking a decision on the matter. The recusal shall be minuted.

10. COMMITTEE OPERATION

10.1 A minimum of four scheduled meetings a year.

10.2 Unscheduled meetings may be convened by the Group Company Secretary or her designate, as and when required. Meetings in addition to those scheduled may be held at the request of the Group Chief Executive, or other members of senior management or at the instance of the Board.

10.3 Papers for consideration by the Committee will be submitted, in the normal course, at least four working days before the meeting, to enable members to study the documentation and allow adequate opportunity for formal and informal discussions. The Chairman of the Committee may meet with the Group Chief Executive, Chief Financial Officer and/or the Group Company Secretary or her designate prior to a Committee meeting to discuss important issues and agree on the agenda.

10.4 Committee members must attend all scheduled meetings of the Committee, including meetings called on an *ad hoc* basis for special matters, unless prior apology, with reasons, has been submitted to the Chairman or the Group Company Secretary or her designate.

10.5 If the Chairman of the Committee is absent from a meeting, the members present must elect one of the members present to act as chairman.

10.6 The Committee must establish an annual work plan for each year to ensure that all relevant matters are covered by the agendas of the meetings planned for the year.

10.7 The annual plan must ensure proper coverage of the matters laid out in the mandate: the more critical matters will need to be attended to each year while other matters may be dealt with on a rotation basis over a three-year period.

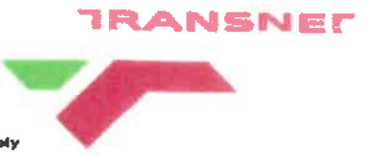
10.8 Committee members must be fully prepared for Committee meetings to be able to provide appropriate and constructive input on matters for discussion.

10.9 The minutes must be completed as soon as possible after the meeting and circulated to the Chairman and members of the Committee for review thereof.

10.10 The minutes must be formally approved by the Committee at its next scheduled meeting.

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INTEGRATED SUPPLY CHAIN MANAGEMENT

TRANSNET PROCUREMENT PROCEDURES MANUAL [PPM]

Version 1
August 2012

PROCUREMENT PROCEDURES MANUAL

SECTION A Background and Context

SECTION B Procurement Planning

SECTION C Go To Market

SECTION D Evaluation and Adjudication

SECTION E Contract Management

SECTION F Governance Structures

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ISSUED BY:

Garry Pita
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Date: 6 SEPTEMBER 2012

SECTION A:

BACKGROUND AND CONTEXT

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- National Objectives
- iSCM Procurement Objectives
- iSCM Control Objectives

Chapter 2: Definitions, Abbreviations and Acronyms

Chapter 3: Scope and Exclusions

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CHAPTER 1 : INTRODUCTION

Transnet SOC Ltd ("**Transnet**") is fully owned by the South African government and operates as a corporate entity. It is aimed at supporting and contributing to the country's freight logistics network by developing South African industry, reducing the cost of doing business, ensuring efficient and profitable operations, whilst at the same time promoting critical developmental and empowerment objectives.

Section 217 of the Constitution Act 108 of 1996 and section 51(1)(a)(iii) of the Public Finance Management Act 1 of 1999 ("**PFMA**") stipulate that Transnet must have and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

Transnet's Supply Chain Policy and this Procurement Procedures Manual ("**PPM**") give effect to these statutory requirements. The aim of the Supply Chain Policy is to ensure that Transnet gets value for money in the procurement of Goods and Services in order to fulfil its mandate whilst redressing the economic imbalances that have been caused by unfair discrimination in the past. Transnet shall therefore carry out its procurement processes as cost-effectively as possible whilst meeting its commercial, regulatory and socio-economic goals. The Policy ensures a coherent framework within which procurement principles and compliance controls are applied across Transnet.

The PPM seeks to operationalise the objectives of the Supply Chain Policy.

1.1 NATIONAL OBJECTIVES

The Transnet supply chain function should firstly be seen in the national context. Government's economic development policies such as the New Growth Path ("**NGP**") emphasise the role that State Owned Companies ("**SOCs**") should play as key agents in a developmental state to accelerate national development by leveraging their procurement spend to ensure that key goals such as job creation, skills transfer and empowerment take place. As one of the major State Owned Companies, Transnet has a pivotal role to play in ensuring that Government's economic development policy goals are met.

1.2 INTEGRATED SUPPLY CHAIN MANAGEMENT ("ISCM") PROCUREMENT OBJECTIVES

1.2.1 Transnet's procurement objectives are ensuring security of supply of goods and services that Transnet requires to fulfil its mandate, and achievement of key socio-economic goals, eg. job creation, empowerment. All Transnet's procurement activities shall be implemented in line with the following best practice principles:

1.2.2 Fairness and Transparency:

- equal treatment of bidders;
- openness and accountability; and
- ethical conduct.

1.2.3 Social Equity:

- Broad-Based Black Economic Empowerment ("B-BBEE"), Preferential Procurement and Supplier Development.

1.2.4 Value for money:

- competitiveness; and
- cost effectiveness.

1.2.5 Due regard must be given to the importance of:

a) the promotion of Transnet's Interdivisional Support Policy; and

b) the development, promotion and support of Transnet's Supply Chain Code of Ethics, which requires that all commercial conduct be based on ethical and moral values and sound business practice. This value system governs all commercial behaviour within Transnet.

1.2.6 Transnet will strive to procure Goods and Services which contribute to its mission: To anticipate and satisfy the requirements of its customers for a highly responsive and cost-effective transportation Service. In order to achieve this, Transnet is committed to working with suppliers who share its goals of continuous improvement in service, Quality and reduction of Total Cost of Ownership (TCO).

1.2.7 Transnet prefers not to do business with any agents ("middlemen"), who do not add significant value to the supply chain. Transnet would rather contract directly with the overseas and/or local Original Equipment Manufacturers (OEMs). In the case of dealing with overseas OEMs for relevant SD targeted commodities such as rolling stock and port equipment, Transnet will negotiate meaningful SD local capability and capacity building initiatives as part of their supply agreements with Transnet.

1.2.8 Transnet commits to clarity in its communication of requirements. It furthermore commits to being professional, courteous, fair, factual and responsive in its business dealings.

1.2.9 Transnet supports good corporate governance by ensuring the preservation of the highest standards of integrity, objectivity, fairness, efficiency and professionalism.

1.2.10 The purpose of one Supply Chain Policy and a uniform set of procedures for the whole Transnet Group is to facilitate a uniform interpretation internally, whilst complying with the requirements of Section 51(1) (a) of the PFMA and Section 217 of the Constitution.

1.3 iSCM CONTROL OBJECTIVES

Transnet's iSCM function is aimed at achieving the following control objectives:

- *only* Goods and Services required by the organisation are acquired;
- *all* Goods and Services required by the organisation are acquired;
- The demand for Goods and Services is appropriately planned and managed;
- Goods and Services required are acquired from the most appropriate supplier at the right time, right cost and right Quality;
- critical socio-economic objectives such as B-BBEE, job creation, skills transfer, etc are achieved;
- transactions are properly accounted for and approved (timeously, accurately and completely);
- accurate and timeous information will be produced for management, ensuring the integrity of the process;
- overall processes exhibit integrity and are efficient in meeting supply chain objectives in relation to strategy;
- optimum working capital balances for inventory and cash will be maintained; and
- all Goods and Services acquired are managed from demand to finalisation considering appropriate security.

NOTE: The detailed Business Critical Activities (BCAs) and Business Critical Controls (BCCs) derived from the above iSCM Control Objectives are attached hereto as Appendix A *(Control Framework)*.

CHAPTER 2 : DEFINITIONS, ABBREVIATIONS AND ACRONYMS

TERM	DEFINITION, ABBREVIATION OR ACRONYM
Acceptable Bid	Any bid which, in all respects, complies with the specifications and conditions of bid as set out in the bid document
Acquisition Council [AC]	The main Acquisition Council of an Operating Division, Specialist Unit or Business. Unless specifically stated otherwise "AC" also includes sub-Acquisition Councils operating under the auspices of the ACs and which caters for transactions falling below the minimum threshold of the main AC, e.g. Acquisition Councils operating on a local or regional basis, as well as the TAC catering for Corporate Head Office and transversal contracts
Advance Payment Guarantees [APGs]	is a guarantee issued by a financial institution, on behalf of a supplier to a buyer, in relation to any advance payment that is made by the buyer to the supplier to allow the work to commence. The guarantee protects the buyer against the risk of non-performance as the buyer can claim reimbursement of the advance payment against the guarantee in such a case
Advertisement	A public invitation to submit bids for the provision of Goods or Services
Alternative Bid	Is a bid that purports to satisfy a stated need but does not fully comply with the laid down specification of the RFX. Alternative Bids are allowed at the discretion of Transnet
B-BBEE	Broad-Based Black Economic Empowerment
B-BBEE Enterprise	Any supplier or contractor who has been rated anything from a Level 8 (10 % recognition level) to a Level 1 (135% recognition level), as defined in the B-BBEE Act and Codes of Good Practice issued by the DTI
Bid	A written offer in a prescribed form in response to an invitation by Transnet for the provision of Services, works or Goods, through price quotations, advertised open bids, approved lists, confinements or proposals
Bidder	Any person/Enterprise which has submitted a Bid
Black People	is a generic term which means Africans, Coloureds and Indians
Board Acquisitions & Disposals Committee [BADC]	A sub-committee of the Transnet Board of Directors tasked with providing oversight and approval for acquisitions and disposals falling within its delegation of authority
Board of Directors [BOD]	The Board of Directors of Transnet SOC Ltd
Buyer	Any person in Procurement or iSCM in any Transnet entity, who has the necessary delegated powers to undertake specific procurement functions with regard to transactions falling within his/her DoA, i.e. the R-value of the transaction

TERM	DEFINITION, ABBREVIATION OR ACRONYM
Carrier	Any person who, in a contract of carriage of goods, undertakes to perform or to procure the performance of carriage, by rail, road, sea, air, inland waterway or by a combination of such modes (used in definitions of Incoterms)
Centre(s) of Excellence [COE(s)]	Cross-divisional teams strategically focusing on a particular functional area. They focus on tactical issues relating to the functional area, and are aimed at identifying and leveraging on the areas of excellence in Transnet. Key strategic objectives will be executed through the COEs with a risk mitigation plan supported by Enterprise Risk Management (ERM)
Chief Executive Officer [CEO]	The Chief Executive Officer at the head of a Transnet Division with appropriate delegated authorities which are in line with the Transnet Group Delegation of Authority (Group Limits of Authority)
Chief Financial Officer [CFO]	A Chief Financial Officer in an Operating Division of Transnet
Construction Industry Development Board [CIDB] bid/contract	Any construction related bid/contract, as defined in, and regulated by the Construction Industry Development Board, by virtue of the CIDB Act. This includes new construction activities as well as the maintenance of existing civil, mechanical or electrical structures
Confinement	A procurement process restricted to one or a limited number of Bidders
Consultant	A person, company or a close corporation that provides expert or specialised advisory skills / services. A consultant does not supply the ultimate end product, but provides a recommendation of the best solution to a specific need based on his/her expertise.
Chief Procurement Officer [CPO]	The Chief Procurement Officer of a Division of Transnet or a Specialist Unit
Cross Functional Evaluation Team [CFET]	A team that is involved in the evaluation of bids regarding transactions of a high value or where the quality / functionality criteria is complex and a simple yes /no answer on technical compliance is not possible or viable.
Cross Functional Sourcing Team [CFST]	A team that is involved in the procurement of transactions of a high value or where the quality / functionality criteria are complex. As they represent various functions, a holistic overview over the process will be ensured.
Delegation of Authority [DoA]	The extent of authority required in order to implement certain actions by or on behalf of the company, including any sub-delegation of authority where permitted. This includes the power to retrospectively authorise, condone or rescind a decision already taken by a sub-delegate.
Exempted Micro Enterprise [EME]	An enterprise with an annual turnover of less than R5 million, as defined by the DTI's Codes of Good Practice
Expression of Interest [EOI]	Means a request for Bidders to register their interest in providing specified Goods or Services and to submit their credentials so they may be invited to submit a Bid should they qualify or are selected to do so.

TERM	DEFINITION, ABBREVIATION OR ACRONYM
Enterprise	A trading business (a company, close corporation, partnership or any other form of business) external to Transnet.
Entity	Used in the Transnet context to describe an internal Transnet Operating Division, Specialist Unit, Transnet business or the various Group Functions comprising the Corporate Centre
Fronting	A deliberate circumvention or attempted circumvention of the BBBEE Act and the Codes. Fronting commonly involves reliance on data or claims of compliance based on misrepresentations of facts, whether made by the party claiming compliance or by any other person
Fruitless and Wasteful Expenditure	Expenditure that was made in vain and could have been avoided had reasonable care been taken. The paying of exorbitant prices which are not market related is also regarded as fruitless and wasteful expenditure
Further Recognition Criteria (Current) [FRC Current]	A mechanism used to evaluate preference, based on the extent to which a bidder's current B-BBEE status in terms of ownership, management control and employment equity meets or exceeds a stipulated minimum target.
Further Recognition Criteria (Future) [FRC Future]	A mechanism used to evaluate preference based on the extent to which an enterprise commits to improving or sustaining its B-BBEE performance over the contract period in excess of stipulated minimum targets. These criteria focus on ownership, management control, employment equity, preferential procurement and enterprise development.
Goods	Any physical object or objects which has value, whether raw or processed, movable or immovable
Group	All Operating Divisions, Specialist Units, Businesses as well as the various different Group Functions comprising the Corporate Centre
Group Chief Executive [GCE]	The person in the Corporate Centre appointed as the Transnet Group Chief Executive, duly appointed by the Minister of Public Enterprises, or the person acting in his/her stead, at any given time, in terms of a proper mandate
Group Chief Financial Officer [GCFO]	The Group Chief Financial Officer in the Group Corporate Head Office, who reports directly to the GCE, or the person acting in his/her stead, at any given time, in terms of a proper mandate
Group Chief Supply Chain Officer [GCSCO]	The General Manager who heads up the integrated Supply Chain Management function in the Corporate Head Office, or the person acting in his/her stead, at any given time, in terms of a proper mandate
High Value Tender Process [HVTP]	A process that is used in the procurement of high value goods/services. This process includes a number of gateway reviews during key steps of the tender process, in order to ensure that any flaws in the process are detected timeously
IC^3 Supplier Development Matrix	A framework utilised to categorise SD opportunities on a matrix based on their value, extent of industrial leverage and strategic importance to Transnet. The matrix is adapted from the DPE Supplier Classification Matrix focused on **I**ncreased **C**ompetitiveness, **C**apability and **C**apacity

TERM	DEFINITION, ABBREVIATION OR ACRONYM
Imported content	That portion of the Bid price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the supplier or its subcontractors) and which costs are inclusive of the costs abroad, plus freight and other direct importation costs, such as landing costs, dock dues, import duty, sales duty or other similar tax or duty at the South African port of entry
Incoterms	(ICC Incoterms 2010) means, in relation to international trade (sale and purchase of Goods), the globally accepted purchase terms for Goods, used to indicate the costs to be incurred by the seller and the buyer and the point at which the risk of the Goods passes from the seller to the buyer See Appendix C for detailed definitions of all Incoterms
Integrated Supply Chain Management [iSCM]	The Integrated Supply Chain Management function as a whole including all Operating Divisions and Centres of Excellence
Irregular Expenditure	Expenditure incurred in contravention of, or that is not in accordance with a requirement of any applicable legislation, including the PFMA
Letter of Award	Is issued when a Bidder is selected as the Successful Bidder. The letter of award informs the Successful Bidder unequivocally that he/she was awarded the business
Letter of Intent (LOI)	Is issued when a Bidder is selected as the Preferred Bidder. The LOI informs the Preferred Bidder of Transnet's intention to negotiate and conclude a contract with it
Local Content (LC)	The portion of the Bid price or quotation which is not included in the Imported Content, provided that local manufacture does take place
Manager	Means any employee in Transnet, by whatever designation he/she is known, who has been delegated certain specific powers in terms of a proper Delegation of Authority
Material Amendment	An amendment which increases the scope, cost or risk of a contract by more than 10% of the original contract value
Market Demand Strategy (MDS)	The Transnet strategy to invest in capital infrastructure in order to meet market demands for increased efficiency and effectiveness in delivery of Transnet's services
Non-Disclosure Agreement [NDA]	A confidentiality agreement between two or more parties
Open Bid	A public request to do business which has been properly advertised and to which any member of the public can submit a Bid
Operating Division [OD]	An operating division of Transnet, namely TFR, TPT, TNPA, TPL and TRE
Parcelling	The practice of deliberately splitting business into smaller portions to keep the transaction value within one's own Delegation of Authority, or to keep it below the threshold of an AC or a person with higher Delegation of Authority

TERM	DEFINITION, ABBREVIATION OR ACRONYM
Parent Company Guarantee	A guarantee by a parent company of a supplier's performance under its contract with a buyer, where the supplier is a subsidiary of the parent company.
Performance Bonds (PBs)	A performance bond from a bank guarantees performance under a contract from commencement to completion. The bank issuing the performance bond undertakes to pay a specified sum of money to the buyer if the supplier does not fulfil its contractual obligations.
Post Tender Negotiation [PTN]	Negotiations between Transnet and one or more shortlisted Bidders after the Bids have been evaluated, but before the business has been awarded
Preferred Bidder	Means a Bidder that has been identified through an evaluation process as the Bidder with whom Transnet intends to conclude a contract subject to the successful completion of contract negotiations
Prequalification Criteria	These are criteria that have to be met for a Bid to be deemed as responsive, e.g. registration with a specific professional body, specific accreditation, etc
Qualifying Small Enterprise [QSE]	An enterprise with a turnover between R5m and R35m, as defined by the DTI's Codes of Good Practice
Quality (Functionality)	The totality of features and characteristics of Goods or Service that bears on its ability to satisfy a stated or implied needs
Rental or Lease	The use of Goods and/or moveable assets for a period and for consideration (compensation)
Request for Information [RFI]	An invitation to a broad base of potential suppliers to provide written information about their capabilities to meet a stated Transnet need. An RFI is primarily used in instances where Transnet is not clear about the precise specifications and/or scope of work required to meet its needs for specified Goods or Services. The information received through an RFI process is typically used to pre-qualify suppliers for consideration before an RFP for the Goods/Services is issued
Request for Quotation [RFQ]	Request for Quotation is used for transactions <R2m. However, CEOs may at their discretion lower the quotation limit
Request for Proposal [RFP]	Request for Proposal is used on the open Bid process i.e. for transactions > R2 million. However, CEOs may at their discretion lower the minimum threshold for open Bids
Request for ... [RFX]	A generic term which can be used interchangeably with either RFI, RFQ or RFP
Service	The provision of labour or work, including knowledge-based expertise, carried out by hand, or with the assistance of equipment and plant
SOC	State Owned Company
Supplier Development (SD)	Improving the socio-economic environment as required by the NGP by creating competitive local suppliers via Enterprise Development, the Competitive Supplier Development Programme and other initiatives such as Preferential Procurement. This results in a reduction in capital leakage and creates a supply base that can be competitive to market its Goods on the international market leading to

TERM	DEFINITION, ABBREVIATION OR ACRONYM
	increased exports.
Successful Bidder	Means a Bidder that has been identified as the Bidder to which business has been awarded
Tender Evaluation and Recommendation Report [TEAR]	A report that must be submitted by the evaluation team to the AC setting out an overview of the bid evaluation process, evaluation methodology, reasons for elimination of Bidders, a recommendation for the award of the tender as well as all supporting evaluation scorecards
Transnet Acquisition Council [TAC]	Acquisition Council catering for Corporate Head Office procurement and Centre-led transversal procurement
Transnet Capital Projects [TCP]	Transnet Capital Projects - a Specialist Unit of Transnet
Transnet Freight Rail [TFR]	Transnet Freight Rail - an Operating Division of Transnet
Transnet National Ports Authority [TNPA]	Transnet National Ports Authority - an Operating Division of Transnet
Transnet Pipelines [TPL]	Transnet Pipelines - an Operating Division of Transnet
Transnet Port Terminals [TPT]	Transnet Port Terminals - an Operating Division of Transnet
Transnet Properties(TP)	Transnet Properties – a Specialist Unit of Transnet
Transnet Corporate Centre [TCC]	The Head Office of Transnet SOC Ltd
Transnet SOC Ltd	Transnet SOC Ltd, Registration No. 1990/000900/30 incorporated in terms of the Companies Act 71 of 2008, as amended which includes all Operating Divisions, Specialist Units and/or subsidiaries
Transnet Rail Engineering [TRE]	Transnet Rail Engineering - an Operating Division of Transnet
Unsolicited Bid	A unilateral request from a person or enterprise to do business with Transnet without Bids or quotations having been invited by Transnet
Working day	Any day other than a Saturday, Sunday or public holiday
Year	Any defined period of 12 (twelve) consecutive months

Note: Words capitalised in the document have been defined in this Chapter.

CHAPTER 3 : SCOPE AND EXCLUSIONS

Save for the exclusions mentioned in Table 1 below and acquisitions that are governed by the Transnet Capital Projects ("**TCP**") Construction Procurement Policy, Processes, Procedures and Methods Manual (the Construction Manual), the PPM is applicable to all acquisitions across the Transnet Group regardless of the value of the transaction. The Construction Manual has been aligned to the Construction Industry Development Board ("**CIDB**") Act and Standards for Uniformity and applies to all construction-related acquisitions across Transnet. The PPM applies to construction-related acquisitions only where the Construction Manual is silent on an issue.

The PPM sets minimum standards for compliance, however, CEs and their duly appointed Acquisition Councils ("**ACs**") may impose more stringent rules and thresholds than those laid down in the PPM.

3.1 PROCUREMENT PROCEDURES

Transnet's Procurement Procedures as encapsulated in this document (the **PPM**), aim to establish the framework within which procurement activities are to be conducted at Transnet. These procedures are derived from the Transnet Supply Chain Policy, and should be read in conjunction with delegated powers granted in terms of the Delegation of Authority Framework. Other formal procedural manuals, directives, circulars or practice notes may be issued from time to time, either from iSCM, or from an Operating Division ("**OD**"), AC or Group Function and these should be read in conjunction with this Manual. However, it must be noted that any directive that changes any substantive principles of the PPM will be issued only on approval from the BADC. Where any conflict arises between such directives and the **PPM**, the **later dated document** shall prevail.

3.2 COMPLIANCE WITH THE PPM

Subject to paragraph 3.4 below, all procurement within Transnet must be conducted in accordance with the PPM.

3.2.1 Non-compliance with the PPM will be regarded in a serious light as it could result in Irregular Expenditure and/or Fruitless and Wasteful Expenditure in terms of the PFMA.

3.2.2 Section 51(1)(e) of the PFMA places an obligation on Transnet to take the necessary appropriate action regarding acts of financial misconduct.

Failure to comply with the provisions of the PPM will lead to disciplinary action and depending on the severity of the non-compliance, possible dismissal and/or legal action. As a general rule, condonation of non compliance with procurement policies and procedures is not permitted in terms of the PPM.

3.3 PURCHASING PROCEDURES

These procedures cover the purchasing and supply of all Goods, Services (tangible and intangible), fixed assets and the appointment of consultants. The aforementioned are in respect of both Operational and Capital expenditure.

3.3.1 Ferrous and non-ferrous scrap

The process of appointing contractors for the disposal of ferrous scrap (steel) and non-ferrous scrap is subject to the PPM. Due to the high value income-generating nature of such disposals as well as the high risk of theft, the disposal of scrap is in addition governed by a separate, detailed "Scrap Disposal Policy and Procedures". This policy is available on the iSCM Transnet Intranet.

3.4 PPM EXCLUSIONS

The transactions and processes tabled below are excluded from this Procurement Procedures Manual:

TABLE 1

• Individuals (temporary staff), including contract workers employed by Transnet Human Resources. (However, the appointment of a recruitment agency, Consultant, consultancy firm or a firm providing a Service to Transnet must follow the **PPM**)
• Petty cash purchases, subject to such instructions as issued from time to time
• Inspection Services in connection with the procurement / sale of Goods / assets
• The rendering of Services by or to government departments, SOCs or other public entities provided that rates charged by such institutions are market related or certified as fair and reasonable
• Media advertising (excluding campaigns involving professional advertising agencies)
• Income generating transactions (i.e. where Transnet's infrastructure, etc. is utilised to provide a Service; including instances where cross-divisional support is engaged for strategic or other reasons. However, procurement relating to such income-generating contracts must follow the PPM - see Chapter 9 *(Contract Options)*
• Water and electricity which is supplied to Transnet, including the provision of Services, as well as the relocation of such Services as a result of Transnet's activities (e.g. the relocation of power lines or water mains due to the construction of a new railway line)
• Rates and taxes and other levies raised by local authorities or provincial administrations, both of which are excluded from these procedures, by virtue of the fact that they can only be obtained from the particular local authority, but which are for purposes of good corporate governance, paid by means of blanket orders, or other approved methods
• Purchase of Goods at auctions
• Sale of Goods at auctions but excluding the appointment of auctioneers
• Letting and hiring of dwellings, and acquisition and alienation of houses or acquisition of land for houses in terms of prescribed housing policy
• Letting and hiring, and acquisition and disposal of all immovable assets. Refer to the Transnet Group Delegation of Authority, available on the iSCM Transnet Intranet.
• Sponsorships and donations, which are strictly governed by Delegated Powers
• Disposal of non-core businesses by the Transnet Restructuring Department, which is strictly governed by the Restructuring Committee, a sub-committee of Transnet's EXCO. Such disposals are on the strict proviso that any employee of the Transnet Restructuring Department, a Transnet Board member or a senior Manager (or higher) in the Transnet Group or any of its divisions will be disqualified from the Bidding process for the said non-core businesses for a period of 18 months from the date of his/her exit from Transnet
• The disposal of all movable assets, e.g. the disposal of redundant PC equipment, cell phones, office equipment and furniture must be properly controlled in terms of the individual policies/procedures governing such disposals. These policies and procedures are available on the iSCM Transnet Intranet.
• The provision of degree or diploma certificates by tertiary institutions, attendance of training courses, seminars and conferences, provided that such transactions are approved by the person with the required DoA.
• Any such exclusions which a Transnet Division may apply for through iSCM and which have been duly approved by the Transnet Group Chief Executive ("**GCE**") or the Transnet Group Chief Financial Officer ("**GCFO**") in accordance with guidelines which may be issued from time to time.

3.5 APPLICATION

This version of the PPM applies to all new procurement processes which have been initiated on or after the commencement date of this document. Procurement processes initiated prior to the commencement date must be dealt with in accordance with the rules that were applicable at the time (i.e. the May 2009 version of the PPM).

CHAPTER 4 : APPLICABLE LEGISLATION AND POLICIES

4.1 LEGISLATION

The Government of the Republic of South Africa, through the Department of Public Enterprise, is the sole shareholder of Transnet. The following legislation has been taken into consideration in the formulation of this document:

TABLE 2

LEGISLATION AND GOVERNMENT POLICY
• The Administrative Adjudication of Road Traffic Offences Act, 46 of 1998
• The Arbitration Act, 42 of 1965
• The Broad-Based Black Economic Empowerment Act, 53 of 2003 as amended, including the Department of Trade & Industry's Codes of Good Practice
• The Companies Act, 71 of 2008 as amended
• The Competition Act, 89 of 1998 as amended
• The Competitive Supplier Development Programme (CSDP)
• The Constitution of the Republic of South Africa Act, 108 of 1996
• The Construction Industry Development Board Act (CIDB Act), 38 of 2000
• The Conventional Penalties Act, 15 of 1962
• The Copyright Act, 98 of 1978
• The Currency and Exchange Act, 9 of 1933
• The Designs Act, 195 of 1993
• The Electronic Communications and Transaction Act, 25 of 2002
• The Framework for the Operationalisation of Government's Procurement Policies in State Owned Enterprises (dated 31 July 2001)
• The Industrial Policy Action Plan II
• The King III Report on Corporate Governance
• The Local Procurement Accord
• The National Ports Act, 12 of 2005
• The National Railway Safety Regulator Act, 16 of 2002
• The New Growth Path (NGP)
• The Occupational Health and Safety Act, 85 of 1993
• The Patents Act, 57 of 1978
• The Preferential Procurement Policy Framework Act (PPPFA), 5 of 2000 as amended, Regulations of 2011 - effective December 2011 (Transnet has applied for exemption and has been granted partial exemption for a period of 12 months. Further developments in this regard will be published in PPM Directives).
• The Prevention and Combating of Corrupt Activities Act, 12 of 2004 as amended
• The Promotion of Access to Information Act (PAIA), 2 of 2000 as amended
• The Promotion of Administrative Justice Act, 3 of 2000
• The Public Finance Management Act (PFMA), 1 of 1999 as amended (Transnet is not bound by the Supply Chain regulations issued in terms of this Act)

LEGISLATION AND GOVERNMENT POLICY
• The Promotion of Administrative Justice Act (PAJA), 3 of 2000 as amended
• The Second-Hand Goods Act, 6 of 2009
• The Standards Act, 8 of 2008
• The Trade Marks Act, 194 of 1993
• The Value Added Tax Act, 89 of 1991

4.2 POLICIES

4.2.1 General Overview of Transnet Policies

The following policies and procedures which are available on the Transnet Intranet are supplementary to this PPM and should be taken into consideration, where applicable. Parties using the PPM must apply the most recent edition of the documents listed in Table 3 below

TABLE 3

TRANSNET POLICIES AND PROCEDURES	LOCATION
• Transnet Code of Ethics	Company Secretary Intranet portal
• Cell phone Policy	ICT Intranet Portal
• PC Disposal Policy	ICT Intranet Portal
• Contracting Procedures Manual	iSCM Intranet portal
• Construction procurement policy, processes, procedures and methods within Transnet Capital Projects	TCP Intranet portal
• Declaration of Interest and Related Party Disclosure Policy	Company Secretary Intranet portal
• Delegation of Authority Framework	Company Secretary Intranet portal
• Gifts Policy	Company Secretary Intranet portal
• Supply Chain Policy	iSCM Intranet portal
• Procure to Pay Procedures(P2P)	iSCM Intranet portal
• High Value Tender Process	iSCM Intranet portal
• Records Management Policy	Company Secretary Intranet portal
• Reverse Logistics Procedure	iSCM Intranet portal
• Scrap Policy	iSCM Intranet portal
• Supplier Development Policy	iSCM Intranet portal
• Transnet Strategy for Broad-Based Black Economic Empowerment	iSCM Intranet portal
• Transnet Broad-Based Black Economic Empowerment Policy for Procurement	iSCM Intranet portal

4.2.2 Preferential Procurement

a) Strategic Intent

Patterns of racial inequality (as well as other forms of social inequality) stubbornly persist almost two decades after the demise of apartheid. There is also a huge disparity in income distribution between social groupings. Transnet will therefore act as a responsible corporate citizen in the context of its B-BBEE endeavours, by utilising various strategies to promote empowerment more vigorously. Such strategies must be applied subject to the discipline of our constitutional framework to ensure that the overall objectives of a non-racial and non-sexist society are achieved. Transnet will also apply these strategies in a manner as to ensure that the constitutional principles of fairness, equity, transparency, competitiveness and cost-effectiveness are not materially undermined.

The strategies referred to above include (but are not limited to) the following:

- allowing preference in accordance with the B-BBEE status of an enterprise, based on its B-BBEE scorecard;
- increasing the weighting allocated to preference in a particular bid beyond the 10 or 20 points allocated in terms of the PPPFA;
- allowing Further Recognition Criteria points to an enterprise whose **current** black ownership, management control or employment equity **meets or exceeds** a stipulated minimum target (This will be referred to as FRC Current);
- allowing points for Further Recognition Criteria points based on the extent to which an enterprise commits to **improving or sustaining its B-BBEE performance** over the contract period in the following areas in excess of stipulated minimum targets: ownership, management control, employment equity, preferential procurement and enterprise development (This will be referred to as FRC Future);
- setting minimum B-BBEE levels as a pre-qualification criterion to participate in a bid process;
- limiting participation in a bid process to persons or entities owned by persons who have been disadvantaged by unfair discrimination;
- requiring bidding entities to form Joint Ventures (JVs) with black owned entities, alternatively to sub contract a minimum percentage of the contract to black owned companies;
- stipulating that an Enterprise will not be awarded points for its B-BBEE status level if it has indicated in its Bid response that it intends sub-contracting more than 25% of the value of the contract to any other Enterprise that does not qualify for at least the points that such a Bidder qualifies for, unless the intended subcontractor is an EME that has the capability and ability to execute the sub-contract;
- stipulating that an Enterprise who has been awarded a contract may not sub-contract more than 25% of the value of the contract to any other Enterprise that does not have an equal or higher BBBEE status level than the Enterprise concerned, unless the contract is subcontracted to an EME that has the capability and ability to execute the sub-contract.
- Requiring winning bidders to take steps to ensure:
    - management and daily operational involvement by Black professionals and managers as prescribed in the different sector charters;
    - skills transfer and training; and
    - employment creation and employment equity.

The underlying objective of the Preferential Procurement methodology is to create an enabling environment for B-BBEE Enterprises to access available procurement opportunities within Transnet and to add value to the supply chain. B-BBEE Enterprises will therefore be engaged as:

- principal contractors;
- joint venture partners;
- professional service providers;
- subcontractors, suppliers and/or manufacturers.

b) Scope and applicability

(i) Transnet's approach to Preferential Procurement applies to all purchases of Goods and Services and will apply to all QSEs, EMEs as well as to large enterprises.

(ii) The approach shall apply to and impact on all levels (Rand value) and types of Bids. It will also apply to any disposal, letting or leasing of assets and the acquisition or granting of any right for and on behalf of Transnet. The objective is to design innovative ways to promote Black Economic Empowerment.

(iii) Bid documents must specifically state that B-BBEE preference in terms of the DTI Codes of Good Practice and/or other relevant Charters will apply.

c) Objectives

(i) Transnet encourages and will recognise all improvement in current and future supplier ratings.

(ii) Transnet will encourage value–adding joint ventures with B-BBEE Enterprises. Bidders may develop joint ventures in order to comply with Transnet's B-BBEE requirements. The following documents shall form part of their submission:

- ownership documents showing the status of the partners to the joint venture;
- Joint Venture Agreement;
- Joint Venture Declaration Form; and
- any other documents as may be required by Transnet.

(iii) Transnet accepts that bidders often create JVs for a specific project only, on the basis that the JV will only be created if they are successful in winning the business and a contract is awarded to them. This is known as an unincorporated JV. A JV will qualify for points as an unincorporated entity provided that the entity submits their consolidated B-BBEE scorecard as if they were a group structure and that such a consolidated scorecard is prepared for every separate tender. The Bidders must also submit a Joint Venture Agreement for the unincorporated JV.

d) Preferential procurement targets and reporting

(i) To promote preference in the procurement of Goods and Services, targets will be set by the B-BBEE Forum and implemented by all the ODs.

(ii) The overriding principle in the setting of such targets is that a sectoral approach will be adopted. Thus for sectors where there is a high probability of finding B-BBEE Enterprises or where there is a need to accelerate transformation, the target may be set higher.

Transnet's approach to preferential procurement is dealt with in more detail in Chapter 10.

4.2.3 Supplier Development – Strategic Intent

a) Background

Government economic development policies such as the New Growth Path (NGP) and IPAP II have increased the focus on how procurement at SOCs such as Transnet can be leveraged to achieve the national goals of reducing unemployment, ensuring industrialisation and developing local suppliers.

Transnet strives to provide a competitive Service, while at the same time, creating opportunities for new entrants to the market and stimulating job creation through the implementation of its SD mission.

Transnet's mission is to transform its supplier base by engaging in targeted SD or B-BBEE initiatives to support local capability and capacity building and industrialisation whilst providing meaningful opportunities for South Africans with particular emphasis on:

- Black youth;
- Black women;
- small businesses;
- people with disabilities; and/or
- rural integration, upliftment and development.

Leveraging procurement to influence the development of the local supplier industry is key to realising Government's objectives relating to growth, employment creation and equality. Achieving SD objectives will provide the following key benefits for Transnet and the broader South African society:

- Acceleration of local capability and capacity building and transformation of local business by promoting technology transfer, skills development and job creation;
- Focused regional development and upliftment of rural communities;
- Increase in Local Content – security of supply, reduced cycle times, reduced exposure to foreign currency and reduction of supply chain costs (over time);
- Transformation of supplier dominance from large international or national monopolies in order to create more opportunities for locally owned and/or Black owned suppliers; and
- Improved B-BBEE rating for Transnet

A Transnet SD strategy, SD policy and SD plan forms the framework within which Transnet will implement its SD initiatives.

b) Applicability

All transactions involving SD should be evaluated against the IC^3 Supplier Development Matrix. This matrix (*Figure [1]* below) categorises transactions according to three principles:

- **Value leverage** refers to transactions where the financial scale of the transaction allows the buyer the opportunity to negotiate SD.
- **Industrial leverage** refers to transactions whereby the nature of the procurement is such that the scale and the industrial complexity of the item being purchased allow for local supply chain development around a particular industry.
- **Strategic importance** to Transnet refers to the extent to which the Goods to be procured has an impact on Transnet's core business.

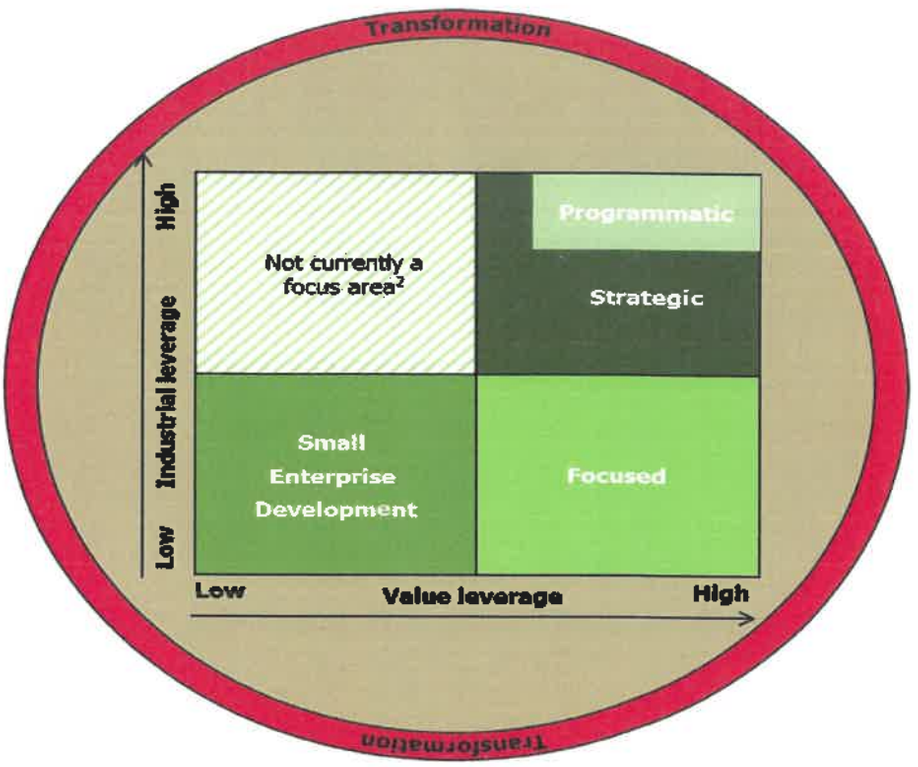


Figure [1] – IC³ SD Classification Matrix

The IC³ Supplier Development Classification Matrix (refer Figure [I] above) assists in categorising opportunities according to their industrial leverage, value leverage and strategic importance to Transnet.

Once opportunities are identified it will be possible to identify the tools that should be implemented to maximise the full supplier development potential from these opportunities.

Based on the classification of a specific transaction, there will be certain SD objectives that Transnet will strive to meet. These objectives are all aligned to national objectives, and explained in more detail in Chapter 12 *(Determining SD Approach and Desired Outcomes).*

CHAPTER 5 : CODE OF ETHICS

5.1 SUPPLY CHAIN CODE OF ETHICS

5.1.1 Transnet's Code of Ethics sets ethical standards for business practice and individual business conduct. It assists all Transnet stakeholders with their ethical deliberations and decisions. The objective of the Code of Ethics as it relates specifically to the Supply Chain environment is to set the standard by which all Transnet Board members and employees (including employees employed on fixed term contracts and temporary employees) are expected to act when engaging in any supply chain related activities. This will earn Transnet the reputation of being:

a) transparent and fair in all dealings and disclosures;
b) politically unbiased;
c) committed to providing Quality Goods and Services;
d) committed to transformation and empowerment;
e) proud of its integrity and credibility;
f) consistent in honouring its social, legal and moral obligations;
g) responsible and accountable; and
h) reliable and aware of the need to foster loyalty and long enduring relationships with all its stakeholders.

5.1.2 All Transnet employees should uphold the following key values:

a) act with integrity and professionalism at all times;
b) be honest;
c) be committed and dedicated to high Quality performance;
d) be customer orientated;
e) respect and maintain the confidentiality of sensitive information gained through association with Transnet;
f) maintain accurate, honest and complete records in appropriate detail;
g) protect Transnet's assets;
h) treat all suppliers with respect and dignity and foster a productive environment free of harassment, intimidation and discrimination;
i) refrain from using a position of authority and / or facilities provided by Transnet to further their own interests or that of friends and relatives;
j) desist from allowing personal interests to influence business decisions or tasks and disclose any actual or potential conflict of interest;
k) honour the content and spirit of all business transactions and not abuse Transnet's name; and
l) maintain an attitude of zero tolerance toward any form of bribery, corruption and inducements.

5.1.3 While considering the advantages of maintaining a continuing relationship with a supplier, Transnet iSCM must avoid any arrangement which in the long term might compromise fair competition or prevent Transnet from achieving optimal value.

5.1.4 No sale to or purchase from a Transnet employee is permitted under any circumstances. This excludes sales by auction or such other exceptions as may be authorised by management from time to time.

5.1.5 Former employees of Transnet shall not be restricted from doing business with Transnet unless they have been restricted from doing so in terms of paragraph 5.1.6 below. Due diligence should be exercised by evaluation teams to determine whether any undue influence/unfair advantage could have been possible between any Transnet employees and the former employee. This should be brought to the AC's attention, and should be stated clearly in submissions to the AC or to the delegated Manager for transactions falling below the AC's jurisdiction.

5.1.6 Former employees of Transnet who were dismissed following disciplinary action or who had resigned to circumvent disciplinary action following charges relating to dishonesty (e.g. bribery, corruption, theft, etc.) shall be formally excluded from future business dealings with Transnet. They will be blacklisted for a specific period and their names shall appear on Transnet's List of Excluded Bidders (see Chapter 23 on *Blacklisting*).

5.2 CONFIDENTIAL INFORMATION AND TRADE SECRETS

5.2.1 Employees have access to information related to Transnet's business strategies and contractual relationships with third parties. This information must be regarded as trade secrets. It includes intellectual property, know-how, processes, techniques, technical detail, methods of operating, cost and source of material, pricing and purchasing policies, systems design and development information. It also includes the contractual and financial arrangements between Transnet and its customers and suppliers. In this regard, all employees have a duty of trust and confidence and a duty to act at all times in the best interests of Transnet. The disclosure of trade secrets or any other confidential information could cause serious damage to Transnet, and possibly claims of damages for breach of contract against Transnet.

5.2.2 No employee may discuss or disclose prices which have been quoted or charged to Transnet.

5.2.3 No employee may disclose information which would, or could be perceived to place a Bidder in a better position than its competitors, or which would put Transnet at a disadvantage against Bidders or suppliers.

5.2.4 Where it is necessary to disclose confidential information to potential suppliers in order to solicit Bids, Non-Disclosure Agreements ("NDAs") must form part of the bid documentation. The NDAs must be signed by all Bidders.

5.3 INTELLECTUAL PROPERTY RIGHTS OF SUPPLIERS/TRANSNET

5.3.1 Transnet will acknowledge and respect suppliers' intellectual property (IP) rights. Transnet will also seek to promote fair competition.

5.3.2 It is recommended that in cases where the IP of suppliers is at stake, Transnet should hold clarification sessions with potential Bidders in order to clarify the position regarding IP rights. Furthermore, before concluding a contract, Transnet should ensure that all issues of IP are properly addressed in the contract and that both parties understand the nature of the agreement.

5.3.3 Depending on the merits of each case, one of the following approaches will be followed and must be stipulated upfront in the Request for Proposal ("RFP") document:-

a) Transnet may choose to pay the supplier outright for its IP in the Goods and purchase the Goods with its IP. In such instances, the supplier relinquishes its rights to the IP and Transnet acquires all rights to the Goods. This applies to all specifications, drawings and/or prototypes. Transnet will disclose this at RFP stage and all aspects pertaining to IP will be negotiated and captured in the contract between the parties. Transnet shall have the right to procure its future requirements via an Open Bid process and the original designer/developer will be free to participate.

b) Transnet may choose to share the IP with the supplier where Goods were jointly developed by Transnet and the supplier. In this scenario, Transnet shares the IP and the royalties emanating from the development of the Goods. This must be clearly set out in the contract between the parties.

c) Where an existing patented article is required by Transnet, Transnet may choose to confine the tender to the manufacturer concerned or issue an Open Bid stating that the patented item or "anything similar" is required. In

this instance the supplier remains the owner of the IP in respect of the article.

5.4 GIFTS AND GRATUITIES

5.4.1 All business decisions and transactions must be made with uncompromised integrity, honesty and objective judgment. Transnet does recognise that in executing its business and applying industry norms, employees may be required to accept or give gifts as a token of appreciation. The Transnet Gifts Policy regulates and controls the acceptance and giving of gifts.

5.4.2 The acceptance and giving of gifts exceeding the value (currently R750.00) stipulated in the Transnet Gifts Policy, as amended from time to time is prohibited.

5.4.3 The occasional exchange of gifts not exceeding this value may be accepted, provided that such gifts are not specifically intended to influence any procurement or sales decisions and are:

a) Declared to the employee's immediate Manager; and

b) Recorded in a Declaration of Gifts Register.

5.4.4 Under no circumstances should gifts be accepted from prospective suppliers, regardless of value, during any bid evaluation period including a period of 12 months after such bid has been awarded. This may be perceived as undue and improper influence over the bid process.

5.4.5 Gratuities, bribes or kickbacks of any kind must never be solicited, accepted or offered, either directly or indirectly. This includes money, loans, equity, special privileges, personal favours, benefits or Services. Such favours will be considered bribery. This is unlawful and the appropriate criminal / civil action will be enforced. If a supplier or employee offers or accepts such "favours" or bribes, it must immediately be reported to the Manager in charge of the function for appropriate action. In accordance with the ordinary principles of delictual liability, Transnet is entitled to recover all damages suffered as a result of the employee's corrupt or negligent conduct from that employee. Any person who has offered a bribe to a Transnet employee may also face criminal or civil action and/or exclusion from future Transnet business.

5.4.6 Employees are not permitted to accept gifts or buy Goods or Services at artificially low prices, not available to the public. Employees are also not allowed to accept personal favours and hospitality which might be deemed by others, to impinge upon the employee's sound business judgment.

5.4.7 Overseas visits on invitation by and at the expense of prospective suppliers will under no circumstances be permitted. Should an overseas visit be deemed necessary for the purposes of evaluating the supplier, this should be for Transnet's own account. All overseas visits have to be fully motivated in terms of the normal procedures for overseas visits. If current suppliers offer to pay for Transnet employees to travel to their offices or plants overseas, these requests need to be properly motivated and approved by the GCE or the relevant divisional CEO or Group Executive.

5.4.8 The following business courtesies are allowed, provided that the cost per instance does not exceed the amount as stipulated in the Gifts Policy:

a) entertainment;

b) advertising material of small intrinsic value such as pens, paper-knives (letter opener), diaries, calendars, etc.

5.4.9 A monetary limit will not be placed on the following:

a) business meals; and

b) hospitality packages to sports, arts and culture events held in the Republic of South Africa, with the objective of enhancing business relationships. Gifts received while on overseas business trips and from foreign delegates, which

exceed the limit set in the Transnet Gifts Policy, should be accepted, entered into the gifts register and submitted to the Group Company Secretariat for disposal in terms of the Gifts Policy.

5.4.10 In addition to the procedure for accepting gifts set out in the Gifts Policy, Supply Chain staff may only accept gifts after approval from their Manager. Supply Chain staff must declare all gifts irrespective of value. Supply Chain Managers must keep a proper gift register of all gifts and hospitality offered to their employees by suppliers and contractors, and vice versa. Unauthorised gifts that have not been accepted (e.g. exceeding the abovementioned limit) should also be entered into the gift register with an indication that they have been returned to the supplier or surrendered to Transnet or any other appropriate action that may have been taken.

5.4.11 All Supply Chain gift registers must be submitted to the relevant AC Chairperson for review on a quarterly basis. A Gift Register Template is attached to the Transnet Gifts Policy and must be used at all times to ensure that all relevant information and signatures of approval are captured.

5.5 DECLARATION OF INTEREST

5.5.1 In terms of the Companies Act 71 of 2008, directors or officers of a company have a duty to disclose their interests in contracts.

5.5.2 For the purposes of the Transnet Declaration of Interest and Related Party Disclosure Policy the requirement to disclose interests in contracts is extended to include all employees.

5.5.3 The Transnet Declaration of Interest and Related Party Disclosure Policy defines a conflict of interest as "a situation in which private interests or personal considerations affect, may affect, or may be perceived to affect, an employee's judgment in acting in the best interests of Transnet. This includes using an employee's position, confidential information, corporate time, material or facilities for:

- *private gain or advancement; or*
- *the expectation of private gain or advancement of the employee or any member of the employee's family, or friends or business associates of the employee."*

5.5.4 The Transnet Declaration of Interest and Related Party Disclosure Policy places a duty on all employees who have an interest, either directly or indirectly, in any new or existing contracts with an entity external to Transnet which may conduct, or does conduct business with Transnet, to declare such interest.

5.5.5 A direct interest in a bid includes the following:

a) Where the employee or Transnet Board member is -
   (i) a shareholder, member or director of a bidding enterprise;
   (ii) a shareholder, member or director of the holding company of a bidding enterprise; or
   (iii) a shareholder, member or director of a subsidiary of a bidding enterprise.

b) Where the employee or Transnet Board member is a direct family member or a close friend or associate of a person who is -
   (i) a shareholder, member or director of a bidding enterprise;
   (ii) a shareholder, member or director of the holding company of a bidding enterprise; or
   (iii) a shareholder, member or director of a subsidiary of a bidding enterprise.

5.5.6 Declaration of a direct interest will result in automatic recusal of an employee.

5.5.7 An indirect interest may include, but is not limited to:

a) being involved with the drafting of the specification or bid documents;

b) being involved with issuing / advertising of the bid; or

c) being involved in the evaluation, and subsequently being involved in the adjudication of the bid (applicable to members and/or alternates serving on the relevant AC).

5.5.8 Any indirect interest of an employee in a bid or offer must be declared and the Manager concerned will determine whether the employee should recuse him/herself. The reasons for this decision must be officially recorded and kept on file.

5.5.9 Bid documents must always contain a clause for prospective Bidders to declare any possible direct family or business relationship with a Transnet employee. Direct family or business relationships includes husband/wife, children (own and step), parents and grandparents (own and in-law), brothers and sisters (own, step and in-laws) and business associates.

5.5.10 Although business with Enterprises that have relationships with Transnet employees in terms of 5.5.9 above is not prohibited, it is imperative that it be properly declared and explicitly pointed out in the submission to the AC. This will allow the AC to consider all relevant facts and decide whether such involvement by a Transnet employee could be regarded as fair or whether other prospective Bidders will be prejudiced or may be perceived to have been prejudiced thereby. Bidders failing to declare such relationship(s) will be disqualified from the bid process. Contracts concluded without adherence to this rule, will be terminated and disciplinary action will be taken against the relevant Transnet employee(s). The company or companies involved will be placed on Transnet's List of Excluded Bidders.

5.5.11 All Transnet employees / board members involved in procurement activities are under a duty to declare their interests as soon as they become aware that they have a direct or indirect interest in a particular matter. If any doubt arises as to whether an interest should be declared or not, the employee concerned shall seek guidance from the office of the Company Secretary. The following must be noted with regard to the duty to declare interests:

a) in terms of the "Declaration of Interest and Related Party Disclosures Policy" all employees are required to submit an annual declaration of interest. These declarations are kept by the Group Company Secretary for employees at Group. Depending on the specific OD, declarations are kept by the OD Company Secretary, Compliance officer or the Legal department in respect of OD employees;

b) in addition to annual declarations, all employees involved in procurement should make a quarterly declaration of interest which must be kept by the relevant Manager;

c) all employees involved in the evaluation, Post Tender Negotiation ("PTN") or adjudication of Bids must sign a declaration of interest certificate indicating whether or not they have an interest in the matter at hand. This declaration must be placed on the relevant bid file; and

d) employees involved in procurement activities other than evaluation, post tender negotiation, or adjudication (such as buyers) will only be required to declare an interest if they in fact have an interest in a particular matter. Should such an employee not make any declaration in a particular matter, he/she will

be deemed not to have an interest in the matter. If it is later discovered that an employee did have an interest which he/she failed to declare, such employee will be found to have failed to comply with the duty to declare conflicts of interests.

e) A proper register of Declarations of Interest should also be kept by Managers responsible for departments involved in purchasing and disposal functions as well as by the Secretariats of the relevant ACs.

5.6 FRAUD AND CORRUPTION

5.6.1 Transnet insists on honesty, integrity and acting beyond reproach at all times and will not tolerate any form of improper influencing, bribery, corruption, fraud or any other unethical conduct on the part of Bidders / Transnet employees.

5.6.2 If Transnet's GCFO (or a duly authorised person) has determined that a Bidder / contractor / supplier has or has caused to be promised, offered or given to any Transnet employee, any bribe, commission, or any unauthorized gift, loan, advantage or other consideration, Transnet shall be entitled to revoke the bid / contract by following the process that governs the Exclusion of Bidders. Upon approval by the GCFO or duly authorized delegate, Transnet will be entitled to place any Bidder / contractor / supplier who has contravened the provisions of Transnet's business ethics on its List of Excluded Bidders. Furthermore, in terms of section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2001, Transnet will refer all matters of suspected corruption to the South African Police Services (SAPS) for further investigation.

5.6.3 Transnet reserves the right to exclude a Bidder from further business and/or to cancel all existing contracts, should a Bidder/supplier be found to have acted in bad faith or engaged in misconduct towards Transnet. Furthermore, no part of a contract may be subcontracted to an Excluded Bidder.

5.6.4 Bid documents should always contain a clause indicating that any suspected fraud, corruption or other unethical activities should be reported to Transnet Tip-offs Anonymous at any of the following addresses and contact numbers. Confidentiality is guaranteed at all times.

- *Toll-free anonymous hotline : 0800 003 056*
- *Email : Transnet@tip-offs.com*
- *Fax number : 0800 007 788*
- *Freepost DN 298, Umhlanga Rocks, 4320*

5.7 SANCTION

Non-compliance with the Code of Ethics is considered to be misconduct and employees may be subject to disciplinary procedures that could lead to dismissal as well as criminal and/or civil action.

CHAPTER 6 : DELEGATION OF AUTHORITY FOR PROCUREMENT PROCESSES

6.1. HOW DELEGATION OF AUTHORITY WORKS

Figure 2 below explains how authority is delegated from the Minister of Public Enterprise to the various structures and persons within Transnet via a series of sub-delegations:

How Delegation of Authority works within the context of Procurement

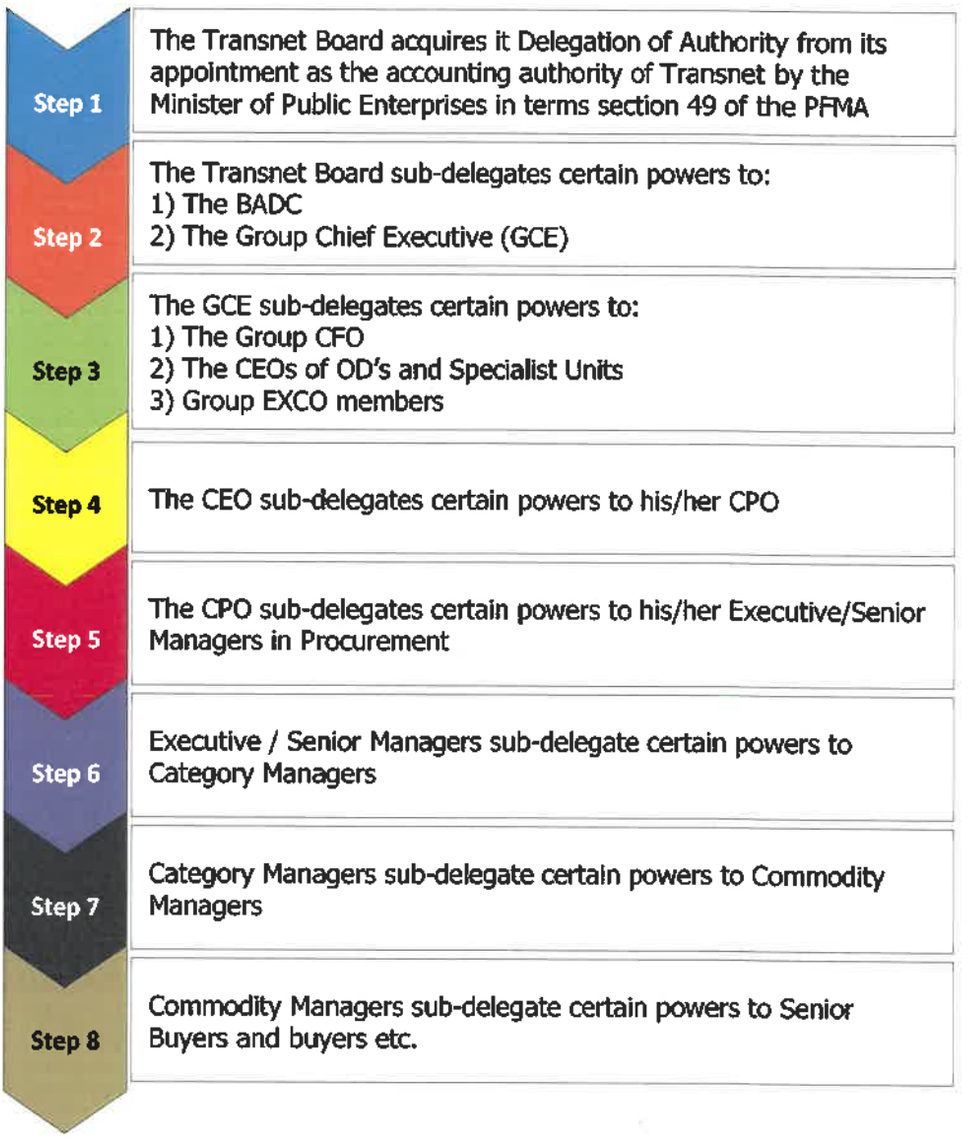


Figure [2] – Delegation of Authority

6.2. DELEGATION OF AUTHORITY FRAMEWORK

The Transnet Delegation of Authority (DoA) Framework sets out the powers delegated to certain officials (e.g. GCE, GCFO, OD CEO, etc) to perform specified tasks in relation to various areas of operation (e.g. finance, treasury, procurement, etc). The following powers, depicted in Table 4 below, are derived from the Transnet Delegation of Authority Framework dated 1 May 2012. **However, please note that these monetary limits are amended from time to time. Employees are therefore required to familiarise themselves with the monetary limits contained in the current DoA Framework.**

TABLE 4

	Approval Authority (R million)							
Procurement delegation	Group Exco Members (Specialist Units, excl.TCP	CEO/ HOD (budget owner) of Specialist Unit, excl. TCP	OD CEOs & TCP GE	GCSCO	GCFO	GCE	BADC	Board
Appointment of Consultants - Clause 5.4.1 of DoA Framework (Cumulative per annum)	≤R10m	Nil	≤R25m	Nil	≤R50m	≤R200m	≤R300m	>R300m
Approval to approach market with Open Bids - Clause 5.4.2 of DoA Framework	Nil	≤R75m	≤R450 m	≤R525m	≤R600m	≤R750 m	≤R1,500m	>R1,500m
Approval to approach market with Confined Bids - Clause 5.4.3 of DoA Framework	Nil	Nil	Nil	Nil	Nil	≤R250m	≤R1,000m	>R1,000m
Management's intervention to address non-compliance with procurement policies & procedures - Clause 5.4.4 of DoA Framework (Condonation)	Nil	Nil	Nil	Nil	Nil	≤R50m	≤R1,000m	>R1,000m
Enter into & signing of contracts - Clause 5.5.1 of DoA Framework	≤R30m	≤R5m subject to the contract period not exceeding 5 Years	≤R450 m	≤R525m	≤R600m	≤R750m	≤R1,500m	>R1,500m

6.3. POWERS VESTED IN TRANSNET OFFICIALS

It is important to bear in mind that not all powers vested in Transnet officials are contained in the DoA Framework. In the procurement context, certain powers are also vested in officials in terms of this PPM whilst other powers are inherent to the job function e.g. the day to day running of the procurement function. Figure 3 below explains the powers vested in Transnet officials in terms of the DoA Framework, the PPM and their job function, respectively:

Delegatee	From Whom	Delegation in terms of Transnet DoA Framework	Powers acquired in terms of the PPM	Delegation in terms of a "general blanket" delegation
GCE	Transnet Board	•Approve Confinements ≤R250m •Consultants ≤R50m •Condonations ≤ R250m •Going to market on open tender & sign contracts ≤ R500m	Final arbiter for appeals on blacklisting	Responsible for the day-to-day running of Transnet
GCFO	GCE	•Consultants ≤R25m •Going to market on open tender & sign contracts ≤ R400m	Approve decision to blacklist	N/A to procurement
OD CEOs	GCE	•Approve consultants ≤ R5m •Going to market on open tenders & sign contracts ≤ R300m	Approve OD Approved Lists Appoint AC & Chair/ members Mediate disagreements between AC and line/procurement, etc.	Responsible for the day-to-day running of the operating division
CPO	OD CEO	Going to market on open tenders & sign contracts depending on the value delegated by the OD CEO	Delegate powers to CFSTs, CFET & PTN teams, empower procurement to utilise quotation system & emergency purchases and initiate blacklisting proceedings	Responsible for the day-to-day running of the OD procurement function
Procurement	OD CPO	Going to market on open tenders & sign contracts depending on the value delegated by the OD CPO	Facilitate CFSTs, CFET & PTN teams Utilise quotation system and emergency purchases, issue open tenders and initiate blacklisting cases	Responsible for the day-to-day procurement tasks and functions

Figure [3] – Types of Delegated Authorities

6.4. DOA SUMMARY

Figures 4 to 9 below collectively represent a summary of the Delegations of Authority required for various procurement approval processes and thresholds as at 1 May 2012. However, please note that these monetary limits are amended from time to time. Employees are therefore required to familiarise themselves with the monetary limits contained in the current DoA Framework.

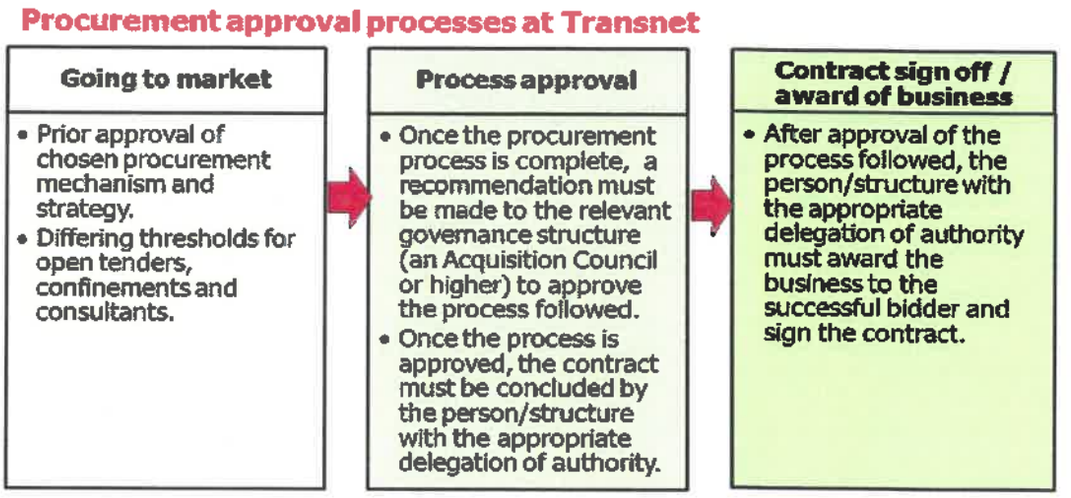


Figure [4] – Procurement approval processes

The thresholds applicable to the various approval steps are depicted in the diagrams below.

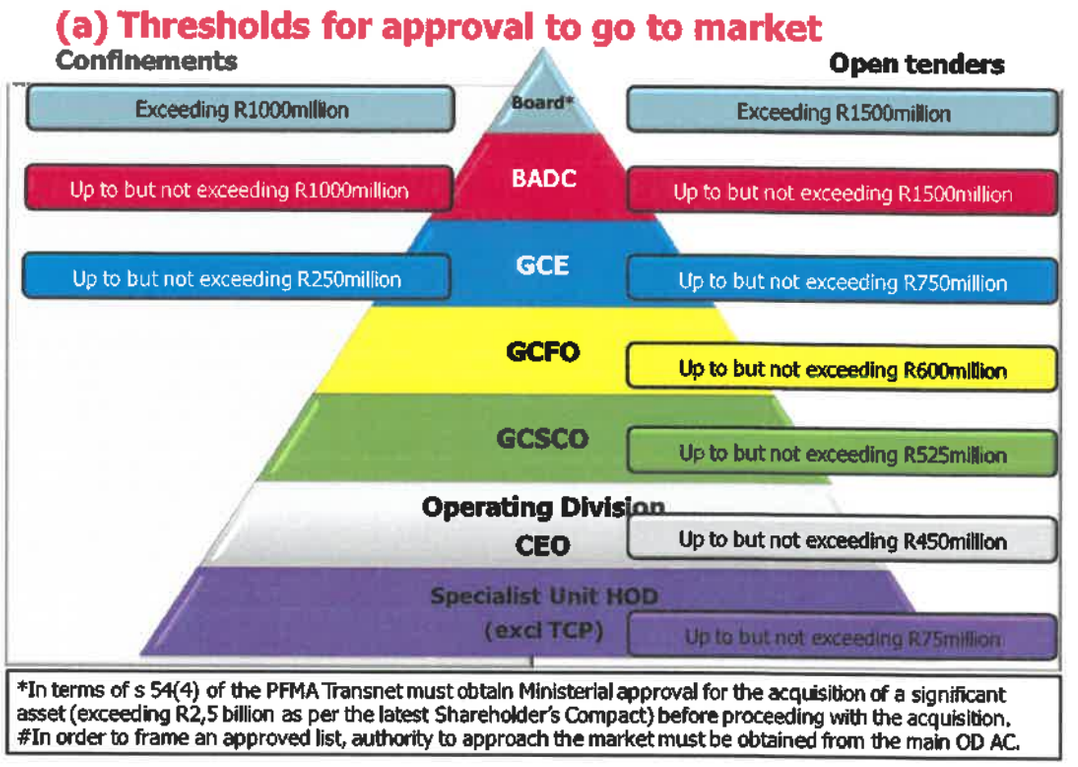
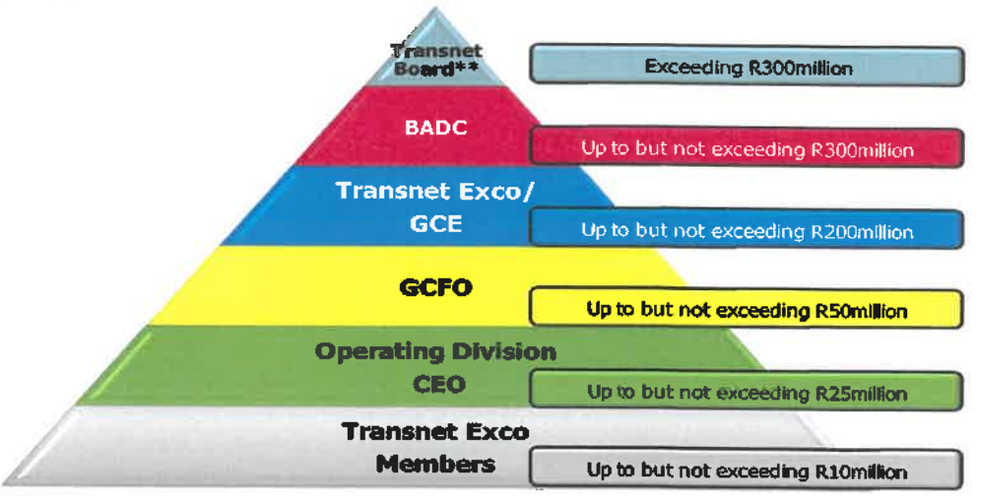


Figure [5] – Thresholds for approval to go to market

(b) Appointment of consultants*

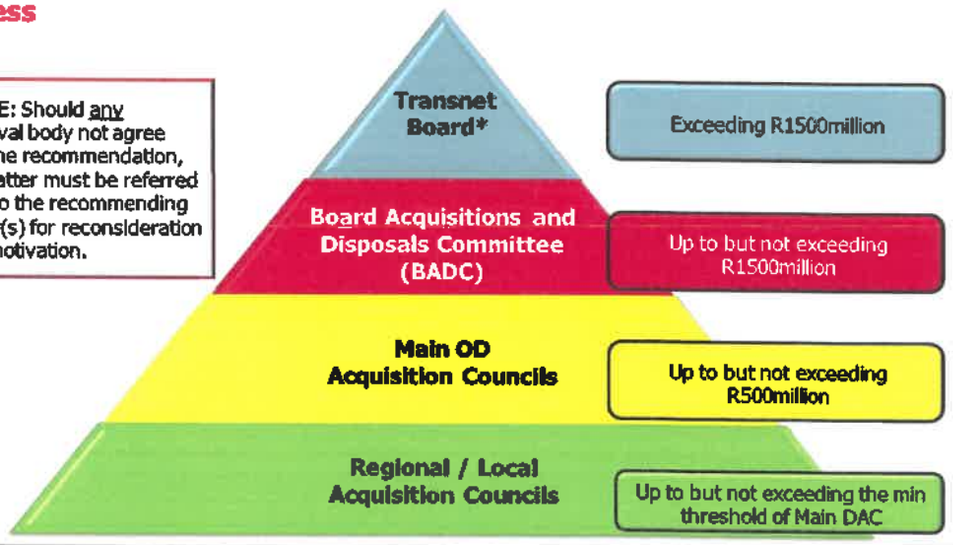


* Approval limits are cumulative per annum.
**In terms of s 54(2)(d) of the PFMA Transnet must obtain Ministerial approval for the acquisition of a significant asset (exceeding R2,5 billion of the value of Transnet's asset base) before proceeding with the acquisition.
#In order to frame an approved list, authority to approach the market must be obtained from the main OD AC.

Figure [6] – Appointment of consultants

(c) Thresholds for Governance Structure approval of process

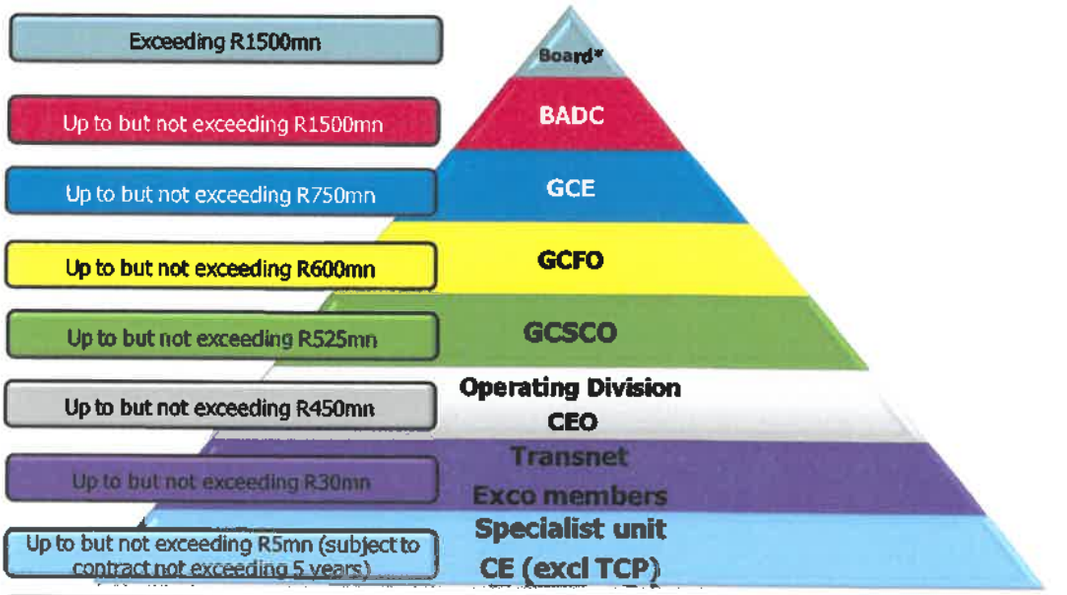
*NOTE: Should any approval body not agree with the recommendation, the matter must be referred back to the recommending officer(s) for reconsideration or remotivation.



Recommendations: The RAC, main AC and the BADC will support the recommendation for transactions above their thresholds. Local/Regional AC normally only consider transactions <R2m but OD CEOs may at their discretion increase these thresholds.
* In terms of s 54(2)(d) of the PFMA Transnet must obtain Ministerial approval for the acquisition of a significant asset (exceeding R2,5 billion of the value of Transnet's asset base) before proceeding with the acquisition

Figure [7] – Thresholds for governance structure approval of process

(d) Thresholds for contract sign off / award of business



*In terms of s 54(4) of the PFMA Transnet must obtain Ministerial approval for the acquisition of a significant asset (exceeding R2,5 billion in terms of the latest Shareholder's Compact) before proceeding with the acquisition.

Figure [8] – Thresholds for contract sign off / award of business

(e) Management's intervention to address non compliance with procurement policies & procedures (Condonations)

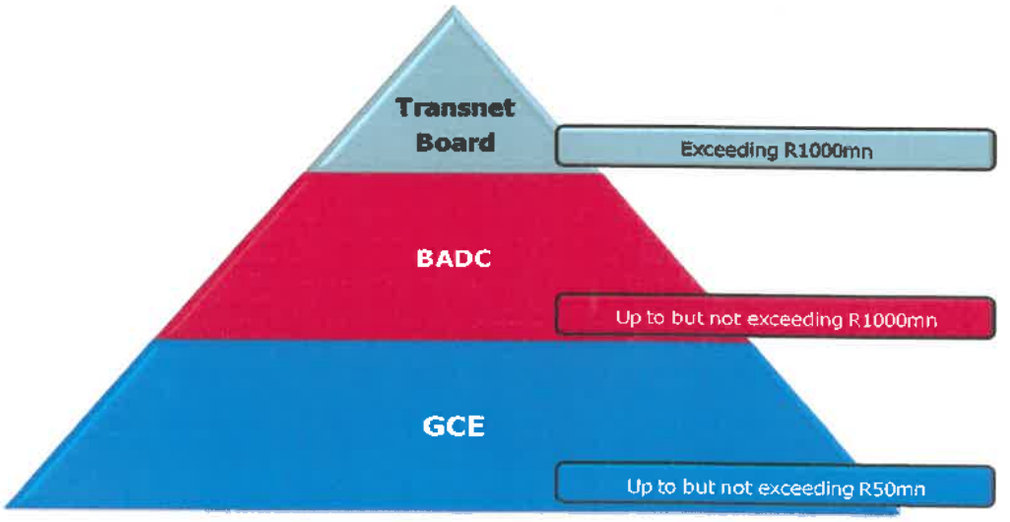


Figure [9] – Management's intervention to address non-compliance with procurement policies & procedures

SECTION A Background and Context

SECTION B: PROCUREMENT PLANNING

Chapter 7: Demand Planning & Demand Management
- Preface
- Demand levers
- Role of procurement in managing demand
- Demand process
- Checklist for demand planning & management
- Sourcing Strategy

Chapter 8: Internal Procurement / Interdivisional Support

Chapter 9: Contract Options
- Summary of contract options
- Contracts > 2 years
- Standard Transnet Terms and Conditions

Chapter 10: Preferential Procurement Approach
- Targets
- Mechanisms
- Measurement of BBBEE status

Chapter 11: Local Content

Chapter 12: Supplier Development Approach
- Categories of SD transactions
- Process of categorising transactions
- Evaluation criteria

Chapter 13: Determining Evaluation Criteria
- Choosing an appropriate evaluation method
- Determining evaluation criteria
- Determine weightings of evaluation criteria

Chapter 14: Main Procurement Mechanisms
- Quotation system
- The open bid process (RFP)
- Approved list purchases
- Two stage bidding process

Chapter 15: Special Cases
- Confinements
- Emergency procedure
- High Value Tender Process
- Unsolicited bids
- Contract consolidation
- Acquisitions associated with income generating contracts

SECTION C Go to Market

SECTION D Evaluation and Adjudication

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Appendices

TYPICAL PROCUREMENT CYCLE

Figure 10 below depicts a typical procurement cycle. Comprehensive guidance on each of these steps is dealt with in the Chapters that follow:

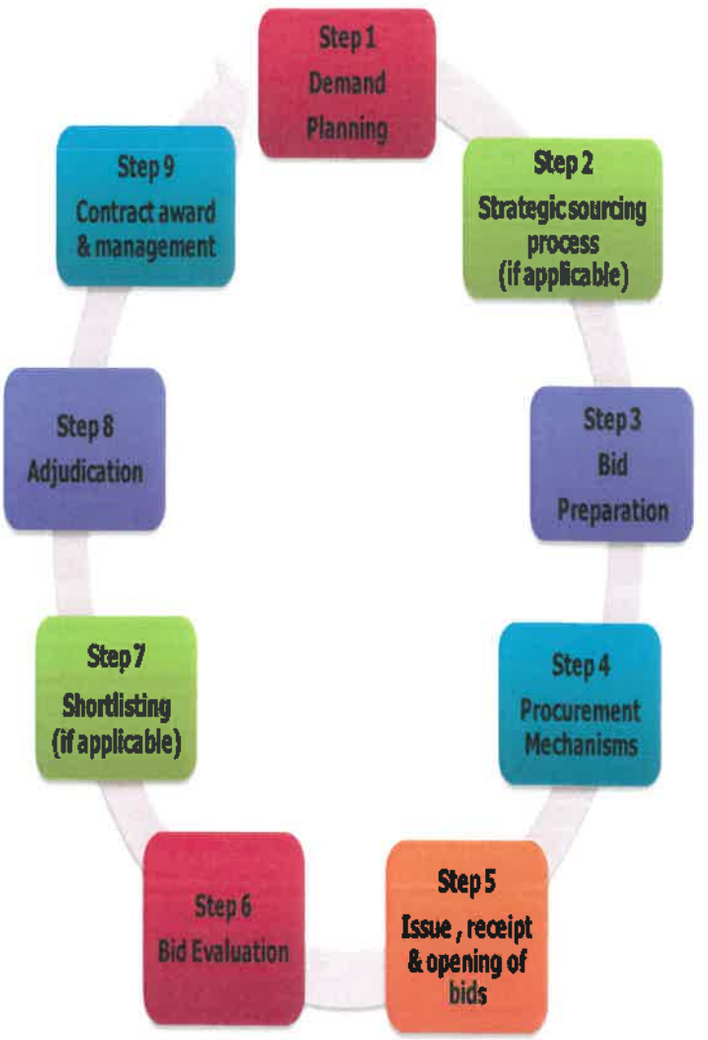


Figure [10] – The Procurement Cycle

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CHAPTER 7 : DEMAND PLANNING & DEMAND MANAGEMENT

7.1. PREFACE

7.1.1. Demand is a business requirement for Goods/Services raised by the business/OD and received by the procurement department for further processing, such as sourcing and payment. There are 2 areas of demand i.e. demand planning and demand management.

7.1.2. Demand Planning is the first step in the procurement process, where:

7.1.2.1. the business needs are assessed in order to ensure that the required Goods/Services are procured so as to meet the business requirements of Transnet;

7.1.2.2. specifications are precisely determined;

7.1.2.3. requirements are linked to budget; and

7.1.2.4. the supplying industry has been analysed and constraints identified and assessed.

7.1.3. Demand planning is a medium term and cross functional planning process supported by a series of meetings that promote alignment, decision making and coordinated action towards achievement of financial budgets and organizational strategy.

7.1.4. Demand Management is about understanding the factors that drive demand for people and products and using this knowledge to identify and implement new and innovative ways to eliminate, reduce or serve demand more efficiently and by doing so reduce costs.

7.1.5. Demand management is about understanding the factors that drive demand for Goods/Services and about using this knowledge to identify and implement new and innovative ways to eliminate, reduce or serve demand more efficiently and to support robust demand planning – and in so doing optimise value and quality by enabling suppliers to have a forward looking view of requirements expected of them and adequately plan production and by enabling the procurement department to adequately prepare itself and work more efficiently and effectively. Demand management therefore involves the reviewing, monitoring and improving of demand.

7.1.6. Demand review is a strategic decision process ensuring that all stakeholders are fully aware and agree to the Goods/Services that are to be procured, why it is to be procured, how it is to be procured, and the cost.

7.1.7. Demand monitoring is a tactical process ensuring that only the required quantity and Quality of Goods/Services are sourced from the right suppliers.

7.1.8. Demand improvement is a strategic and a tactical process ensuring that the quality of demand improves continuously as the demand management process matures, with initiatives such as reducing the demand and rationalising the Goods/Service portfolio.

7.1.9. Therefore, the purpose of demand planning and management is to ensure that the resources required to fulfil the requirements identified in Transnet's Corporate Plan are delivered at the correct price, time and place and that the delivered quantity and quality will satisfy those requirements.

7.1.10. The intention of demand planning is to:

7.1.10.1. to have a clear view of the demand requirements for major strategic commodities;

7.1.10.2. to ensure that end-users and the procurement department are brought closer together in order to enhance efficiency and achieve value for money; and

7.1.10.3. to foster an improved working relationship of openness between Transnet and its suppliers and/or service providers.

7.2. DEMAND LEVERS

A demand consists of various demand levers that are managed by the demand planning and management process. These levers are:

TABLE 5

SOURCE	The origin of the demand such as the initiating department or OD
REASON	The motivation for the demand such as why these Goods/Services need to be sourced
QUANTITY	Review the number/scope of the Goods/Services required
SPECIFICATION	Opportunity to simplify/standardise specifications
TIMEFRAME	Reduce demand frequency
COST	The indicative cost of the Goods/Services that need to be sourced
PREFERRED SUPPLIER	The preferred supplier (if any) for the requested Goods/Services Other potential suppliers who could also be in a position to supply the same Goods/Services

7.3. ROLE OF PROCUREMENT IN MANAGING DEMAND

Procurement needs to manage the demand for Goods/Services by:

- analysing demand levers and sourcing data that will enable a more accurate view/prediction of demand;;
- identifying opportunities for improvement of the entire demand management function;
- short-listing and prioritising improvement initiatives;
- developing and implementing an action plan for identified initiatives;
- monitoring the progress of improvement of the initiatives; and
- conducting regular assessment of the effectiveness and relevance of improvement initiatives.

7.4. DEMAND PROCESS

Figure 11 below gives an outline of the main steps in the demand management process.

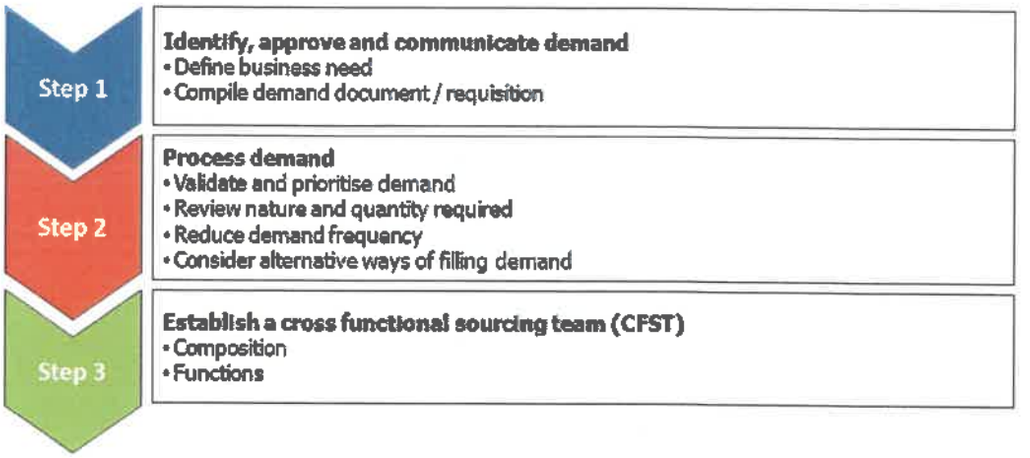
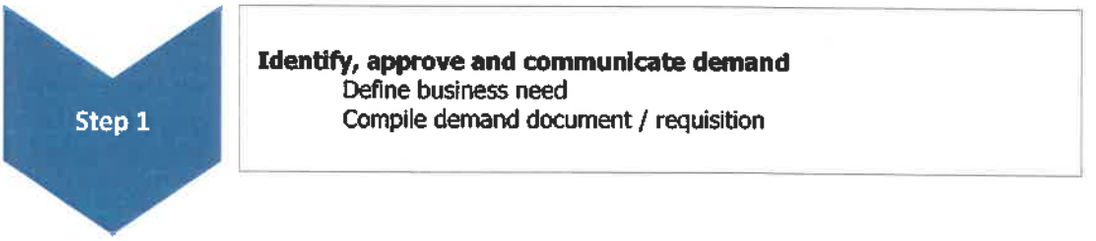


Figure [11] – Demand Steps

For sourcing events falling within the threshold for High Value Tenders, refer to the "High Value Tender Process (HVTP)" available on the iSCM Transnet Intranet.

OPERATIONS (end users) are responsible for completing STEP 1



7.4.1. STEP 1 : Identify, approve and communicate demand

a) Definition of business need

The end users in the business (operations) need to follow the steps outlined below, in order to ensure that there is a clearly defined need in the business:-

(i) conduct a needs analysis to establish requirements relating to the business, taking into account all required capital acquisitions, planned maintenance, and other operational needs – this will be informed by both future requirements (based upon Transnet's Corporate Plan); as well as market demand forecasts (based upon Transnet's current client base demand and/or commitments made by Transnet's sales department);

(ii) establish and consolidate the reasons for the need;

(iii) ratify the need irrespective of whether it is a CAPEX or OPEX acquisition and apply for and obtain budget approval; and

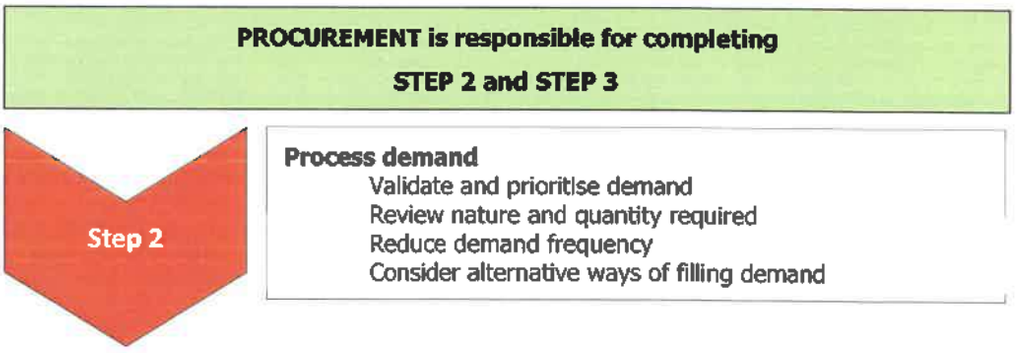
(iv) draw up an annual procurement plan.

b) Compilation of demand document (per transaction)

The end users in the business (operations) are responsible to provide procurement with a detailed demand requisition. This should provide a clear description of the function, required specifications, drawings, and where applicable it should:-

(i) indicate the quantity/-ies required;
(ii) indicate the frequency/-ies required;
(iii) indicate the quality required;
(iv) indicate the unit of measure;
(v) indicate packaging, if applicable;
(vi) attach the relevant specification/drawing, where applicable;
(vii) provide previous price or estimated costs and budgetary requirements;
(viii) indicate the expected delivery date(s) and delivery address(es);
(ix) indicate any logistical and/or storage requirements;
(x) any material obsolescence risks; and
(xi) suggest potential source/s of supply and a brief analysis of the supplier industry landscape, if available.

The demand document should first be approved at an operational level. Once that is completed, it should be submitted to procurement. Operations should submit this document timeously, and allow sufficient time to acquire the Goods/Services, given lead times and governance processes.



7.4.2. STEP 2 : Processing Demand

a) **Validate and prioritise demand**

Procurement shall establish the following:

(i) Is the demand document/requisition duly approved by operations?
(ii) Is this a critical demand? ("Critical" is defined as having an impact on the Service provided by Transnet or the profit made by Transnet).
(iii) What would be the impact on operations if the procurement did not occur?

b) **Review nature and quantity required**

Procurement shall establish and review the following:

(i) Establish whether this is a requirement for Goods or a Service?

(ii) If Goods are required, whether the demand will be on-going or once-off?

(iii) If Goods are required, determine how many types of items and quantity of each item are required in total by operations at present time and going forward? What are the options (if any) for reducing volume?

(iv) If a Service is required, determine for what length of time the Service is required? (Indicate length of Transnet's previous use (if any) of the specific Service). Could this be reduced or extended?

(v) Determine the estimated value of the sourcing event (If not provided by operations) to establish which sourcing process must be followed:

- if below R2 million, or lower threshold set by the OD CEO for Open Bids, use the quotation system (see Chapter 14);
- if over R2 million use an "open RFX", approach (see Chapter 14); and
- if within the threshold for High Value Tenders, use the High Value Tender process (see iSCM Transnet Intranet portal).

c) **Reduce demand frequency**

Procurement shall establish and review the following:-

(i) If the Goods to be purchased will require additional purchases going forward, is it reasonable for an "as-and-when call off" contract to be established? State reasons either for or against an "as-and-when call off" contract.

(ii) If a Service is required, what is the length of the anticipated contract? Explain rationale for this time period.

d) **Consider alternative ways of fulfilling demand**

Procurement shall establish and review the following whether:-

(i) the required Goods can be re-engineered or reclaimed from existing assets or Goods;

(ii) any other OD can manufacture the required Goods or provide the required Service;

(iii) the Goods are currently available in another OD with spare capacity;

(iv) this is a stock item; or

(v) this item is available on a current contract– even if it is potentially at another OD.

Step 3

Establish a cross functional sourcing team (CFST)

Composition

Functions

7.4.3. STEP 3 : Establish a Cross Functional Sourcing Team ("CFST") in the case of acquisitions greater than R5 million or where the quality criteria is not a simple yes/no decision

a) **Rationale for the formation of a CFST**

Demand management shall be a cross-functional exercise with a view to ensuring that end users, procurement and all stakeholders are brought together in order to enhance efficiency and achieve value.

b) **Composition of the CFST**

Procurement shall establish a CFST, consisting of at least the following roles: Procurement, operations (end users), SD (including B-BBEE) and risk. Other possible representatives are finance, treasury, maintenance, logistics/warehousing, disposal and legal or governance.

In instances where the sourcing event is uncomplicated and the risk to Transnet is low, the CFST can be comprised of only procurement and Quality (technical) representatives.

Procurement must ensure that the CFST consists of the relevant expertise; and that the size of the team is not of such a nature that it cannot function effectively. Nonetheless, in all instances, procurement and operations must reach agreement on the composition of the CFST.

In order for the CFST to be effective, consistent attendance by the same members is required for continuity.

c) **Functions of the CFST**

(i) Determining specifications:-

"Specification" is the terminology used to describe the requirement for goods.

If Goods are being sourced, consider whether there is any opportunity to purchase standard "off-the-shelf" Goods.

If there are technical specifications:-

- these must be compiled with a view to promoting the broadest possible competition, whilst still assuring that critical elements of performance or other requirements are achieved;
- ascertain whether similar (albeit not identical) Goods are currently in use elsewhere in Transnet, which could enable standardisation;
- interrogate the specification, i.e. determine whether it is possible to provide a functional/performance-based specification rather than a detailed specification;
- determine whether the specification has been over-engineered; and
- verify that the specification is not biased in favour of a particular brand or type of Goods.
- If a functional specification is the chosen option, the following must be observed and described in detail:

- functions and characteristics;
- desired performance and/or result parameters, based on both inputs and outputs;
- method statement templates on how outputs will be reached; and
- inclusion of relevant KPIs.

If a detailed specification will be issued, ensure that the latest specification is used, and that the quality standards (e.g. SANS, ISO) are included where applicable. In addition, ensure that the drawings are up to date and that detailed descriptions of manufacturing processes, workmanship and/or materials are indicated.

The following must be observed and indicated in the RFX in respect of functional as well as detailed specifications:

- the location(s) of required provision;
- details of qualifications required where appropriate;
- details of the conditions in which the Goods must operate;
- environmental and safety features;
- packaging, marking and labelling requirements;
- inspection or testing requirements;
- documentation required, i.e. manuals, user guides, licenses, test certificates, etc.;
- size/dimensions;
- integration with other Goods/Services;
- security requirements;
- health, safety, electrical, environmental requirements;
- training requirements, if applicable;
- timing considerations; and
- interfaces with other systems.

(ii) Determining Terms of Reference

"Terms of Reference" (ToR) is the terminology used to describe the requirement for services.

The following must be observed and indicated in respect of the ToR:

- project title;
- background;
- objective of the project
- expected outcomes/deliverables;
- competency and expertise requirements;
- timeframes;

- reporting requirements;
- whether a site inspection or information session are required with date, time and venue stated;
- available documentation; and
- minimum requirements.

(iii) Reduce portfolio or range complexity:

- Options for rationalisation of the range of Goods/Services must be considered.
- Implications for users if choice options are reduced must be considered.

(iv) Identify and mitigate risks:

- All risks to Transnet associated with the demand must be identified and addressed in the eventual RFX;
- It should be ascertained whether suitable skills are available within procurement to address the demand and its management process.

(v) Establish the evaluation methodology to be employed – See Chapter 13 on Determining bid Evaluation Criteria.

(vi) Establish evaluation criteria and weightings – See Chapter 13 on Determining Evaluation Criteria. Clear evaluation criteria must be established, as bids may only be evaluated according to the criteria stipulated in the bid documents.

(vii) Oversee preparation and sign off of the bid documentation – See Chapter 16 on Bid Preparation.

(viii) Determine who should serve on the evaluation committee – See Chapter 18 on Evaluation.

(ix) Handover the sourcing event to procurement

7.5. CHECKLIST FOR DEMAND PLANNING & MANAGEMENT

The following checklist could be used as a template to identify the progress with respect to the Demand Management process:

TABLE 6

Demand Planning & Management Focus	Responsible
Is there a business case and approval of the demand?	Business
Has the demand been identified in the annual Procurement Plan? (The Procurement plan forms the basis of demand management)	Business & Procurement
Is there a budget allocated for this demand?	Business
Is there an approval as per the associated DoA?	Business
Have the options of fulfilling the demand (such as existing contracts and critical items) been assessed?	Business & Procurement
What is the outcome of reviewing the quantity required (i.e. are	Procurement

Demand Planning & Management Focus	Responsible
the Goods/Services required on an on-going or once-off basis)?	
Has the possibility of reducing the demand frequency, such as further purchasing or call-off, been assessed?	Business & Procurement
Have the options of alternate ways of fulfilling this demand, such as whether other Transnet ODs could manufacture these Goods, been assessed?	Procurement
Have the options of re-use been assessed? (e.g. re-engineered Goods from existing Goods or whether the Goods are available from other Transnet ODs) Have the 3 Rs (Reduce-Reuse-Recycle) been considered?	Business & Procurement
Has the possibility of standardising the Goods and its specifications, such as off-the-shelf and customised, been assessed?	Business
Has the opportunity of reducing the Goods portfolio, such costing and risk implications associated with it, been identified?	Procurement
Have the strategic risks associated with this demand, such as strategic nature of this demand been identified?	Business
Has internal availability been assessed, i.e. • Can the needed Goods be re-engineered / reclaimed from existing assets/Goods? • Can any OD of Transnet manufacture the required Goods or provide the required Service? • Are these Goods currently available in another OD with spare capacity? • Is this a stock item? • Is this item available on a current contract?	 Business & Procurement Business & Procurement Business & Procurement Business & Procurement Business & Procurement
Was the CFST properly constituted?	Procurement
Have the risks associated with the CFST working on this demand, such as capacity and capability not available within the Transnet been identified?	Procurement
Does the CFST represent all the necessary disciplines for identifying the risks associated with the event?	Procurement
Did the CFST members sign confidentiality agreements and declarations of interest?	CFST
Did the CFST properly interrogate the specification?	CFST
Were all risks identified and included in the RFX?	CFST
Has it been considered whether this should be a transversal event in the interests of Transnet as a whole?	CFST
Has an 'As-and When' contract option been investigated, in order to cater for future demand?	CFST
Was the appropriate evaluation method chosen?	CFST
Were thresholds set for SD and Quality/Functionality?	CFST
Were proper evaluation criteria set for:	

Demand Planning & Management Focus	Responsible
• SD • Functionality • Preference • Price / TCO?	CFST
Were appropriate weightings allocated to each criterion?	CFST

7.6. SOURCING STRATEGY

Once a CFST has been established, the next step is to determine the sourcing strategy. The methodology for determining a sourcing strategy is depicted in the figure below. Please refer to the Strategic Sourcing Standard Operating Procedures (SOP) which provides detailed guidance on the strategic sourcing process. The SOP can be downloaded from the iSCM Transnet Intranet.

Methodology for developing a Sourcing Strategy

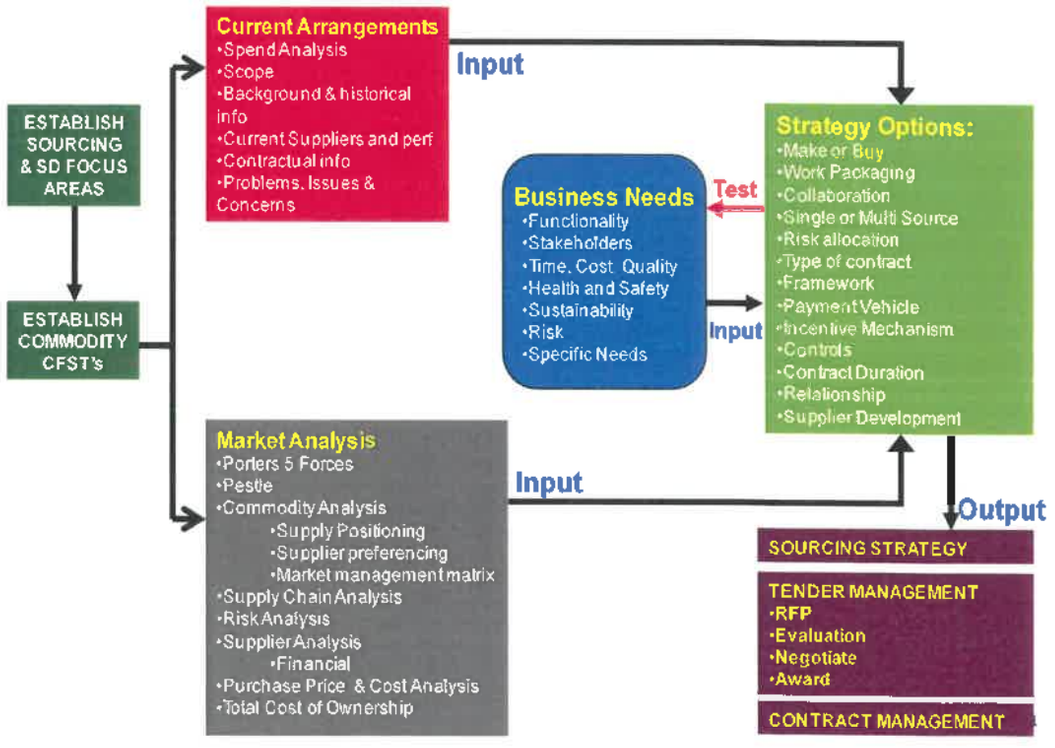


Figure [12] – Methodology for developing a sourcing strategy

CHAPTER 8 : INTERNAL PROCUREMENT/INTERDIVISIONAL SUPPORT POLICY

8.1 INTERDIVISIONAL RELATIONSHIPS

Transnet Entities are required to develop trust and a sound interdivisional working relationship with one another in the interest of Transnet. To achieve this, such entities **must** be afforded the right of first refusal in the procurement of Goods and Services.

8.2 STRATEGIC SPECIALIST UNITS

The following Specialist Units have been identified as strategically important to the Transnet Group:

TABLE 7

Division or Specialist Unit	Goods and/or Services Provided
Transnet Rail Engineering ("**TRE**", a specialist core Division)	TRE is responsible for: • heavy engineering including locomotive, wagon and coach repairs, upgrades and maintenance • component manufacture, locomotive manufacture and assembly • port equipment, and is being positioned for maintenance and repairs thereof
Transnet Capital Projects ("**TCP**")	TCP is responsible for: • multi-disciplinary design Services • project management and construction management Services Construction projects >R300 million **must** be carried out by TCP. In the case of construction related projects <R300 million, the following rules apply: • The project may be carried out by the OD itself if the OD has the necessary in-house resources; and • If the OD decides not to run the project itself, TCP must be given the first right of refusal before the external market can be approached
Transnet Fuel Solutions (TFS, previously known as HSA)	TFS is responsible for: • Transnet-wide fuel acquisition, distribution and management
Transnet Freight Rail ("**TFR**") School of Rail	TFR School of Rail is responsible for: • training tailored exclusively for core businesses, e.g. School of Rail, train drivers, train control officers, • software training in general, etc.
Transnet National Ports Authority ("**TNPA**") School of Ports	TNPA School of Ports is responsible for: • Facilitation of knowledge transfer as the provider of marine training programmes in South Africa • Planning to position itself as Africa's training leader in Marine Operations, Port Management and Port Engineering.

Division or Specialist Unit	Goods and/or Services Provided
Transnet Property (TP)	TP is responsible for: • Property management • Facilities management • Property development • Property valuations • Property surveying

8.3 ABILITY OF TRANSNET ODS TO PERFORM

Before considering which procurement mechanism would be most appropriate, it is important that the end-user and procurement department consider whether another Transnet OD is able to provide the required Goods or Services.

8.4 COMPULSORY UTILISATION OF SPECIALIST UNITS

The Specialist Units mentioned above must be utilised by other Transnet Entities for required Goods and Services falling within their scope. The external market may not be approached for Goods and Services falling within the strategic Specialist Units' or Division's core-competency areas. The only exception to this rule is if the Specialised Unit indicates in writing that they do not have the ability or capacity to provide the required Goods or Services.

8.5 INTERDIVISIONAL SUPPORT POLICY

Internal contracts (Memoranda of Understanding) between ODs and Specialist Units are dealt with in the terms of the Interdivisional Support Policy. Such contracts do not require AC approval. However, any external contracts which may be required by the internal Specialist Unit are subject to these procedures and require AC approval.

8.6 MEMORANDA OF UNDERSTANDING

The business relationship between Transnet Divisions and Specialist Units must be governed by an overarching Memorandum of Understanding (MOU) between the parties. The MOU must be signed by the CEs of the relevant ODs or Specialist Units and Service Level Agreements should be signed where appropriate.

8.7 DISPUTES

Any disputes must be resolved in terms of the agreed MOU. If the OD CEs are unable to resolve the dispute, the matter must be escalated to the GCE who shall make a final decision on the matter.

8.8 SERVICE LEVEL AGREEMENT

ODs will need to enter into a project-specific agreement (SLA) in relation to each individual project. This agreement will set out in details the rights, duties and obligations of each OD in that specific project. Contracts between divisions such as SLAs and project specific agreements may be entered into between OD CEs in terms of paragraph 5.5.3 of the DoA Framework.

8.9 INTERDIVISIONAL PRICING

Transnet entities undertaking work on behalf of other entities should reciprocate by pricing and carrying out their Services in a way that promotes and develops a culture of interdivisional support. The pricing must be based on appropriate market analysis to benchmark fair and reasonable prices. Should there be a dispute regarding pricing, the matter is to be escalated to the CEs of the relevant Divisions for resolution. Should the CEs not reach consensus, the matter must be escalated to the GCE who shall make a final decision on the matter.

8.10 NON-CORE BUSINESSES

Non-core businesses which have already exited Transnet, such as Freightdynamics and Autopax (Pty) Ltd will enjoy no interdivisional support.

8.11 AC INVOLVEMENT

Interdivisional transactions between Transnet Entities and Specialist Units fall outside the scope of the AC. However, in any case where the external market is approached, normal procurement procedures must be followed, and if relevant, the AC needs to approve the transaction.

CHAPTER 9 : CONTRACT OPTIONS

9.1 CHOICE OF CONTRACT

The selection of the type of contract to be entered into with a supplier is based on various factors such as the duration of the contract, the type of Goods or Services to be acquired, the frequency of demand and the availability of the Goods. The following table outlines the various contract options and provides a guideline as to when those options may best be utilised.

TABLE 8

Ref	Contract Options	Description	Characteristics	Best Suited For
1	"As and When" contracts	Short or medium-term contracts entered into for a fixed period against which call-offs are made as and when required by the customer	• Shorter contract periods (1-2 Years) • Estimated quantities • Specific period/volume/value ceiling or a combination.	• Continuous but irregular demand for Goods/Services • Volumes cannot be accurately determined upfront • Demand cannot be anticipated • Generally off-the-shelf items
2	Fixed quantity contracts	Contracts entered into for once-off purchases	• Demand is known • Once-off purchase • Once-off or staggered delivery	• Planned programmes
3	Long-term contracts	Contracts entered into for a fixed period typically for five-Years or more	• Long term demand signal • Emphasis on SD • Suppliers' recoupment of investment is long-term • Restricts other market players for a period of time	• Purchase of high value Goods/Services • Goods/Services of strategic importance • Goods with long lead time
4	Transversal contracts	A contract that services more than one internal consumer (an internal shared service arrangement) entered into for a fixed period. A transversal contract may be entered into for the benefit of the entire Group, a particular OD and/or just a region. Below is a list of the types of Transversal contract options:	• Emanates from a formal strategic sourcing event • Fixed-contract period Optimising economies of scale through consolidation of demand/purchasing power	

Ref	Contract Options	Description	Characteristics	Best Suited For
		• Group-wide Transversal contracts		Consolidation of Goods / Services used Group wide
		• Transversal between ODs/Corporate		Consolidation of Goods / Services used between ODs
		• OD-wide Transversal contracts		Consolidation of Goods / Services used within an OD
		• Regional Transversal contracts		Consolidation of Goods / Services used within a region by one or more than one OD
5	Lease/Rental contracts	Lease contract for the use of moveable assets entered into for a fixed period	• Specified/unspecified period • Agreed Rental • Option of renewal	• Goods /Services where it would be more economically viable to lease than to purchase
6	Inter-Divisional Memoranda of Understanding (MOUs)	A 'contract' to govern the service performance agreed between ODs	• Not a formal contract • It governs the internal relationship between the ODs	• Governing the performance as agreed between the ODs
7	Income-generating (revenue) contracts	Although excluded from the PPM, associated procurements fall within the ambit of the PPM (See paragraph 15.6)	• Listed as a process excluded from PPM • Associated procurement must follow the PPM	• As per OD requirements
8	CIDB and NEC3 Engineering & Construction Contracts	Contracts for construction procurement	• Refer to the TCP Construction Manual	• Construction supply, engineering & construction and services contracts

**Any of the above-mentioned contract options can originate from any of the defined procurement mechanisms and/or special mechanisms for procurement.*

9.2 CONTRACTS FOR A PERIOD LONGER THAN TWO YEARS

Contracts for a period longer than two Years require prior AC approval. However, if the RFP provides for a number of bid options including a period of up to two Years and more than two Years, prior AC approval is not required. (Also see paragraph 21.9). Irrespective of which of the two options above is followed, the award of the business has to be approved by the relevant AC in the normal manner.

9.3 STANDARD TRANSNET TERMS AND CONDITIONS OF CONTRACT

Standard templates must be used unless there are cogent reasons why such standard agreements cannot be used in a particular instance. Refer to the Standardised Transnet Templates available on the iSCM Transnet Intranet, including but not limited to:

- Standard Terms and Conditions of Contract
- Master Agreements

Any additions or deletions from the above-mentioned templates must be contained in a Special Conditions Schedule. (Also see paragraph 21.7.2)

9.4 CONSOLIDATION OF CONTRACTS

Refer to paragraph 15.5 for the process to be followed when there is an opportunity to consolidate two or more existing contracts in the best interest of Transnet rather than engaging the market anew.

9.5 CHOICE OF SALES/PURCHASE TERMS FOR IMPORTED GOODS (INCOTERMS)

The Incoterms rules or International Commercial terms are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC) widely used in international commercial transactions. A series of three-letter trade terms related to common sales practices, the Incoterms rules are intended primarily to clearly communicate the responsibilities, costs and risks associated with the transportation and delivery of Goods. The Incoterms rules are accepted by governments, legal authorities and practitioners worldwide for the interpretation of most commonly used terms in international trade. They are intended to reduce or remove uncertainties arising from different interpretation of the rules in different countries. First published in 1936, the Incoterms rules have been periodically updated, with the eighth version (Incoterms 2010) having been published and made effective on January 1, 2011. "**Incoterms**" is a registered trademark of the ICC[1].

Refer to Appendix C for a detailed explanation of all Incoterms.

[1] *Source: Wikipedia*

CHAPTER 10 : PREFERENTIAL PROCUREMENT APPROACH AND DESIRED OUTCOMES

10.1 TARGETS

In accordance with its vision of being a significant agent of empowerment within the South African society, Transnet has adopted the following plan to achieve its B-BBEE targets. These targets are more ambitious than those prescribed in the DTI Code of Good Practice:

TABLE 9

Sub Element	DTI Generic Targets	Base Line	Short-term Target 2012/2013	Interim Target 2013/2014	Long-term Target 2014/2015
B-BBEE procurement spend from all suppliers based on the B-BBEE procurement recognition level as a percentage of total measured procurement spend	70%	To be completed after completion of base line exercise			
B-BBEE procurement spend from QSEs or from EMEs based on the applicable B-BBEE procurement recognition levels as a percentage of total measured procurement spend.	10%	To be completed after completion of base line exercise			
B-BBEE procurement spend from any of the following suppliers as a percentage of total measured procurement spend: • Suppliers who are more than 50% Black-owned (3 out of 5 points); and • Suppliers who are more than 30% Black women-owned (2 out of 5 points)	15%	To be completed after completion of base line exercise			

10.2 MECHANISMS

Transnet's exemption from applying most of the provisions of the PPPFA regulations affords it a greater degree of flexibility in determining its preferential procurement framework than is currently allowed for in the PPPFA.

Transnet would like to conduct a holistic assessment of bidders' B-BBEE performance based on the following:

- bidders' past B-BBEE performance based on the B-BBEE scorecard;
- the extent to which bidders' present black ownership, black management and employment equity exceed certain minimum targets set by Transnet. [This is referred to as Further Recognition Criteria (Current)]; and
- the extent to which bidders undertake to improve or maintain their future B-BBEE status in excess of certain minimum targets over the contract period. [This is referred to as Further Recognition Criteria (Future)].

Preference points will be allocated for each of the above categories.

Transnet therefore applies the following additional mechanisms to ensure its B-BBEE targets are achieved:

10.2.1 **Allocating additional points for preference**

Transnet has adopted a scoring methodology based on a sliding scale of 20 to 40 points to be allocated to preference depending on the nature of the transaction involved. The points allocated to preference should be split between the following categories: B-BBEE scorecard, B-BBEE Further Recognition Criteria (Current) and/or Further Recognition Criteria (Future). FRC (Current) must be given a higher weighting than FRC (Future) if both FRC (Current) and (Future) are included in a particular tender. Should it be decided that only B-BBEE scorecard is going to be used to evaluate preference, the total points for B-BBEE scorecard may range from 20 to 40 points. Table 10 below indicates how the point allocation should take place, depending on the total number of points allocated to preference[2]:

Table 10

	Total of 20 points allocated to preference	Total of 30 points allocated to preference	Total of 40 points allocated to preference
B-BBEE Scorecard	**10**	**10**	**10**
B-BBEE FRC (Current)	**7**	**15**	**20**
B-BBEE FRC (Future)	**3**	**5**	**10**

10.2.2 **Further Recognition Criteria (Current)**

This would entail allocating points to entities based on the extent to which their current black ownership, management control and employment equity exceeds stipulated minimum targets.

10.2.3 **Further Recognition Criteria (Future)**

This would entail allocating further points to Bidders based on the extent to which they commit to improving their B-BBEE status over the contract period in the areas of black ownership, management control, employment equity, preferential procurement and enterprise development.

[2] Note that this table is a guideline. Depending on the nature of the commodity/service being purchased, it must be determined whether FRC (Current) and/or FRC (Future) are appropriate.

10.2.4 Minimum B-BBEE threshold

On a case by case basis, Transnet may set minimum B-BBEE thresholds as pre-qualification criteria in its bidding process in instances where it is considered that the application of the normal preference point system will not bring about the required transformation. In order to give effect to the principles of fairness, competitiveness and cost effectiveness, while at the same time promoting equity, the threshold should not be set at an unrealistically high level. A thorough market analysis must be undertaken prior to setting a B-BBEE threshold.

10.2.5 Limiting participation in a bid process to persons previously disadvantaged by unfair discrimination (set asides)

South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills. Unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race. The introduction of "set asides" is required in sectors that have been historically lagging behind in terms of transformation. On a case by case basis, Transnet may decide to limit (set aside) participation in a bid process to persons previously disadvantaged by unfair discrimination e.g. black owned companies, black women owned companies, exempted micro enterprises, persons with disabilities, persons in rural areas, etc. Set asides will be considered where there is evidence that applying only a preference point system will not achieve desired transformation objectives. The application of set asides must also be conducted in a manner that does not materially undermine the constitutional principles of fairness, competitiveness and cost effectiveness.

Set asides must be approached with great circumspection, as it has the potential to create unfairness if dealt with incorrectly. Set asides must therefore be based on a proper market analysis and rationale to justify the use of this mechanism in a particular instance. The following guidelines are provided for the use of set asides:

- identify the specific contract or commodity where a set aside will apply;
- give an indication of the number of black owned and/or black women owned companies which operate within the sector;
- give an indication of the percentage of Transnet's procurement spend on black owned and black women owned companies operating in the sector over the previous 3 to 5 Years;
- identify the obstacles to success i.e. why are black owned and black women owned companies not achieving success when bidding for Transnet contracts e.g. pricing, quantity, etc.
- explain why an increased weighting for black ownership is unlikely to achieve the desired result and why a set-aside is the only solution;
- explain that the percentage spend in relation to the contract/sector targeted for the set aside is relatively small when compared with Transnet's overall spend;
- demonstrate that the set aside will not operate in an overly harsh manner in relation to entities that are not black owned or black women owned;
- explain that the use of set asides will not be a permanent feature in relation to the procurement of the relevant commodity, but will be used on a case by case basis to increase Transnet's procurement spend on black owned and black women owned companies;

- demonstrate that the principles of competitiveness and cost effectiveness are not materially undermined.

10.3 MEASUREMENT OF B-BBEE STATUS

10.3.1 Measurement as per scorecard

Bid documents must specifically state that all Suppliers will be measured in accordance with the DTI Generic Scorecard provided for in the Codes of Good Practice or the applicable Sector Code.

Transnet prefers doing business with enterprises that share its values, and are prepared to contribute to meaningful B-BBEE initiatives (e.g. subcontracting, JV's etc.) as part of their Bid responses. Transnet will accordingly allow a preference to companies who provide a B-BBEE Verification Certificate. As a general rule, Transnet will award between 10 and 40 points to a Bidder on the basis of the B-BBEE Verification Certificate[3]. The remaining points will be allocated to FRC (Current) and FRC (Future) (see Table 10 above for an indication as to how the available points for preference will be divided between the scorecard, FRC (Current) and FRC (Future). Transnet requires prospective Bidders to have themselves verified by any verification agency accredited by the South African National Accreditation System ("SANAS") or Registered Auditors approved by the Independent Regulatory Board of Auditors ("IRBA") in accordance with the approval granted by the Department of Trade and Industry. Verification certificates are only valid for one Year from the date of issue. Enterprises will be rated by such agencies based on the following:

TABLE 11

Type of Enterprise	Annual Turnover	Number of Elements Scored on the B-BBEE Generic Scorecard
Large	In excess of R35 million	All 7 elements
Qualifying Small Enterprise (QSE)	Between R5 million and R35 million	Any 4 elements (equal weighting of 25% each)
Exempted Micro Enterprise (EME)	R5 million or less	Deemed to be 100% compliant. Automatic Level 4 rating irrespective of race of ownership

a) Exempted Micro Enterprises (EMEs) are defined by the Codes as companies with an annual total turnover of R5 million or less. EMEs enjoy a deemed BBBEE recognition of a Level 4 contributor. EMEs which are either 50% Black owned or 50% Black women owned are promoted to a Level 3 contributor.

b) Sufficient evidence of qualification as an EME is an auditor's certificate (auditors need not meet the prerequisite for Independent Regulatory Board of Auditors ("IRBA") approval to provide B-BBEE assurance services for the purpose of conducting verification and issuing EME B-BBEE certificates), a certificate issued by an accounting officer as contemplated in the Closed Corporations Act 69 of 1984, or a certificate issued by a Verification Agency accredited by SANAS.

10.3.2 In addition to the above, Bidders who wish to enter into a Joint Venture or sub-contract portions of the contract to B-BBEE companies, must state in their bids the percentage of the total contract value that will be allocated to such B-BBEE companies should they be successful in being awarded any business. A rating

[3] This will depend on whether FRC (Current) and FRC (Future) will also be evaluated as part of Preference. Should it be decided that only B-BBEE scorecard is going to be used to evaluate preference, the total points for B-BBEE scorecard may range from 20 to 40 points.

certificate in respect of such B-BBEE JV-partners and / or sub-contractor/s, as well as a breakdown of the distribution of the aforementioned percentage must also be furnished.

10.3.3 Transnet has adopted a scoring methodology based on a maximum 20 to 40 points to be allocated to preference of which a maximum of 10 points will be allocated to a Bidder based on its B-BBEE scorecard.

10.3.4 Based on the overall performance of a supplier using the Generic Scorecard, it receives one of the following B-BBEE statuses and a point out of 10 is awarded based on Figure [13] below:

BEE Status	Qualification	Recognition level	Ten Preference Points based on scorecard
Level **One** Contributor	≥100 points on the Generic Scorecard	135%	10
Level **Two** Contributor	≥85 but <100 points on the Generic Scorecard	125%	9
Level **Three** Contributor	≥75 but <85 on the Generic Scorecard	110%	8
Level **Four** Contributor	≥65 but <75 on the Generic Scorecard	100%	6
Level **Five** Contributor	≥55 but <65 on the Generic Scorecard	80%	4
Level **Six** Contributor	≥45 but <55 on the Generic Scorecard	60%	3
Level **Seven** Contributor	≥40 but <45 on the Generic Scorecard	50%	2
Level **Eight** Contributor	≥30 but <40 on the Generic Scorecard	10%	1
Non-Compliant Contributor	<30 on the Generic Scorecard	0%	0

Figure [13] – B-BBEE Scorecard

10.3.5 B-BBEE points must be claimed by Bidders utilising the B-BBEE Preference Points Claim Form. This Claim Form must be listed as a returnable document and is annexed as Appendix D.

10.3.6 **Measurement based on Further Recognition Criteria (FRC) (Current)**

Points will be allocated in respect of preference to measure the Respondent's CURRENT B-BBEE status at the time of submission of their bid. These points are allocated based on the extent to which the Respondent's current ownership, management control and employment equity meets or exceeds certain minimum targets. Please note that a Respondent's ownership, management control and employment equity at the time of the submission of the bid, may differ from that which is reflected in the B-BBEE scorecard. When claiming points for FRC (Current) the bidder must reflect his B-BBEE status at the time of submitting the bid. Supporting documentation may be requested in this regard. Please see Table 12 below - a guideline on evaluating FRC (Current).

TABLE 12

Indicator	Required Responses	Compliance Target	Score out of 10
A. Ownership (O/S):			

Indicator	Required Responses	Compliance Target	Score out of 10
1. The percentage of the business owned by Black' persons.	Indicate ownership in the hands of Black persons as a percentage of total ownership of the organisation.	Points will be allocated for any percentages >25% to 100%, on a sliding scale	26 - 30% = 1 31 - 40% = 2 41 - 50% = 3 51 - 60% = 5 61 - 70% = 6 71 - 74% = 7 75 - 100% =10
2. The percentage of the business owned by Black Women.	Indicate ownership in the hands of Black women as a percentage of total ownership of the organisation.	Points will be allocated for any percentages >10% to 100%, on a sliding scale	10 - 20% = 1 21 - 30% = 2 31 - 40% = 4 41 - 50% = 5 51 - 60% = 6 61 - 70% = 7 71 - 75% = 8 76 - 100% = 10
3. The percentage of the business owned by black youth.	Indicate ownership in the hands of Persons living with Disabilities as a percentage of total ownership of the organisation.	Points will be allocated for any percentages >5% to 100%, on a sliding scale	6 – 20% = 1 21 - 30% = 2 31 - 40% = 3 41 - 50% = 4 51 – 60% = 5 61 – 70% = 6 71 – 80% = 7 81 – 90% = 8 91 – 95% = 9 96 – 100% = 10
4. The percentage of the business owned by black youth and/or black Persons living with Disabilities	Indicate ownership in the hands of Persons living with Disabilities as a percentage of total ownership of the organisation.	Points will be allocated for any percentages >3% to 100%, on a sliding scale	3-5% = 1 5.1-7% = 2 7.1-10% = 3 11-20% = 4 21-30% =5 31-40% = 6 41-50% = 7 51-60% = 8 61-70% = 9 71-100% = 10
5. The percentage of the business owned by Employment Schemes/Co-Operatives.	Indicate ownership in the hands of Employment Schemes/Co-Operatives as a percentage of total ownership of the organisation.	Points will be allocated for any percentages >5% to 100%, on a sliding scale	6 – 10% = 1 11 - 20% = 2 21 - 30% = 3 31 - 40% = 4 41 – 50% = 5 51 – 60% = 6 61 – 70% = 7 71 – 80% = 8 80 – 100% = 10
B. Board Participation (BP):			
1. The percentage of Black Board members in relation to the total number of Board members.	Indicate the number of black Board members as a percentage of the total Board.	Points will be allocated for any percentages >50% to 100%, on a sliding scale	51-55% = 1 56-60% = 2 61-65% = 3 66-70% = 4 71-75% = 5 76-80% = 6 81-85% = 7 86-90% = 8

Indicator	Required Responses	Compliance Target	Score out of 10
			91-95% = 9 96-100% = 10
2. The percentage of Black Female Board members in relation to the total number of Board members.	Indicate the number of black female Board members as a percentage of the total Board.	Points will be allocated for any percentages >50% to 100%, on a sliding scale	51-55% = 1 56-60% = 2 61-65% = 3 66-70% = 4 71-75% = 5 76-80% = 6 81-85% = 7 86-90% = 8 91-95% = 9 96-100% = 10
C. Management (MC):			
1. The percentage of Black Senior Top Management involved in day to day management of the organisation, in relation to the total Top Management cadre.	Provide the percentage of Blacks that are appointed by the Board and operationally involved in the day to day **Top management** of the business, with individual responsibility for overall and/or financial management of the business and actively involved in the development and implementation of overall strategy of the organisation.	Points will be allocated for any percentages >40% to 100%, on a sliding scale	41-45% = 1 46-50% = 2 51-55% = 3 56-60% = 4 61-65% = 5 66-70% = 6 71-75% = 7 76-80% = 8 81-85% = 9 86-100% = 10
2. The percentage of Black Middle Management involved in day to day management of the organisation, in relation to the total Middle Management cadre.	Provide the percentage of Blacks appointed by the organisation in the **middle management** cadre and operationally involved in the day to day management of the business, with individual responsibility for a particular area within the business and actively involved in the day to day management of the organisation.	Points will be allocated for any percentages >63% to 100%, on a sliding scale	64-67% = 1 68-71% = 2 72-75% = 3 76-79% = 4 80-83% = 5 84-87% = 6 88-91% = 7 92-95% = 8 96-100% = 10
3. The percentage of Black Junior Management involved in day to day management of the organisation, in relation to the total Junior Management cadre.	Provide the percentage of Blacks appointed by the organisation in the **junior management** cadre and operationally involved in the day to day running of the business, with individual responsibility for a particular area within the business and actively involved in a supervisory role with regard to the day to day management of the organisation.	Points will be allocated for any percentages >68% to 100%, on a sliding scale	69-71% = 1 72-74% = 2 75-77% = 3 78-80% = 4 81-83% = 5 84-86% = 6 87-89% = 7 90-92% = 8 93-95% = 9 96-100% = 10
D. Employment Equity (EE):			
1. The percentage of Black employees as a percentage of the total workforce i.e. of all employees in the organisation.	Indicate the number of Black employees as a percentage of the organisation's total workforce.	Points will be allocated for any percentages >65% to 100%, on a sliding scale	66-68% = 1 69-71% = 2 72-74% = 3 75-77% = 4 78-80% = 5 81-83% = 6

Indicator	Required Responses	Compliance Target	Score out of 10
			84-86% = 7 87-89% = 8 90-92% = 9 93-100% = 10
2. The percentage of Black women employees as a percentage of the total workforce.	Indicate the number of Black women employees as a percentage of the organisation's total workforce.	Points will be allocated for any percentages >40% to 100%, on a sliding scale	41-45% = 1 46-50% = 2 51-55% = 3 56-60% = 4 61-65% = 5 66-70% = 6 71-75% = 7 76-80% = 8 81-85% = 9 86-100% = 10
3. The percentage of Black youth and/or Black disabled employees in relation to the total number of employees in the organisation.	Indicate the percentage of Black disabled employees in relation to the total of all employees in the organisation.	Points will be allocated for any percentages >2% to 10%, on a sliding scale	3% = 1 4% = 2 5% = 3 6% = 4 7% = 5 8% = 6 9% = 7 10% = 8 11 - 12% = 9 13 - 15% = 10

Once all FRC (Current) evaluation criteria have been scored, the scores must be reduced to the weighting allocated to FRC (Current).

For example, assume a weighting of 10 points has been allocated to FRC (Current). A particular Bidder scored 100 for FRC (Current) out of 130 points (as there are 13 criteria for FRC (Current) scored out of 10). The Bidder's score must be divided by 130 and multiplied by the weighting of 10 in order to obtain the weighted score for FRC (Current) i.e. $\frac{100}{130} \times 10 = 7.7$

10.3.7 Measurement based on Further Recognition Criteria (FRC Future)

In addition to points allocated on the basis of the scorecard and FRC (Current), further points may also be allocated in respect of FRC (Future). Bidders may earn points for FRC based on the extent to which they commit to improving their B-BBEE status over the contract period. Points are allocated on an ascending scale calculated on the extent to which Bidders propose to maintain, meet or exceed Transnet's compliance targets. The contract with the Successful Bidder must contain a penalty clause which stipulates the penalties that will be imposed by Transnet, should the Bidder fail to meet the preference targets in the contract. Furthermore, failure to achieve FRC Future targets will result in breach of contract and provide Transnet with cause to terminate/cancel the contract. Milestones in terms of achievement of FRC (Future) targets per year must be stipulated in suppliers' contracts so that penalty/breach of contract clauses may be invoked if required.Please see Table 13 below - a guideline on evaluating FRC (Future).

TABLE 13

Indicator	Required Responses	Compliance Target	Score out of 10
A. Ownership (O/S):			
1. The percentage of the business owned by Black persons.	Provide a commitment based on the extent to which ownership in the hands of Black persons as a percentage of total ownership of the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >50% to 100%, on a sliding scale	51-55% = 1 56-60% = 2 61-65% = 3 66-70% = 4 71-75% = 5 76-80% = 6 81-85% = 7 86-90% = 8 91-95% = 9 96-100% = 10
2. The percentage of the business owned by Black women.	Provide a commitment based on the extent to which ownership in the hands of Black women as a percentage of total ownership of the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >30% to 100%, on a sliding scale	31-35% = 1 36-40% = 2 41-45% = 3 46-50% = 4 51-55% = 5 56-60% = 6 61-65% = 7 66-70% = 8 71-75% = 9 76-100% = 10
3. The percentage of the business owned by Black youth	Provide a commitment based on the extent to which ownership in the hands of black youth as a percentage of total ownership of the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Points will be allocated for any percentages >5 to 100%, on a sliding scale	1 = 6 -20% 2 = 21-30% 3 = 31-40% 4 = 41-50% 5 = 51-60% 6 = 61-70% 7 = 71-80% 8 = 81-90% 9 = 91-95% 10 = 96-100%
4. The percentage of the business owned by Black Persons living with Disabilities	Provide a commitment based on the extent to which ownership in the hands of persons living with disabilities as a percentage of total ownership of the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Points will be allocated for any percentage above 3%to 100% on a sliding scale	3-5% = 1 5.1-7% = 2 7.1-10% = 3 11-20% = 4 21-30% =5 31-40% = 6 41-50% = 7 51-60% = 8 61-70% = 9 71-100% = 10
5. The percentage of the business owned by Employment Schemes/Co-Operatives.	Provide a commitment based on the extent to which ownership in the hands of Employment Schemes/Co-Operatives as a percentage of total ownership of the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Points will be allocated for any percentages >10% to 100%, on a sliding scale	11-20% = 1 21-30% = 2 31-40% = 3 41-50% = 4 51-60% = 5 61-70% = 6 71-80% = 7 81-90% = 8 91– 100% = 10
B. Board Participation (BP):			

Indicator	Required Responses	Compliance Target	Score out of 10
1. The percentage of Black Board members in relation to the total number of Board members.	Provide a commitment based on the extent to which the number of black Board members as a percentage of the total Board will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >50% to 100%, on a sliding scale	51-55% = 1 56-60% = 2 61-65% = 3 66-70% = 4 71-75% = 5 76-80% = 6 81-85% = 7 86-90% = 8 91-95% = 9 96-100% = 10
2. The percentage of Black Female Board members in relation to the total number of Board members.	Provide a commitment based on the extent to which the number of Black Female Board members as a percentage of the total Board will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Points will be allocated for any percentages >50% to 100%, on a sliding scale	51-55% = 1 56-60% = 2 61-65% = 3 66-70% = 4 71-75% = 5 76-80% = 6 81-85% = 7 86-90% = 8 91-95% = 9 96-100% = 10
C. Management (MC):			
1.The percentage of Black Senior Top Management involved in day to day management of the organisation, in relation to the total Top Management cadre.	Provide a commitment based on the extent to which the percentage of Blacks appointed by the Board and operationally involved in the day to day **Top management** of the business, with individual responsibility for overall and/or financial management of the business and actively involved in the development and implementation of overall strategy will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >40% to 100%, on a sliding scale	41-45% = 1 46-50% = 2 51-55% = 3 56-60% = 4 61-65% = 5 66-70% = 6 71-75% = 7 76-80% = 8 81-85% = 9 86-100% = 10
2.The percentage of Black Middle Management involved in day to day management of the organisation, in relation to the total Middle Management cadre.	Provide a commitment based on the extent to which the percentage of Blacks appointed by the organisation in the **middle management** cadre and operationally involved in the day to day management of the business, with individual responsibility for a particular area within the business and actively involved in the day to day management of the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the	Score will be allocated for any percentages >63% to 100%, on a sliding scale	64-67% = 1 68-71% = 2 72-75% = 3 76-79% = 4 80-83% = 5 84-87% = 6 88-91% = 7 92-95% = 8 96-100% = 10

Indicator	Required Responses	Compliance Target	Score out of 10
	contract period.		
3. The percentage of Black Junior Management involved in day to day management of the organisation, in relation to the total Junior Management cadre.	Provide a commitment based on the extent to which the percentage of Blacks appointed by the organisation in the **junior management** cadre and operationally involved in the day to day running of the business, with individual responsibility for a particular area within the business and actively involved in a supervisory role with regard to the day to day management of the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >68% to 100%, on a sliding scale	69-71% = 1 72-74% = 2 75-77% = 3 78-80% = 4 81-83% = 5 84-86% = 6 87-89% = 7 90-92% = 8 93-95% = 9 96-100% = 10
D. Employment Equity (EE):			
1. The percentage of Black employees as a percentage of the total workforce i.e. of all employees in the organisation.	Provide a commitment based on the extent to which the number of Black employees as a percentage of the organisation's total workforce will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >65% to 100%, on a sliding scale	66-68% = 1 69-71% = 2 72-74% = 3 75-77% = 4 78-80% = 5 81-83% = 6 84-86% = 7 87-89% = 8 90-92% = 9 93-100% = 10
2. The percentage of Black women employees as a percentage of the total workforce.	Provide a commitment based on the extent to which the number of Black women employees as a percentage of the organisation's total workforce will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >40% to 100%, on a sliding scale	41-45% = 1 46-50% = 2 51-55% = 3 56-60% = 4 61-65% = 5 66-70% = 6 71-75% = 7 76-80% = 8 81-85% = 9 86-100% = 10
3. The percentage of Black youth and/or Black disabled employees in relation to the total number of employees in the organisation.	Provide a commitment based on the extent to which the percentage of Black disabled employees in relation to the total of all employees in the organisation will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >2% to 10%, on a sliding scale	3% = 1 4% = 2 5% = 3 6% = 4 7% = 5 8% = 6 9% = 7 10% = 8 11 - 12% = 9 13 - 15% = 10
E. Preferential Procurement (PP) :			

Indicator	Required Responses	Compliance Target	Score out of 10
1. B-BBEE procurement spend from all suppliers based on the B-BBEE procurement recognition level as a percentage of total measured procurement spend	Provide a commitment based on the extent to which B-BBEE spend will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >50% to 100%, on a sliding scale	51-55% = 1 56-60% = 2 61-65% = 3 66-70% = 4 71-75% = 5 76-80% = 6 81-85% = 7 86-90% = 8 91-95% = 9 96-100% = 10
2. B-BBEE procurement spend from QSEs based on the applicable B-BBEE procurement recognition levels as a percentage of total measured procurement spend.	Provide a commitment based on the extent to which B-BBEE spend from QSEs will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >10% to 100%, on a sliding scale	11-20% = 1 21-30% = 2 31-40% = 3 41-50% = 4 51-60% = 5 61-70% = 6 71-80% = 7 81-90% = 8 91-95% = 9 96-100% = 10
3. B-BBEE procurement spend from EMEs based on the applicable B-BBEE procurement recognition levels as a percentage of total measured procurement spend.	Provide a commitment based on the extent to which B-BBEE spend from EMEs will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >10% to 100%, on a sliding scale	11-20% = 1 21-30% = 2 31-40% = 3 41-50% = 4 51-60% = 5 61-70% = 6 71-80% = 7 81-90% = 8 91-95% = 9 96-100% = 10
4. B-BBEE procurement spend from any of the following suppliers as a percentage of total measured procurement spend: • Suppliers who are more than 50% Black-owned • Suppliers who are more than 30% Black women-owned	Provide a commitment based on the extent to which spend from suppliers who are more than 50% Black owned or 30% Black women owned will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Score will be allocated for any percentages >15% to 100%, on a sliding scale	16-20% = 1 21-30% = 2 31-40% = 3 41-50% = 4 51-60% = 5 61-70% = 6 71-80% = 7 81-90% = 8 91-95% = 9 96-100% = 10
F. Enterprise Development (ED) :			
1. The organisation's annual spend on Enterprise Development as a percentage of Net Profit after Tax (NPAT)	vide a commitment based on the extent to which your organisation's annual spend on Enterprise Development initiatives as a percentage of its Net Profit after Tax will (a) be increased; or (b) be maintained in excess of the compliance target over the contract period.	Scores will be allocated for any percentages >1% of NPAT, on a sliding scale OR based on the actual Rand-value spent on ED	<1% = 0 1%-1.4% = 1 1.5– 2.9% = 2 3%-4.9% = 3 5% -10% = 4 >11% = 10

Once all FRC (Future) evaluation criteria have been scored, the scores must be reduced to the weighting allocated to FRC (Future).

For example, assume a weighting of 15 points has been allocated to FRC (Future). A particular Bidder scored 100 for FRC (Future) out of 180 points (as there are 18 criteria for FRC (Future) scored out of 10). The Bidder's score must be divided by 180 and multiplied by the weighting of 15 in order to obtain the weighted score for FRC (Future) i.e. $\frac{100}{180} \times 15 = 8.33$.

CHAPTER 11 : LOCAL CONTENT

11.1 Increased Local Production and Content ("LC") forms an integral component of Transnet's Supply Chain Strategy. This is aligned to Government's vision as articulated in IPAP 2 and the NGP as well as Transnet's Supply Chain Policy. Transnet Entities are therefore required to actively promote local content and production in their bidding processes.

11.2 Designated sectors

11.2.1 The PPPFA Regulations, 2011 which came into effect on 7 December 2011, prescribe how Local Production and Content is to be measured in public sector Bids. In accordance with Regulation 9(1), when issuing bids involving "designated sectors" Transnet must advertise such bids with a specific Bid condition that only locally produced goods, services or works which meet a **stipulated minimum threshold** for Local Production and Content will be considered.

11.2.2 Designated sectors are those sectors which have been designated by the Department of Trade and Industry ("DTI") for Local Production and Content. The following table indicates the designated sectors and minimum threshold for local content as determined by the Department of Trade and Industry and National Treasury:

TABLE 14

Designated sector	Prescribed minimum % for local content
Textile, clothing, leather and footwear	100%
Power Pylons (not including Steel)	100%
Rolling Stock	65%
Canned/processed vegetables	80%
Buses (bus body)	80%

11.2.3 Please note that the above reflects only the first wave of designated sectors as at the date of issue of this PPM. Future changes to the list of designated sectors and/or the applicable thresholds will be communicated as they are issued by National Treasury.

11.3 Non designated sectors

11.3.1 When issuing bids in sectors that have not been specifically designated for Local Production and Content ("non designated sectors"), Transnet will actively promote Local Production and Content where possible. Therefore, before approaching the market, Transnet Entities are required to conduct proper market analysis to determine on a case by case basis whether opportunities for Local Production and Content exist. Where opportunities do exist, this must be reflected in the

procurement strategy. Furthermore, in accordance with Regulation 9(3), the RFP must reflect the minimum threshold for LC that must be met by bidders to qualify for further consideration. Bidders who fail to achieve the set minimum thresholds will be disqualified from the bidding process.

11.3.2 In this regard Transnet must consciously look for ways to incorporate local content in its tenders, where appropriate, particularly where the tender falls within one of the sectors clusters identified in IPAP II. These sector clusters are as follows in terms of the IPAP 2012/2013 – 2014/2015:

a) Cluster 1 Qualitatively New Areas of Focus

- Metal fabrication, capital and transport equipment sectors;
- Oil and gas sectors;
- 'Green' and energy saving industries;
- Agro-processing linked to food pricing and security; and
- Boatbuilding.

b) Cluster 2 Scaled up and Broadened Interventions in Existing IPAP Sectors

- Automotive products and components;
- Plastics, pharmaceuticals and chemicals;
- Biofuels;
- Forestry, paper, pulp and furniture;
- Strengthening of links between cultural industries and tourism; and
- Business processing.

c) Cluster 3 Sectors with Potential for Long Term Advanced Capabilities

- Nuclear;
- Advanced Materials; and
- Aerospace.

11.4 Definition of LC

11.4.1 Local Content is defined as that portion of the Bid price which is not included in the Imported Content, provided that local manufacture actually does take place. Local Production and Content is therefore determined as a percentage of the Bid price. For example, if the stipulated minimum threshold for Local Production and Content is 60%, this means that 60% of the Bid price must be spent on Local Production and Content (i.e. everything that is not included in Imported Content.) "Imported Content" is given a very specific meaning in the regulations. It means "*that portion of the tender price represented by the cost of components, parts or materials which have been or are still to be imported (whether by the supplier or its subcontractors) and which costs are inclusive of costs abroad, plus freight and other direct importation costs, such as landing costs, dock dues, import duty, sales duty or other similar tax or duty at the South African port of entry.*"

11.5 Evaluation of LC

11.5.1 The calculation of LC can therefore be expressed in the following simple formula:

Bid price-value of Imported Content (cost of components, parts & materials)
= value of Local Production & Content

The value of the Local Content must be reflected as a percentage of the bid price to determine whether it meets the stipulated minimum threshold.

11.5.2 National Treasury requires that the value of Local Production and Content be calculated according to the following formula:

$$LC = \left(1 - \frac{x}{y}\right) \times 100$$

Where

x imported content

y bid price excluding VAT

Prices referred to in the determination of x must be converted to Rand (ZAR) by using the exchange rate published by the South African Reserve Bank at 12:00 on the date, one week (7 calendar days) prior to the closing date of the Bid.

11.6 DTI and National Treasury are in the process of issuing directives and guidelines to ensure compliance with the regulations. These directives and guidelines will be provided to Transnet Entities as soon as they have been issued by DTI and NT.

11.7 It is important to note that LC does not form part of SD evaluation and must be evaluated as the first threshold in the evaluation process. The evaluation of LC must not overlap or be duplicated in the evaluation of "local capability and capacity building" which forms part of the SD evaluation. LC is purely concerned with the percentage of the bid price that will be spent locally. "Local capability and capacity building" on the other hand also takes non monetary measurements into account, such as the number of local suppliers to be utilised, etc.

11.8 It is a requirement of National Treasury that the Declaration Certificate for Local Content (SBD 6.2) form part of the RFP, whenever a minimum threshold for LC is required. In such instances, SBD 6.2 must be listed as a compulsory returnable document. SBD 6.2 has been annexed as Appendix E.

11.9 **Note:** LC will always be the first threshold – i.e. LC will always be evaluated as a first step, to determine whether bids comply with the minimum stipulated threshold for that particular designated sector or non designated sector where Transnet intends to set a minimum threshold for LC. Bidders that do not meet the set minimum threshold for LC must be rejected at this stage.

CHAPTER 12 : DETERMINING SD APPROACH AND DESIRED SD OUTCOMES

SD (including CSDP and/or B-BBEE) should form an integral part of the procurement strategy in every procurement transaction. The nature and extent of the SD opportunities will depend on the nature of the transaction.

Increased Competitiveness, Capability and Capacity (IC^3) matrix:

Transnet's SD approach is to leverage the MDS infrastructure programme to foster economic growth and promote transformation

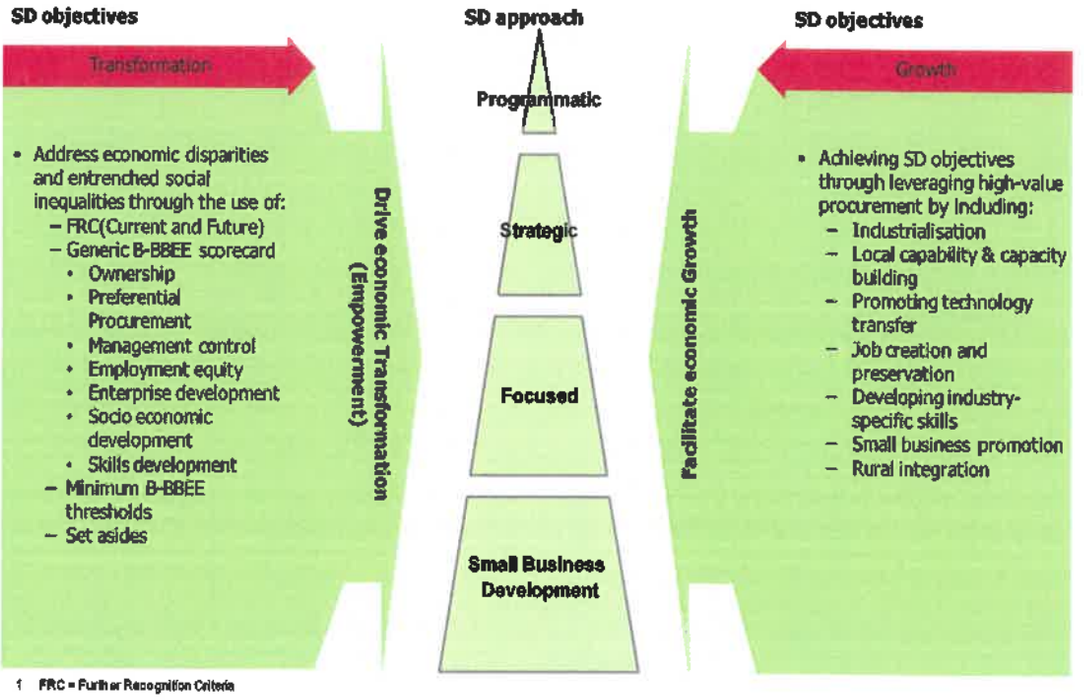


Figure [14] – SD Approach

The Figure referred to above, categorises SD opportunities based on their value, extent of industrial leverage and strategic importance to Transnet.

12.1 SD CATEGORIES

All transactions involving SD should be evaluated against the IC^3 Supplier Development Matrix. The IC^3 Supplier Development Classification Matrix assists in categorising opportunities according to their industrial leverage, value leverage and strategic importance to Transnet. Once opportunities are identified it will be possible to identify the tools that should be implemented to maximise the full SD potential from these opportunities.

The categories of SD identified in the Matrix are as follows:

12.1.1 **Programmatic**

Programmatic initiatives follow a longer than normal planning horizon and generally exceed the funding capacity of Transnet's balance sheet. They are identified either in IPAP II or through Transnet as a strategic fleet. Collaboration between the SOC and Government is achieved through focused task teams whereby infrastructural development and industrialisation are attained through joint support and in some cases public spending.

Investment is focused in plant, technology and skills in both intermediate and advanced capabilities to develop competitive advantage. An example is the Transnet locomotives fleet.

12.1.2 **Strategic**

Strategic initiatives follow a 3 to 5 Year planning horizon, involving investment in technology and/or skills in intermediate capabilities to achieve local capability and capacity building. This ensures that multinational corporations, original equipment manufacturers (OEMs) and service providers develop a certain percentage of their Goods locally. Strategic initiatives can therefore be used to achieve local capability and capacity building objectives by increasing the competitiveness, capability and efficiency of local suppliers. Strategic initiatives can sometimes focus on advanced capabilities but will in most cases require government support to develop local capability.

12.1.3 **Focused**

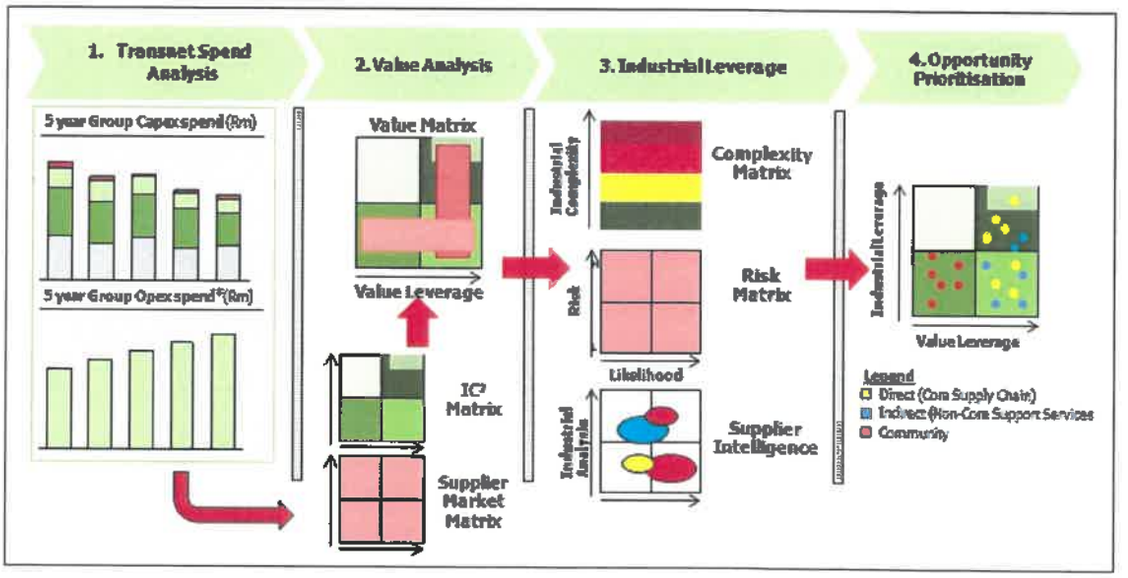
Focused initiatives include all medium to high value transactions with limited industrial leverage and medium to low strategic importance. These initiatives address short to medium term contracts that can be leveraged to encourage supplier and product development. The focus on investment in technology or skills enhances existing local industrial capability and/or the ability to supply strategic Services. Emphasis will largely be placed on benefiting previously disadvantaged individuals. The overall result improves the socio-economic environment by creating competitive local suppliers. It furthers the objectives of empowerment, transformation, regional development and rural upliftment.

12.1.4 **Small Enterprise Development**

Small Enterprise Development transactions are typically of low value and have no industrial leverage as it is characterised by low complexity Goods and high competition. These initiatives concentrate on increasing the capability of small local suppliers and are targeted toward previously disadvantaged individuals and communities, providing basic skills development and improving local employment and quality job creation. It includes a wide range of financial and non-financial Services that help entrepreneurs to start new businesses and to grow existing ones.

12.2 CATEGORISATION OF TRANSACTIONS INTO THE RIGHT SD QUANDRANT

Transnet has designed a focused four-step process for identifying high value generating SD opportunities (see *Figure [15]* below). The process takes Transnet's CAPEX and OPEX spend and then filters specific commodities by value to identify significant spend items. Significant spend items are likely to have the most leverage for SD opportunities. The industrial leverage analysis provides a view on the risk and the complexity of the commodity to understand the risk to the supplier and to Transnet. The process needs to be conducted in its entirety in order to determine the true nature of the opportunity as there are various elements which impact on the categorisation of opportunities. Each transaction must be analysed on a "case by case" basis, taking cognisance of the nature and complexity that is involved in that particular SD activity.



1. Transnet Spend Analysis	2. Value Analysis	3. Industrial Leverage	4. Opportunity Prioritisation
A spend analysis of the Transnet Capex and Opex spend value and associated spend timeline is conducted.	Through the spend analysis, commodities will be plotted based on their respective cost values, onto the Value/Industrial leverage quadrants informed by the Supplier Market Intelligence Matrix, as this will provide guidance on how each spend category will be treated and what policy environment will be applicable.	Industrial leverage is comprised of: • Industrial Complexity. • Commercial and technical risks. • Supplier Intelligence. • The number of units purchased and the duration of procurement? Based on this analysis opportunities are further positioned on the framework.	This analysis further classifies the opportunities into direct, indirect and community categories to ensure appropriate prioritisation is given toward the category and to further ensure focus Priorities are then articulated in the SDP and detailed action plans are developed to ensure value capture.

Figure [15] – 4 Step Process

This process is briefly described above, but a detailed description can be obtained in the Transnet Supplier Development Plan.

12.3 SUPPLIER DEVELOPMENT (SD) EVALUATION CRITERIA

If a specific commodity has been earmarked as a SD commodity, SD should be included in the evaluation criteria. A rigid "one size fits all" approach cannot be implemented as each procurement transaction will need to be evaluated on its own merits based on the nature of the transaction with specific focus areas. The assistance and guidance of the SD COE must always be sought when developing SD criteria.

Depending on the supplier market and what is feasible and achievable on a specific bid, SD criteria will differ on a case by case basis. For example, in one case local manufacture, local assembly, industrialisation may be feasible, whilst in another the focus may fall on skills transfer, job creation/preservation and skills development (*Figure [16]* below).

The IC³ framework developed by the DPE was adopted to assist in the prioritisation of SD opportunities and includes transformation

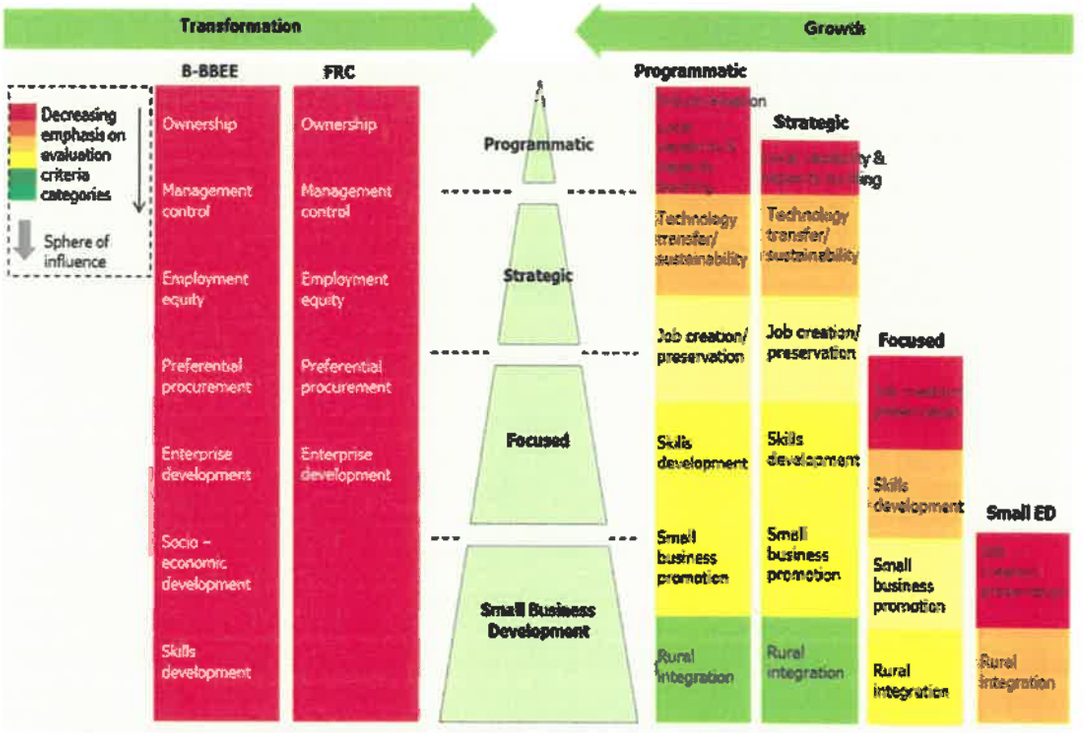


Figure [16] – SD Criteria

These broadly stated evaluation criteria that were developed during the planning phase, should be broken down into specific measurable components and incorporated in the bid documents. This is shown in the table below:

TABLE 15

Evaluation criteria	Measurable areas	Further explanation
Industrialisation	• Value of investment in plant • % of Local Content utilised in the investment in plant • Reduction in import leakage • Potential increase in export content	• Quantification of the monetary value invested in machinery, equipment, buildings • % of the value invested in machinery, equipment, buildings that are sourced from local companies • A percentage indication of the increase in locally supplied Goods and therefore the resultant decrease in imports as a result of the contract • The % increase in exports that will result from increased industrial capability developed in relation to the award of the contract

Evaluation criteria	Measurable areas	Further explanation
Capability & capacity building	• % Local Content • Value of local parts in relation to the bill of materials • Value spent on local suppliers • Number of local suppliers in the supply chain of the Bidder	• Planned use of local parts as a percentage of the total contracted items • Planned monetary value of the parts utilised in the bill of materials (as a percentage of the total spend) • Planned percentage monetary value spend on procurement of Goods and Services procured from SA suppliers • Number of South African suppliers that are to be utilised in the fulfilment of the contract
Technology transfer and sustainability	• Technology transfer including: o Methods of manufacturing o Introduction of new technologies o IP transfer (no. and value)	• Introduction of a new/improved method of manufacturing o Provision of new technologies o For processes o ICT o The transfer of patents, trademarks and copyrights
Skills development	• Number company employees to be trained including: o Number of artisans o Number of technicians o Number of Black People o Total number of people • Number of downstream supply chain individuals to be trained, including o Number of artisans o Number of technicians o Number of Black People o Total number of people • Certified training • Rand value on training to be spent in the Industry • Number of bursaries / scholarships (specify field of study)	• No. of individuals within the company (in South Africa) that the supplier plans to train over the contract period; training undertaken in the previous Year will not be taken into account as past employee training appears in the skills development pillar of the BBBEE scorecard; criteria broken down as for industry training above • No. of individuals that the supplier plans to train in the industry over the contract period; training undertaken in the previous Year will be taken into account to make allowance for suppliers who have just completed a training drive within the industry • What percentage of training for 1 and 2 above complies with local and/or international skills accreditation • Total planned monetary value spend (as a % of contract value) on skills development/training for the contract period within the industry; money spent in the previous Year will be included in Year 1 to make allowance for suppliers who have just completed a training drive within the industry • The number of higher education bursaries/scholarships provided in the previous Year and planned for the duration of the contract • The number of apprentices that the company plans to enlist during the course of the contract • The monetary value that the supplier is

Evaluation criteria	Measurable areas	Further explanation
	• Number of apprentices (specify industry) • Investment in schools in specific sectors (e.g. engineering)	prepared to invest in the development and running of schools to increase technical skills development
Small business promotion	• % of planned procurement from QSEs • % of planned procurement from EMEs • % of planned procurement from start-ups • Non-financial support provided to small business • Joint ED initiatives with Transnet	• Refers to the planned procurement from small business as a % of the total planned procurement spend • Suppliers will be given a point for each non-financial ED support that they are planning to give to small business e.g. Professional support; employee time allocated to assisting small business • Suppliers will be given a point for each financial ED support initiative that they are planning to undertake during the contract period e.g. Shorter payment terms; interest free loans • The number of ED initiatives that the supplier will jointly run with Transnet: • That are aligned to Transnet's objectives • That are financial or non-financial in nature
Rural development and regional integration	• Number of local employees • Value spent on local business • Proximity of business to operations • Number of rural businesses to be developed • CSI spend	• Number of people to be employed from within the town / city of operation • Monetary value to be spent on business within the town / city of operation • The locality of the bidder's business in relation to operations. Preference is given to regional (provincial) locality • The monetary value of CSI to be spent on rural community development projects

12.4 SUCCESSFUL BIDDER'S FAILURE TO MEET SD TARGETS

The contract with the Successful Bidder must contain a penalty clause which stipulates the penalties that will be imposed by Transnet, should the Bidder fail to meet the SD targets in the contract. Furthermore, failure to achieve SD targets will result in breach of contract and provide Transnet with cause to terminate/cancel the contract with the Successful Bidder. Milestones in terms of achievement of SD targets per year must be stipulated in suppliers' contracts so that penalty/breach of contract clauses may be invoked if required.

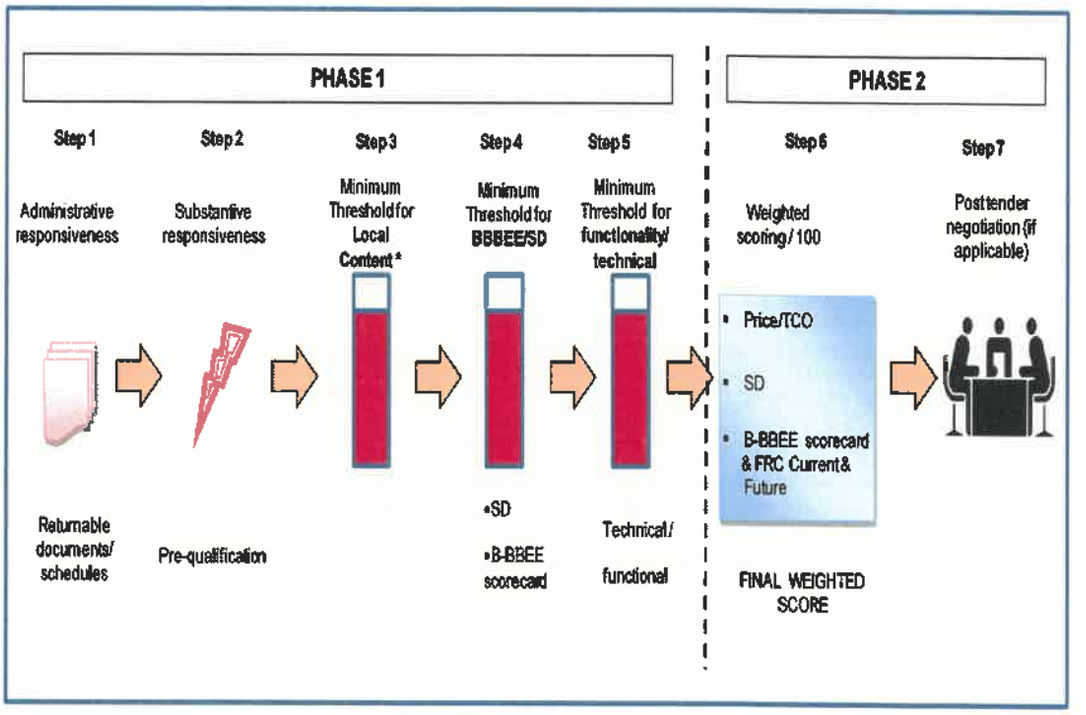
CHAPTER 13 : DETERMINING BID EVALUATION CRITERIA

13.1 CHOOSING AN APPROPRIATE EVALUATION METHOD

There are two possible evaluation methods that can be followed when evaluating a bid.

Method 1 follows a two-stage methodology where minimum thresholds are set for Local Content (where applicable – designated sectors), B-BBEE/SD and Quality. Only those bidders that meet (or exceed) the relevant minimum thresholds, advance to the next evaluation phase (step 6 in diagram below, where Price/TCO, SD and BBBEE are scored using the pre-determined weightings. Method 1 is the preferred method for evaluating bids within Transnet. Method 2 is used only in instances where Quality is of critical importance and assigned a greater weighting than price in Step 6 of Phase 2 (SD, B-BBEE and FRC weights remain unaffected).

13.1.1 Method 1 (Preferred Method)



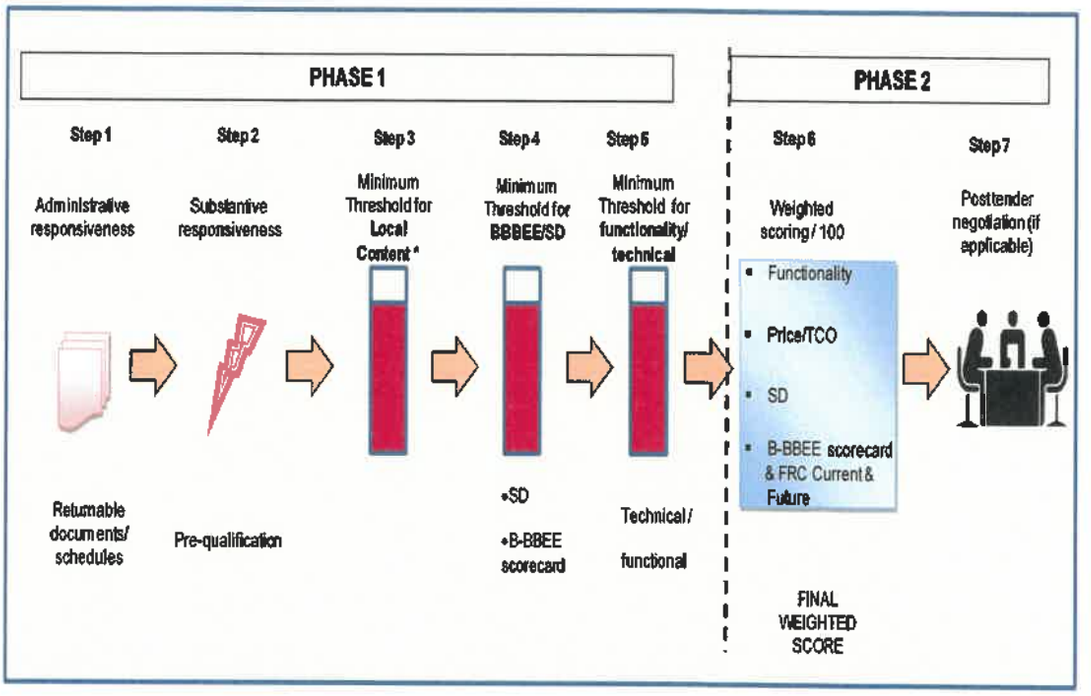
*When issuing a tender in a designated sector, Transnet **must** set a minimum threshold for Local Content. When issuing a tender in a non designated sector, Transnet has a discretion whether to include a minimum threshold for Local Content or not. However, as a general rule Transnet will actively pursue opportunities for Local Content in all bids.

Figure [17]: Method 1

- Phase 1: A minimum threshold must be set for Local content (where applicable) and both SD/B-BBEE and Quality. These are separate thresholds, and the Bidder must meet the minimum criteria for all of these in order to proceed to phase two.
- Phase 2: The suppliers who meet the minimum threshold for Local content, SD and Quality (phase 1) will then be evaluated against each other using price, SD and BBBEE (Including FRC) as criteria

13.1.2 **Method 2**

(An alternative used in limited instances where Quality is of critical importance)



*When issuing a tender in a designated sector, Transnet **must** set a minimum threshold for Local Content. When issuing a tender in a non designated sector, Transnet has a discretion whether to include a minimum threshold for Local Content or not. However, as a general rule Transnet will actively pursue opportunities for Local Content in all bids.

Figure [18]: Method 2

- Phase 1: A minimum threshold must be set for Local Content if applicable and both SD/B-BBEE and Quality. These are separate thresholds, and the Bidder must meet the minimum criteria for all of these in order to proceed to phase two.
- Phase 2: Quality/Functionality is included in the evaluation and has a higher weighting than Price. The weightings allocated to SD, B-BBEE and FRC remain unaffected.

13.2 CHOOSING APPROPRIATE EVALUATION CRITERIA

13.2.1 General principles

Evaluation criteria must be:

- **Unambiguous.** The bid documents must provide a complete explanation of the scope of work as well as the criteria and sub-criteria that will be used in the evaluation of bids. Care should be taken to ensure that the RFP does not contain any contradictory clauses. Where drawings are included as part of the RFP, such drawings must be completely aligned to the written description of the Goods or Services required.
- **Rational and justifiable.** Evaluation criteria must be rationally linked to the projected procurement outcomes.
- **Quantifiable.** If a criterion cannot be measured, it should not be included as an evaluation criterion.

- **Predetermined.** Evaluation criteria must be stated upfront in the RFP document. No evaluation criteria should be used in the evaluation process that were not stipulated in the RFP document.
- **Objective.** Evaluation criteria should not be written with a specific product in mind, but should rather describe functional (as opposed to product specific) characteristics.

13.2.2 Quality criteria

Quality criteria must be determined taking into account the needs and expectations of the end user with regard to functional outcomes of Goods or Service, i.e. conformance to stated requirements. It is important to note that only necessary quality/ technical criteria must be included as evaluation criteria. Quality evaluation criteria must not be drafted in an exclusionary manner e.g. requesting 10 years experience in an industry when actually 5 years experience would suffice. In developing Quality criteria, it is necessary to consider how these items are to be measured, verified and evaluated in Bid submissions.

a) Quality criteria may include criteria such as[4]:-

(i) technical merit;
(ii) aesthetic and functional characteristics;
(iii) safety characteristics;
(iv) environmental characteristics (including green economy, energy conservation and climate control);
(v) quality control practices;
(vi) reliability;
(vii) durability;
(viii) method statement (including organization, logistics and support resources) relevant to the scope of work;
(ix) qualifications and demonstrated experience of key staff in relation to the scope of work;
(x) demonstrated experience of the Bidder with regard to specific aspects of the project/comparable projects;
(xi) running costs;
(xii) after sales Service and technical assistance;
(xiii) delivery date;
(xiv) delivery period or period of completion;
(xv) inspection or testing requirements;
(xvi) integration with other Goods / Services; and
(xvii) training requirements.

b) Where the weighting for Quality forms a significant part of the overall weighting, at least 2 persons of the CFST who are conversant with the technical aspects of the bid shall set the evaluation criteria and weightings. These persons shall also determine the prompts or qualitative indicators for judgment, with fixed scores assigned to each prompt. Quality must be scored in terms of such prompts for judgment, individually and then averaged, subject to moderation.

c) It should also be determined whether interviews, site visits and presentations should form part of the scoring, and if so, the relative weights assigned to each of these must be determined. These aspects must be clearly dealt with in the RFP. It is important to note that interviews, site visits and presentations should only form

[4] *This section on quality is largely based on clause 4.3 of the CIDB Standard For Uniformity in Construction Procurement*

part of the scoring if there are aspects of the bid that cannot be evaluated based on the responses to the RFP document.

d) The evaluation of bids shall be based only on the information contained in Bid submissions, and where relevant from interviews, presentations and site visits.

13.2.3 Price criteria

a) When dealing with more complex bids, the evaluation of price must involve an evaluation of the Total Cost of Ownership (TCO). In such cases, Bidders must be requested to provide all information relevant to the evaluation of TCO. It is recommended that Bidders be provided with a comprehensive pricing schedule to ensure that they all follow a standardised approach with pricing. This will facilitate uniformity in the evaluation of price. The evaluation of TCO includes, but is not limited to, factors such as:

- Installation costs;
- Warranties;
- Service and maintenance costs;
- Operating supplies;
- Storage costs;
- Commercial discounts;
- Incoterms;
- Price adjustment conditions; and
- Exchange rate fluctuations.

b) When calculating prices, only discounts which have been made unconditionally must be taken into account during evaluation. However, where a discount is made conditionally, such discount must, despite not being taken into account for evaluation purposes, be implemented when payment is effected.

13.2.4 Preference criteria

All Bids should be evaluated against preference criteria. The preference criteria, as set out in Chapter 10, should be included in the bid document.

13.2.5 Supplier development (SD) criteria

If a specific commodity has been earmarked as a SD commodity, then SD should be included in the evaluation criteria. The SD criteria, as developed in Chapter 12, should be included in the bid document.

13.2.6 Evaluation of financial stability

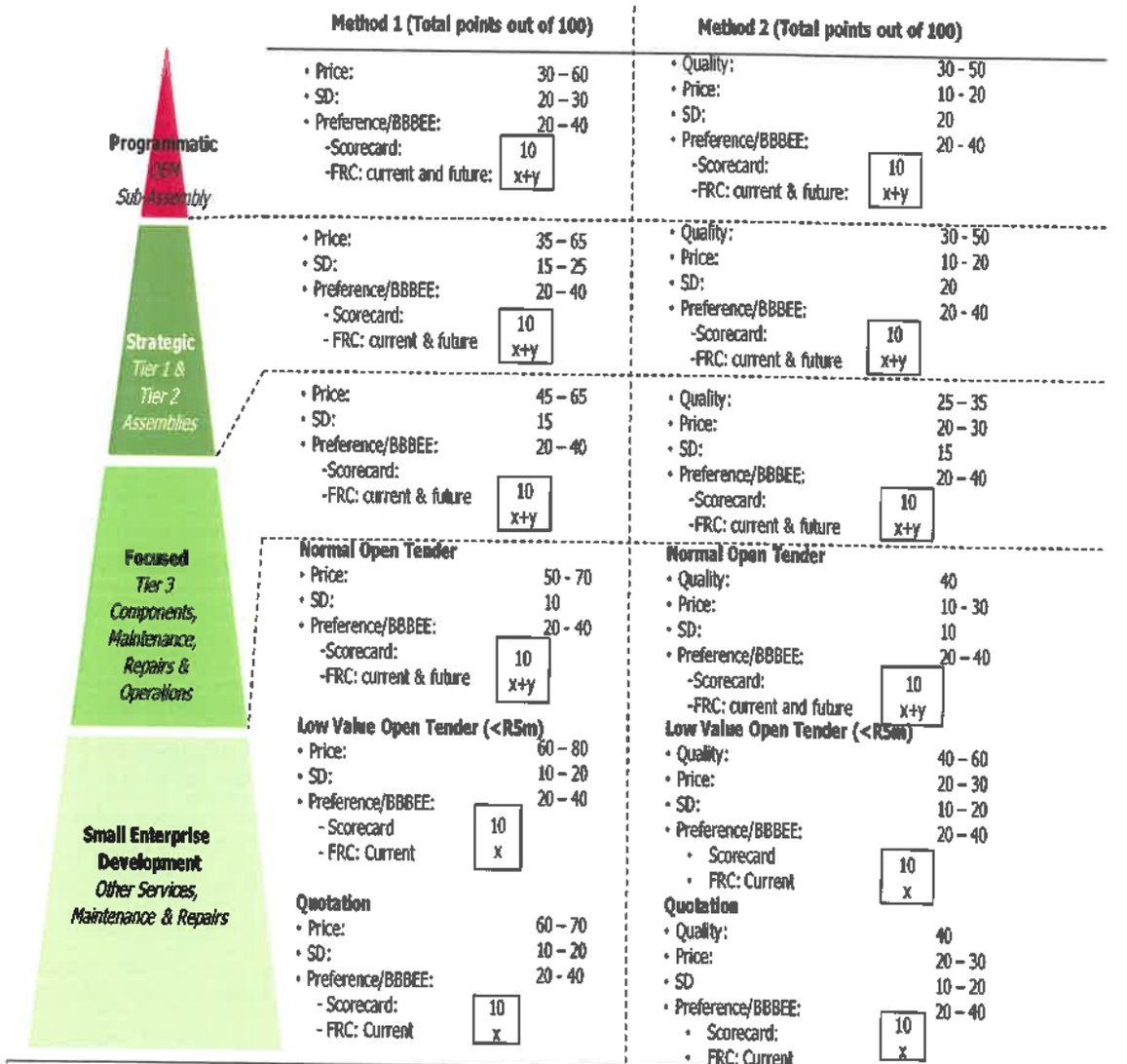
Depending on the type of Goods/Services being procured, it may be important that the financial stability of Bidders be evaluated based on their audited financial statements, etc. Depending on the importance of the financial stability of the successful Bidder/s, financial stability may either be included as a pre-qualification criterion or an evaluation criterion. It is important to note that the evaluation of financial stability will not feature in every bid, particularly those which seek to advance Start-up and emerging enterprises. Financial stability may also be evaluated at the discretion of the AC in terms of paragraph 20.3.

13.3 DETERMINING THE WEIGHTING FOR EVALUATION PURPOSES

The weighting of the various components i.e. Quality, Price, SD, and B-BBEE need to be considered on a case by case basis as each procurement event will differ. It is important that these be determined upfront and included in the RFX document. Once included in the RFX document one cannot deviate from that and the evaluation has to be done strictly in accordance with what was stated in the RFX document.

The weighting of Quality requirements as a whole, as well as the sub-requirements within the Quality section, need to be carefully determined to ensure that the end product/service is optimal and fit for purpose.

It is suggested that the component weighting should vary in terms of preference, SD and Quality/price, depending on the particular IC^3 quadrant. (see *Figure [19]* below).



The weightings above are purely indicative and may be changed with the approval of the Procurement Specialist or person with the appropriate contracting DoA.
Also note that depending on the weighting allocated to Preference/B-BBEE, the weightings for the other evaluation criteria must be amended proportionally.
The values for FRC Current (x) and FRC Future (y) must be determined on a case by case basis provided that the cumulative points for B-BBEE do not exceed the range as stipulated in the diagram.

Figure [19]: Methods 1 & 2

13.4 It is important that all of the above should be carefully considered by the CFST and included in the sourcing strategy, the RFX and RFX sign-off template prior to issuing the RFX to the market, as neither the evaluation criteria, nor the weightings, nor the evaluation methodology (i.e. Method 1 or 2) may be changed during the evaluation phase.

CHAPTER 14 : MAIN PROCUREMENT MECHANISMS

14.1 FACTORS TO CONSIDER WHEN SELECTING THE APPROPRIATE PROCUREMENT MECHANISM

Sourcing/procurement strategies are closely linked to the strategic importance and value of the Goods/Services. The first step is to classify Goods/Services on a risk/value matrix. In order to determine the importance of Goods/Services to Transnet as well as the appropriate procurement mechanism to be used, the commodity should be plotted on the four quadrant matrix below:

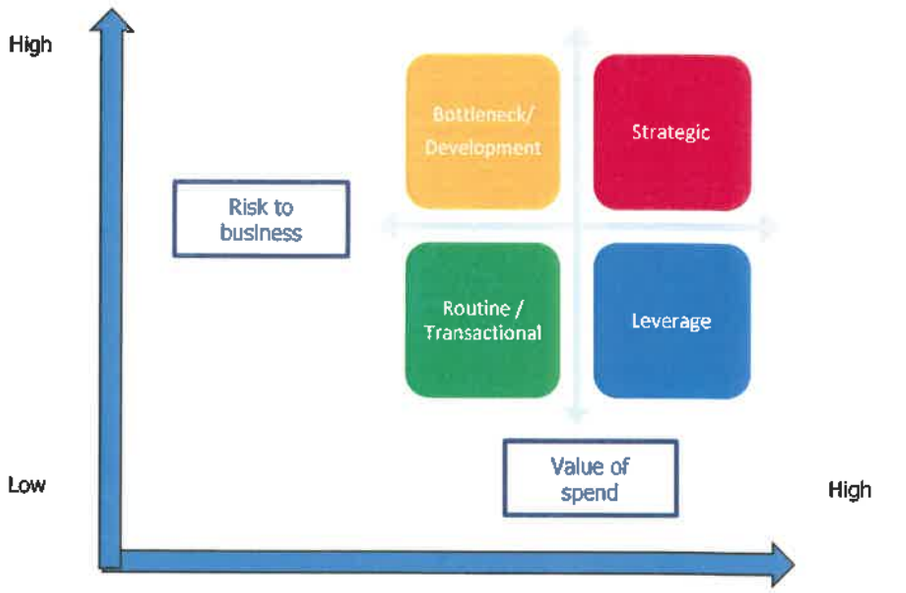


Figure [20] – Risk / Value Matrix

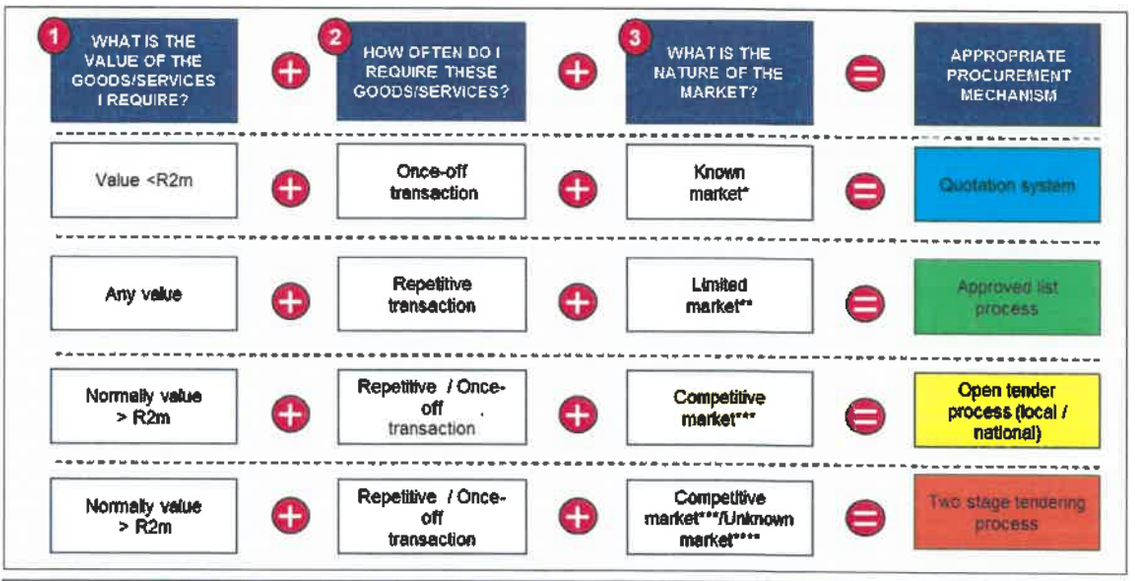
The following guidelines will assist in determining the correct procurement mechanism to use depending on where in the matrix particular the Goods/Services are placed:

TABLE 16

Type	Characteristics	Appropriate procurement mechanism/s	Possible contract options
Routine/ Transactional	• Low risk; low spend • Non-critical items • Many suppliers in the market • Objective is to minimise spending significant time and effort on obtaining these Goods / Services through 'as and when' contracts	• Open Bid • Quotation system (only when non repetitive and under R2 million)	• "As and when" contract for short and medium term • Transversal contract
Leverage	• Low risk; high spend • Non-critical items • Many suppliers in the market	• Open Bid	• Transversal contract • "As and when" contract for short and

Type	Characteristics	Appropriate procurement mechanism/s	Possible contract options
	• Objective is to leverage economies of scale		medium term
Bottleneck/ Development	• High risk; low spend • Limited suppliers • These are items that Transnet must have but which are difficult to obtain • Critical items • Includes specialised equipment, instrumentation or software from proprietary suppliers • Objective is to secure supply	• Two stage bidding system • Approved list • Confinement	• "As and when" contract for medium term • Fixed quantity
Strategic	• High risk; high spend • These are items that are critical to Transnet's business	• Open Bid • Two stage bidding system • Approved list • Confinement	• Medium to long term contract • Transversal contract

Depending on the circumstances of each requirement for the procurement of Goods or Services, any one of the following main procurement mechanisms or procurement paths may be utilised:



* Known market - suppliers are listed on the vendor database
** Limited market - only a restricted number of suppliers exist eg. Original Equipment Manufacturers, limited suppliers or a sole supplier
*** Competitive market - many suppliers exist in the market
**** Unknown market - there is no clear specification of requirements and/or the availability of the goods/services is unknown

Figure [21] – Procurement Mechanisms

14.2 PROHIBITED PRACTICES

14.2.1 As a general rule, the quotation / bidding system must not be used merely to obtain market related prices for budget or benchmarking purposes.

14.2.2 In cases where it is absolutely necessary to obtain test bids for budget purposes only, the request to the market must clearly and unambiguously state that the request for a quote is for budget purposes only and that no business will be awarded against this invitation. Care should, however, be exercised that such budget pricing exercise is not abused merely to give certain contenders advance notification of a new project in the pipeline. It would be advisable to rather obtain test quotes from more than one, or even better, all the known suppliers so as not to run the risk of being perceived to have given only one contender advance notification.

14.2.3 Requirements may not be deliberately split into parts or items of lesser value in order to keep the transaction value within a particular Delegation of Authority level or to keep it below the threshold of an AC or a person with higher Delegation of Authority. This is considered to be Parcelling.

14.2.4 Specifications should be functional and fit for purpose, rather than brand- or product-specific. Specifications must not include any exclusionary terms. Compiling a specification around one supplier's product is unfair and not allowed.

14.3 THE QUOTATION SYSTEM FOR VALUES BELOW R2 MILLION REQUEST FOR QUOTATION ("RFQ")

- Only used for transactions below R2 million in value
- The Goods or Services must be required on a non-repetitive basis
- The market should be known
- A minimum of three quotes must be obtained, where possible

14.3.1 Definition

The quotation system is a procurement system used for transactions below R2 million that are required on a non-repetitive basis.

14.3.2 When to use the quotation system

b) The quotation system is intended for non-frequent purchases of fairly low value. It should not be used on a continual / repetitive basis for the same commodity i.e. instances where the same commodity is purchased (sometimes even from the same supplier), but on different purchase orders/requisitions. This will be regarded as Parcelling.

c) The quotation system is best suited in the following circumstances where:

(i) transactions are valued at less than R2 million;

(ii) the purchase is not required on a repetitive basis. Where the same purchase is regularly made, consider a fixed term as-and-when-required contract. If market prices of the commodity are volatile and it is impossible to obtain firm prices for a specific period (even with price

review mechanisms included), consider a short term as-and-when-required contract;

(iii) the value of the transaction would make it impossible, impractical or economically unviable to call for Open Bids; or

(iv) there are opportunities to develop suppliers in order to achieve transformational objectives. This mechanism is considered to be the best avenue to facilitate entry to the market for emerging small B-BBEE companies.

14.3.3 Advantages and disadvantages of the quotation system

Advantages	Disadvantages
Quick turn-around times in the case of non-repetitive purchases	• This procurement mechanism is not the most cost-effective as the benefit of volume discount is lost • Turnaround time is longer when using the quotation system as opposed to an 'as and when' contract, in the case of repetitive purchases • Risk of limiting competition to only certain service providers

14.3.4 The authority to obtain quotes

CEOs may at their own discretion decide to allocate different levels of authority to different Managers in terms of their Delegation of Authority. The CEO [and ultimately the Chief Procurement Officer ("**CPO**")] will delegate specific powers to specific Managers in the procurement function to invite quotations up to a certain value and secondly for the award of the business resulting from the quotation system.

Furthermore, the CEO of a Division may at his/her own discretion and within the Transnet DoA framework, introduce OD specific control mechanisms for these "low" value transactions (e.g. Petty Cash policies, etc).

Depending on the value of transactions falling within the quotation system, appropriate control measures must be implemented from low value quotes to high value quotes:

TABLE 17

Transaction value	Mechanism for obtaining quote	No. of quotes
Less than R5 000.00	Fax/email quotes	1
R5 000.00 – R50 000.00	Fax/email quotes	2
Greater than R50 000.00 – R250 000.00	Fax/email quotes	3
Greater than R250 000.00 – R1000 000.00	Short form RFQ request (receipt of bids at the tender box)	3 or more

Greater than R1000 000.00 – R2 000 000.00	Formal RFQ process (receipt of bids at the tender box)	3 or more

14.3.5 Number of quotes to be requested

a) As a general rule, a minimum of three quotations should be requested. However, a buyer may request more than three quotes if necessary. Where it is impossible to request three quotes e.g. patented articles, OEM spares etc., one or two quotes will suffice. However, a submission must be prepared with the reasons for not being able to request at least three quotations. This must be approved by the CPO or his/her delegate, depending on the value of the transaction and the delegated authority of the procurement official. Since OEM spares and components will in all probability be required on a regular basis, consideration should be given to either the framing of an Approved List, or the conclusion of an "As-and-when required" term contract.

b) It is important to note that once a request for quotations has been made to prospective Bidders, a buyer cannot subsequently request further quotes if all Bidders approached have not responded to the request by the closing date.

14.3.6 Transnet Vendor Portal

a) An automated Transnet wide Vendor Portal (TVP) has been created for all potential suppliers wishing to do business with Transnet to register and update their company profiles. The web address is https://vendorportal.transnet.net.

b) Potential suppliers should provide full details of the Goods/Services on offer, their tax clearance certificate, their BBBEE level, including % Black ownership and area of operation. Suppliers will be classified accordingly on the TVP.

c) Buyers who wish to obtain quotations must proceed to search the TVP and/or the OD's own vendor database for potential Bidders.

d) The TVP should ultimately have the functionality to invite quotes from potential suppliers on a rotational system to ensure an equitable spread of opportunities among all potential suppliers.

14.3.7 Process

a) As indicated above, the buyer will request quotes from at least 3 potential Bidders on the TVP where possible.

b) For relatively low value, simple Goods/Services, the RFQ should ideally be open for 3 to 4 Working Days in order to afford Bidders a reasonable opportunity to respond. For higher value, more complex Goods/Services, the RFQ should be open for a minimum of one week.

c) The bids must be received in a controlled environment, e.g. a dedicated email address, dedicated fax number or a tender box.

d) As a general rule, quotations are to be evaluated on the basis of price and B-BBEE. In addition to the 10 points allocated to the B-BBEE Scorecard, bidders

will be evaluated against the current status of their Ownership and Management Control. Ten points will be allocated to Ownership and a further 10 points to Management Control (see Figure [19] above). A minimum B-BBEE threshold of Level 4 should be used as pre-qualification criteria for quotations, unless not possible. In the event that technical evaluation is also necessary, the technical evaluation criteria must be pre-determined and included in the RFQ document. The highest scoring Bidder is to be selected as the Successful Bidder.

e) In instances where quotes are invited from potential new bidders, the prices quoted should, where possible, be benchmarked against previous prices paid, to ensure that Transnet obtains optimal value for money, whilst achieving its social obligation.

f) As indicated in paragraph 14.3.6 (d) above, quotations should be invited from potential bidders on the TVP on a rotational basis so as to ensure an equitable spread of opportunity among all potential suppliers.

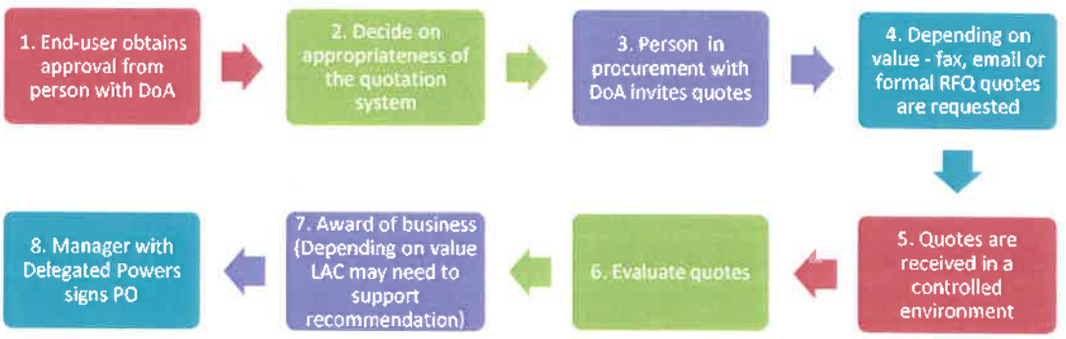


Figure [22] – Quotation Process

14.4 THE OPEN BID PROCESS (RFP)

- Generally used for transactions greater than R2 million in value
- There must be a competitive market and a clear detailed specification available to which many prospective Bidders are able to respond
- Bids may be advertised in local, national and / or international media depending on the market

14.4.1 Definition

The Open Bid Process (RFP) is a competitive process where the general public is approached with an invitation to bid that is published in the media. All interested parties are granted an equal opportunity to bid for Transnet's business. Once the bid has closed, the winning Bid is selected by means of a transparent evaluation, recommendation and adjudication process.

14.4.2 When to use the open bid process

The Open Bid system is the procurement/disposal mechanism best suited to the following circumstances:

a) the monetary value of the purchases is in excess of R2 million;

b) even if the bid value is less than R2 million, an Open Bid should be issued if the market is not known or the Goods or Services are required on a repetitive basis;

c) the market is competitive (i.e. many potential suppliers are able to provide the required Goods/Services);

d) there are clear and unambiguous specifications to ensure that all potential suppliers bid for the same product;

e) there is enough time available;

f) the value of the transaction must warrant the cost, time and effort taken to use an Open Bid process; and

g) in cases where Transnet's needs / specifications etc. are still too vague to issue a formal bid, the two-stage Bid system (RFI) should be followed.

14.4.3 Advantages and disadvantages of the open bid process

Advantages	Disadvantages
The Open Bid system is regarded as the procurement mechanism which best ensures open and fair competition.	The Open Bid process is time consuming. In order to ensure that Goods / Services are delivered to the business when they are needed, the need for the Goods / Services needs to be anticipated well in advance. Requires significant resources (cost, time, etc.)

14.4.4 Process

a) Before any bid document may be issued to the market, the person with the necessary delegated authority must provide written authority to approach the market. This must include approval of the evaluation methodology, evaluation criteria and the availability of funds. The evaluation team is also to be decided on at this point.

b) The bid document should be compiled according to the guidelines set out in Chapter 16 *(Bid Preparation)*.

c) Bids may be advertised in local, national and / or international media depending on the market and value of the bid.

d) Bids should be kept open for a reasonable period. Refer to paragraph 16.3 for more detail.

e) Bids are to be finalised as soon as possible after the closing date of the bid.

See process below to be followed in the case of an Open Bid process

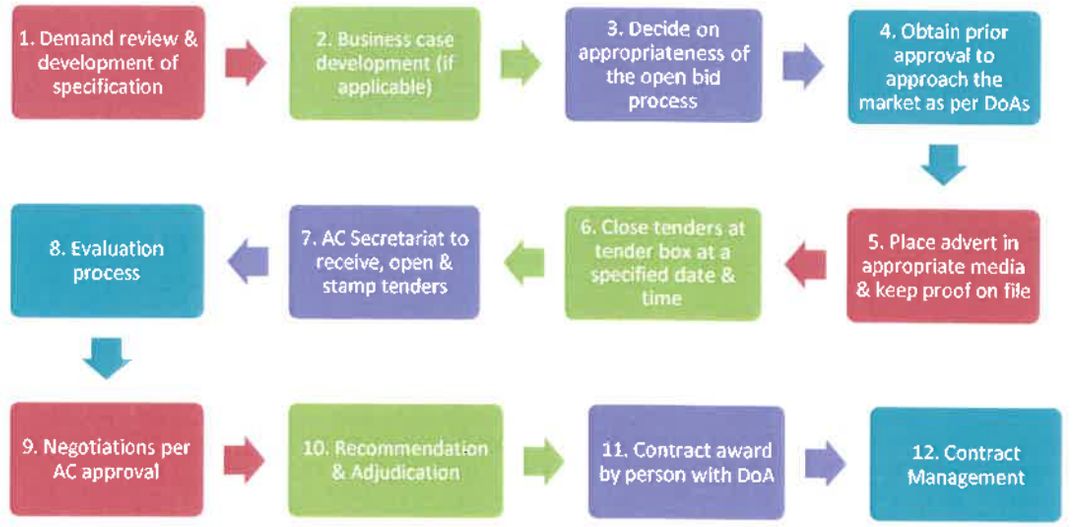


Figure [23] – Open Bid Process

14.5 APPROVED LIST PURCHASES

- An approved list is utilised for Goods or Services that are required according to unique specifications, on a continual basis and from a limited number of suppliers.
- This mechanism is used for non-standard items that are not available off the shelf.

14.5.1 Definition

An approved list is generally used for Goods or Services that are required according to unique specifications, e.g. OEM spares or proprietary articles. An approved list is framed and utilised for Goods or Services required on a continual basis.

14.5.2 General principles

a) In order to qualify for inclusion on any approved list a supplier must be able to supply Goods or Services of the quantity and quality required. Furthermore, if so required, the supplier must have submitted samples or delivered Goods which have satisfactorily passed Transnet's quality tests.

b) Approved supplier status cannot be acquired merely by being on a Division's Vendor Master or on a B-BBEE Manager's List of EMEs or QSEs for specific Goods or Services. Approved supplier status can only be obtained after following the process stipulated below.

c) Specifications must be drawn up to promote fair competition.

d) ODs and Specialist Units must attempt as far as possible to procure off-the-shelf Goods as opposed to drawing up their own specifications.

e) An Open Bid may not be issued for Goods/Services appearing on an approved list.

f) Information regarding Transnet's Approved Lists may not be disclosed to anyone outside Transnet without the written approval of the GCSCO.

g) The standard template for approved lists must be used.

14.5.3 When to use the approved list process

This procurement mechanism is ideally suited for the following transactions:

a) strategic, high-value, high-risk items, non-standard items which are not available "off-the shelf";

b) where equipment can only be obtained from Original Equipment Manufacturers (OEMs) or limited suppliers; or

c) Goods and specialised Services that cannot be sourced from non-approved suppliers because of Transnet's own unique specifications, Quality standards, or safety requirements i.e. commodities that are not freely available in the market from a range of suppliers.

14.5.4 Advantages and disadvantages of the approved list process

Advantages	Disadvantages
• Reduces administrative burden as there is no need to approach the open market every time there is a requirement for Goods/Services. • Bidders are pre-qualified and need not be evaluated on technical aspects every time there is a requirement. • New entrants can be accommodated at any time.	Delays between identifying and approving new entrants into the market due to stringent testing requirements.

14.5.5 Types of Approved Lists

a) **Type 1: Generic Approved Lists – Indefinite validity**

(i) This type of approved list remains valid indefinitely, subject to the proviso that they must be advertised every 6 months to afford new suppliers an opportunity to be included onto the list.

(ii) Although the list remains valid indefinitely, the suppliers on the list will be subject to periodic quality testing in order to maintain their name on the list. Should suppliers fail to meet quality standards, their names may be removed from the approved list as per paragraph 14.5.8.

(iii) This type of approved list may be framed by following one of the two procurement processes outlined below:

- After public Advertisement of the intention to frame an approved list in a notice requesting all prospective suppliers to formally apply.
- By framing an initial approved list of suppliers based on previous experience and/or tests carried out. The list will nevertheless be advertised publicly thereafter to invite new entrants to the market.

(iv) Testing: Bidders are entitled to a full explanation of the testing process that was/is to be carried out on their product. Bidders may, upon request, be allowed to observe the testing process carried out by Transnet. Those Bidders who's Goods fail the relevant tests, must be provided with detailed reasons why their Goods failed the tests and should be afforded an opportunity to resubmit their Goods for testing once the necessary improvements have been made.

(v) In either of the two processes listed above, aspirant suppliers may apply for inclusion after the approved list has been established. Such suppliers may be provisionally included on the approved list where it is not practical to test their product/sample beforehand e.g. overhaul of traction motors; reconditioning of transformers for electric substations, etc. Potential suppliers in this category will be subjected to a quality check e.g. ISO certification, previous experience on work of a similar nature and complexity, quality control systems etc. Qualifying suppliers will then, subject to AC and CEO approval, be placed on the approved list as "aspiring suppliers". When obtaining bids from suppliers already appearing on the approved list, the aspiring prospective suppliers must also be invited to submit bids. If an aspiring applicant is awarded a contract or portion of the contract for testing purposes and performs satisfactorily, their name must be placed on the approved list by following the normal approval process i.e. AC and CEO approval must be obtained.

(vi) A list of all approved lists with their respective specifications, contact details of technical expert, etc. must be displayed on the notice/bulletin boards in bid issuing offices so that potential new entrants are made aware of its existence.

(vii) Although the generic approved list remains valid for an indefinite period, it must be advertised every 6 months in order to afford new suppliers an opportunity to be included. However, such approved lists can be updated at any time. It is not necessary to wait for the 6 month interval to include a new name on the approved list. After a new entrant's product has successfully passed the quality tests, AC and CEO approval must be obtained and the list must be updated accordingly.

(viii) New entrants may apply at any time for inclusion on the approved list. Any new applications received outside of the 6 month advertising intervals must be dealt with immediately and not held over until the next Advertisement.

(ix) It is important to note that when such an approved list is utilised to solicit bids, all approved suppliers (including aspiring suppliers, if applicable), must be approached and invited to submit bids. Under no circumstances may only certain names be selected off an approved list on a selective or rotational basis. Furthermore, all such requests for bids must be dealt with in terms of the standard procedures.

(x) Award of business on the approved list is subject to approval from the person/body with the necessary DoA, as well as the relevant AC if such transaction falls within its jurisdiction.

(xi) It is important to note that the names on the generic approved list will remain on the list unless their names are removed for one or other reason.

b) Type 2: Hybrid Approved Lists – Fixed period validity

Hybrid Approved Lists are typically used in the following circumstances:
• Competitive market where there is a need to prequalify suppliers, as well as to limit the need to continuously evaluate large numbers of bids

(i) "Hybrid approved lists" are publicly advertised and framed for a fixed period. The validity period of the list must be clearly stated in the Advertisement, as well as in the subsequent letter informing successful applicants of their inclusion on the Approved List.

(ii) The nature of the Goods/Services will inform the decision on whether to make use of this type of approved list. Typically, a competitive market must exist in order to use this type of approved list. Examples of such "approved lists" are the Transnet Legal Panel and the Transnet List of Approved Security Service Providers.

(iii) Unlike the generic approved list, no new applications for inclusion on the list may be considered during the period that the existing list is in force.

(iv) The manner in which the approved list is to be structured and implemented must be fully motivated and submitted to the relevant AC for prior consideration and approval by the CEO.

(v) At the end of the fixed period, the list must be re-advertised and a new list must be framed, if there is still a need for such an approved list. Suppliers who were included on the previous approved list must re-apply for inclusion onto the new list, and they must be made aware of this when the new list is being advertised.

14.5.6 Authority to frame an approved list

a) The framing of an approved list or any amendment thereto must be approved by an OD CEO or in respect of Transnet Corporate Centre ("TCC") requirements or transversal contracts, the GCSCO, upon recommendation from the AC.

b) The AC will be responsible for the distribution of the List within the particular entity and to Group iSCM. All Approved Lists should be communicated to the Governance function at Group ISCM, who will distribute the list to all other ACs in the Transnet Group. Group iSCM will be responsible for developing a shared portal to facilitate easier access to all approved lists, by all Transnet entities. The division which initiated the list will, however, be responsible for the periodic updating thereof.

c) Any person or Enterprise whose application for inclusion on the approved list has been refused or whose name has been removed from the list, may make representations to the relevant CEO. Should the person/Enterprise not be satisfied with an OD CEO's ruling, an appeal may be made to the Group Chief Supply Chain Officer ("GCSCO") whose decision shall be final. In respect of TCC, an appeal may be made to the GCFO whose decision shall be final.

14.5.7 Process

a) The OD AC must first provide "in principle" approval for the framing of an approved list.

b) The Advertisement for an approved list must only make reference to the Goods/Services for which the list is being framed and not the names of the approved suppliers.

c) All approved lists have to be advertised at least every 6 months, by means of a public notice in the appropriate media, inviting all interested parties to submit applications for possible inclusion on the relevant approved list.

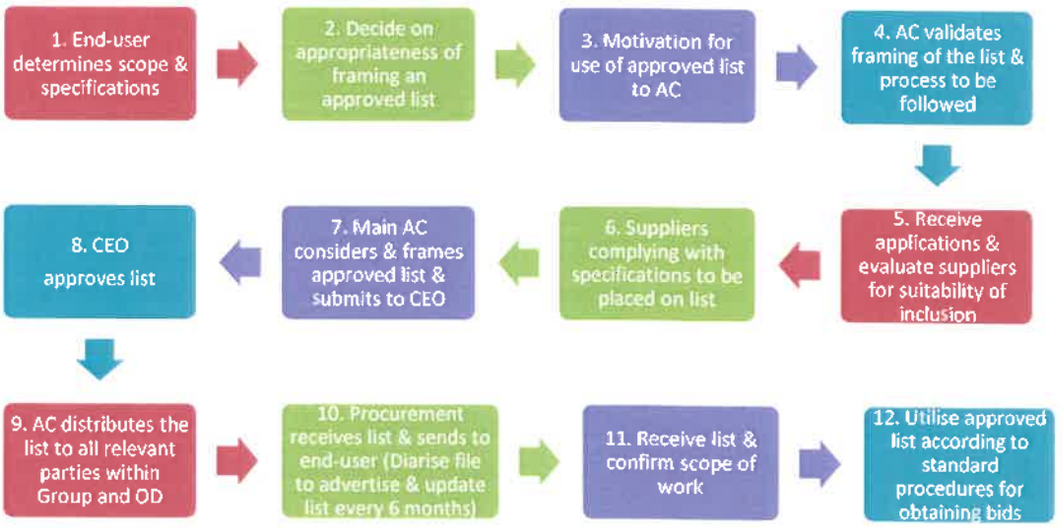


Figure [24] – Process to frame Approved List

14.5.8 Removal of names from the approved list

a) The name of an Enterprise may be removed from an approved list at any time if the Enterprise:

b) has been convicted of any offence under any law relating to wages, hours of work or other conditions of employment;

c) fails or ceases to comply with the requirements of such approved list;

d) continues to perform unsatisfactorily after having been informed accordingly when measured on any of the following criteria: timeliness, Quality, price escalation and service;

e) sub-contracts the whole or any portion of a contract for the supply of Goods or Services in respect of an approved list to an Enterprise or person whose name does not appear on that list;

f) otherwise acts in a manner which, in the opinion of Transnet, is construed to nullify the object of framing an approved list;

g) has ceased to carry on business under the name on the approved list and has not informed Transnet of this change;

h) has been dealt with in terms of Transnet's List of Excluded Bidders;

i) has shown little interest over a reasonable period to submit quotations when invited to do so; or

j) has not been awarded any business over a reasonable period due to non-competitive prices;

Before a name is removed from an approved list, the Enterprise concerned shall be notified in writing of the intention to remove it from the list including reasons. The Enterprise shall be afforded the opportunity to make representations as to why its name should not be removed from the list.

14.6 TWO-STAGE BIDDING SYSTEM (RFI/RFP PROCESS)

This procurement mechanism is appropriate under the following circumstances:

- where the suitability of service providers must first be determined prior to them being invited to bid for Goods / Services;
- when assessing the availability of Goods / Services where there is no clear specification of requirements; or
- there could be solutions available in the market unknown to Transnet.

14.6.1 Principles

This procurement mechanism is appropriate under the following circumstances as it takes into account the most satisfactory solution to Transnet's specific procurement needs:

a) where due to the nature of the Goods / Services being acquired, the suitability of service providers must first be determined prior to them being invited to bid for the Goods / Services (pre-qualification);

b) where there is no clear specification of requirements and it is not feasible/possible for Transnet to formulate detailed specifications for the Goods or Services required; or

c) where Transnet seeks first to establish the various possible solutions available in the market in order to determine the best solution for Transnet.

In scenarios (a) and (b) above Transnet may draw up a functional specification in the RFP based on the responses received to a Request for Information ("**RFI**") taking into account its specific needs. It is critical that the specification not be drafted around a particular supplier's response to the RFI. Intellectual property issues must be taken into account prior to proceeding to stage two of the process.

14.6.2 When to use the two-stage bidding process

a) This mechanism is used in assessing the availability of Goods/Services where there is no clear specification of requirements or where the suitability of service providers must first be determined prior to the undertaking of any development work.

b) The use of this mechanism is appropriate where there are various possible means of meeting the need.

c) The RFI process is ideally suited to projects involving research, development, studies or experiments. In such instances it is not in the best interests of either Transnet or the prospective Bidders to develop a detailed plan when it has not yet been determined as to whether implementation is feasible.

d) The RFI process can be utilised to determine the availability of Goods and different suppliers' specifications in order for Transnet to draft its own specifications in such a way that accommodates as many potential suppliers as possible that are able to provide a product of acceptable quality.

e) To obtain Expressions of Interest (EOI) from the market before stage 2 of the two-stage bidding process is embarked upon.

14.6.3 Advantages & disadvantages of the two-stage bidding process

Advantages	Disadvantages
• Allows Transnet to obtain an indication of what is available in the market before approaching the market with a firm invitation to bid. • Allows Transnet to draft a clear specification when it approached the market	• The two stage bidding process is a time consuming process • There is a risk of possible infringement of IP

14.6.4 Process

A two stage bidding process involves the following steps:

a) **Stage 1 (RFI stage):**

(i) Prospective Bidders are invited to submit their proposals via an open RFI after approval to approach the market has been obtained.

(ii) The evaluation criteria in the first stage may include criteria such as technical, Quality, contractual terms, conditions of supply and the professional and technical competence of the suppliers. Transnet may wish to request rough costing estimates during this first stage. However, price would typically not be requested at this stage.

(iii) The RFI must clearly indicate Transnet's intention during the second stage of the process: i.e. whether:

- suppliers will be subjected to pre-qualification criteria and be short listed in order to proceed to the second stage;
- Transnet will issue an Open Bid based on the responses and specifications received in the first stage; or
- Transnet will approach one or a shortlist of Bidders based on the responses and specifications received in the first stage.

(iv) The RFIs received must be evaluated in terms of pre-determined criteria which have been made available to all contenders in the RFI.

(v) A recommendation is made to the AC or relevant authority regarding the outcome of the first stage, and the eligibility of the bidders to participate in the second stage.

(vi) AC agreement with the recommendation effectively authorises the second stage of the process.

b) **Stage 2 (RFP stage)**

(i) Depending on the option exercised in stage 1, Transnet may either issue an Open Bid or limit the second stage to only one or a shortlist of Bidders, as approved by the AC.

(ii) Bidders are invited to bid in the normal manner.

(iii) The bids are evaluated and awarded in the normal manner.

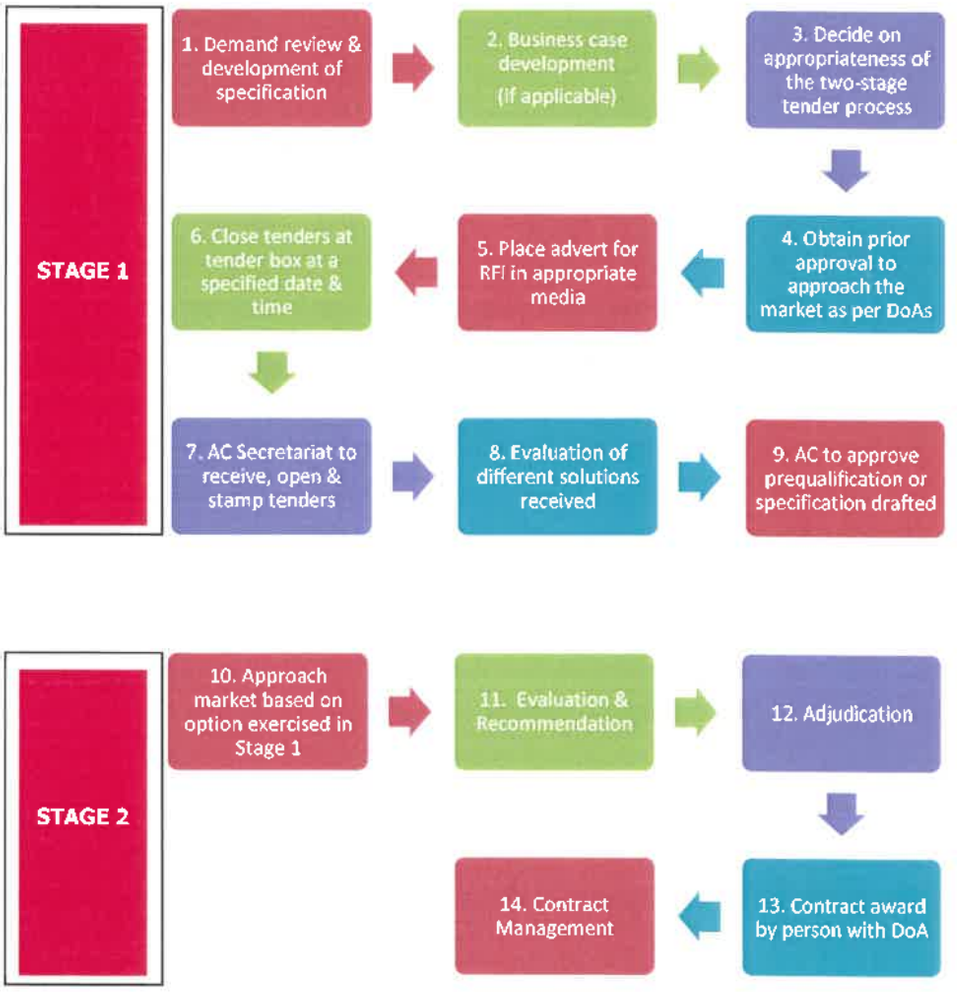


Figure [25] – Two stage bidding process

CHAPTER 15 : SPECIAL CASES

15.1 CONFINEMENTS

Confinements are to be used under the following circumstances:

- for transactions over the value of R2 million
- usually when Goods/Services are required on a once-off basis
- when the nature of the Goods/Services fall within one of the grounds for Confinement

15.1.1 Definition

A Confinement is a mechanism where permission is sought from the person with the appropriate Delegation of Authority to **"confine"** enquiries for required Goods/Services to one or a limited number of Bidders.

A Confinement is a departure from the norm of an open, competitive bidding process and as such must be treated with great circumspection. The misuse of confinements has the potential to entrench monopolies and as such is at odds with the imperatives of the New Growth Path. The NGP seeks to encourage open competition and the introduction of new entrants into the market, particularly those from previously disadvantaged communities.

It is important to note that confinements only apply to transactions over R2m. These rules therefore do not apply to transactions falling below R2m. The quotation system applies to such transactions regardless of the number of quotations the buyer is able to obtain.

15.1.2 Grounds

Confinements will only be considered under the following circumstances:

a) where a genuine unforeseeable urgency has arisen. Such urgency should not be attributable to a lack of proper planning. In such cases appropriate action must be taken against the individual(s) responsible for the bad planning.

b) the Goods/Services are only obtainable from one/limited number of suppliers. For instance, patented/proprietary Goods or OEM spares and components. Operating divisions are however required to provide evidence that there are no new entrants to the market who could also be approached;

c) for reasons of standardisation or compatibility with existing Goods and Services. A case must be made that deviation from existing standardized Goods or Services will cause major operational disruption. If not, confinements based on "standardisation" will not be considered; or

d) when the Goods or Services being procured are highly specialized and largely identical to those previously executed by that supplier and it is not in the interest of the public or the organization to solicit other offers, as it would

result in wasted money and/or time for Transnet. When this particular ground is intended to be used as a ground for Confinement, it is important to note that all pre-requisites must be satisfied: The Goods or Services must be highly specialised, almost identical to previous work done and approaching the market again would result in wasted money and time.

15.1.3 Types of confinements

Depending on the circumstances one of the following two Confinement routes will be applicable:-

a) The normal Confinement route:
- prior authority to confine must be obtained from the person with the relevant delegation;
- bids will close at the relevant AC (relevant AC to be indicated in the submission for approval); and
- the relevant AC will consider the award of business.

b) Confine and award which is only to be used in cases where there is a sole supplier and/or cases of extreme urgency:
- prior authority to confine and award must be obtained;
- the submission to the person with Delegated Powers must fully motivate the reason for the urgency and provide an indicative / benchmark price;
- bids will close at the relevant AC (relevant AC to be indicated in the submission for approval);
- the business will be awarded by the person with the delegation to the relevant Bidder provided that the final price is within the benchmark as initially approved by the person with the delegation to approve the Confinement; and
- the AC must be informed after award.

15.1.4 Delegation of authority

a) Depending on the value of the transaction, only the GCE, BADC and the Transnet Board have the authority to authorise a Confinement.

b) The relevant monetary thresholds for authorising confinements are as follows:

(i) GCE – up to but not exceeding R250 million;

(ii) BADC – up to but not exceeding R1 000 million; and

(iii) The Board – exceeding R1 000 million.

15.1.5 Process

a) The submission for Confinement must be fully motivated in writing by the end-user and the OD CPO to the OD's main AC and the OD's CEO for prior written support of the recommendation to confine. It is important to properly motivate submissions taking into account all relevant factors. Poorly motivated submissions will be referred back to the OD concerned for re-motivation. The submission should be submitted on the relevant template under cover of a memo to the GCE.

b) Only if the reasons advanced for the proposed Confinement are supported and considered to be in the best interest of Transnet, should the Confinement of business to one or more contenders be escalated to Group.

c) The Confinement request must be considered by the Transnet GCSCO and the Group CFO each of whom shall indicate whether or not they support the request.

d) The matter must then be submitted to the GCE, the BADC or to the Board itself for final approval depending on the value of the transaction.

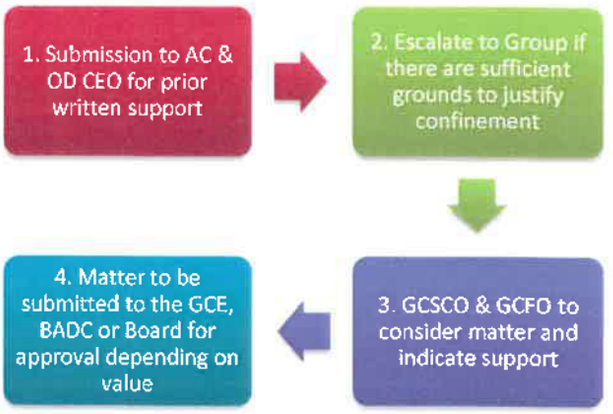


Figure [26] – The Confinement process

15.1.6 Confinement divided between more than one Bidder

Should it be decided to divide the total requirement of a Confinement between more than one Bidder, the total value of the business and not the individual contracts shall determine the level of approval required for the Confinement. Only after the necessary approval has been obtained, may the individual contracts be signed by the Manager with the necessary delegated contractual powers.

15.1.7 Amendment to contracts awarded via Confinement

a) Where a Material Amendment (i.e. the price, duration or scope is increased by more than 10%) to a contract awarded via Confinement is required, the matter must be sent to the relevant AC for support. The AC must submit the amendment to the original approver of the Confinement for prior approval of the amendment. The same principle applies where the cumulative value of amendments equals or exceeds 10% of the original contract value.

b) Where an amendment increases the price, duration or scope by less than 10%, this should be submitted to the AC for approval.

c) Where an amendment to a contract results in the value of the Confinement reaching a higher approval level, the matter must be sent to the original approver for review and recommendation. Approval must then be sought from the person with the delegated authority to approve the higher value of the Confinement.

15.2 EMERGENCY PROCEDURE

The emergency procedure is to be used under the following circumstances:

- Where the circumstances giving rise to the emergency were unforeseeable;
- Where engaging in normal bidding procedures or any other methods of procurement would be impractical; and
- Where the occurrence requires immediate action

The concept of retrospective authority applies only in the context of emergencies. Where an emergency process is followed correctly, condonation is not required.

15.2.1 Definition

a) The following circumstances would normally be regarded as sufficient grounds for invoking the emergency procedure i.e. a situation has arisen where there is an imminent risk of:
   - human injury or death;
   - human suffering;
   - serious business disruption that could not have been reasonably foreseen;
   - interruption of essential services;
   - serious damage to property or financial loss;
   - suffering or death of livestock or other animals; or
   - serious environmental damage or degradation.

b) The concept of an "emergency" must be applied restrictively and should not be used as an excuse for bad planning. As such, in order to qualify for the emergency procedure:
   - the circumstances giving rise to the emergency must not have been foreseeable;
   - engaging in bidding procedures or any other methods of procurement would be impractical; and
   - the occurrence requires immediate action.

An emergency should not be attributable to a lack of proper planning. In such instances appropriate action must be taken against the individual(s) responsible for the bad planning.

15.2.2 Process to institute the emergency process

a) The end-user requests authority from the person with the necessary delegation of authority to institute the emergency procurement procedure. If possible, the end user must notify procurement of the emergency requirement telephonically followed by email.

b) The duly authorised Manager to invoke the emergency process will consider the request and decide on whether to grant such authority. He/she will notify the requestor in the form of an email, SMS or even verbally. If by SMS or verbally, this must be confirmed in writing or by e-mail afterwards.

c) Procurement will invite a Bid(s) from a supplier(s) best able to deal with the emergency immediately. Alternatively, if the emergency occurs after office hours or it is not possible to contact procurement, the end user, after having received the required approval as per sub-paragraph (a) above, may invite the Bid/s directly from suppliers and/or issue instructions to commence the work.

d) Retrospective authority must be obtained as soon as possible thereafter.

15.2.3 Retrospective authority for the emergency procedure

a) The person who has the delegated authority to retrospectively approve the transaction, must be approached for retrospective authority for the emergency. This person, who is different from the person authorised to institute the emergency process, must consider the motivation and provide retrospective authority if the emergency is validated. Please see attached Appendix F for the Matrix for Approval of Emergency Procedures.

NB: Each Entity is responsible for developing its own Emergency Procedural Manual, covering all the relevant disciplines in the entity, and assigning specific persons and value thresholds, for the different roles (i.e. to institute (invoke) and to retrospectively approve). Note that the AC may also be utilised to retrospectively approve the emergency procedure.

b) Retrospective authority must be sought using the standard template.

c) All emergency procedure purchases, irrespective of the value, must then be submitted to the AC for information purposes.

d) The concept of retrospective authority applies only in the context of emergencies and does not apply to the condonation process.

e) If an emergency procedure is followed correctly, condonation is not required. It is also important to note that a correctly followed emergency procedure also falls outside the ambit of the Confinement process.

15.3 HIGH VALUE TENDER PROCESS (HVTP)

- The High Value Tender Process (HVTP) subjects all transactions falling within the High Value Tender threshold to independent scrutiny and validation of all commercial, contractual, process and governance aspects of the Bid process.
- The process enables Supply Chain to detect any shortcomings at key gateways in the Bid process and to make appropriate corrections before any award of business is made.

15.3.1 Principles

a) The HVTP applies to all transactions falling within the High Value Tender threshold. The HVTP offers an opportunity for peer review, guidance, advice and the sharing of good practice and experience. The HVTP subjects all high value bids to independent scrutiny and validation of all commercial, contractual, process and governance aspects of the bid process.

b) The process enables Supply Chain to detect any shortcomings at key gateways and to make appropriate corrections. This further reduces Transnet's risk on larger value acquisitions as any inefficiencies are addressed before any award of business is made.

The gateways that are reviewable in the process are as follows:

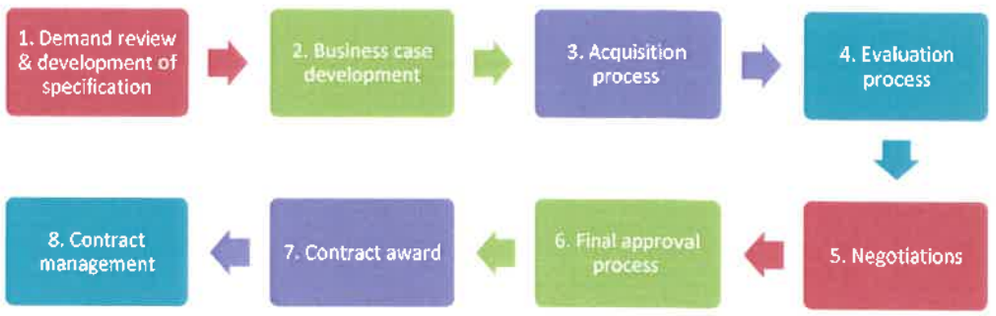


Figure [27] – The HVT process

15.3.2 The HVT Process

The following steps must be followed for any transactions falling within the High Value Tender threshold:

Entities must contact and involve the HVT team from the outset of the bidding process i.e. at the demand review stage;

The HVT team must attend to all procurement processes and advise Entities during each phase of the process as follows:

- Review the demand and business cases.
- Review the RFX document for accuracy and correctness before going to market.
- Assess the adequacy of the procurement proposed mechanism used i.e. RFP/RFI/Confinement and determine if governance is being followed by ensuring that the approval process has been complied with.
- Ensure that in all high value bids, a CFST contains at least Technical, Financial, Operational and Legal Support.
- Advise on the scoring methodology and governance issues related to the evaluation process.
- Advise the teams during the evaluation process on all bids;
- Advise and support teams during the moderation process of scores on all bids;
- Review AC documents for accuracy and correctness.
- Advise teams during the negotiation process and also determine if governance processes have been followed.
- Advise teams during the contracting process and also determine if governance processes have been followed.

- During each gateway review the HVT team will raise questions and/or concerns. The teams may not continue with the process until all the HVT team's concerns have been addressed.
- The HVT team must report significant process breaches to Transnet management. Firstly at Entity level, and if still not satisfied with the outcome / corrective action, such matters must be reported to Group iSCM.
- The HVT team must document lessons learnt throughout the process and provide feedback so that processes may be improved.

A detailed description of the HVTP and associated templates can be found on the iSCM Transnet Intranet.

15.4 UNSOLICITED BIDS

- An Unsolicited Bid is an offer unilaterally submitted by a potential supplier of its own accord and received by Transnet outside of its normal procurement process.
- Transnet is not obliged to consider Unsolicited Bids received outside its normal bidding process.
- These rules do not apply to Bidders who merely seek to be registered on Transnet's Potential Vendor Portal (TPVP) in order to be considered as potential suppliers for future business. When Goods or Services are to be acquired from such Bidders, the normal procurement mechanisms are to be used

15.4.1 Definition

An Unsolicited Bid is an offer unilaterally submitted by a potential supplier of its own accord and received by Transnet outside of its normal procurement process.

Transnet does not encourage the consideration of Unsolicited Bids. Furthermore, Transnet is not obliged to accept Unsolicited Bids.

15.4.2 Risks

There are a number of risks related to the consideration of Unsolicited Bids:

a) It potentially undermines fair and competitive bidding processes.

b) It can result in purchasing Goods/Services at higher than market-related prices.

c) Transnet runs the risk of being accused of infringing on the Unsolicited Bidder's intellectual property if it uses the concepts used in the Unsolicited Bid to approach the market.

d) There is also danger that an Unsolicited Bid may be received, evaluated and regarded as an excellent proposal and accepted, only to ascertain afterwards that there were many suppliers in the market supplying the same or better goods or technology at much better / similar prices.

15.4.3 Criteria for consideration of unsolicited bids[5]

[5] *This section is largely based on the Municipal Finance Management Act Regulations and National Treasury's Practice Note 11 of 2008/2009 on Unsolicited Proposals*

Transnet may only consider an Unsolicited Bid if the following requirements are met:

a) the product or service offered is a demonstrably or proven unique and innovative concept;

b) a need for the service or product has been established;

c) the product or service will be exceptionally beneficial to Transnet or have exceptional cost advantages for Transnet;

d) the Bidder is the sole supplier of the service or product; and

e) the reasons for not using one of the normal bidding processes have to be found to be sound by the person with the necessary delegation of authority.

15.4.4 **Unacceptable unsolicited bids**

Transnet must reject an Unsolicited Bid if the Bid:

a) relates to known institutional requirements which can, within reasonable and practicable limits, be acquired by conventional competitive bidding methods;

b) relates to goods or services which are generally available; or

c) does not comply substantially with the requirements of paragraph 15.4.3 above.

15.4.5 **Rejection of unsolicited bids**

Should Transnet decide to reject an Unsolicited Bid, the following steps must be followed:

a) The Bidder must be notified of the decision;

b) All documents received in the Unsolicited Bid must be returned to the Bidder; and

c) Transnet must ensure that it does not make use of any intellectual property or data that was contained in the Unsolicited Bid.

15.4.6 **Process for consideration of unsolicited bids**

a) The Unsolicited Bid must be considered by an evaluation team. The minutes of the evaluation meeting must be recorded.

b) The evaluation team should investigate and verify whether there are no other suppliers in the market.

c) In the event that the evaluation team has resolved to procure the Goods or Services, depending on the contract value, the Confinement or quotation process must be followed and thereafter a recommendation made to the AC, Manager or person with the relevant authority to approve the award.

d) All copies of Unsolicited Bids, records of discussions, records of deliberations and copies of correspondence relating to it, will be kept by the procurement official who led the process, and the AC secretary for record purposes.

15.4.7 **Information to accompany the recommendation for award of the unsolicited Bid**

The following information must be contained in the recommendation:

a) A detailed description of the goods or services;

b) A detailed description of benefits Transnet is to derive from the envisaged acquisition;

c) The costs associated with the acquisition of the service or product;

d) The validity period of the Unsolicited Bid;

e) Proof of certification that the Bid was submitted by the person who holds the intellectual property rights in the goods or service; and

f) Certification by the evaluation team that there are no other suppliers who can provide the goods or services.

15.5 CONTRACT CONSOLIDATION

Contract consolidation may represent optimal value for Transnet in the following circumstances:

- where more than one Entity have existing contracts for the same Goods / Service with the same or different suppliers with significant price variations and differing contract terms; or
- where one or more Transnet Entity become aware that another Entity has already concluded a contract for the Goods /Services required by it and wish to utilise the existing contract ('piggybacking').

15.5.1 Principles

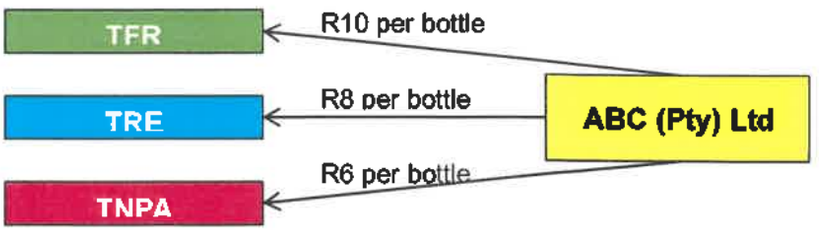
Consolidation of existing contracts is potentially problematic from a governance and operational perspective. For this reason, Transnet must endeavour to approach the market with a consolidated demand signal clearly outlined in a single RFP, rather than having each Entity approach the market in a piecemeal fashion and thereafter seeking to consolidate a number of different contracts. Therefore, when an Entity identifies the need to acquire goods/services that are common to more than one entity, it is imperative that they first ascertain whether it is feasible and advantageous to approach the market with the consolidated requirements of all Entities that require the goods / services.

Transnet can gain significantly from consolidating its demand. Due to economies of scale, it will be in a better position to negotiate price and contractual advantages. In addition, it will lessen the administrative burden on Transnet to manage a multiplicity of contracts.

15.5.2 Triggers for consolidation

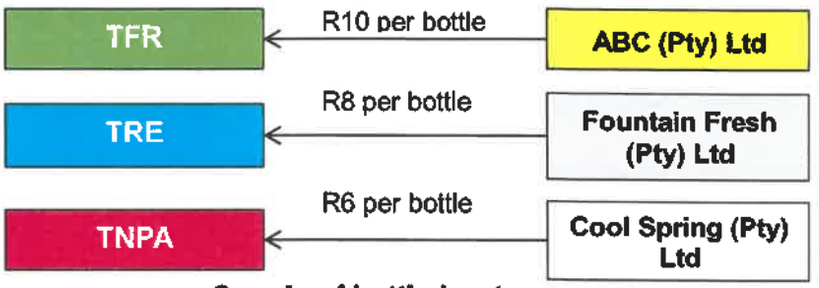
One of the following circumstances should trigger the need for consolidation of existing contracts:

a) The same commodities or categories of commodities are being purchased by more than one entity from the same supplier but with differing prices and contract terms. For example:



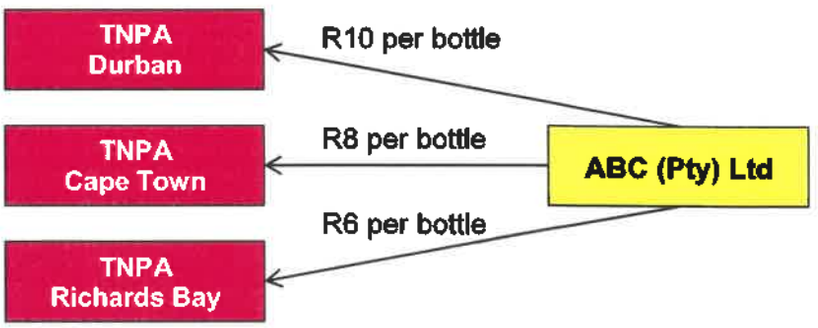
Supply of bottled water

b) The same commodities or categories of commodities are being purchased by more than one entity from different suppliers with differing prices and contract terms. For example:



Supply of bottled water

c) The same commodities are being purchased by one OD from the same or different suppliers, with significant price variations. For example:



Supply of bottled water

15.5.3 Factors to consider when consolidating

The following factors need to be considered when consolidating existing contracts:

a) The probable increase in volumes required from the preferred suppliers (expressed in %) if contracts were to be consolidated;

b) Whether the existing contracts allow volume changes, and what the contract terms and conditions regarding volume changes are;

c) Price differentials between various contracts;

d) Other key contractual differences (e.g. specifications, delivery, payments, volume discounts etc.);

e) Whether the contracts allow for cancellation 'without cause';

f) The expiry dates of the various contracts;

g) The cost of termination (penalty for breach); and

h) Current contract management and monitoring.

The merits of each case should be evaluated based on the factors above in order to determine the feasibility of consolidation. Once the feasibility of contract consolidation has been determined, a decision will be made on whether to renegotiate one of the existing contracts or issue a new bid.

The cost of termination of existing contracts must be calculated and then weighed against potential benefits of consolidation in terms of cost and Quality. It is important to note that existing contract periods must be adhered to where financially viable. Paying high penalties due to the cancellation of existing contracts should be avoided as far as possible.

Where it is clear that there is no financial benefit for Transnet to renegotiate the existing contracts then the process to be followed would be to issue a new bid for the consolidated spend, when the existing contract(s) terminate.

15.5.4 Deciding on which contract to consolidate

Once a decision has been made to consolidate, the next issue is to determine which contract is the most favourable for consolidation. In arriving at this decision, the following factors must be considered:

a) Identify the contract that entails the biggest spend or usage;

b) The OD and/or region contributing the largest volume;

c) Whether one supplier can meet all Transnet's requirements;

d) The perception regarding potential market challenges (type of commodity and potential suppliers);

e) The competitive landscape of these Goods and Services; and

f) New suppliers in the market.

15.5.5 Process for consolidation of a number of existing contracts

a) Where it is considered feasible to consolidate spend to one of the existing contracts, all other contracts must be terminated. The most favourable existing contract would be increased to include other Transnet Entities' requirements after negotiation. The Transnet Entity originally managing that contract will be responsible to initiate the approval process for the increase of contract value.

b) Where the increase in value is below 10% of the original contract value, the matter must be submitted to the relevant Entity AC for noting.

c) If the increase in contract value is above 10%, the matter must be submitted to the relevant Transnet Entity's AC for approval.

d) Once the relevant Transnet Entity has approved the increase, the matter must be submitted to the other Transnet Entities' ACs for information.

e) Where consolidation would result in a substantial increase in the scope and value of the contract (more than 50% of the original estimated contract value as approved by the AC), it would be peremptory to embark upon a new bid process for the consolidated spend.

f) Inclusion of entities into the consolidated contract may be on a staggered basis. For example, where a current Transnet Entity's contract expires 3 months after the consolidated contract commences, that contract can be allowed to run its full period. Thereafter, the entity will be included in the new transversal agreement, with a sliding-scale volume discount structure being coupled to the pricing.

g) Contract "owners" must notify all Transnet users of the new transversal contracts that are in place to ensure maximum advantage for Transnet. However, please note that this mechanism is to be regarded as almost an interim measure. Ideally all entities must be approached during the demand planning stage already to obtain their estimated requirements beforehand for inclusion in the consolidated RFX document.

h) Note that the process to be followed for the normal increase of contract values and cancellation of contracts will still apply.

15.5.6 "Piggybacking"

a) "Piggybacking" arises when an existing contract has been identified, which one Transnet Entity has concluded for specific goods/services, and which another entity would like to utilise for their requirements.

b) The Transnet Entity who wishes to "piggyback" off an existing contract should obtain prior approval from the AC of the Transnet Entity that concluded the contract. Once approval from that AC is obtained, the supplier should be approached to indicate whether he/she is able to meet the increased volume as well as any price discounts that may be offered.

c) Where the increase in value is below 10% of the original contract value, the matter must be re-submitted to the relevant AC for noting. If the increase in contract value is above 10%, the matter must be re-submitted to the relevant Entity AC for final approval.

d) Once the relevant Entity has approved the increase, the matter must be submitted to the other ACs of Entities who want to make use of this contract for information.

e) The respective Transnet Entities must make satisfactory arrangements between themselves regarding the apportionment or recovery of costs for goods / services, if applicable.

f) Where consolidation would result in a substantial increase in the scope and value of the contract (more than 50%), it would be prudent to embark upon a new bid process for the consolidated spend.

15.6 ACQUISITIONS ASSOCIATED WITH INCOME GENERATING CONTRACTS

15.6.1 Although income generating contracts are in principle excluded from this Procurement Procedure Manual, all associated expenditure contracts necessary to fulfil such contracts (i.e. procurement contracts to acquire the necessary Goods or Services), falls within the ambit of the PPM.

15.6.2 For example, TFR negotiates an income generating contract to transport fuel from the Port of Durban to Zimbabwe. This would be a pure income generating contract and although it might require approval from the TFR Exco or even Transnet Board of Directors, it would fall outside the scope of the PPM and AC approval would not be necessary.

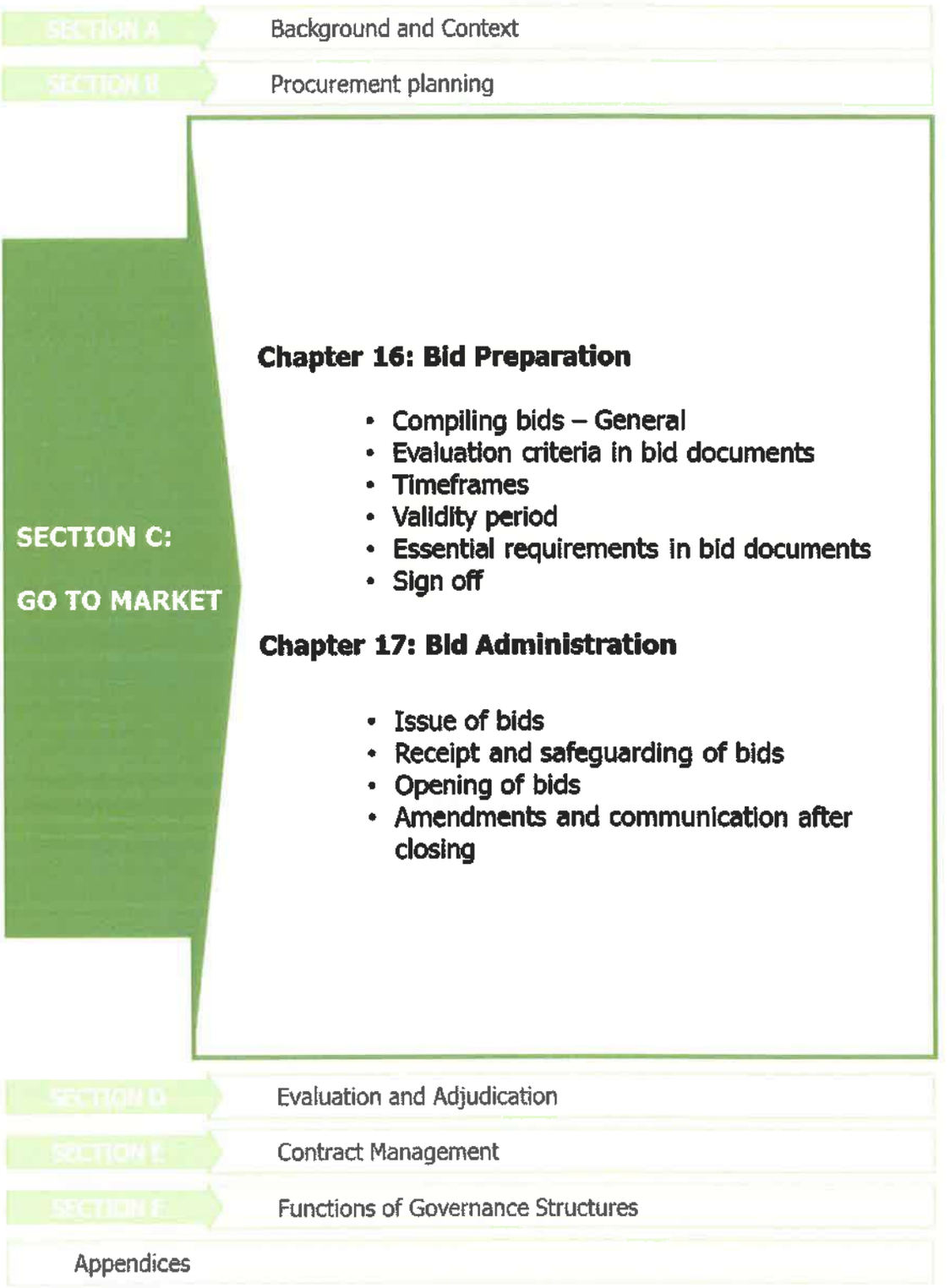
15.6.3 However, if TFR needs to purchase 2 additional locomotives and 90 rail tank wagons to provide this Service (fulfil the contract); such associated expenditure / procurement contracts would fall within the ambit of the PPM and would also require AC approval.

15.6.4 The only exception to this rule would be in circumstances where a Transnet Division or Specialist Unit needs to respond to an external bid invitation (e.g. TRE responding to a bid invitation issued by PRASA for the supply of suburban coaches). In such instances Transnet would need to prepare its bid for the income generating contract taking into consideration any goods/services that it would need to acquire in order to respond to the bid. The limited time available to respond to such bid invitation would not allow the Transnet Division or Specialist Unit to invite bids in the normal manner for goods/services required.

15.6.5 In such cases, irrespective of the monetary value of such transaction(s), the CEO, BADC or the Board may authorise such "confined" requests for bids from potential suppliers and/or approve the selection of possible joint venture partners/subcontractors, etc., without AC approval, provided that the matter(s) be reported for the AC's information as soon as possible after the Transnet OD has lodged its bid. When obtaining bids in respect of goods and services required in order to respond to an external bid invitation, the Transnet Entity must clearly state that the award of any business pursuant to such bids cannot be guaranteed and is conditional on the Transnet Entity being selected as the Successful Bidder.

15.6.6 Such transaction(s) need not be submitted for approval again, should the Transnet Entity be selected as the Successful Bidder, as this could lead to delays in the execution of such external income generating contract.

15.6.7 On completion of the project, the AC should be informed of the outcome in detail, e.g. how the selected subcontractors/JV Partners performed, whether the project was completed on time, what income was derived from the income generating contract after all outsourced parts have been accounted for, etc.


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CHAPTER 16 : BID PREPARATION

16.1 COMPILING BIDS - GENERAL

Bid documents define the rights, risks and obligations of the parties involved in the bidding process and subsequent contract. Documents must therefore clearly and precisely spell out all relevant aspects of the bid such as the work to be carried out, the goods to be supplied, the place of delivery or installation, the schedule for delivery or completion, minimum performance requirements and the warranty and maintenance requirements.

Accordingly, such documentation should be legally and technically sound and should assign risk in an appropriate manner. The bid documents must provide Bidders with clear and comprehensive information necessary to enable them to submit responsive bids. The specifications, including the evaluation criteria and weightings, must be determined upfront as indicated in Chapter 13 above *(Determining Evaluation Criteria)*, as bids may only be evaluated according to the criteria stipulated in the bid documentation. Bid documents must be drafted with care and precision so as to reduce the risk of legal challenge by unsuccessful bidders and avoid unintended consequences.

16.2 EVALUATION CRITERIA IN BID DOCUMENTS

The bid documents must make it clear that, [6]where applicable, Bidders will be assessed in two stages:

16.2.1 STAGE 1

a) **Test for administrative responsiveness**

Inform Bidders of the minimum requirements for responsiveness, and the consequences of not being responsive.

b) **Test for substantive responsiveness (Prequalification criteria)**

Indicate Prequalification Criteria, if any.

c) **Threshold**

(i) Indicate that there are thresholds that have to be met before a Bidder can proceed to further evaluation in the following order: Local Content/Production threshold if applicable, SD/B-BBEE threshold and Functionality (Quality) threshold.

(ii) State what these thresholds are, as well as the minimum score that has to be met to pass the threshold.

(iii) The RFP may also state that if no Bidders pass a particular threshold, or if only one bidder passes the relevant threshold, then in the interests of promoting competitiveness and cost effectiveness, Transnet reserves the right to lower the threshold by a certain pre-determined percentage. This must be clearly specified in the RFP, provided it is in Transnet's best interests to do so and there is concurrence between the end user and the CPO.

(iv) Kindly note that since the LC thresholds are laid down in terms of legislation, the lowering of such minimum thresholds as determined by the DTI is not allowed, and bidders who fail to meet the laid down minimum thresholds for LC, will be disqualified.

[6] This is the default position but will not necessarily be applicable in all instances, e.g. low value transactions or approved list purchases where the quality of the product has already been pre-approved.

16.2.2 STAGE 2

a) Evaluation criteria

The RFP must specify all the evaluation criteria which will be taken into account in evaluating the bid and how such criteria will be evaluated. The weighting of each criterion must also be disclosed in the RFP document. Typically this would include the following:

(I) Quality

(Quality is normally included only as a threshold in Phase 1. However, where Quality is of critical importance, it may be included as an evaluation criterion again in Phase 2)

Include Quality criteria as discussed in Chapter 13 *(Determining Evaluation Criteria)*. If interviews, presentations or site visits are required in order to assess Quality, this should be stated in the RFP. The specific purpose and outcomes of the interviews, presentations or site visits and the associated scoring should also be included.

(Ii) Price

The following issues are frequently included in price to assess TCO:

- Installation costs
- Warranties
- Service and maintenance costs
- Operating supplies
- Storage costs
- Commercial discounts
- Incoterms
- Price adjustment conditions
- Exchange rate fluctuations

It is necessary to provide Bidders with a comprehensive pricing schedule to enable proper and uniform submission from Bidders and to enable a uniform approach to evaluation.

(Iii) Supplier development

The SD criteria that were developed during the planning phase should be incorporated in the bid document. These typically include a combination of the following:

- Industrialisation
- Capability and capacity building
- Technology transfer/ sustainability
- Skills development
- Job creation/ preservation
- Small business promotion
- Rural development/upliftment and regional integration

(iv) **Preference (B-BBEE)**

The preference criteria that were developed during the planning phase should be incorporated in the bid document. These typically include a combination of the following:

- Standard B-BBEE criteria, as per B-BBEE scorecard;
- Minimum B-BBEE thresholds;
- Further Recognition Criteria (Current)
  - Ownership;
  - Management control;
  - Employment equity;
- Further Recognition Criteria (Future)
  - Ownership;
  - Management control;
  - Employment equity;
  - Preferential Procurement; and
  - Enterprise development.

These could differ on a case-by-case basis depending on the specific market, and what Transnet's expectations and objectives for that particular market are.

(v) **Financial stability** (if applicable - see paragraph 13.2.6)

This will be evaluated using ratios based on Bidders' audited financial statements.

16.2.3 Alternative Bids

The RFP should indicate clearly if Alternative Bids would be accepted. If Alternative Bids are acceptable, the RFP must state that an Alternative Bid will only be considered if a Bidder also submits a main offer strictly in accordance with all the requirements stated in the RFP. Such alternative bids will be evaluated as separate bids and included in a schedule that compares the requirements of the RFP with the Alternative Bid that is proposed.

In instances where the RFP did not invite alternative bids, alternative bids will as a general rule not be considered, as that could prejudice bidders who did not provide alternative bids and also on the basis that the RFP did not state clearly that alternative bids will also be considered. The CFST therefore has to consider this aspect carefully when preparing the bid documents.

16.3 TIMEFRAMES

16.3.1 Submission of Bids

Suppliers should have sufficient time to prepare and submit Bids. Below are guidelines to determine the minimum timeframes:

a) **Off-the-shelf type of purchases:** a minimum of two weeks should be allowed, if possible.

b) **More complex bids** (such as construction works which involve quantity surveying, national bids, etc): a minimum of 3 weeks should be allowed.

c) **When international responses are anticipated**, more than 3 weeks should be allocated to ensure a sufficient response.

16.4 VALIDITY PERIOD

The validity period must allow ample time for the evaluation, drafting of the recommendation and approval by all the necessary governing structures for each bid. Unless circumstances require a longer or shorter period, bid documents must state that the Bids must hold good for at least 90 days from the closing date.

16.5 ESSENTIAL REQUIREMENTS IN BID DOCUMENT

The standard RFX template, available on the iSCM Transnet intranet, must be used when Goods and Services are procured.

16.5.1 Inclusions

When preparing the bid documentation based on the standard RFP template, the following must be considered:

a) Name and address of the Transnet Entity/ies procuring the goods/services.

b) Manner and place for the submission of proposals.

c) Deadline for submission of proposals.

d) Validity period of submitted Bids.

e) Bid reference number (see paragraph 17.1.1).

f) Instructions for preparing Bids.

g) Consecutively indexed and numbered pages of the bid documents in order that both Bidder and contract administrator can easily check the completeness of the bid document.

h) The rules governing communication between the Bidder and Transnet during the bidding process.

i) The name and contact details of the Transnet employee who is authorised to communicate directly with and to receive communications directly from suppliers in connection with the bid invitation, including clarifications of the bid.

j) An indication as to whether or not Transnet intends to convene a compulsory briefing session.

k) General terms and conditions of contract.

l) Requirements of the CIDB in the case of a bid relating to construction, upgrading or refurbishment of buildings and infrastructure.

m) Any criteria required by other applicable legislation.

n) Obligation on Bidders to declare any conflict of interest they may have in respect of the Bid that is to be submitted. In particular, Bidders must state whether they have any personal or business relationship with any employees or directors of Transnet.

o) An indication of whether or not suppliers are permitted to submit proposals for only a portion of the goods/services to be procured and if so, a description of the portion(s) for which such proposals may be submitted. Bid documents must be specific as in certain instances Transnet may require that the whole contract be completed by the same contractor in order to establish responsibility.

p) Bid documents must state that Transnet reserves the right to accept a complete Bid, even if it is not the lowest, provided it is in the best interest of Transnet.

q) Whether the process may involve negotiations.

r) Anticipated date(s) for starting delivery and/or completion of delivery of the Goods/Services.

s) Conditions regarding shipping, if applicable.

t) Currency and the manner in which the proposal price is to be formulated or expressed.

u) A notice to Bidders that Bids must be submitted by the Bidder in a sealed envelope. The envelope must indicate the bidder's name, a contact person and details, the bid number, the subject and closing date, time and venue so that there is no need to open the document and risk the possibility of prices being leaked.

v) Terms of payment.

w) Where Bidders are required to insert prices on price lists supplied by Transnet, they must be advised to delete items for which they do not wish to bid if they have this option. If the price has been included elsewhere in the price list, this must be indicated. After Bids have been opened, Bidders may not supplement their original offer if it was incomplete.

x) A list of the required returnable documents, e.g. tax clearance certificates, industry-specific certificates, etc. The list should indicate clearly which returnable documents must be submitted by the closing date, failing which bidders will be eliminated.

y) Bid documentation must state that Transnet shall not be obliged to accept the lowest, any bid or an alternative bid.

z) Bid documentation must stipulate that disputes regarding the bidding process must be settled by the Procurement Ombudsman.

aa) A space on each page where the Bidder has to append his signature plus name of company and company stamp.

bb) A certificate of acquaintance with the RFP documents, as well as a certificate of attending a compulsory site inspection/tender briefing session.

16.5.2 A CD containing pricing spreadsheets may be requested in order to simplify the copying of information for comparison purposes. This CD should be supplementary and should contain no information that is not in the hard copy of the Bid submission.

16.5.3 **Transnet's Disclaimers**

The standard RFP documents should state that Transnet is not committed to any course of action as a result of its issuance of the RFP and/or its receipt of a proposal in response to it. The RFP should also state that Transnet will not be bound by an interim step in the procurement process such as the selection of a preferred bidder/s. In particular, Transnet reserves the right to:

a) modify the RFP's goods/services or other terms and conditions and request respondents to re-bid on any changes;

b) reject any proposal which does not conform to the detailed instructions and specifications;

c) disqualify proposals submitted after the stated submission deadline;

d) not necessarily accept the lowest priced proposal;

e) reject all proposals, if it so decides;

f) award a contract in connection with the RFP at any time after the RFP's closing date;

g) award only a portion of the proposed goods/services which are reflected in the scope of the RFP;

h) split the award of the contract between more than one supplier; or

i) make no award of a contract.

Bidders who submit Bids subject to certain qualifications which are in conflict with certain bid conditions must be advised to withdraw such qualification, failing which the Bid may be disqualified.

16.5.4 Transnet's standard terms and conditions of contract

When issuing any RFP, Transnet's standard terms and conditions must be used. Please note that a standard contract template has been prepared for Market Demand Strategy related projects. For any additional terms and conditions, a schedule detailing these must be added to the standard terms and conditions. The reason for this is that the terms and conditions that accompany the RFP document will become the terms and conditions of any master agreement that is concluded with a supplier in terms of the RFP.

16.6 SIGN-OFF OF BID DOCUMENTATION AND GO-TO-MARKET STRATEGY

Once the bid documentation has been compiled, the bid document must be reviewed and signed off as correct by the CPO or person to whom the power has been delegated, as a quality control measure. Once this sign-off has been obtained the media advert must be approved by Group Communications in terms of extant instructions issued by that office, before adverts may be placed in the media.

CHAPTER 17 : BID ADMINISTRATION
(issue, receipt, opening of bids and communication)

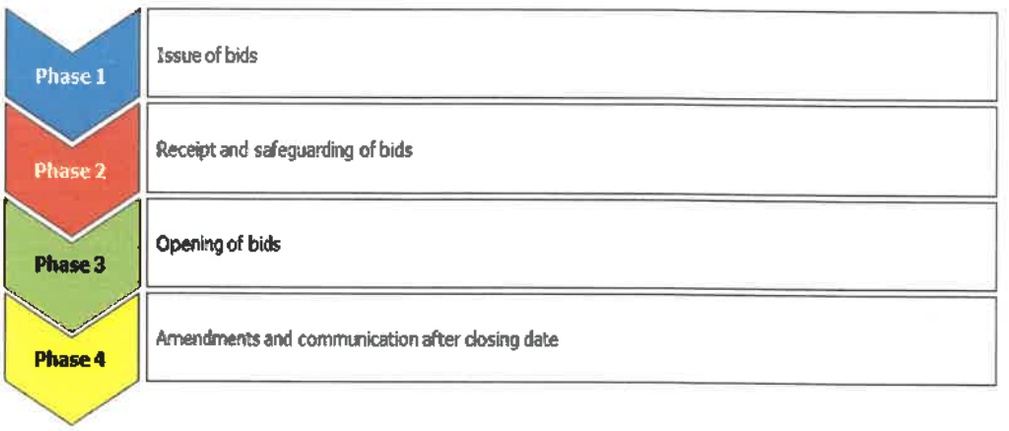
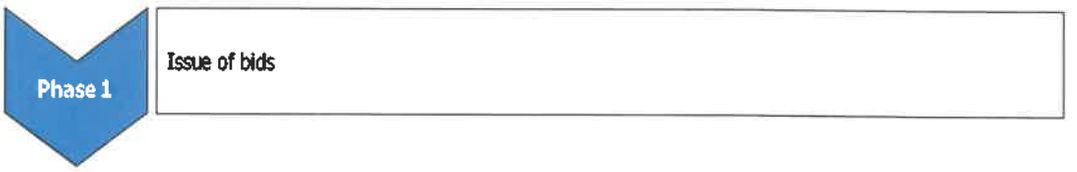


Figure [28] – Four phases of bid administration



17.1 PHASE 1: ISSUE OF BIDS

17.1.1 Bid reference numbers and short descriptions

At this stage in the process, the RFX document, the evaluation criteria and weightings, the evaluation methodology, as well as the going to market strategy has already been signed off by the person or governance structure with the appropriate DoA.

Prior to advertising, each RFX must be issued with a business-unique consecutive number. The issuing of RFX numbers must be controlled by a responsible person. The RFX number must clearly indicate the following:

- whether it was an Open Bid or a quotation; e.g. RFX No, Quotation No, or Approved List No.;
- the entity which issued the bid;
- in the case of a CIDB bid, allocated a prefix to the bid number to indicate that it is a CIDB-bid;
- a specific digit/character can be allocated to indicate whether a bid will close at the AC or at Regional/depot level e.g. BID NO: TPT/CT/11/01/138/CIDB; and
- following the unique number, a short description of the requirement must be added, e.g. "CONSTRUCTION OF NEW ELECTRIC SUB-STATION AT THE CONTAINER TERMINAL AT PIER NO 2, PORT OF SALDANHA".

17.1.2 All notices and adverts to be issued in the name of Transnet SOC Ltd

All documentation relating to bids shall be issued in the name of Transnet SOC Ltd and shall be published (advertised) in the Republic of South Africa,(nationally and/or

regionally), and abroad if necessary. The name of the relevant OD requiring the service shall be clearly indicated, e.g. Transnet Freight Rail, a Division of Transnet SOC Ltd (Reg. No. 1990/000900/30). The rationale for issuing notices in the name of Transnet is that every legal document must reflect the registered company name i.e. the legal persona of the company which will be contracted with.

17.1.3 Important information to be included in notices and Advertisements

The format of the Advertisement is informed by Group Communications guidelines. This format must be used for all Advertisements, and can be obtained on the Transnet Intranet.

The advert should be as short as possible but nevertheless should contain all relevant information. Notices and Advertisements calling for Bids must include the following information pertaining to the collection and lodging of bid documents:

- RFX number;
- brief description of the goods / services required;
- where the prescribed forms may be obtained and the cost to purchase them (if any) and the closing date for collection of bid documents;
- closing date and time for submission of the bid document;
- place where Bids must be lodged;
- information pertaining to site inspections or pre-bid briefing sessions;
- contact person's business address, telephone/fax number and email address; and
- details of Transnet's fraud line.

17.1.4 Bid document fees

a) A Manager with the necessary Delegated Authority for a particular contract may decide, at his/her own discretion, that a non-refundable fee be charged to Bidders for bid documents. This fee must only reflect the administrative costs of preparing and issuing the bid documents. The price to be charged for the bid documentation must be stated in the advertisement and invitation to bid. The decision to charge a document fee must be taken with circumspection as small companies may be unfairly excluded from the process due to the prohibitive costs of the bid documents.

The following guidelines (though not prescriptive) may be used at the discretion of the Manager, to determine a fee for bid documents:

TABLE 18

Value of bid	Bid fee (guideline)
<R2million	no charge
R2million to <R5 million	R250
R5million to <R10 million	R500
R10million to <R35 million	R750
>R35 million	R1000 or higher (discretion of CPO)

b) Where a document fee is to be charged, the advert must clearly state the payment method. Due to the risks involved in handling cash, the sale of bid documents at site meetings should be avoided. Strict control over cash received

should be exercised and documentary proof of documents sold and receipts issued should be kept on the appropriate files.

c) Should cash payment be one of the chosen payment methods, bid documents must clearly stipulate that payments be made to the finance office (or another office independent from the office that issued the bid).

d) The finance office must ensure that the RFX number is clearly reflected on the receipt. Bid documents may only be issued to Bidders producing a valid original receipt clearly indicating the relevant RFX number. A copy of the receipt with the signatures of the issuing officer and the Bidder who purchased the document must be kept on the appropriate file. A copy of this documentation must be sent to the Secretary of the AC before the closing date.

17.1.5 Publication of notice / advert

a) The notice/advert must be published on or before the day of issuing of the bids. Bids may be published in the appropriate media for the Goods/Services being procured, e.g. trade magazines, newspapers which are distributed locally or wider, in electronic bid bulletins, other media which specifically targets specific markets or small business enterprises, whichever is best suited to reach the potential Bidders.

b) Copies of the notice and prescribed forms shall be furnished to the AC secretariat if the bid is expected to fall within the jurisdiction of such an AC. This would be the case if the bid is expected to be over the laid-down limit or longer than two Years or where there is uncertainty as to whether it will fall within the jurisdiction of a Manager.

c) Any subsequent amendments to notices inviting Bids (e.g. extension of the closing date) shall be communicated in the same media as the initial bid. The AC Secretariat must be notified timeously of such amendments. The office responsible for placing the adverts shall retain copies of all adverts as placed by the relevant media, for audit purposes.

17.1.6 RFX Issue Register

The following important information pertaining to all bid documents issued must be entered into the RFX Issue Register, which is compiled by the RFX Issuing Office:

- RFX number and description;
- receipt number and date of purchase if a bid document fee was charged;
- document number e.g. 'Document 3' sold to 'Potential Bidder x';
- name and contact particulars of person who collected documents;
- bidder's (company) name; and
- closing date.

A record must be kept of all the names, contact particulars of the persons or enterprises to which bid documents have been issued, as well as the document number sold to the potential Bidder. This is necessary in case there is a clarification or amendment, and all Bidders need to be informed.

17.1.7 Queries from bidders / amendments before the closing date

Employees/persons listed in bid notices as contact persons must be available to answer requests for clarification from the prospective Bidders. This is because a

Bidder may only communicate with the person listed on the bid document on any matter regarding his Bid prior to the closing date of the bid.

Without identifying which bidder sought the clarification, the clarification provided must be communicated simultaneously in writing to all Bidders who obtained bid documents. The response to such a request must be effected within a reasonable time prior to the deadline of the bid to enable the Bidders to make timely submissions of their Bids, considering the clarification. If necessary, the deadline should be extended.

The disclosure of information to potential Bidders by the contact person must be made with circumspection. For example, it would not be allowed to provide potential Bidders with information such as budget amount approved, names of previous respondents, prices paid on previous contracts, number of bid documents issued to date, etc.

17.1.8 **Amendments before the closing date**

a) Transnet is entitled to amend any bid condition, validity period, specification or plan; or extend the closing date before the closing date, or in the case of a compulsory briefing session, before the scheduled session.

However, such amendments or extensions must be advertised and/or all Bidders who obtained bid documents must be advised in writing per fax or email of such amendment or extension a minimum of three Working Days before the scheduled date. The new closing date and time must be clearly reflected.

b) Where the closing date of a bid is extended, the notice of extension shall also state that Bids already received will be retained unopened in the tender box and be duly considered after the expiry of the extended period. However, the Bidder may request that such Bid be returned to him/her. The Bidder may also cancel the existing Bid by submitting a later dated Bid before the extended closing date. For amendments after the closing date refer to paragraph 17.4.1.

17.1.9 In the event of a Material Amendment to the specification or scope of work, to which other new Bidders could possibly respond, the bid must be cancelled and a revised RFX must be advertised. This would give all other potential Bidders the opportunity to respond. This can only be done after approval by the person who signed off the RFX document (refer paragraph 16.6 above), has been obtained. The cancellation must be advertised in the relevant media. If the cancellation and reissue happen simultaneously, they may be advertised together where the re-issue makes reference to the cancellation.

17.1.10 **Compulsory Site Inspection / Briefing Sessions**

a) A compulsory site inspection or briefing session has to be held in cases where it is necessary for the Bidders to view the site in order to prepare their Bids, or where Transnet deems it necessary to provide Bidders with further information to allow them to complete their Bids properly.

b) If a compulsory site inspection/briefing session is convened, minutes of the meeting must be recorded together with an attendance register. The minutes must include the queries/requests raised for clarification at the meeting, together with the responses to those requests without identifying the sources of the requests. It is recommended that questions be submitted in writing by Bidders and that Transnet respond in writing to all bidders within 48 hours of the briefing session. The minutes must be forwarded to all Bidders who attended the meeting so as to ensure that the same information is provided to

all Bidders. This would enable the Bidders to take the minutes into account in preparing their Bids.

c) Bidders are obliged to attend scheduled compulsory briefing sessions, as failure to do so will result in disqualification of the Bids. The bid notices must clearly indicate this. Discretion must therefore be exercised in deciding whether or not a compulsory site inspection or briefing session is absolutely necessary.

d) If a compulsory briefing session is not considered absolutely essential, consideration could be given to having a non-compulsory briefing session. In such instances, attendance at such a meeting would be on a voluntary basis. The RFX documents must clearly state this. The RFX should also state that Transnet will not be held responsible if any Bidder who did not attend the non-compulsory session subsequently feels disadvantaged as a result thereof.

e) Latecomers to any briefing session will be allowed to attend. However, no information will be repeated for the benefit of latecomers. They must be advised that the information will be made available to them by means of the minutes of the briefing session. The minutes will be made available to all attendees who completed the attendance register. Details of latecomers (e.g. company name and names of their representatives, as well as approximate time of (late) arrival) must be recorded on the site register, so as to ensure that Transnet's interest is protected.

17.1.11 **Electronic issuing and receipt of Bids**

ODs may at their discretion, and provided that they have introduced sufficient controls to prevent abuse, make use of electronic technology to:

- advertise bids electronically (e.g. website);
- issue bid documents electronically;
- enable electronic payment for bid documents where applicable; and/or
- receipt of Bids electronically.

This will only be allowed **provided** that the following basic requirements are complied with:

a) Potential Bidders who are not in a position to access electronic media must also be accommodated;

b) There is an option for potential Bidders to obtain either electronic or hard copies of the bid document;

c) Where applicable, bid documents must be paid for, irrespective of whether the bid documents are obtained in hard copy or electronically;

d) Appropriate measures must be taken to protect electronic versions of the bid document;

e) Bids must be received in a controlled environment, and may only be accessed /downloaded from the dedicated 'Electronic Tender Box' (ETB) after the closing date and time;

f) The ETB should be able to send an automated acknowledgment confirming date and time of delivery;

g) There should be a backup system in case of server failure;

h) The ETB may not accept late Bids. A Bid is late if it is received at Transnet after the closing date and time. Bidders must be advised that server issues outside of the Transnet electronic environment will not be considered as a reason for acceptance of late Bids.

i) The ETB should be able to send a message to the sender to inform him/her that the Bid was received late and will not be considered;

j) The ETB should be able to handle unlimited numbers of last minute Bids. It should be impossible to overload;

k) ETBs need to be able to cater for different bids closing on different dates;

l) It will be allowed to receive scanned original documents e.g. Tax and BBBEE certificates; Transnet may however at its discretion decide to subsequently call for hard copy certified originals if deemed necessary.

m) Documents must be write protected; and

n) There must be no file size constraints with regard to mail attachments.



Receipt and safeguarding of bids

17.2 PHASE 2: RECEIPT AND SAFEGUARDING OF BIDS

The RFX document should clearly indicate what must be stated on the outside of the sealed envelope containing the Bid. Refer to paragraph 16.5.1u) in Chapter 16 on *Bid Preparation.*

17.2.1 Bids are to be lodged are kept in a controlled environment

a) All bids falling within the jurisdiction of the AC must clearly indicate the physical (and courier address, if not the same), and/or ETB address (if electronic Bids will be allowed) of the AC where the Bids will be received.

b) Where the Bid price is reasonably expected to fall within the jurisdiction of a Manager, (i.e. below the jurisdiction of the AC), the bid document must clearly indicate to whom the Bids are to be addressed, the closing venue, date and time.

c) If upon receipt it is found that such Bids do fall within the AC's jurisdiction, they are to be dealt with in exactly the same manner as if it had closed at the AC. The award of such business must be referred to the AC for consideration in the normal manner, together with an explanation as to why the bid did not close at the AC.

d) Under no circumstances should such bids be cancelled and re-issued. Furthermore, condonation is not required.

e) Bids that were anticipated to fall within the AC threshold, and which therefore closed at the AC, but were subsequently found to fall below the AC threshold,

must be dealt with by the relevant Manager. The matter must be reported to the AC for information.

f) Where some Bids fall below the AC jurisdiction and some are within the AC jurisdiction, the lowest priced responsive bid will determine where the matter must be dealt with.

g) The tender box shall be fitted with two locks, and the keys shall be kept separately by two nominated officials. No single person must be allowed to open a tender box on his/her own. Both officials shall be present when the box is opened on the stipulated closing date and time.

17.2.2 Unsealed Bids/Bids without sufficient cover information

a) If a Bid is received unsealed or without the relevant information on the envelope, the contents shall be ascertained and then sealed with a note made on the envelope indicating:

- date of receipt and by whom (name, designation and contact number);
- the state in which the Bid had been received;
- number and description of Bid; and
- correct closing date, time and venue.

It will then be placed in the correct tender box for opening at the appropriate closing time.

b) When finally opened, such envelopes shall be kept on the appropriate files as a record. The bid list compiled by the officer responsible for the bid opening should also indicate that such Bid was received open, so that the evaluation team can consider whether or not there is evidence of possible manipulation of the process. However, such Bids should not be summarily disqualified.

17.2.3 Receipt of quotes via fax or e-mail

a) No Bid received by e-mail or fax must be considered unless the bid document specifically provides for it.

b) Where the bid document specifically provides for the receipt of Bids via e-mail or fax, provision must be made in the bid document to indemnify Transnet against any claims which may arise as a result of a Bidder not being able to transmit his/her quote to Transnet for any reason whatsoever before the closing time.

c) Faxed or e-mailed offers must be received by a person who has not been involved in the development of the bid documents and/or will not be involved in the evaluation of submissions.

d) Strict control measures must be exercised over fax machines used for the receipt of low value Bids. Once received, the person responsible for receiving the Bids must seal the respective Bids in separate envelopes and keep them in a controlled environment until the closing date.

e) On the closing date and time, the Bids must be opened and stamped. A register of the quotes requested and received must also be kept. No additional quotes are to be requested or considered after the closing date and time.

17.2.4 Late Bids

a) Transnet will not accept any late Bids. A Bid is late if it is not placed in the relevant Tender Box or delivered by hand by the bidder or his courier to the relevant responsible person indicated in the bid document by the closing time for such bid. A late Bid shall not be admitted for consideration and where feasible shall be kept unopened. A letter explaining the reasons for not considering the late Bids must be sent to all late Bidders. The Bidders must be notified that they may collect their late Bids if they wish to do so.

b) A Bidder must, however, not be penalised if a Bid is received late due solely to a fault on the part of Transnet.

c) Where it is necessary to open a late Bid to obtain the contact details of the sender, each page of the document shall be stamped "Late Bid" before the Bid is placed on the appropriate files. The exact time and date that the Bid was received must be recorded. The envelope must be stamped, initialled and retained for record purposes on the appropriate files.

d) However, the Chairperson of the AC has the discretion to decide whether a late Bid may be considered where exceptional circumstances arise. The decision to consider a late Bid should be taken with great circumspection. All documentary evidence leading to such decisions as well as proof of the decision itself must be kept on the appropriate file as part of the record. Hereunder follows a non-exhaustive list of circumstances where an AC Chairperson may decide to exercise discretion and accept a late Bid:-

- If Transnet was solely to blame for his Bid being late e.g. a labour strike action in front of the building, or an evacuation drill effectively denying the bidder access to the tender box;
- In cases where only one Bid is received and such Bid is received late. In such cases, no prejudice is suffered by anyone if the late Bid is accepted. Consideration must, however, be given to whether the process could have been manipulated to favour the one and only late Bidder.
- Late responses on a RFI process where the purpose of the RFI was merely to gauge what is available in the market, or to compile a specification; and
- Where the Bidder provides compelling reasons for being late, indicating that the lateness of the submission is not due to any fault or bad planning on his or her part.

e) Bidders who submit late Bids must be informed of their right to petition the Chairman of the AC should they believe that they have valid grounds for inclusion. The motivation for acceptance of a late Bid, plus the chairperson's ruling on the matter, must be retained on the relevant files.

f) Late Bids that are not considered must be retained for a period of at least 6 months before being destroyed. Record of destruction must be recorded on the relevant file.

Phase 3 Opening of bids

17.3 PHASE 3: OPENING OF BIDS

17.3.1 Time and manner of opening of bids

a) Bids shall be opened promptly after the deadline for the receipt of Bids, or as soon as possible thereafter.

b) Bids shall be opened by a duly authorised senior employee in the presence of at least one other employee. The persons must declare their interest. In the event of a conflict of interest they must recuse themselves from the opening of the Bids. In addition, the persons opening the Bid documents must not be involved in the issuing, evaluation or adjudication of that bid as they are perceived to have an indirect interest in the bid.

c) There should be a check to verify that Bidders had paid bid fees, where applicable. If bid fees had not been paid, the Bid must be endorsed accordingly, and an explanation obtained from the Bidder by the AC Secretary. If no reasonable explanation can be provided by the Bidder, the Bid must be disqualified. A record of this decision must be kept by the Secretary.

17.3.2 Stamping of Bids

a) An employee shall date stamp the Bid and all attachments to the bid document to signify that such documents were part of the original bid document. Bids must be numbered in the sequence in which they have been opened and the words "and last" must be endorsed on the last Bid. Where only one Bid has been received, the words "and only" must be endorsed on such Bid.

b) Where Bidders are required to insert prices on price lists supplied by Transnet and prices have not been inserted in all the relevant spaces on the forms or have not been deleted by Bidders, such spaces shall be stamped "no price" by the employee who opens the Bids. All pages indicating prices, delivery times, special conditions, etc., that will be regarded as crucial during the evaluation process must be stamped and initialled by the opening official.

c) Likewise, in instances where the Bidder has deleted prices and inserted new prices, or where prices have been corrected with correction fluid, the opening official must endorse the correct amount in words, initial next to it, make a copy of the relevant page, and retain it on the bid file. When the matter eventually serves at the AC for the award of the business, the AC Secretary must verify that Bid prices or other crucial information have not been tampered with.

d) Where Bidders were requested to submit their Bids in duplicate (or more copies) all duplicate documents must be stamped "Duplicate" on the cover page after the opening official has verified that all the crucial information in the different documents are identical.

e) The employee in charge of the bid opening will record particulars of all Bids received in duplicate in a Bid Opening Register. The original list of Bids received must accompany the original Bid documents when forwarded to the department that invited the Bids. The name, contact details and signature of the person collecting the Bid documents must be obtained and the duplicate list with the signature will be kept by the bid opening office, either on the appropriate file or in a register as part of the record.

Phase 4 Amendments and communication after closing date

17.4 PHASE 4: AMENDMENTS AND COMMUNICATION AFTER CLOSING DATE

17.4.1 Amendments after the closing date

Transnet is entitled to amend any bid condition, validity period, specification or plan **after** the closing date of a bid. However, all parties who obtained bid documents and submitted valid Bids must be advised thereof in writing by fax or e-mail and be given the opportunity of bidding on the amended basis by an extended closing date and time. Proof of such written communication must be kept for record purposes. Bidders who did not submit valid Bids (e.g. submitted their Bids late, or who did not attend the compulsory briefing session/site inspection) cannot participate in the extended invitation. Authority for such communication must be obtained and is dealt with in paragraph 17.4.3.d) below.

In the event of a material amendment to the specification or scope of work, to which other new Bidders could possibly respond, the RFX must be cancelled and a revised RFX must be advertised. This would give all other potential Bidders the opportunity to respond. This can only be done after approval had been obtained from both the person who signed off the RFX document (refer paragraph 16.6 above), and the relevant AC. The cancellation must be advertised in the same media where the initial advert was placed. If the cancellation and reissue happen simultaneously, they may be advertised together where the re-issue makes reference to the cancellation. In such instances it will not be necessary to obtain AC approval for a non-award as this will delay the matter unnecessarily at this critical stage. However, full details of this 'intervention' must be disclosed to the AC when the final award of business recommendation is made. Also refer to paragraph 17.1.8(c) in this regard.

17.4.2 Extension of validity periods

If a bid cannot be evaluated and awarded within the stated validity period, a motivated request for an extension of the validity period should be made to the appropriate AC to request an extension of the validity period. This request should explain the reasons for the delay, and include the revised timeline for the completion of the bidding process.

NB: Validity periods must be extended BEFORE expiry. Bids in respect of which the validity periods have already expired cannot be revived. In such instances the process must be started afresh after having obtained the necessary AC approval for the non-award of the expired RFP.

If an avoidable delay occurs with adjudication, Bidders must be requested to extend the validity period of their Bids on the same terms and conditions **before** the expiry of the validity period. In such instances, Bidders will not be allowed to change any aspect of their Bid, unless they are able to demonstrate that the proposed change/s is as a direct and unavoidable consequence of the extension of the validity period e.g. price changes due to changes in the market which have impacted major cost components of their price. If a need arises to extend the validity period of the bid, this must be done BEFORE the validity date expires since a bid process automatically terminates on the validity date unless timeously extended.

17.4.3 Communication after the closing date

a) After the closing date of a bid (i.e. during the evaluation period) a Bidder may only communicate with the chairperson and the secretary of the relevant AC.

b) No communication relating to the specific bid is allowed between a Bidder (or any other party who has an interest in a bid), and any employee of Transnet after the closing date and before award, except as provided for in paragraph 17.4.3 (c) below. Every case of unauthorised communication must immediately

be reported to the Chairperson of the AC. The Bidder that is associated with an unauthorised communication may be disqualified from the process.

c) It is accepted that in certain cases Bidders might have existing contracts with Transnet, where communication regarding the existing contract is unavoidable. However, any communication during the evaluation period of another bid, should be limited where at all possible, and under no circumstances should socialising, e.g. golf days, product launches, lunch/dinner invitations, sporting events, etc., be entertained during this period. Even if no discussion about the bid being evaluated is entertained during such social events, other competing Bidders may form a perception of bias and it may lead to claims of an unfair bidding process.

d) The chairperson, the secretary of the AC, or the Manager with the delegated power, may subject to the provisions of paragraphs 17.4.3e), f) and g) below, authorise an employee in writing (including by fax or email) to communicate with a Bidder after the closing date for the purpose of:

(i) Explaining and verifying declarations made in Bid response;

(ii) Confirming that a quoted price is correct, or requesting a breakdown of the pricing without altering the price;

(iii) Confirming technical particulars and the compliance thereof with specifications;

(iv) Determining whether there will be any change in price if only a portion of the work is awarded to a Bidder;

(v) Requesting an explanation for an unreasonable price increase when it is compared with a previous price and the interim movement of a relevant price index;

(vi) Clarifying delivery times, quantities, etc;

(vii) Amending any bid condition, validity period, specification, etc. after the closing date;

(viii) Clarifying any other commercial aspect;

(ix) Carrying out site inspections of the bidder's premises; and

(x) Requesting presentations by all Bidders. If only certain shortlisted Bidders are invited for presentations, the relevant AC's prior approval of the shortlist must be obtained.

(xi) Requesting returnable documents erroneously omitted from the original Bid.

e) During communication after the closing date, no change in a matter of substance of the Bid, including changes in price, terms or changes aimed at making an unresponsive Bid responsive must be sought, offered or permitted. Also note that the abovementioned communication issues covered in paragraph 17.4.3 (d) do not include post-tender negotiation. This topic is covered in Chapter 19 (Post Tender Negotiation) below.

f) Where the bid is managed by a Specialist Unit with a specific strategic focus on behalf of the user OD, the Specialist Unit shall coordinate all communication of a technical, financial or commercial nature between Transnet and the Bidder.

g) In all cases where authority to communicate with Bidders has been granted in terms of paragraph 17.4.3(d) above, the submission to the AC must clearly state the nature of the communication as well as who granted the authority to communicate and the outcome thereof. Documentary evidence of all authorisations to communicate, the actual communication as well as the outcome thereof (bidder's response) are to be kept on the appropriate files as part of the record.

SECTION A Background and Context

SECTION B Procurement planning

SECTION C Go to Market

SECTION D: EVALUATION AND ADJUDICATION

Chapter 18: Evaluation and Recommendation

- Summary of bid evaluation process
- Test for administrative responsiveness
- Preparation for evaluation
- Substantive test for responsiveness
- Evaluation of bid against pre-determined criteria
- Final evaluation
- Recommendation

Chapter 19: Post Tender Negotiations (PTN)

- Purpose of PTN
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- General principles of adjudication
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Appendices

CHAPTER 18 : EVALUATION AND RECOMMENDATION

SUMMARY OF BID EVALUATION

It is the responsibility of the evaluation committee to ensure that the evaluation takes place within the validity period. If there are delays, the validity date(s) of the bids should be extended, using the process described in Chapter 17 *(Bid Administration)*.

The following are the key steps to be followed during the evaluation of Bids.

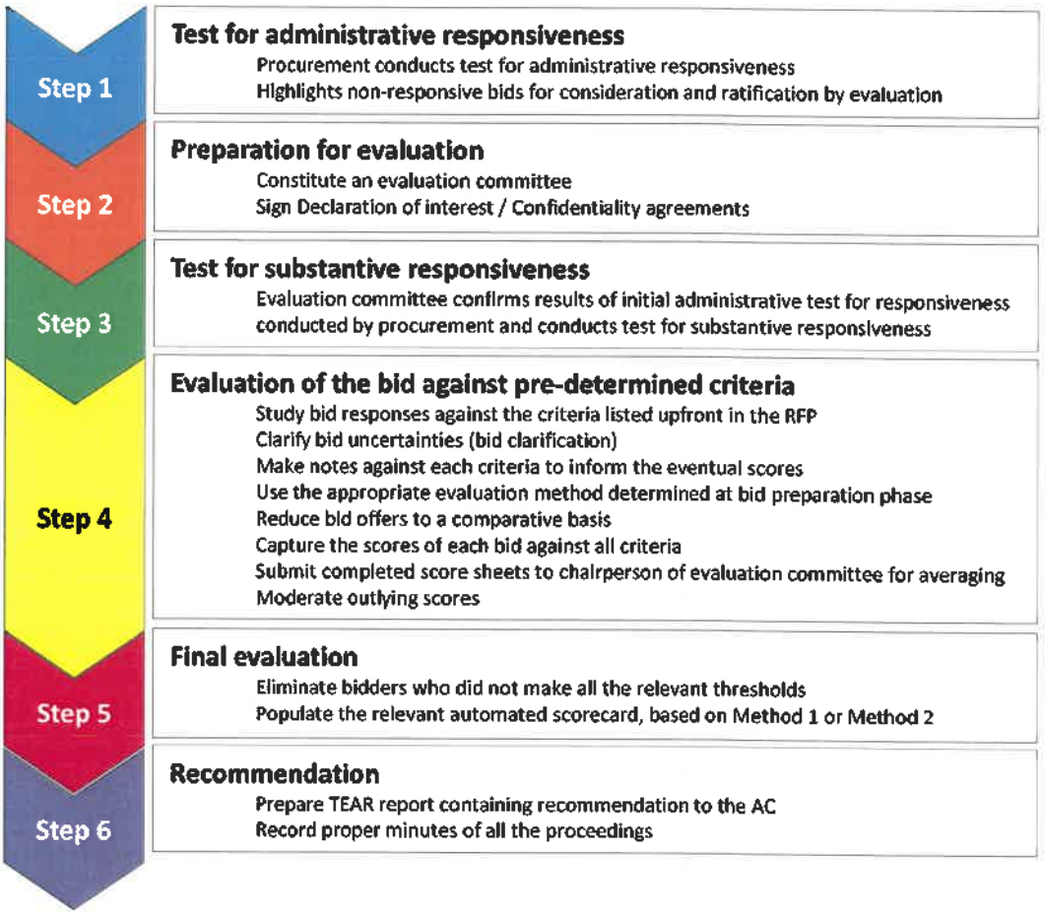
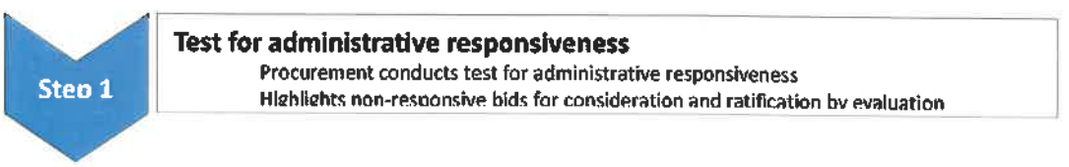


Figure [29] – 6 Steps for Bid Evaluation



18.1 TEST FOR ADMINISTRATIVE RESPONSIVENESS

18.1.1 Test for Responsiveness based on returnable documents submitted and signatures on the Bid documents:

a) Check the Bid document to see whether all returnable documents called for in the bid documents and which are required for evaluation purposes and/or incorporation into the contract have been received.

b) The RFP must clearly identify those material returnable documents which must be submitted upfront with the bid submission. If any such mandatory returnable documents are not provided upfront, the bid must be regarded as non-responsive e.g. tax clearance certificate, etc.

c) Certain other returnable documents, although essential, may not result in automatic elimination if not provided upfront. In such instances, a reasonable grace period (about 5 Working Days) may be afforded to the Bidders to supply the required documents. If the Bidder does not provide the document(s) by the end of the grace period, the Bid(s) must be regarded as non-responsive.

d) A third category of returnable documents are those that are required from an administrative perspective but which are not material or essential to the bid e.g. a completed Vendor Application Form. The failure to submit such documents for the purpose of evaluating and awarding the business will not result in the bid being regarded as non-responsive, but could be requested at a later stage.

e) If a Bidder had omitted to sign certain pages of the Bid documentation, he/she may be requested to do so within a reasonable period of time (about 5 Working Days). If the signature is not provided within the timeframe provided, the Bid must be regarded as non-responsive.

18.1.2 A schedule must be drawn by Procurement to indicate whether the Bids received are administratively responsive or not, and the efforts expended to obtain any outstanding information (see example in Figure [30] below):

Returnable Document Comparative Schedule (add fields for all returnable documents)

RFX Number _____

Bidder	Correctly Recorded by AC Secretary	Tax Clearance Certificate	VAT Registration Certificate	PSIRA Certificate	Due date for responses after grace period	Docs received by due date	Returnable Documents outstanding after due date	Bid responsive	Remarks
A	Yes / No	Yes / No	Yes / No	Yes / No	Date	Yes / No	Indicate outstanding documents	Yes / No	
B	Yes / No	Yes / No	Yes / No	Yes / No	Date	Yes / No	Indicate outstanding documents	Yes / No	
C	Yes / No	Yes / No	Yes / No	Yes / No	Date	Yes / No	Indicate outstanding documents	Yes / No	
D	Yes / No	Yes / No	Yes / No	Yes / No	Date	Yes / No	Indicate outstanding documents	Yes / No	
E	Yes / No	Yes / No	Yes / No	Yes / No	Date	Yes / No	Indicate outstanding documents	Yes / No	

Figure [30] – Schedule to record Bid compliance

Step 2

Preparation for evaluation

Constitute an evaluation committee

Sign Declaration of interest / Confidentiality agreements

18.2 PREPARATION FOR EVALUATION

18.2.1 Composition of Evaluation Committee / Panel

The composition of the evaluation committee would vary depending on the nature of the particular goods/services being procured. As a guide, evaluation committees should be determined as follows:

a) **Low complexity evaluations**

There are very limited criteria for consideration due to the absence of complexity. Typically, criteria can be assessed through a 'yes' or 'no' question. There must be at least two members on the committee - one from the procurement department and the other from the user department.

b) **Complex evaluations**

Where a number of criteria are evaluated on a weighted point system method, the evaluation committee should be cross-functional and should be composed of procurement personnel and officials from the department/s requiring the goods/services.

There must be at least three members, one of which must be a subject matter expert. When it is deemed necessary, independent experts may also be invited to a bid evaluation committee in an advisory capacity.

It is recommended that the people who serve on the CFST do not also serve on the bid evaluation committee. Only if separation of duties is not possible due to a lack of resources/expertise, may the CFST and the evaluation committee be allowed to have the same membership. If the same people served on both the CFST and evaluation committee, this must be recorded in the minutes, and be disclosed to the relevant AC.

c) **Highly complex evaluations**

A properly appointed multi-disciplinary evaluation team must be utilized. The evaluation committee may comprise sub-committees. Each sub-committee must be composed of at least 3 or more specialists in that field of expertise. A sub-committee will evaluate Bids only in the field that they are tasked with, e.g. Quality, commercial, SD, preference, etc.

(For bids falling within the threshold for High Value Tenders also refer to the High Value Tender Process available on iSCM Transnet Intranet).

18.2.2 Declaration of Interest / Confidentiality

a) Prior to commencing with the evaluation all members of the evaluation panel must sign a Declaration of Interest form, indicating whether or not they have an interest in the particular bid or any of the Bidders. Also refer to the Code of Ethics (paragraph 5.5 above) for further information on Declaration of Interest.

b) Information relating to the evaluation of Bids shall not be disclosed to suppliers or to any other person not officially involved in the evaluation or adjudication process. A confidentiality agreement must therefore be signed by all members at the start of every meeting of the evaluation committee.

18.2.3 Setting the ground rules for evaluation and rules of conduct

At the onset of the initial meeting, the Chairperson of the committee must indicate to the members that the following scoring methodology is to be used:

a) Confirm whether Method 1 or 2 will be followed as well as the weighting per category and thresholds as set out in the RFP (See Chapter 13 – Determining Evaluation Criteria).

b) Confirm whether scoring will be done in terms of a desktop evaluation only, or whether it will also include site visits, presentations and/or interviews. This should be indicated in the RFP;

c) Validate scorecard, including the prompts for judgment;

d) Members of the evaluation committee must score each Bid individually, i.e. each member must score every Bid without consulting any other members;

e) Thereafter, the raw scores given by each evaluator in respect of every criterion and sub criterion are populated onto a comparative score sheet;

f) The Chairperson of the evaluation committee identifies any numerical outliers (if any) and follows a process of moderation;

g) After moderation, the scores given by each of the evaluators in respect of each Bidder are averaged and allocated per Bidder;

h) The weightings for each criterion and sub criterion are then allocated against the average score for each Bidder, to determine the final weighted score per Bidder.

18.2.4 Rules of Conduct

a) Consistency throughout the whole bid evaluation process is essential. All members of the evaluation team must evaluate all the bid responses. This also entails having a kick-off meeting where the entire evaluation team is present and all aspects of the evaluation process is agreed upon to ensure that everyone is aligned.

b) Although it would be ideal, the evaluation of all bids need not necessarily be completed at one sitting of the CFET.

c) It is important that all members are present at the moderation session, be it in person or via teleconference. All members must sign off on all the relevant score sheets, including the final automated scorecard (previously known as the B-BBEE scorecard)

d) Minutes must be kept of all decisions and important deliberations taken at each meeting of the evaluation team.

e) Document security must be maintained at all times.

18.2.5 Evaluation criteria

Bids may only be evaluated in accordance with the criteria specified in the bid documentation (such as specific returnable documents, pricing, quality, commercial, SD, preference, financial stability, etc.).

a) In cases where an evaluation criterion was unclear and it resulted in divergent and incomparable responses being received from the Bidders, the criterion should be clarified and sent to all Bidders. They will then be required to resubmit Bids only in respect of such amended criterion/criteria.

b) In cases where a critical factor was not included in the evaluation criteria, an addendum to the RFP should be issued and sent to all Bidders to provide information pertaining to the additional criteria. The CPO must approve the inclusion of the additional criteria as well as the amendment to the RFP.

c) However, if the required clarity in respect of a) above or the introduction of new criteria in respect of b) above, introduces a substantive change to the RFP then, in the interest of fairness, an amended RFP should be issued by issuing a new tender to the market.



Test for substantive responsiveness

Evaluation committee confirms results of initial administrative test for responsiveness conducted by procurement and conducts test for substantive responsiveness

18.3 TEST FOR SUBSTANTIVE RESPONSIVENESS

The evaluation committee is required to confirm the result of the administrative test for responsiveness undertaken by Procurement.

A Bid is substantively responsive if it conforms to all the terms, conditions, scope and/or specifications of the bid documents without material deviation or qualification. A Bid is regarded as substantively responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the bid documents. Any such deviations must be quantified as far as possible. These deviations must be considered during the evaluation and comparison of Bids.

Before evaluating the Bids, members of the evaluation team are required to:

18.3.1 Verify the names of the entities appearing on the bid documents against the correspondence (copy of the bid register) received from the AC Secretariat (i.e. check that only those Bids received through the Secretariat, are being considered);

18.3.2 Check that all the pages of the respective Bids had been date-stamped by the Secretariat;

18.3.3 Check that each Bid reflects a consecutive stamped number, consistent with the Secretariat's correspondence. (This normally forms part of the Secretariat's bid date stamp).

18.3.4 Check that all pages of the bidder's covering letter (if any) and all pages containing pricing, delivery and any other conditions, which may have a direct influence on the evaluation process, have also been initialled by the Secretariat;

18.3.5 Check that the last (highest numbered) Bid also reflects the stamp "and last" (or "and only", in respect of instances where only one Bid was received) on all its pages; and

18.3.6 Any deviation from the above must be brought to the attention of the AC Secretary. A memo explaining such deviation must be compiled by the Secretary

and submitted to the evaluation team. Copies of this memo shall be kept on the Secretary's file as well as the evaluation file. The memo shall also be included in the AC agenda pack. The evaluation committee shall express an opinion on such deviation in their final report to the AC.

18.3.7 Confirm the results of the initial test for administrative responsiveness conducted by Procurement.

18.3.8 Reject Bids that do not pass the test for substantive responsiveness.

A Bid is considered substantively non responsive if it:

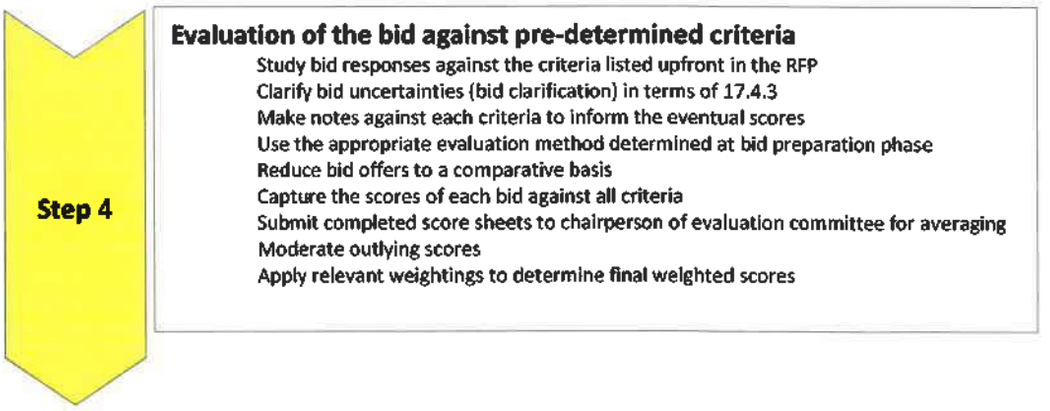
(i) does not contain pricing or response to any other crucial aspect stated in the RFP document;

(ii) does not meet minimum pre-qualification criteria;

(iii) materially departs from the scope, or specification of the Goods/Services requested; and

(iv) would affect the competitive position of other Bidders presenting responsive Bids, if it were to be rectified.

Non-responsive Bids must be rejected and Bidders shall not be allowed to modify their Bids once they have been rejected as non-responsive. Exclusion of a Bid as non-responsive must be defensible based upon objective and justifiable grounds.



18.4 EVALUATE THE BID AGAINST PRE-DETERMINED CRITERIA

Evaluate the Bid against pre-determined criteria using comparative schedules or score-sheets as follows:

18.4.1 Ensure that the evaluation process is strictly aligned with the evaluation methodology outlined in the bid documents, i.e. either Method 1 or Method 2 (see Chapter 13 – Determining Evaluation Criteria). If certain Bidders have not met the thresholds for Phase 1, no further scoring in respect of those Bidders takes place in Phase 2.

a) **Local Content**

If the transaction falls within one of the designated sectors as determined by DTI, and it was stated as such in the RFX document, Local Content/manufacture (LC)

will always be evaluated as a first step, to determine whether such Bid complies with the stipulated minimum threshold for that particular designated sector. Bidders that do not meet the stipulated minimum threshold for LC do not progress any further and are rejected at this stage. This applies irrespective of whether Method 1 or 2 is utilised. The threshold as determined by the DTI is not negotiable and bidders who do not meet the minimum set thresholds will be disqualified and will not be evaluated any further.

b) **Supplier Development/ Quality (functionality) and Preference**

(i) Evaluating each Bid individually

Each member of the evaluation committee is required to study Bid responses and record observations. The evaluator must first get an overall view of each Bid. This is done by studying each Bid individually, and then comparing it to the evaluation criteria.

The prompts that were provided for judgment or qualitative indicators relating to all SD criteria and any sub-criteria that are linked to a specific score should be used in assessing the Bids.

The evaluation of Bids shall be based on the information contained in Bid submissions, and where relevant from interviews, presentations and site visits. **Bids should not be evaluated on the basis of speculation or the personal knowledge or subjective experience which an evaluator has of any particular Bidder.**

The evaluator must record observations on the bidder's response to each specific evaluation criterion on the score sheet. References to page numbers should be added where applicable.

At this stage, no scoring is done.

Score-sheet 1 (*Figure [31]* below is used for such observations and is available on the Transnet Intranet).

Sheet 1	Working scoresheet					
RFP Number	(Insert RFP Number)					
Name of evaluation committee member	(Insert name of evaluation committee member					
CRITERIA (Supplier Development	BIDDER NO.1		BIDDER NO.2		BIDDER NO.2	
	Score	COMMENTS	Score	COMMENTS	Score	COMMENTS
Value of investment in plant Reduction in import leakage Potential increase in export content Number company employees to be trained Number of downstream supply chain individuals to be trained Certified training Rand value on training to be spent in the industry % of planned procurement from QSEs	Do not complete score at this stage	Evaluate entire bid before progressing to next bid Make comments on the bidder's response to various evaluation criteria	Do not complete at this stage	Evaluate entire bid before progressing to next bid Make comments on the bidder's response to various evaluation criteria	Do not complete at this stage	Evaluate entire bid before progressing to next bid Make comments on the bidder's response to various evaluation criteria

Figure [31] – Score-sheet 1

(ii) Scoring

The next step is to allocate scores on Score-sheet 1 above. This is done by scoring one evaluation criterion at a time for all Bidders. E.g. compare and score the responses to 'Value of investment in plant' for all Bidders before moving on to the next criterion.

All scores must preferably be out of 10 (i.e. the 1 to 10 scale, although a 1 to 5 scale can also be used if specific objective measuring criteria has been set).

Finally, each member's individual scores in respect of each bidder must be carried over from Sheet 1 and inserted on score sheet 2 – see below.

Sheet 2	Final member scoresheet			
RFP Number	(Insert RFP Number)			
Name of evaluation committee member	(Insert name of evaluation committee member			
CRITERIA (Supplier Development)	**BIDDER NO. 1**	**BIDDER NO 2**	**BIDDER NO. 3**	**BIDDER NO. 4**
	Score	**Score**	**Score**	**Score**
Value of investment in plant	5	7	5	7
Reduction in import leakage	4	6	5	6
Potential increase in export content	5	6	4	6
Number company employees to be trained	5	8	5	8
Number of downstream supply chain individuals to be trained	4	5	4	7
Certified training	5	6	3	8
Rand value on training to be spent in the industry	4	7	5	7
% of planned procurement from QSEs	5	6	4	6
Total	**37**	**51**	**35**	55

Figure [32] – Score-sheet 2

(iii) Moderating scores

The Chairperson of the evaluation committee transcribes all the individual members' scores from the respective score sheets (Sheet 2) onto the consolidated score-sheet. (Score-sheet 3, see example (*Figure [33]*) below. These scores should be regarded as provisional and subject to moderation.

In the event of significant variances in individual scores, the scores must be moderated at the discretion of the Chairperson of the evaluation committee. An outlying score/s should as a general guideline be determined where there is a point differential of more than 4 points on the 10 point scale as compared to the other scores. The outlying scorer (Nivan, in the example of Sheet 3 below) must be asked to motivate his/her score(s). If the score can be rationally explained, the score can remain unchanged. Other scorers should be afforded the opportunity to reconsider their scores, in light of the explanation provided by the outlier. If the outlier cannot rationally explain his/her score, he/she must be asked to reconsider the score. If the outlier refuses to reconsider the score, the chairperson of the evaluation committee may approach the AC Chairperson for a ruling on whether the outlier should be replaced with a different scorer or not.

The process followed with moderation of scores must be recorded in the minutes of the evaluation committee. Any changes to a score sheet due to the moderation must be countersigned by both the scorer and the Chairperson. This should also be cross-referenced with the relevant minute/resolution.

(iv) Weighting scores

The following provides an explanation on how weighted scores are arrived at. However, there is an automated score sheet available on the iSCM Transnet

Intranet, where the weighted scores are automatically calculated based on the raw scores.

Step 1

The Chairperson calculates the average scores per criterion per Bidder (after moderation). This is done by dividing the sum by the number of evaluators to arrive at an average score for each particular criterion per Bidder.

Sheet 3	Combined score sheet									
RFP Number	(Insert RFP Number)									
CRITERIA (Supplier Development)	Bidder No. 1 Evaluation Member Scores					Bidder No. 2 Evaluation Member Scores				
	Nomhle	Thulani	Bill	Nivan	Average	Nomhle	Thulani	Bill	Nivan	Average
Value of investment in plant	4	5	3	8	5	6	7	7	1	5.25
Reduction in import leakage	3	4	4	8	4.75	5	6	5	1	4.25
Potential increase in export content	4	5	3	9	5.25	5	6	6	2	4.75
Number company employees to be trained	4	5	4	8	5.25	5	8	5	4	5.5
Number of downstream supply chain individuals to be trained	5	4	5	7	5.25	6	5	7	3	5.25
Certified training	4	5	4	8	5.25	5	6	6	2	4.75
Rand value on training to be spent in the industry	3	4	4	7	4.5	5	7	6	2	5
% of planned procurement from QSEs	4	5	3	8	5	6	6	5	1	4.5
Total	31	37	30	63	40.25	43	51	47	16	39.25

Figure [33] – Score-sheet 3

Step 2

The Chairperson must now calculate the weighted scores against each criterion to determine the total weighted score against each Bidder. (See example in Score-sheet 4 - Figure [34] below)

For example, a score of 8 out of 10 for a particular criterion that has a weighting of 20 will be calculated as follows:

$$\frac{8}{10} \times 20 = 16$$

Sheet 4	Final weighted scoresheet								
RFP Number	(Insert RFP Number)								
CRITERIA (Supplier Development)	Weighted maximum	Bidder Number							
		No. 1		No. 2		No. 3		No. 4	
		Score	Weighted	Score	Weighted	Score	Weighted	Score	Weighted
Value of investment in plant	20	5	10	7.5	15	4	8	7	14
Reduction in import leakage	10	4.75	4.75	6	6	5	5	6	6
Potential increase in export content	10	5.25	5.25	6	6	4.5	4.5	6	6
Number company employees to be trained	20	5.25	10.5	8	16	5.5	11	8	16
Number of downstream supply chain individuals to be trained	10	5.25	5.25	5	5	4	4	7	7
Certified training	5	5.25	2.625	6	3	3	1.5	8	4
Rand value on training to be spent in the industry	10	4.5	4.5	7	7	5	5	7	7
% of planned procurement from QSEs	15	5	7.5	5	7.5	4.5	6.75	6	9
Total	100	40.25	50.375	50.5	65.5	36.5	45.75	55	69

Figure [34] – Score-sheet 4

The total weighted score above represents the ranking of each Bidder in respect of SD.

Note: The score for preference (B-BBEE scorecard only), together with the score for SD determines the SD Threshold. See example below, which indicates how the SD score and the B-BBEE score according to recognition level added together are used to determine the consolidated SD/preference score for threshold purposes assuming a 60% threshold.

Bidder	SD (50)	Scorecard (50)	TOTAL (100)	
Bidder No. 1	35	40	75	
Bidder No. 2	41.5	50	91.5	
Bidder No. 3	43.25	35	78.25	
Bidder No. 4	45	45	90	
Bidder No. 5	25	5	30	(Non-responsive - minimum threshold not met)

Figure [35] – Consolidated scorecard for SD /B-BBEE

18.4.2 Quality / functionality offer

For the purpose of evaluation, Quality is considered to comprise all the criteria set out in the RFP, except price (or TCO), SD and preference (B-BBEE and/or FRC).

As with the evaluation of the SD offer, the Quality/Functionality proposal must be evaluated against the criteria as stipulated in the RFP. Repeat the process as stipulated in paragraph b), utilising the Quality/Functionality criteria and component weightings.

18.4.3 Preference

Preference is scored according to the B-BBEE scorecard only and the FRC criteria (Current and Future) will only be used in the final evaluation stage.

Step 5

Final evaluation

Eliminate bidders who did not make both the thresholds

Populate the relevant automated scorecard, based on Method 1 or Method 2

18.5 FINAL EVALUATION

One of two methods of evaluation may be used depending on what was stated in the RFX document (Refer to paragraph 13.1).

18.5.1 Applying the criteria in Method 1

a) **Method 1: Phase 1** (Refer paragraph 13.1.1 above)

All Bids which have failed to achieve the minimum qualifying threshold for LC (where applicable), SD/Preference or Quality must be rejected. All Bids which exceed the minimum qualifying threshold for quality are regarded as *'equally technically compliant'* irrespective of the margin by which they exceed the threshold.

All Bids that have achieved or exceeded the minimum qualification thresholds for firstly, LC (if applicable), SD/Preference and Quality/Functionality proceed to Phase 2. They must now be evaluated further in terms preference and SD for a second time, as well as Price.

b) **Method 1: Phase 2** (Refer paragraph 13.1.1 above)

Only the Bidders who had met the predetermined thresholds for firstly LC (if applicable) and both SD/Preference and Quality progress to this stage.

(i) Score for SD

With regard to the evaluation of SD in this phase, no new evaluation takes place. The points awarded to Bidders in Phase 1 for SD are simply weighted and added to the weighted scores for preference and FRC both Current and Future strictly in terms of the criteria as stipulated in the RFP document.

(ii) Score for Price

Before conducting a mathematical evaluation of price, a cognitive evaluation will be conducted in order to determine the reasonableness of the price quoted. All bidders will be required to provide supporting documentation motivating their price e.g. complete a checklist indicating which aspects of their bids have been quoted for. Such a checklist will be included as a returnable document in Transnet tenders and will allow Transnet to conduct a comparative analysis in terms of pricing. Bidders who fail to quote on all Transnet mandatory requirements will be declared non responsive.

Next, select and utilise the automated scorecard for Method 1.

The following formula has been built into the automated score sheet to calculate the score for price:

$$Ps = \frac{Pbm}{Pt} \times W1$$

Where: Ps = Score for Bid under consideration
Pt = Comparative price of Bid under consideration
Pbm = Benchmarked price calculated using average price of bids received less 10%
W1 = The percentage score given to price

Bidders with a price lower than the benchmark will be given an automatic score of the full points allocated to price.

The method to calculate the benchmark against which all prices are evaluated may be adjusted on motivation to and approval by the GCE.

A bidder's score for price must be added to the consolidated score for SD, BBBEE and FRC. The Bid with the highest score must be selected unless there are objective criteria other than the evaluation criteria that justify the award to another Bidder. This discretion must be exercised sparingly. Examples which would justify the award to a bidder other than the highest ranked bidder includes instances where the highest ranked bidder has just been fined a huge amount by the Competition Commission which impacts on its ability to deliver on the contract; or notice has just been received from iSCM Governance that the company has been placed on Transnet's List of Excluded Bidders.

Where two or more Bids have scored the highest equal points based on Price and SD/Preference, the Successful Bid must be the one with the highest score on preference.

Pricing Offer

All Bid pricing offers must be reduced to a common base in a comparative schedule in order to facilitate a fair comparative analysis. In order to facilitate a fair comparison between Bids, it is necessary to distinguish between the bid price and comparative price as the Bid price may not include certain factors impacting on cost. As stated in chapter 16 above on Bid Preparation, it is necessary to provide all Bidders with a uniform pricing schedule to ensure all Bidders include not only the base price, but all other factors that may influence total cost of ownership (TCO). If a comprehensive pricing schedule is provided by all Bidders, it will ensure that prices received are already on a common basis. Failing this, Bidders must be asked to re-submit prices in accordance with a clear pricing schedule; alternatively, prices must be reduced to a comparative schedule as follows:

- Whether the cost of transport has been factored into the Bid price.
- Incoterm-related costs, i.e. all other transit-related costs in respect of Goods supplied from abroad, must be added to the Bid price. These include: inspection costs, freight and insurance (from the place where the Goods have been offered to the destination where it shall be delivered), landing charges, customs duties, import duties, wharfage, etc.
- Unconditional discounts must be subtracted from the Bid price, where applicable.
- Other considerations which affect a non-fixed Bid price such as price adjustment factors, currency, etc. that affect the prices over the full period or part of the contract period.
- Time value of money where cash flow implications differ, e.g. when upfront or staggered payments are required rather than a lump sum payment at the end of the contract.
- Differences in Quality which can be expressed in monetary value, e.g. if one bidder's brake blocks guarantees a 20% more useful lifespan than another bidder's.
- Any other incidental costs which may arise from the acceptance of an offer.

Any modification to the bidder's original Bid price due to the process of reaching comparative pricing must be validated with the Bidder him/herself.

Arithmetical errors, i.e. obvious arithmetical errors, must be pointed out to the Bidder (with permission from the AC Secretary) and corrected figures utilised for comparative purposes.

The comparative schedule should reflect the comparison of prices under the following headings (delete where not applicable):

- Tendered prices

- Arithmetical corrections
- Comparative prices
- Projected prices
- TCO adjustments
- Total comparative price

(iii) Score for Preference

Preference is scored according to the B-BBEE scorecard and FRC Current and Future in the final evaluation stage.

EXAMPLE 1 (Automated score sheet in respect of Method 1)

BASIS FOR COMPARATIVE OFFER : METHOD 1: PRICE (60) SD (20) BBBEE (10) AND FRC (10)

Name of Tenderer : Ranked lowest to highest Price	Financial Offer (P)	Comparative Offer (Pm)	Points for Financial Offer (Max 60)	Points for SD (Max 20)	BBBEE Level of Contribution (Level 1 to 9)	BBBEE Point out of 10 (scorecard only)	Points for FRC (Max 10)	Total point out of 100	Overall Ranking Price, SD, Function-ality and BBBEE	% Premium payable	Premium payable in Rands
BIDDER E	NON-RESPONSIVE - Minimum threshold for SD and BBBEE not met										
BIDDER A	R 119,000,000	R 119,000,000	60.00	14.00	Level 3	8	7	89.00	2	0.00	R 0
BIDDER B	R 120,837,221	R 119,000,000	59.07	16.67	Level 1	10	5	90.74	1	1.64	R 1,837,221
BIDDER C	R 122,886,753	R 119,000,000	58.04	17.30	Level 4	7	6	88.34	3	3.27	R 3,886,753
BIDDER D	R 140,965,432	R 119,000,000	48.92	16.60	Level 2	9	7	83.52	4	18.46	R 21,965,432

		SD (20)	Scorecard (10)	TOTAL(30)	
BIDDER A		14	8	22	
BIDDER B		16.6	10	26.6	
BIDDER C		17.3	7	24.3	
BIDDER D		18.6	9	27.6	
BIDDER E		10	1	11	(Non-responsive - minimum threshold not met)

MINIMUM THRESHOLD FOR SD and BBBEE = 15, i.e. 50%

Figure [36]

From *Figure [36]* above, Bidder B becomes the Preferred Bidder as he has attained the highest score out of 100. The recommendation to the AC will therefore be in favour of B (and not Bidder D although D has the highest B-BBEE contribution level or Bidder A who is the cheapest).

18.5.2 Applying the criteria in Method 2

Phase 1 of Method 2 is exactly the same as Phase 1 of Method 1. The difference between the two methods is in Phase 2, where Quality/Functionality is added as a fourth evaluation criterion and given a weighting greater than price, SD and preference.

Select and utilise the automated scorecard for Method 2.

A bidder's score for price must be added to the consolidated score for SD, BBBEE and FRC.

Where two or more Bids have scored the highest equal points based on Price, Quality and SD/Preference, the Successful Bid must be the one with the highest score on quality, since quality carries the highest weighting.

Such criteria must be communicated in advance in the bid documents.

EXAMPLE 2 (Automated score-sheet in respect of Method 2)

BASIS FOR COMPARATIVE OFFER : METHOD 2: PRICE (20) TECHNICAL (40) SD (20) BBBEE (10) AND PRC (10)

Name of Tenderer : Ranked lowest to highest Price	Financial Offer (P)	Comparative Offer (Pm)	Points for Financial Offer (Max 20)	Points for Technical (Max 40)	Points for SD (Max 20)	BBBEE Level of Contribution (Level 1 to 9)	BBBEE Point out of 10 (scorecard only)	Points for PRC (Max 10)	Total point out of 100	Overall Ranking Price, Technical, SD, Function-ality and BBBEE	% Premium payable	Premium payable in Rands
BIDDER E	NON-RESPONSIVE - Minimum threshold for SD and BBBEE not met											
BIDDER A	R 95,574,943	R 95,574,943	20.00	18.00	14.00	Level 3	8	7	67.00	4	0.00	R 0
BIDDER B	R 111,837,221	R 95,574,943	19.56	28.40	16.67	Level 1	10	5	79.67	2	17.02	R 16,282,278
BIDDER C	R 150,896,753	R 95,574,943	8.42	36.00	17.30	Level 4	7	6	74.72	3	57.83	R 55,321,810
BIDDER D	R 170,995,432	R 95,574,943	4.22	38.00	18.60	Level 2	9	7	76.82	1	78.83	R 75,396,488

	Technical (40)			SD (20)	Scorecard (10)	TOTAL	
BIDDER A	45%	18		14	8	22	
BIDDER B	71%	28.4		16.6	10	26.6	
BIDDER C	90%	36		17.3	7	24.3	
BIDDER D	95%	38		18.6	9	27.6	
BIDDER E	50%	20		10	1	11	(Non-responsive - minimum threshold not met)

MINIMUM THRESHOLD FOR SD and BBBEE = 15, i.e. 50%

Step 6

Recommendation

Prepare TEAR report containing recommendation to the AC
Record proper minutes of all the proceedings

18.6 RECOMMENDATION

18.6.1 Tender Evaluation and Recommendation Report (TEAR)

After a bid is evaluated a TEAR report should be completed by the Chairman of the evaluation committee setting out how all relevant evaluation criteria were measured and how Bidders were ranked as a result of the evaluation process. The motivation for the award of business must be supported by the evaluation score sheets as well as a copy of the automated scorecard. These documents must accompany the AC submission regarding the final award of business or the submission to short-list for post-tender negotiation.

The TEAR report must substantiate the results of the evaluation. This includes reasons why a Bidder was eliminated, for example, due to non-responsiveness or failure to meet any minimum technical qualifying criteria.

18.6.2 The recommendation to the AC

a) A recommendation for the award of the business must be drafted for submission to the relevant AC. This must be accompanied by the evaluation report motivating how all the relevant selection criteria have been evaluated.

The evaluation panel may be called upon by the AC to clarify any uncertainties.

b) When for whatever reason, it is considered in Transnet's best interest to award only a portion of the scope of requirements, Transnet should consider giving an opportunity to all participants in the bid process to re-bid on the amended scope by a new closing date and time. This is because a reduction in scope may impact on pricing / discounts offered by Bidders which in turn could affect their competitive position.

18.6.3 **Reasons for recommendation**

a) The reasons for recommending a particular Bid(s) must be clearly stated by the recommending officers.

b) When only one technically Acceptable Bid is received and recommended for acceptance, it shall be indicated whether the prices are fair and reasonable and how this has been determined (e.g. benchmarking against previous prices etc.).

c) If a Bid other than the Bid with the overall highest score is selected, the recommending officer shall provide a full explanation for this decision, and state which objective criteria are relied upon to justify the recommendation of such Bid.

d) In the event that two or more bids have scored equal total points, the successful bidder must be the one which scored the highest number of preference points for B-BBEE, except in the case of Method 2 where the equal scorer, with the highest score for quality will be the successful bidder.

e) Should two or more bids be equal in all respects, the award shall be decided by the drawing of lots.

CHAPTER 19 : POST TENDER NEGOTIATION

19.1 POST TENDER NEGOTIATION (PTN)

19.1.1 Post Tender Negotiation is an effective tool to drive down cost or extract further value for Transnet and can be used very effectively in conjunction with any procurement mechanism. PTN is used after the evaluation process has been completed and the Preferred Bidder/s have been identified and approved by the relevant AC, based on the criteria as set out in the RFX. PTN is normally reserved for high-value, strategic commodities, but it may also be used in lower value transactions where it is considered that further value for Transnet can be extracted from this process. Depending on the circumstances, this tool can be used either with all technically compliant Bidders, or a selected short-list, or even with the Preferred Bidder only, but subject to the following requirements to ensure good corporate governance.

19.1.2 In order to ensure that PTN is conducted in a fair manner, shortlisted Bidders should be negotiated with individually. The negotiation process should follow the same agenda for all Bidders. After negotiation the Bidders should submit their best-and-final offers, in the relevant tender box, by a specified closing date and time. After proper evaluation of all best-and-final Bids received, business is ultimately awarded to the highest rank Bidder, based on these offers.

19.1.3 PTN may only take place if the RFX document contained a clause stating that 'Transnet reserves the right to enter into post tender negotiations with a Preferred Bidder or any number of shortlisted bidders'.

19.1.4 Before PTNs are conducted with the Preferred Bidder or short-listed Bidders, it must be approved by the relevant AC. The R-value of the proposed contract to be negotiated will determine within which AC's jurisdiction the matter falls. (Refer to paragraph 19.3 below for instances where PTN is envisaged for transactions falling below the AC jurisdiction.) The submission requesting authority to negotiate should include the following:

- list of Preferred Bidders (or Bidder) and how the list has been determined including the threshold set for qualification for PTN;
- the composition of the negotiating team;
- the targeted price reduction;
- the increase in SD commitment;
- B-BBEE commitment;
- the motivation for PTN; and
- other aspects that will be negotiated to achieve a "win-win" situation, e.g. payment terms, minimum order size and frequency, delivery, lead times, etc.

19.2 AUTHORITY TO ENGAGE IN PTN (transactions falling within AC jurisdiction)

19.2.1 Matters falling within the jurisdiction of the AC (i.e. above the minimum R-threshold of the AC), should be submitted for the approval of the AC in the normal manner, indicating in detail the process followed in determining the shortlist of Bidders to be negotiated with, details of the agenda that will be negotiated, etc. (refer to paragraph 19.4 below).

a) Upon receiving AC approval, and completion of the PTN process, and the resultant evaluation and scoring of the best-and-final Bids, full details of the

best-and-final offers, must be provided when a recommendation on the final award of the business is made to the relevant AC

b) On these higher value transactions, the negotiating team to be appointed by the relevant AC, shall comprise of procurement, SD, technical, financial and commercial (marketing) and legal disciplines, (where appropriate), to facilitate unity of purpose from Transnet's perspective and to enable the Bidder to deal with all relevant matters before making a final offer.

19.3 STANDING AUTHORITY TO PTN (transactions falling below AC jurisdiction)

19.3.1 It would also be acceptable, especially in respect of transactions falling below the AC minimum Rand thresholds, for certain officials (preferably in procurement), to be given specific standing Delegated Powers to conduct and/or authorise PTN, without the necessary prior AC approval as contemplated in paragraph 19.2 above.

a) This authority must be obtained from the Manager or CPO and must be included in the Delegation of Authority of the relevant official. Copies of this should be filed with the AC Secretariat. The standing Delegation of Authority must clearly reflect the maximum transaction value for which the official may conduct or approve PTNs, without prior AC approval. Full details of all such PTN transactions undertaken, should be reported to the AC at regular intervals.

b) A standing authority to negotiate is different from a standing authority to communicate (refer to paragraph 17.4.3) and separate PTN authority must be obtained. Standing Delegated Powers to negotiate will be granted with great circumspection and only to employees who have demonstrated the necessary negotiation skills.

c) Detailed records must be kept in the relevant files of the Bidders who have been negotiated with, how their eligibility for PTN was determined, including their best-and-final offers received. Copies of such standing authority must also be kept on the relevant files. Standing authority to conduct/approve PTN should not exceed the minimum R-value thresholds of the AC. In such cases the process as outlined in paragraph 19.2 above detailing the AC's involvement in the various stages, must be followed.

19.4 PTN PROCESS

19.4.1 Under no circumstances may prices of one Bidder be disclosed to another with the request to improve on such price in order to be awarded the business. This is considered as 'horse-trading' and is considered an unfair business practice. Such misconduct will not be tolerated and will result in disciplinary action.

19.4.2 It is important that all members of the PTN team sign declarations of interest and non-disclosure or confidentiality agreements when appointed to such teams. These forms must be kept on the appropriate files as an audit trail.

19.4.3 Negotiations must be preceded by thorough research and a caucus discussion by the cross-functional negotiation team to be able to obtain a co-ordinated approach.

a) To ensure fairness, the same agenda must be used with all short-listed Bidders to ensure that all Bidders are provided with the same information and the same opportunity to improve their Bid in all respects. The agenda must be made known in advance to all shortlisted Bidders so that they can prepare for the negotiations. The final evaluation criteria against which the best-and-final Bids

will be scored should also be disclosed to the shortlisted Bidders. Such criteria may only differ marginally from the original criteria as per the RFX document.

b) The objectives of the negotiating team must be recorded in consultation with the relevant disciplines concerned (e.g. financial, SD, technical and commercial).

c) The objectives should be approved by the relevant AC. The financial advantages, or other objectives sought (e.g. B-BBEE commitment, Enterprise Development initiatives, faster delivery, etc.), must be quantified and no negotiation will be regarded as final until all the approved objectives have been properly negotiated by the negotiating team. After receipt and evaluation of the best-and-final offers, the results must be recorded against the envisaged objectives.

d) Under no circumstances should a Preferred Bidder be informed that he has been awarded a contract prior to the PTN process, as that would jeopardise Transnet's negotiation power.

e) Where PTNs are conducted with a duly approved short-list of Preferred Bidders, all such Bidders must be requested to deposit their "best-and-final offer" in the tender box by a set closing date.

f) This method may also be employed in the single Preferred Bidder scenario, if there is reason to believe that this may yield a further price reduction, or extract further value for Transnet, subsequent to the negotiation session.

g) Although PTN offers shortlisted Bidders the opportunity to improve upon their Bid in areas such as price, quantity, etc., care should be exercised to ensure that the final contract negotiated does not differ substantially from the terms and conditions of tender set out in the original RFP document.

19.5 APPROVAL TO AWARD BUSINESS AFTER PTN

19.5.1 Business may be awarded to one of the shortlisted Bidders or split between any number of shortlisted Bidders.

19.5.2 It is possible and permissible for the ranking of shortlisted Bidders to change from the first evaluation stage when the shortlist was determined, to the final ranking after PTN was conducted and the best-and-final Bids were evaluated, provided that PTN was conducted strictly in terms of the rules as stipulated above.

19.5.3 In instances where the relevant AC has authorised PTN with a shortlist of Preferred Bidders, the ultimate award of the business, whether awarded to one or more than one shortlisted contender (i.e. a split-award) should again be presented to the relevant AC which approved the Preferred Bidder/short-list.

19.5.4 In instances where the relevant AC has authorised PTN with a single Preferred Bidder, the ultimate award of the business must also be presented to the relevant AC for approval to ensure that the final contract is substantially the same as the terms indicated in the RFP, unless the AC approved the preferred bidder and the subsequent award of the contract, upfront, due to operational requirements, (urgency etc), in which case the final negotiated terms, and contract value needs to be reported to the AC for information purposes only.

CHAPTER 20 : ADJUDICATION

20.1 GENERAL PRINCIPLES

Adjudication can best be described as the validation of the process leading to the recommendation of the Successful or Preferred Bidder/s. It is important to note that there are two different elements to this and these are often confused.

20.1.1 The ACs do not have any contracting powers and as such do not actually conclude the contract in the name of Transnet. The AC validates the process of selecting the Successful / Preferred Bidder.

20.1.2 When an AC has approved a submission, it clearly does so subject to the provisos listed in paragraph 21.3.1, one of which is that the person with the necessary DoA has to sign the actual contract. Likewise, the person with the necessary DoA may not execute his DoA and sign the contract, without the relevant AC approval of the process.

20.2 THE ROLE OF THE AC DURING ADJUDICATION

The function of the AC is to validate both the process related aspects as well as the commercial aspects of the bid process. The AC is required to satisfy itself that all Bidders were treated fairly in the bidding process and that the process was conducted in accordance with the applicable regulatory framework and Transnet's internal rules. The AC is also required to determine that the price to be paid by Transnet is market related, that the commercial terms and conditions are fair and reasonable and that the award of business is in the best interests of Transnet.

Factors to be considered during adjudication include whether:

20.2.1 the bid was advertised for a reasonable period of time and in the appropriate media;

20.2.2 all Bids are still valid i.e. still within the validity period;

20.2.3 communication with Bidders after the closing date was properly authorised and conducted in a fair manner;

20.2.4 Bidders were evaluated against the evaluation criteria stated in the RFP;

20.2.5 the scoring of Bidders was reasonable, rational and in accordance with the scoring methodology;

20.2.6 the recommended Bidder scored the highest points overall. If not, whether the recommendation to award the contract to another Bidder is based on other objective criteria

20.2.7 the recommended Bidder is not on the Transnet List of Excluded Bidders, the Treasury list of Bid Defaulters or the Treasury database of Restricted Suppliers;

20.2.8 the recommended Bidder has legal capacity to enter into a contract;

20.2.9 the contract is to be awarded to the same business enterprise as the one which submitted the Bid;

20.2.10 the recommended Bidder submitted a valid and original tax clearance, VAT certificate (where applicable) and whether the recommended Bidder complies fully with all legal requirements stated in the RFP;

20.2.11 the recommended Bidder is not insolvent, in receivership, bankrupt or being wound up, has his affairs administered by a court or judicial officer, has suspended his business activities or is subject to legal proceedings in respect of the aforegoing;

20.2.12 the award of business to the recommended Bidder would not be harmful to Transnet's image. In this regard, it must be borne in mind that Transnet is a public company and its sole shareholder is the Government of the Republic of South Africa. For this reason, business transactions with entities that could harm Transnet's image should be avoided;

20.2.13 price and other commercial terms are market related; and

20.2.14 The award of business does not pose any other legal or material risks to Transnet that has not been mitigated.

20.3 RISK EVALUATION

Upon receiving a recommendation to award business to a particular Bidder, the AC may at its own discretion call for a risk evaluation on the Bidder if it is of the opinion that this was not considered at the evaluation stage. If on reasonable grounds it is determined that there is a material risk involved in awarding the business to that particular Bidder, the AC may, depending on the likelihood and consequence of the risk materialising recommend one of the following:

- not awarding to the Bidder;
- awarding part of the business to the Bidder; or
- splitting the business between the Bidder and another Bidder.

The concept of material risk must be interpreted restrictively and be limited to instances where Transnet would be severely prejudiced by the award of business to a particular Bidder.

20.4 SPLITTING OF BUSINESS

The AC should enquire whether the splitting of the award of business was considered during evaluation, as this is a feasible mechanism to promote the development of new entrants into the market. Transnet's standard bid conditions allow for the selection of multiple suppliers or the award of the whole, or any part of a Bid to any particular Bidder. Transnet may also choose not to make an award if there are valid grounds for doing so.

Bidders who qualify their Bids on the basis that the whole Bid should be accepted (in conflict with the bid conditions) must be advised that the restriction must be withdrawn before their Bid can be considered.

20.5 DISAGREEMENT REGARDING AWARD OF BUSINESS

20.5.1 Should a dispute arise between the recommending officer(s) and the AC regarding a submission after the AC has referred the matter back to the recommending officer for re-motivation, the matter must be escalated to the Entity's CEO for a final decision.

20.5.2 Where the recommendation of the evaluation team conflicts with the opinion of the end user, the matter must be referred to the AC for a ruling.

20.6 NON AWARD / CANCELLATION OF BIDS

20.6.1 Non award of business must be approved by the relevant AC. A motivation for non award may be considered by the AC at any stage of the process before the Successful Bidder is finally selected and informed about the bid award. Once a Successful Bidder has been selected and informed about the outcome of the bid

process (i.e. he/she was awarded the bid), Transnet is said to be functus officio and can no longer cancel the bid process without an order of court authorizing it to do so.

20.6.2 It should be noted that a Bidder can only be regarded as the Successful Bidder when he/she was unequivocally informed that the bid was awarded to him/her. An award that is made subject to further negotiation or qualification cannot be regarded as a final and unequivocal award. Thus the award of "Preferred Bidder status", subject to the successful negotiation and conclusion of a subsequent contract does not amount to being selected as the "Successful Bidder" as the award is conditional and subject to the outcome of the negotiation process.

20.6.3 Group legal / the OD Legal department should be consulted before a decision to cancel a bid is taken to advise on the legal risk associated with cancellation and also whether Bidders should be invited to make representations before a final decision can be taken.

20.6.4 The decision not to award business must as far as possible be taken timeously. Bidders must be advised of this decision as soon as possible after the decision has been approved.

20.6.5 Non-award of business (as a result of Transnet's bad planning) should for obvious reasons be minimised as far as possible as Bidders expend a significant amount of time, effort and money when preparing and lodging Bids. Non award has the effect of cancelling a bid and the AC must therefore act judiciously when authorising a non award so as to minimize prejudice to Bidders.

20.6.6 When no Bid can be recommended for acceptance, the Manager concerned shall provide a motivation to the AC clearly stating the reasons why no Bid can be recommended and give an indication as to how need for the required Goods/Services will now be met.

20.6.7 The AC may approve a non award under the following circumstances:

a) Where due to changed circumstances there is no longer a need for the Goods or Services;

b) Where due to a fundamental change in specification, the bid has to be cancelled and re-advertised;

c) Funds are no longer available to cover the envisaged expenditure;

d) No Acceptable Bids were received;

e) When a material irregularity has occurred in the bidding process which cannot be remedied, other than through cancellation; or

f) All bids received are well over budget and considered to be excessive.

When the AC authorises a non award on the grounds of a), b) or c) above, all Bidders should be reimbursed for the bid document fee, if bid documents were sold. Where a non-award is authorised on the basis of ground e) above, Bidders not involved in the material irregularity should be reimbursed.

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Chapter 21: Award of Business & Contracting Process

- Approval of acceptance of bids not to be anticipated
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Appendices

CHAPTER 21 : AWARD OF BUSINESS AND CONTRACTING PROCESS

21.2 APPROVAL OF ACCEPTANCE OF BIDS NOT TO BE ANTICIPATED

No employee shall anticipate the approval of acceptance of bids. Therefore, no employee may enter into contracts verbally or in writing or place orders before the prescribed adjudication process has been performed and authority has been duly granted by a Manager with the appropriate DoA.

21.3 DECISION TO ACCEPT BIDS OR OFFERS

21.3.1 A Manager may only communicate the acceptance of a Bid i.e. issue a Letter of Award and proceed to conclude the contract if the following provisos have been adhered to:

a) he/she has complied with all internal policies and procedures and obtained the AC's concurrence by means of an AC resolution or (if applicable) approved AC minutes;

b) he/she has confirmed that there is still a need for the Goods/Service(s);

c) he/she has confirmed that the appropriate funds are still available;

d) the value of business awarded is within the level of his/her powers to contract in terms of his Delegation of Authority;

e) where the value exceeds his/her powers, he/she shall obtain a mandate from higher authority to conclude and administer the contract; and

f) where the value of business exceeds the relevant OD CEO's Delegated Powers to contract, the relevant higher authority (e.g. Transnet GCSCO, GCFO, GCE, BADC or Transnet Board) must conclude the contract. Alternatively, a mandate must be sought from the relevant higher authority in Group in favour of the OD CEO to conclude and administer the contract. The award can be to one or more specified contractors for a specific amount/s, but the cumulative value of the business (individual contracts) shall determine the approval authority required. As stipulated in the Transnet DoA Framework, it is advisable to obtain a written mandate from that Approval Authority (as defined) to administer the contract and to effect amendments to it not exceeding 10% of the initially approved contract value. Such mandate must be in writing and kept on the appropriate file for record purposes.

21.4 NOTICES OF ACCEPTANCE AND NON-ACCEPTANCE OF BIDS TO BE FINALISED

21.4.1 As soon as possible after approval to award a contract has been received, the OD which invited the Bids shall arrange to inform the Successful or Preferred Bidder(s) of the acceptance of his Bid. This notice may only be communicated by a person with the necessary DoA, or a person with a written mandate for a specific contract. Unsuccessful Bidders shall be advised in writing of the name of the Successful Bidder. On award of business to the Successful Bidder all unsuccessful Bidders must be informed of the reason as to why their Bids had been unsuccessful, e.g. price, delivery period, Quality, SD, preference or any other applicable reason. Please refer to the standard regret letter templates available on the iSCM Transnet Intranet. It is essential that the reasons for not accepting a Bid are factually correct, as the regret letter could form the basis for litigation against Transnet.

21.4.2 The details of the contract award must be placed on the Transnet internet site. These details must include:

a) bid number and description;

b) name(s) of the Successful Bidder(s) and preferences claimed;

c) the contract price(s); and

d) the duration of the contract.

21.5 APPLICATIONS RECEIVED IN TERMS OF PAIA

Should an application be received in terms of the Promotion of Access to Information Act (PAIA) or the Promotion of Administrative Justice Act (PAJA), the matter should be referred to either the OD Legal Department or Group Legal. It is important to note that all requests received in terms of PAIA or PAJA must be dealt with immediately, as there are deadlines within which to respond to the requestor.

21.6 DELIVERY OF ACCEPTANCE TO BIDDER

21.6.1 When a Bidder has been advised by letter of the acceptance of his Bid, the South African Post Office shall be regarded as the agent of the Bidder and delivery of such notice of acceptance to the above-mentioned offices shall be considered as delivery to the Bidder.

21.6.2 Where a Bidder has been informed per fax of the acceptance of his Bid, the acknowledgement of receipt transmitted by his fax machine shall be regarded as proof of delivery to the Bidder.

21.6.3 Where a Bidder has been informed by e-mail of the acceptance of his Bid, the "delivered message" on the sender's mailbox will be regarded as proof of delivery. Where the bidder's mailbox is set to allow for "Read messages" to be transmitted to the sender, these should also be kept as an audit trail.

21.7 FORMAL WRITTEN CONTRACT (LETTER OF AWARD)

A formal commitment in the form of a written contract is entered into with the Successful Bidder (Letter of Award)

Contracts provide the framework to mitigate risks and to measure operational and financial performance as well as compliance with business obligations and regulatory requirements.

A contract arises when an offer made by the Bidder is accepted. The Bid submitted by the Successful Bidder, read together with Transnet's letter of acceptance and terms and conditions of the RFP, constitute a binding contract between Transnet and the Bidder. Usually, this constitutes an "interim" contract until such time as Transnet and the Successful Bidder have been able to conclude a written contract to formalise their contractual relationship.

Although a verbal contract is equally binding on the parties, it is Transnet's policy that only formal written contracts shall be entered into with the Successful Bidder unless the Goods or Services are for immediate delivery or execution, in which case a formal order must be processed.

21.7.1 Letter of Intent (LOI)

a) A Letter of Intent is issued when a Bidder has been selected as a Preferred Bidder. The LOI informs the Preferred Bidder of Transnet's intention to negotiate and conclude a contract with it. The LOI also makes it clear that if a contract

cannot be agreed upon, Transnet reserves the right not to award the business to the Bidder. No contractual or other legal rights are vested in a Bidder purely by virtue of having been issued a LOI.

b) The validity of such LOI should be for a limited period only and every effort must be made to finalise the signing of the contract within the shortest possible period. The extension of the validity period of a LOI should be avoided and only considered in exceptional circumstances.

c) Only if the Goods/Services are critical for operations, will it be permissible to draw off a LOI, whilst the negotiation process is underway. In such cases the LOI serves as a proxy for the binding legal agreement and under its authority Transnet may place orders on the supplier for its interim requirements, during which period the final agreement will be negotiated and finalised between the parties. Should negotiations between the parties break down for any reason, the supplier may immediately invoice Transnet for all reasonable costs for Goods/Services delivered (based on proof of delivery). Such amounts shall become due and payable by Transnet.

d) It is important to note that the longer the LOI is allowed to continue, the less likely it will be that Transnet will be able to leverage its negotiating power to change a contract condition to benefit Transnet.

e) When issuing an LOI, one of the approved standard templates available on the Intranet must be used.

21.7.2 Use of Transnet's Standard Agreements

Where Transnet has standard agreements or terms and conditions in place, it is imperative that the standard template (available on iSCM Transnet Intranet) be used unless there are cogent reasons why such standard agreements cannot be used in a particular instance. Any omissions or additional clauses to such standard agreements must be captured in a schedule of special conditions. Should it not be possible to utilise a standard agreement, any non-standard agreement must be vetted and signed off by the relevant OD's Legal Department or Group Legal. The deviation from the standard agreement must be properly motivated.

It is always advisable to include Transnet's standard requirements/terms and conditions/agreements in the bid documents and/or RFPs. The respondent(s) will therefore be made aware of Transnet's requirements/expectations in advance.

21.7.3 Process for expediting contracts

On award of the bid, the following process must be followed in expediting a formal contract:

a) The employee responsible must draft the contract using the appropriate Standard Template plus a schedule and service level agreement (SLA) (where applicable).

b) He/she must present the draft contract and SLA to the Transnet representative with the requisite DoA and obtain his/her approval of the contract and SLA in principle.

c) Two duplicate originals of the contract and SLA must then be presented to the external party for signature.

d) Once the external party has signed, the duplicate original contracts and SLA must be returned to the Transnet representative with the DoA for signature.

One original must be forwarded to the external party and the other must be kept by Transnet.

e) The contract and a copy of the SLA must be stored in a secure repository and be readily available when reference to it is required.

21.7.4 **Non adherence to existing contracts ('Maverick Spend')**

a) As a general rule, Transnet is required to acquire the relevant Goods/Services only from the contracted supplier. Transnet is exposed to legal risk if it purchases Goods/Services outside of the contract.

b) If any person wishes to buy outside of a contract, the prior approval of the relevant Manager is required.

21.7.5 **Formal contracts are to be entered into in the name of Transnet SOC Ltd**

All contracts shall be concluded, as soon as possible after the award of the business to the Successful Bidder, in the name of Transnet SOC Ltd, according to guidelines issued. It shall be signed for and on behalf of Transnet by a Manager with the appropriate DoA.

21.7.6 **Transnet may insist on a suitable security/guarantee for fulfilment of contract**

a) When security has to be provided by Successful Bidders in terms of the contract, the delegated Manager entering into a contract shall ensure that adequate security is obtained for the fulfilment of the contract. It shall preferably be in the form of a guarantee by a bank or approved guarantee corporation, or a deposit with Transnet of approved Government or municipal stock in negotiable form. All securities shall be safely held by the OD concerned which shall keep a register thereof and shall ensure that the security does not lapse before the contract is completed.

b) Cash deposits or a "guarantee" in the personal name of an official of a bank or other institution is not acceptable.

c) Provided that the contract document allows for that, one can also retain part of the payment as retention money. Retention money (performance guarantees), normally 5 to 10% of the individual payments, is held back by Transnet as a guarantee for the satisfactory completion of the project. When such amounts have accumulated sufficiently, consideration is normally given to the refunding of the guarantees or sureties. Retention money is only refunded after completion of the guarantee period (normally 6 to 12 months, depending on the risk of latent defects).

d) Depending on the risk to Transnet, these measures may be relaxed to facilitate Transnet's B-BBEE objectives to develop small or emerging black companies.

21.8 CONTRACTING WITH SECOND-RANKED BIDDER

In the following cases Transnet will be allowed, at its sole discretion, to consider accepting the second most favourable Bid, provided that this option is exercised within a reasonable period after the initial award:

21.8.1 when a Successful Bidder, after having been informed of the acceptance of its Bid, fails to sign a contract within a reasonable period after being called upon to do so;

21.8.2 when a Successful Bidder has failed to provide the necessary security, if required;

21.8.3 when a Successful Bidder fails to meet a condition precedent for the award of business (e.g. to obtain the necessary funding, provide valid and/or original tax clearance certification, etc.), or

21.8.4 when final contract negotiations with a Preferred Bidder fails and a contract is not agreed upon; and

21.8.5 it is not practical within the time available to call for fresh Bids.

The award of business to the second ranked Bidder must be approved by the relevant AC.

21.9 APPROVAL OF CONTRACTS FOR PERIODS EXCEEDING TWO YEARS

The Main AC is to approve all contracts for periods exceeding two Years

No contract shall be entered into for a period longer than two Years without the main AC's (or the person with DoA) written approval, except for large construction contracts where the period allowed will be the completion period of the project. The same principle also applies with respect to the extensions of contracts, i.e. the initial period of the contract together with the extension may not exceed 2 Years without the main AC's (or the person with DoA) approval.

Property leases are also excluded from these Procedures and approval levels are determined by means of the Delegation of Authority of those employees, CEO's and higher authorities of the relevant property division/s.

CHAPTER 22 : POST AWARD CONTRACT MANAGEMENT

(Also refer to the Contracts Management Manual available on the iSCM Transnet Intranet)

Contract Lifecycle Management (**CLM**) is "the process of systematically and efficiently managing contract creation, execution and analysis for maximising operational and financial performance and minimising risk".[7]

Contract Management is an end-to-end process but is often confused with the concept of contract administration which constitutes only one part of it. This Chapter addresses the core components and activities of post-award Contract Lifecycle Management, including contract administration:

Delivery Management	to ensure that the Goods and/or Services are being delivered in accordance with agreed performance, costs and Quality levels set out in the contract
Supplier Relationship Management	to manage Transnet's relationship with the supplier in order to develop and maintain an open and constructive association with the supplier
Contract Administration	to undertake the formal contractual processes and obligations required and to comply with Transnet's post-award policies and procedures

In addition there are three fundamental aspects for consideration in relation to performance measurement:

PERFORMANCE FEEDBACK	SOURCE
Factual, objective information from the supplier	Normally obtained from IT systems and managed by outputs from the Service Level Agreement (**SLA**)
Feedback from users concerning Service/Goods received	A supplier relationship function, typically through questionnaires, surveys, telephone or face-to-face enquiry
The supplier's own experience of dealing with Transnet	A supplier relationship function, reported through supplier feedback

22.1 POST-AWARD FUNCTIONS

The immediate post-award contract management activities establish the basic awareness and procedures required to initiate Transnet's on-going contract management obligations. These include:

- Ensuring that all relevant parties are aware of their roles and responsibilities in the immediate implementation and transition process;
- Checking that the agreed processes for contract management are in place by both parties;
- That knowledge transfer from the procurement or project team (which may not have included members of the contract management team) to the contract management team takes place to ensure successful management of the contract

[7] *Source: Aberdeen Group*

- That, where necessary, the continuity plans for the seamless transition of the Service from the previous supplier to the new supplier will be carried out as agreed.

22.2 DELIVERY MANAGEMENT

This activity is concerned with Transnet's ability to measure the supplier's performance in terms of the contract, whilst managing the associated risks. It is important that the performance measures selected provide clear and demonstrable evidence of the success (or otherwise) of the contractual deliverables. In principle, issues such as the following should typically be considered:

- cost and value obtained;
- performance and customer satisfaction;
- delivery improvement and added value;
- Supplier Development (SD), Empowerment and Local Content (LC) where applicable;
- delivery capability;
- benefits realised; and/or
- supplier responsiveness.

22.2.1 Service Level Agreements (SLAs)

Contracts with suppliers will normally define the service levels and terms under which Services are to be provided. Service level management includes assessing and managing the performance of suppliers to ensure value for money.

It is generally beneficial to establish an SLA, since an SLA creates a common understanding about services, priorities and responsibilities of both parties. Transnet must decide in each instance whether or not it is appropriate to utilise an SLA. However, the default position should be to establish an SLA.

Where applicable, an SLA must be put in place with the Successful Bidder to ensure proper performance management and to mitigate any financial, operational, safety, environmental or reputational risks which may arise during the term of the contract.

The SLA shall, at the very least, govern the following aspects:

- representative(s) from both parties who will attend the meetings;
- schedule of meetings;
- venue(s) for meetings;
- party responsible for taking minutes (to be approved by both parties prior to circulation);
- risk areas to be measured (refer sub-paragraph 22.2.10 below);
- size of the samples to be tested in terms of performance management;
- key performance indicators (KPI);
- required outcomes;
- commitment to remedial actions, when needed;
- reporting on the results; and
- dispute resolution procedure in the event of disagreement or deadlock between the representatives of the parties (dispute resolution procedures are normally set out in the contract, failing which it is the Transnet Relationship Manager's responsibility to set out the procedures to be adopted – refer sub-paragraph 22.3.2 below)

22.2.2 Performance Scorecard

Service levels should be agreed and benchmarked for both Transnet and the supplier and should be:

- established at a reasonable level; if they are set too high they will attract additional charges from the supplier;
- prioritised by Transnet in order of importance and on agreed scales, for example; critical, major, urgent, important, minor;
- easily monitored (objective, tangible and quantifiable);
- unambiguous and understandable; and
- open to renegotiation at any time.

A performance management scorecard reflecting the performance of both parties should form an integral part of the SLA.

(See table below for a typical example of a scorecard for the purchase of Goods)

TABLE 17

KPA	Sample	KPI	Acceptable	Assessment	Remedial Action
DELIVERY	*Daily* all deliveries	On time	99% on time	*88%*	*Supplier to improve to 92%*
	Daily all deliveries	Accurate	99% accurate	*100%*	*N/A*
	Daily 1 in 5 deliveries	Lead-times met	99% lead-times met	*40%*	*Supplier to improve to 70%*
	Daily all deliveries	Paperwork in order	100% paperwork correct	*100%*	*N/A*
QUALITY	*Daily* 1 in 5 deliveries	No. of items rejected by GR	<2% Items rejected	*0*	*N/A*
	Weekly all deliveries	No of items rejected by production	0 items rejected	*0*	*N/A*
	Weekly 1 in 2 deliveries	Items properly packed	<3% Items incorrectly packaged	*0*	*N/A*
PRICE REVIEW	*Monthly* 10 prices	Price charged vs. market	95% of items in market pricing range	*91%*	*Supplier to improve to 95%*
PAYMENT	All payments	Payment within 30 days	90% payments on time	*40%*	*Transnet to improve to 80%*

22.2.3 Performance review meetings

The following must be observed by the Relationship Manager (refer sub-paragraph 22.3.1 below) prior to and/or during the performance review meetings between Transnet and the supplier:

- ensure that performance review meetings are convened at intervals as agreed upon with the supplier;
- ensure that tangible proof of the supplier's performance against all the KPAs is obtained prior to the meeting;
- proper minutes shall be kept of all performance meetings; and
- over and above the requirement that minutes should be kept, a specific record (paper trail) shall be kept of recurring instances of poor performance by the supplier. Such record shall reflect the various performance assessments, interventions by the contract Manager, the remedial actions agreed upon, and the results thereof.

22.2.4 Performance monitoring

a) A process for monitoring the delivery of the suppliers must be set up by management to ensure continuing adherence to the supplier contract and service level agreements. Suppliers must be monitored against agreed performance metrics defined in service level agreements and contracts, it must be confirmed that suppliers are meeting current business requirements.

b) Contracted fees must be in line with fees specified in the contracts.

c) Performance metrics must be periodically reviewed to ensure that they continue to support business requirements. Improvements in price, Quality or service must be sought and, where possible and built into the contract terms.

d) Benchmarking against similar organisations, appropriate international standards or recognised industry best practices must be undertaken. Benchmarking results must be used to evaluate and compare supplier prices and services. Results of benchmarking must be used to make adjustments to current supplier contracts and agreements.

e) Independent audits must be undertaken with key suppliers and recommendations obtained from independent audits must be reviewed by Transnet management for subsequent use to improve delivery.

22.2.5 Adherence to contractual sourcing (Goods)

For Goods manufactured in South Africa:

When a contract is placed for Goods to be manufactured in South Africa, the supplier may not be permitted to substitute imported Goods without the AC's prior written approval. For contracts of values below the AC's jurisdiction, the Manager concerned may decide whether imported Goods can be substituted. Where the supplier has secured the business by reason of the Local Content offered, it shall not be allowed to substitute imported Goods for those to be supplied from South African sources. An exception to this ruling may only be considered when the supply from the South African source has been curtailed due to reasons beyond the supplier's control.

22.2.6 Conformance with specifications and delivery instructions (Goods)

a) Inspection and shipment/delivery of Goods:

All Goods are to be delivered strictly in accordance with the contract. Timeous arrangements must be made by Transnet for the inspection and/or shipment and delivery arrangements, as indicated by the contract terms.

(i) In the case of imported Goods:

The supplier must notify Transnet or its nominated clearing and forwarding agent as to when consignments are to be ready for inspection and/or shipment in order that arrangements may be made for inspection and/or shipment, except in instances where it has been specified that the Goods shall be inspected at destination. (Refer *Appendix C – ICC Incoterms 2010* for further details relating to alternative purchase terms and related responsibilities of seller and buyer).

(ii) In the case of locally manufactured Goods:

- where Quality is not assured by means of SANS, ISO or other standards, suitable Quality assurance mechanisms must be provided for in the contract e.g. inspections during manufacturing process, inspections at point of despatch or delivery. A suitable clause should be included in the relevant contract to the effect that Transnet reserves the right to return defective Goods for replacement in accordance with specifications;
- where Goods are of such a nature that Quality inspections are not deemed necessary, a suitable clause should be included in the relevant contract to the effect that Transnet reserves the right to return defective Goods for replacement in accordance with specifications.

b) Acceptance of Goods received:

Transnet employees responsible for the receipt of delivered Goods must ensure that all Goods are provided:

(i) strictly in terms of the contract, i.e. the delivery note may not differ from what was required in terms of the contract or purchase order; and

(ii) that the Goods delivered correspond exactly with the delivery note, i.e. short supplies should be clearly endorsed on the delivery note and over-supplies should be returned to the company, with the delivery note clearly endorsed as such.

22.2.7 Remedy for repetitive instances of poor performances

Where poor performances have been recorded and when no improvement in performance has been demonstrated by the supplier after several interventions on the part of the Transnet representative (including the imposition of penalties, where applicable – refer sub-paragraph 22.2.8 below), the following remedies should apply:

a) Should the contract Manager believe that the supplier is unlikely to improve its performance, the Manager must approach OD Legal or Group Legal to obtain direction regarding cancellation of the contract; and thereafter

b) Procurement is to initiate the blacklisting process, if appropriate.

It is of utmost importance that the specific additional record (a paper trail) of recurring instances of poor performance by the supplier is available to inform the recommendation to cancel the contract and/or to blacklist (see Chapter 23, paragraph 23.4 for Blacklisting protocols).

It must be remembered that poor performance amounts to breach of contract. Transnet's contracts contain a standard "breach clause" in terms of which a defaulting supplier must be notified of the breach and afforded an opportunity to remedy the breach. Only if this fails may steps be taken to cancel a contract.

22.2.8 Imposition of penalties

a) A penalty is a stipulation in a contract (a "penalty clause") providing that a party who acts in conflict with its contractual obligations must pay a sum of money to the other party. Where a contract provides for penalties in the event of breach such penalty should be enforced.

b) However, unless a contract expressly provides for a penalty, a penalty may not be imposed. Where a contract does not contain a penalty clause Transnet must sue for damages arising from breach of contract. Damages must be recovered by way of litigation and only after the amount of damages is proven and awarded by a court.

c) Transnet cannot recover both penalties as well as damages. Furthermore, Transnet cannot claim damages in lieu of penalties unless the contract states so specifically.

d) Penalties should be reasonable and not out of proportion to the prejudice suffered. In terms of the Conventional Penalties Act 15 of 1962, a court may reduce a penalty if it is unreasonable, disproportionate and inequitable.

22.2.9 Failure by a supplier to perform - liability for additional expenses

The bid documents (as well as the eventual contract) shall make provision for the Bidder to undertake that if, after it has been notified of the acceptance of its Bid, it fails to perform, whether by not entering into a contract or by not undertaking any steps when requested to do so within a period stipulated in the bid conditions or within such extended period as Transnet may allow, the supplier will be held liable for any additional expense which Transnet may incur in having to call for Bids afresh and/or accepting any less favourable Bid to complete the whole or remaining portion of the contract. In addition, consideration can also be given to placing such a contractor on Transnet's List of Excluded Bidders (See Chapter 23).

22.2.10 Risk Management

Risk can be defined as 'the probability of an unwanted outcome happening".

It is advisable to seek to remove or at least mitigate risk whenever possible before contract award. The obligations placed upon buyers to analyse, assess and mitigate risk during the pre-award stages of contract management are dealt with in previous chapters of this PPM. These pre-award activities can be collectively summarised as follows:

Analysis	The process of identifying all potential issues that can go wrong with an activity and estimating the probability of each happening
Assessment	The process of assessing the likely impact of a risk on Transnet
Mitigation	Having assessed the risks and identified those requiring action, responsibility for managing and mitigating them is allocated, which allocation must be dependent on the assessment of the likelihood and consequence of the risk

Contracts provide the framework to mitigate risks and to measure operational and financial performance as well as compliance with business obligations and regulatory requirements.

Post-award risk management undertaken during the contract period comprises those activities associated with identifying and controlling the risks that may potentially affect the successful fulfilment of the contract. Risks to the contract include such issues as:

- lack of capacity of the supplier, particularly if there are significant increases in demand;
- reduction in demand leading to higher unit costs borne by the supplier;
- an event which causes an increase in the total price to Transnet;
- an event which causes a programme delay;
- supplier staff changes;
- changes to the supplier's business objectives;
- deterioration in the supplier's financial standing;
- demand changes that cannot be met by the supplier;
- deterioration of Quality;
- *force majeure* issues;
- market fluctuations for commodities; and/or
- labour unrest.

When a risk is anticipated or perceived, to manage this involves the parties working together to identify *who* has the responsibility for the risk, the *method* of minimising it and *how* the risk will be managed. In order to do so the contract Managers must undertake the following actions:

- establish a binding process to encourage early warning system for issues such as those mentioned above;
- identify the party best able to control the situation leading to the risk occurring;
- identify the party best able to control the risk itself;
- identify who should be responsible if the risk cannot be controlled; and
- if the risk is transferred to the supplier, establish whether or not this cost will fall to Transnet, whether transfer will introduce new risks and the legal position of any such transfer.

Finally it should be considered that business risk cannot be transferred to the supplier and that the ultimate responsibility will always remain with Transnet for any failure in the fulfilment of a contract.

22.3 SUPPLIER RELATIONSHIP MANAGEMENT

In addition to the contractual and commercial aspects with Transnet's suppliers, a healthy relationship between Transnet and its suppliers is fundamental to the effective management of a contract. Management structures for contracts need to be designed to facilitate such a healthy relationship. There must be set procedures for raising and handling issues, so that these are dealt with as early as possible and at the appropriate level within the organisations.

The value, risk and strategic positioning of a contract will dictate the appropriate degree of supplier relationship management to be established per contract. This decision must be made by the OD's CPO and recorded accordingly in the supplier's contract file.

22.3.1 Supplier Relationship Managers

a) Transnet management must appoint relationship Managers (a "Relationship Manager") to be responsible for ensuring the quality of the relationships with suppliers. Relationship Managers are responsible for liaising between Transnet and the supplier regarding issues arising and must retain accountability for provisions and Quality of services delivered by suppliers. Supplier roles and responsibilities and Transnet roles and responsibilities for management of overall supplier relationships and individual supplier contracts must be defined and communicated to Transnet and the suppliers. Those involved in managing the supplier must understand Transnet fully and know the contract documentation thoroughly. This is essential if they are to understand the implications of problems (or opportunities) over the life of the contract.

b) Transnet and suppliers need to understand the objectives and business of each other. Transnet must have clear business objectives, coupled with a clear understanding of how the supplier will contribute to them. The supplier must also be able to achieve its objectives, including making a reasonable margin.

c) Supplier relationship management must maintain mutual trust and understanding, openness, and excellent communications which are key to the fulfilment of the formal contract terms and conditions.

22.3.2 Duties of a Relationship Manager

The activities of a Relationship Manager that must be accomplished to effectively manage a Transnet supplier are summarised as follows:

- Relationship Managers must control the technical relationship between Transnet and the supplier regarding the schedule of requirements or statements of work and specification as per supplier contracts and service level agreements.
- Relationship Managers must communicate potential issues for mitigation and immediate diffusion before issues are escalated.
- Relationship Managers will establish and manage a communication framework for the supplier for which they are responsible and ensure that it is employed effectively to sustain communication flow.
- Informal issues resulting in concerns in a supplier relationship must be identified and resolved by the Relationship Manager.
- Relationship Managers can identify and recommend changes to supplier arrangements, communication flows, supplier contracts and SLAs to ensure an effective relationship is maintained.
- Regular formal and informal reporting procedures will be established by Relationship Managers.
- Relationship Managers must be actively involved in supplier dispute resolution processes.
- Relationship Managers will organise the necessary forums, working groups, seminars, road shows, training sessions and other information activities involving Transnet staff and suppliers.
- Ways to improve supplier relationships wherever possible must be proactively considered by Relationship Managers, based on end-user and supplier feedback.

22.3.3 Factors that can inhibit the development of a successful supplier relationship include:

Frequent and rapid recourse to the formal contract to overcome problems
Clashes in company cultures which are so disparate as to prevent the creation of the level of trust and confidence required
Reluctance by the supplier to cooperate in value for money or benchmarking tests conducted by Transnet
Commercial issues, for example lack of real competition resulting in uncompetitive poor value for money terms from the supplier, or conversely that Transnet is critically dependent on one supplier leading to price rise vulnerability and/or problems of management capability, resources or financial capitalisation
Too frequent demands for submission of competitive Bids which reduces trust in the relationship

22.3.4 **Factors that encourage the development of a successful supplier relationship include:**

Securing senior level support in both organisations
Recognising that actions and attitudes affect the tone of the relationship
Ensuring that the governance arrangements are fair
Ensuring that the relationships between the parties are peer-to-peer as far as possible
Ensuring that roles and responsibilities are clearly understood by both parties and that the necessary authority levels have been ascribed
Ensuring that escalation routes are clear and understood but that problems are resolved as early as possible and as low down the management tree as possible
Separating strategic matters from the day-to-day service delivery issues
Ensuring that appropriate attitudes and behaviours are practised and displayed to assist the promotion of a positive and constructive relationship

22.4 CONTRACT ADMINISTRATION

This activity is concerned with the practicalities of the relationship between Transnet and the supplier and the operation of the routine administrative and clerical functions. The importance of contract administration to the smooth running of post-award contract management must not be underestimated and should be resourced appropriately. This is the responsibility of Transnet's Relationship Manager.

The typical functions included under post-award contract administration responsibilities are:

- Change control;
- Charges and cost monitoring;
- Ordering and payment procedures;
- Budget controls;
- Contract meeting schedules and minutes;
- Resource management and planning; and
- Contract termination or extension/renewal.

All the above issues should have been addressed at the pre-award stage and included in the contract documentation, as applicable. The role of Transnet's Relationship Manager is to

manage these functions during the term of the contract. Certain key administrative issues and the governance thereof are further addressed in the following paragraphs.

22.4.1 Change control procedures

Changes will almost inevitably occur during the period of a contract and managing these changes is a particularly important activity. Formal change control procedures should be designed and set out in the original contract documentation to avoid misunderstanding and ambiguity about roles, responsibilities and the actions to be taken in any given situation.

The procedures need to be comprehensive but also flexible and straight forward and should cover such issues as:

- How to request changes, including additional demands placed on the supplier
- Assessing the impact including contractual implications
- Prioritisation and authorisation levels
- Agreement on methodology
- Controls for implementation

22.4.2 Extension of contracts

The relevant legal principles are explained as follows:

a) A contract may be extended before its expiry date. This will involve an agreed Material Amendment to the existing terms and conditions of the contract. Where the contract expressly allows for an option to extend or renew, such prescribed extension or renewal process must be followed before the termination date.

b) A contract that has lapsed or expired cannot be extended. The purported "extension" of an expired contract either for a given period (e.g. 1 Year) or on a month-to-month basis has inherent risk, because the terms and conditions safeguarding Transnet would have expired with the original contract itself. Transnet would have effectively entered into a "new" contract without the safeguards of the initial contract. This could also give rise to irregular expenditure in terms of the PFMA.

22.4.3 In view of the legal principles set out above, the practice of extending a contract after its termination date is considered to be irregular.

The following approach with regard to the extension of contracts must be followed:

a) Any request for the extension of a contract must be submitted to the AC at least 45 (forty-five) Working Days before the contract is due to expire. This is to ensure that the AC may consider the request before the expiry date.

b) A request for the extension of a contract must indicate whether such extension is as a result of exercising an option to extend or whether the extension sought amounts to an amendment to the contract.

c) Any request for the extension of a contract for a given period (e.g. 1 Year) or on a month-to-month basis should contain proof that the supplier is willing to extend the contract based on the same or better terms and conditions for Transnet.

d) No request for the extension or renewal of a contract after the expiry date of the contract shall be entertained and any proposed continuation of business shall be regarded as a new sourcing event, i.e. open RFX, Confinement or to be effected under laid down emergency procedures.

e) In the event that the contract has been allowed to exceed its termination date, such irregular "extension" shall be submitted to the AC for condonation of the action taken.

f) Should a supplier request extension of the contract completion date, the relevant circumstances must be considered in order to reach a fair decision in response to such a request, as follows:

(i) Where the bid document or contract stipulates that completion of the works, services, project or delivery of the Goods has to take place by a specified date and the supplier completed it / handed it over only after the contractual completion date, penalties may be raised under the terms of the contract.

(ii) A supplier may apply for an extension of the contract completion date if it considers that the reasons for late completion were/are:

- beyond its control (e.g. *Force majeure* events such as acts of God, rain, floods or earthquakes);
- whereas the supplier had exercised reasonable control, the late completion could not have been foreseen, minimised or prevented; and/or
- or the delay(s) had been attributable to Transnet

(iii) The supplier's claims in terms of (ii) above may be lodged at any time during the course of the contract or after the expiry date and must be substantiated by means of site diary entries, etc. Transnet then has to consider the reasoning and if considered to be valid, shall recommend to the AC the refund of some or all penalties already levied in terms of the contract or the waiving of some or all penalties.

(iv) Late completion of the contract due to valid reasons will require an extension of the contractual completion date. This would constitute a Material Amendment to the contract and would require AC approval. Should the extension of time be granted, i.e. approved by the AC, the supplier shall be entitled to price escalation over the extended period only if escalation has been provided for in the original contract.

(v) If Transnet does not consider the supplier's claim for an extension of time to be valid, the contract completion date may nevertheless be extended but penalties may be imposed in terms of the contract. Price escalation will also not be payable after the official completion date. However, Transnet is not obliged to grant the supplier's request for an extension of time and may (especially in instances where time is of the essence) decide to cancel the contract.

(vi) A waiver or reduction of penalties would constitute a Material Amendment to the contract and would require AC approval.

22.4.4 Exercising options

a) If Transnet wishes to reserve the right to extend a contract period, this should be stipulated upfront in the RFP. Furthermore, the inclusion of this option must be brought to the attention of the AC (or the person with DoA) when the initial recommendation to award the business is made.

b) Should it be decided to exercise the option during the course of the contract, the recommendation to exercise the option must be submitted to the AC for prior written approval in the normal manner. An indication must be given at that stage that the exercise of the option is still the best value in the market place (also see paragraph 9.2 and 22.4.3(b)).

22.4.5 Involvement of AC in material contract amendments

Goods/services contracts

These contracts are normally fixed term contracts. The AC must approve all Material Amendments to contracts within their threshold and recommend those above their threshold. This applies even if the initial award had only been submitted for the information of the AC, e.g. an emergency procedure or business awarded via the 'confine and award' process.

Extension of contracts, additional work, increase in quantities, price amendments, cession and assignments, waiving of penalties, etc., are all examples of Material Amendments to contracts, and need prior AC approval.

Where a contract specifies:

(i) estimated quantities at unit prices in respect of "as-and-when required" purchase or service contracts; or

(ii) specified quantities at unit prices in respect of purchase or service contracts over a fixed period,

a Manager may approve any increases or decreases in quantities or additions or additional work of which the total value does not exceed 10% (10 per cent) of the original value of the contract, and must inform the AC accordingly.

This provision does not include price escalations not provided for in the contract, i.e. the same goods to be provided at an increased price. Such matters should be presented to the AC for prior approval regardless of the value of the proposed increase in price.

22.4.6 General amendment principles

General principles applying to amendments of both Goods/Services and engineering/construction-type contracts include the following:

a) where the original value of the contract falls below the AC's jurisdiction, a Manager may approve additions, increases or decreases provided the total value of the contract does not exceed his/her Delegated Powers. However, if the original contract value is below the AC's jurisdiction but amendments bring it within the AC's jurisdiction, the matter must be submitted to the AC; or

b) where the value of the contract falls within the AC's jurisdiction, a Manager may approve the amendment of non-material provisions (less than 10% of the original contract value) provided that such amendment shall be reported for the information of the AC as soon as possible thereafter; or

c) where any material provision needs to be amended (e.g. price or delivery date, cession and assignment of contract, or the termination of a contract, waiving or reduction in penalties, etc.) the Manager concerned shall submit a recommendation for AC consideration together with supporting documentation indicating that the proposed amendment to the contract is in the best interest of

Transnet, that it represents the optimal value for Transnet, and how this has been determined.

Following AC approval such amendment needs to be signed off by the person with DoA who signed the initial contract (or the person mandated to do so) provided the cumulative value of the contract and subsequent amendment(s) still falls within his/her DoA.

22.4.7 Contract closure

This stage concerns the activities associated with finalising the close-out or termination of a contract, whether in accordance with the expiry date or as a result of early contract cancellation. Depending on the nature of the contract, such activities may include the following:

- Complete all administrative matters;
- Record all technical issues have been resolved;
- Determine the extent of any liquidated damages to be deducted from the contract price made against or received from the supplier;
- Record the end of retention and guarantee periods, plus date of final inspection;
- Record the date of release of retention and/or bank guarantees;
- Agree to limits on any on-going obligations, including warranties;
- Record any material reconciliations;
- Transfer any assets, including data, intellectual property and loan items;
- Transfer operating systems (as applicable) to new/replacement supplier;
- Conclude final contract payments;
- Summarise claims made against or received from the supplier; pr
- Ensure retention of records (refer sub-paragraph 22.4.8 below)

On completion of the above activities agreement should have been reached between Transnet and the supplier on all technical and commercial aspects of the contract.

22.4.8 Safe custody of Bid documentation, contracts and contract files

a) Each OD shall arrange for the safe custody of Bid documentation and contracts at a suitable, approved, centralised or regional location.

b) Related documents which should be kept on contract files as part of the contract records include, but are not limited to, documents such as
   - RFP (requisition);
   - the going to market strategy and approval;
   - bid Advertisements;
   - authorisations to confine;
   - minutes of relevant meetings/briefings;
   - evaluation score-sheets;
   - TEAR reports;
   - declaration of interest documents signed by members of evaluation teams and post bid negotiation teams;
   - certificates authorising communication with Bidders;
   - agendas and minutes of post bid negotiation meetings;

- correspondence with Bidders;
- RFX offer from Successful Bidder;
- letters of award and non-award;
- Letter of Intent;
- Approvals of draft contract (sign off schedule);
- Executed original copy of contract;
- Vendor Application Form;
- Insurance details (if applicable);
- Original and valid SARS VAT and Tax Clearance Certificate (to be update annually);
- B-BBEE Verification Certificate;
- Contract Addendums (if any); and
- Confirmation of expiry or extension to contract.

Refer to the iSCM Transnet Intranet for the checklist template of documents and signoffs which should be kept on contract files.

22.4.9 Document Retention

The following may be used as guidelines as to how long records should be retained:

a) Unsuccessful Bids must be kept for 5 Years after completion of the contract, and thereafter may be destroyed.

b) Successful Bidder's Bid/contract document, as well as the contract file and related general correspondence must be kept on site in a proper and safe archiving facility for a period of 5 Years after completion of the contract, and thereafter may be archived in an off-site archiving facility in compliance with normal archiving procedures.

These files should be properly archived and recorded by means of a formal register so that they can be easily traced when required for audit investigations and/or litigation purposes.

22.4.10 CONTRACT LIFECYCLE MANAGEMENT METHODOLOGY

Transnet has a standardised Contract Lifecycle Management (CLM) methodology. It is a requirement in terms of this PPM document that these CLM prescripts be followed. **INDICATIONS OF SUCCESSFUL CONTRACT MANAGEMENT**

22.5 Successful contract management will achieve benefits by:

Managing Transnet's own responsibilities during the contract
Ensuring the supplier meets the minimum performance criteria, such as compliance
Allowing the achievement of both short and long term supplier performance improvement through developing effective supplier relationships
Ensuring that suppliers deliver Goods/Services of the agreed quality and price
B-BBEE and SD commitments are closely monitored and enforced
Reduction of costs and continuity of supply
Roles, responsibilities, rights, obligations of all stakeholders are clearly communicated and understood

- Early identification and resolution of poor performance and disputes thereby minimising risks
- Eliminating unethical practices within Transnet
- Enhanced Supplier relationships through the visualisation and establishment of win-win scenarios
- Entrenching uniformity of managing contracts and the principle of fairness
- Creating a database of lessons learnt to aid future planning through the dissemination of good practices
- Increased competitive and strategic advantages through effective control and visibility of contracts
- Evaluation of the specification against contract performance and identification of contract changes or variations

In summary, successful contract management is indicated if:

- The arrangements for service delivery continue to be satisfactory to both parties
- The expected business benefits and value for money are being achieved
- The supplier is co-operative and responsive
- Transnet understands its obligation under the contract
- There are no disputes
- There are no surprises
- A professional and objective debate over changes and issues arising can be had
- Efficiencies are being realised

CHAPTER 23 : BLACKLISTING PROCEDURES AND GUIDELINES

23.1 DEFINITION

Blacklisting is a mechanism used to exclude a company/person from future business with Transnet for a specified period. The decision to blacklist must be based on one of the grounds for blacklisting. The standard of proof to commence the blacklisting process is whether a "*prima facie*" (i.e. on the face of it) case has been established.

The Transnet GCFO or his delegate may, upon a recommendation by the relevant AC and the Group Chief Supply Chain Officer decide that no Bid from that person or Enterprise be considered/accepted for any new contracts concluded for a specified period as may be determined.

Depending on the seriousness of the misconduct and the strategic importance of the Goods/Services, in addition to blacklisting a company /person from future business, Transnet may decide to terminate some or all existing contracts with the company /person as well.

A supplier or contractor to Transnet may not subcontract any portion of the contract to a blacklisted company.

23.2 GROUNDS FOR BLACKLISTING

23.2.1 Grounds for blacklisting include: If any person/Enterprise which has submitted a Bid, concluded a contract, or, in the capacity of agent or subcontractor, has been associated with such Bid or contract:

a) has withdrawn such Bid after the advertised closing date and time for the receipt of Bids;

b) has, after being notified of the acceptance of his Bid, failed or refused to sign a contract when called upon to do so in terms of any condition forming part of the bid documents;

c) has carried out any contract resulting from such bid in an unsatisfactory manner or has breached any condition of the contract;

d) has offered, promised or given a bribe in relation to the obtaining or execution of the contract;

e) has acted in a fraudulent or improper manner or in bad faith towards Transnet or any Government Department or towards any public body, Enterprise or person;

f) has made any incorrect statement in a certificate or other communication with regard to the Local Content of his Goods or his B-BBEE status and is unable to prove to the satisfaction of Transnet that:

(i) he made the statement in good faith honestly believing it to be correct; and

(ii) before making such statement he took all reasonable steps to satisfy himself of its correctness;

g) caused Transnet damage, or to incur costs in order to meet the contractor's requirements and which could not be recovered from the contractor;

h) has litigated against Transnet in bad faith.

23.2.2 Transnet recognizes that trust and good faith are pivotal to its relationship with its suppliers. When a dispute arises between Transnet and its supplier, the parties should use their best endeavours to resolve the dispute in an amicable manner, whenever possible. Litigation in bad faith negates the principles of trust and good faith on which commercial relationships are based. Accordingly, Transnet will not do business with a company that litigates against it in bad faith or is involved in any action that reflects bad faith on its part. Litigation in bad faith includes, but is not limited to the following instances:

(iii) Vexatious proceedings. These are frivolous proceedings which have been instituted without proper grounds;

(iv) Perjury. Where a supplier commits perjury either in giving evidence or on affidavit;

(v) Scurrilous allegations. Where a supplier makes allegations regarding a senior Transnet employee which are without a proper foundation, scandalous, abusive or defamatory.

(vi) Abuse of court process. When a supplier abuses the court process in order to gain a competitive advantage during a bid process.

23.2.3 Where any person or Enterprise has been found guilty by a court of law, tribunal or other administrative body of a serious breach of any law, during the preceding 5 Years, such person/Enterprise may also be blacklisted. Serious breaches of the law would include but are not limited to corruption, fraud, theft, extortion, or contraventions of the Competition Act 89 of 1998 (e.g. collusive tendering). This process excludes minor convictions such as traffic offences or personal disagreements between parties which have no bearing on the business operations of the person or Enterprise.

a) When issuing RFXs, prospective Bidders must be requested to disclose whether the company or any of its directors were found guilty of a serious breach of the law during the preceding 5 Years.

b) Should any prospective Bidder declare a conviction of a serious nature, the blacklisting process should be instituted without delay and dealt with expeditiously, whilst the evaluation of the bidder's Bid continues.

c) Under no circumstances may any prospective Bidder be excluded from the evaluation process or overlooked for the award of business until such time as a final decision to blacklist has been made.

23.2.4 Grounds for blacklisting include a company/person recorded as being a company or person prohibited from doing business with the public sector on National Treasury's database of Restricted Suppliers or Register of Tender Defaulters.

23.3 WHO MAY BE BLACKLISTED?

The following persons / entities may be considered for blacklisting:

23.3.1 any person/company who has submitted a Bid in response to a bid request issued by Transnet;

23.3.2 any person/company who has concluded a contract/s with Transnet;

23.3.3 any person who has acted in the capacity of subcontractor to a supplier of Transnet;

23.3.4 any agent or employee of the company concerned, or his/her spouse who may be conducting the same business but under a different name;

23.3.5 Transnet employee found to be involved in fraudulent or corrupt activities;

23.3.6 companies associated with the person/s guilty of misconduct (i.e. entities owned, controlled or managed by such persons); and/or

23.3.7 any companies subsequently formed by the person(s) guilty of the misconduct or where such person(s) acquires a controlling stake in an existing company.

23.4 FACTORS TO CONSIDER BEFORE TAKING THE DECISION TO BLACKLIST

23.4.1 A decision to blacklist has far reaching implications for the company/person concerned. Therefore, Transnet must act fairly, reasonably and rationally whenever it decides to blacklist a company/person. The decision to blacklist must be considered on a case-by-case basis and must be based on the merits of the particular matter.

The following factors must be taken into account in deciding whether to blacklist a company/person:

a) the gravity / seriousness of the offence/misconduct/breach;

b) any previous offence/misconduct on the part of the company/person;

c) any remedial action taken by the company, including steps to ensure that the misconduct will not be repeated;

d) the seniority of the person(s) who acted in bad faith;

e) the impact of the proposed blacklisting of the company on Transnet's operations;

f) the reasonableness of the explanation for the misconduct;

g) whether the company/person has received direct or indirect benefit as a result of the misconduct; and

h) whether Transnet suffered actual or potential prejudice.

23.4.2 The decision to extend the blacklist to associated companies will be at the sole discretion of Transnet and must be carefully considered. Associated companies must not be blacklisted by default. The merits of each case will inform the decision as to whether a particular associated company will be blacklisted or not. In addition to considering the factors mentioned above, as a general rule the blacklist should only be extended to associated companies where the directors/members common to both entities were either directly involved in the misconduct against Transnet, or failed to take remedial action for a serious offence. Furthermore, it is important to consider whether the blacklisted director/member plays an active role in the associated company or has a controlling stake in the associated company.

23.5 GUIDELINES FOR DETERMINING AN APPROPRIATE PERIOD FOR BLACKLISTING

Blacklisting cannot be imposed for an indefinite period. The following is a general guideline on the number of Years of blacklisting to impose on suppliers found guilty of misconduct against Transnet:

TABLE 18

Grounds for Blacklisting	Suggested Period
Offences involving bad faith / dishonesty (e.g. theft, corruption, fraud, Fronting, misrepresentation, etc.)	Not less than 5 Years, and not exceeding 10 Years
Other misconduct (e.g. breach of contract, poor performance, etc.)	1 – 5 Years (However, Transnet reserves the right to impose a longer period of restriction to a maximum of 10 Years, depending on the gravity of the misconduct.)

23.6 BLACKLISTING PROCEDURE

The following procedure must be followed in order to blacklist any person/company:

23.6.1 As soon as an OD detects misconduct by a person/company falling within one of the grounds for blacklisting, the matter must immediately be reported to the procurement division of the OD concerned.

23.6.2 Procurement will review the motivation for the blacklisting. If possible grounds for blacklisting exist; a forensic audit may be conducted to establish whether the grounds for blacklisting are valid.

23.6.3 Should the forensic report establish that possible grounds for blacklisting exist; the OD AC shall be approached for approval to proceed with the blacklisting in principle.

23.6.4 Transnet Internal Audit will be requested to conduct ITC searches on the Company and its members/directors in order to ascertain the identity of all companies associated with such members/directors.

23.6.5 The matter must then be referred to the OD legal department or Group Legal where an OD does not have its own legal department, who will be responsible for the following:

a) The company, its directors and all associated entities are to be informed both by registered and hand delivered mail of the intention to blacklist, as well as reasons for the proposed blacklisting. The letter should also indicate whether Transnet intends to cancel any existing contracts with the supplier. Proof of delivery should be obtained. The companies/persons must be afforded a period of 14 Working Days within which to make representations as to why they should not be blacklisted or why existing contracts should not be cancelled.

b) After the 14-day period the Legal Department must consider the responses (if any) from the companies/persons. The motivation must then be completed and signed off by the Legal Department, Management and procurement.

23.6.6 The matter must then be submitted to the AC to consider whether or not to proceed with the blacklisting. Should the AC support the blacklisting motivation, the matter shall be forwarded with all supporting documentation to Group iSCM for further action where the GCSCO will consider the matter. If blacklisting is no longer recommended, the relevant Legal Department is to inform the OD and the relevant entity concerned of this decision.

23.6.7 If supported, Group iSCM will draft the final submission and attach all original documents including the relevant AC minutes for consideration by the GCFO.

23.6.8 Final approval for blacklisting will be made by GCFO.

23.6.9 Group iSCM will then notify all companies/persons by registered (or hand delivered) mail of the blacklisting. Group iSCM will also update and circulate the List of Excluded Bidders.

23.6.10 Group iSCM will notify the Transnet Content Bureau to update the RAMIS and SAP CLM system to either:

a) block the blacklisted company(ies) on the system altogether if all existing contracts have been terminated and ensure that all payments already incurred have been settled; or

b) ensure that no new contract may be loaded on the system if existing contracts with the company have not been terminated so that payments on the existing contracts may still be effected, and

c) Publish the blacklist on Transnet's external website so that blacklisted entities may not be used as subcontractors or JV partners.

23.7 APPEAL AGAINST DECISION TO BLACKLIST

Any company/person against whom a decision with regard to exclusion from future business has been taken may make representations to the GCE whose decision shall be final.

23.8 RESCISSION OF A DECISION TO BLACKLIST

The Transnet GCFO or his duly authorised delegate may at any time, on good cause shown, rescind a decision taken or reduce the period of exclusion as initially determined.

23.9 ENFORCEMENT OF THE TRANSNET LIST OF EXCLUDED BIDDERS

Prior to the approval of the award of business by any AC, the Secretary of the AC shall verify that no business is awarded to companies or persons appearing on Transnet's List of Excluded Bidders. This will include verifying the identity numbers of the directors/members of the recommended Bidder against the identity numbers of the restricted persons on the List. The Secretary and Chairperson of the AC shall sign off a certificate stating that no business is awarded to entities or persons appearing on Transnet's List of Excluded Bidders. The certificate should be retained by the Secretary of the AC.

23.10 ANCILLARY ACTIONS

Furthermore, in cases of corruption or fraud, theft, extortion and forgery involving R100, 000.00 or more, Transnet must:

a) act in terms of section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and report the matter to the South African Police Services for further investigation.

b) In addition to subparagraph (a) above Transnet may also, at its sole discretion, decide to institute criminal and/or civil action.

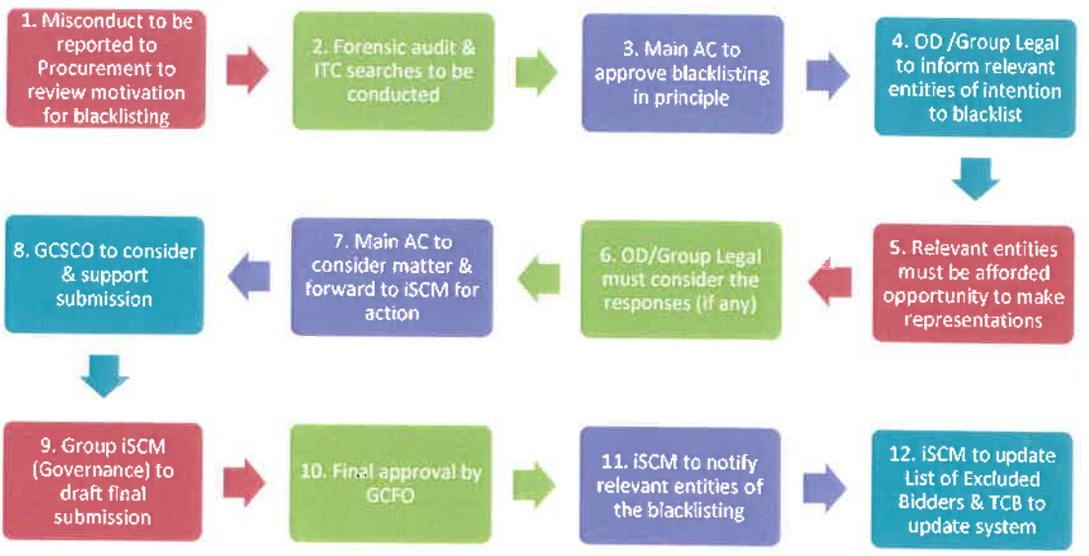


Figure [37] – The blacklisting process

SECTION A Background and Context

SECTION B Procurement planning

SECTION C Go to Market

SECTION D Evaluation and Adjudication

SECTION E Contract Management

SECTION F: GOVERNANCE STRUCTURES

Chapter 24: Functions of Governance Structures and Departments

- Main OD Acquisition Councils
- Transnet Acquisition Council (TAC)
- Procurement Ombudsman
- Capital Investment Committee (CAPIC)
- Board Acquisitions and Disposals Committee (BADC)
- Integrated Supply Chain Management (iSCM)

Appendices

CHAPTER 24 : FUNCTIONS OF GOVERNANCE STRUCTURES AND DEPARTMENTS

24.1 MAIN ACQUISITION COUNCILS (Main AC)

Each division will have its own main AC which will consider and approve all procurement processes, as well as the disposal of scrap, falling within its jurisdiction from R2 million, but not exceeding R500 million. This is subject to the discretion of the OD CEO to lower the R2 million threshold, or to create secondary ACs. Transactions exceeding the CEO's Delegated Powers will likewise be considered by the OD's main AC. If it concurs with the recommendation, the matter will be referred to the relevant governance structure for approval.

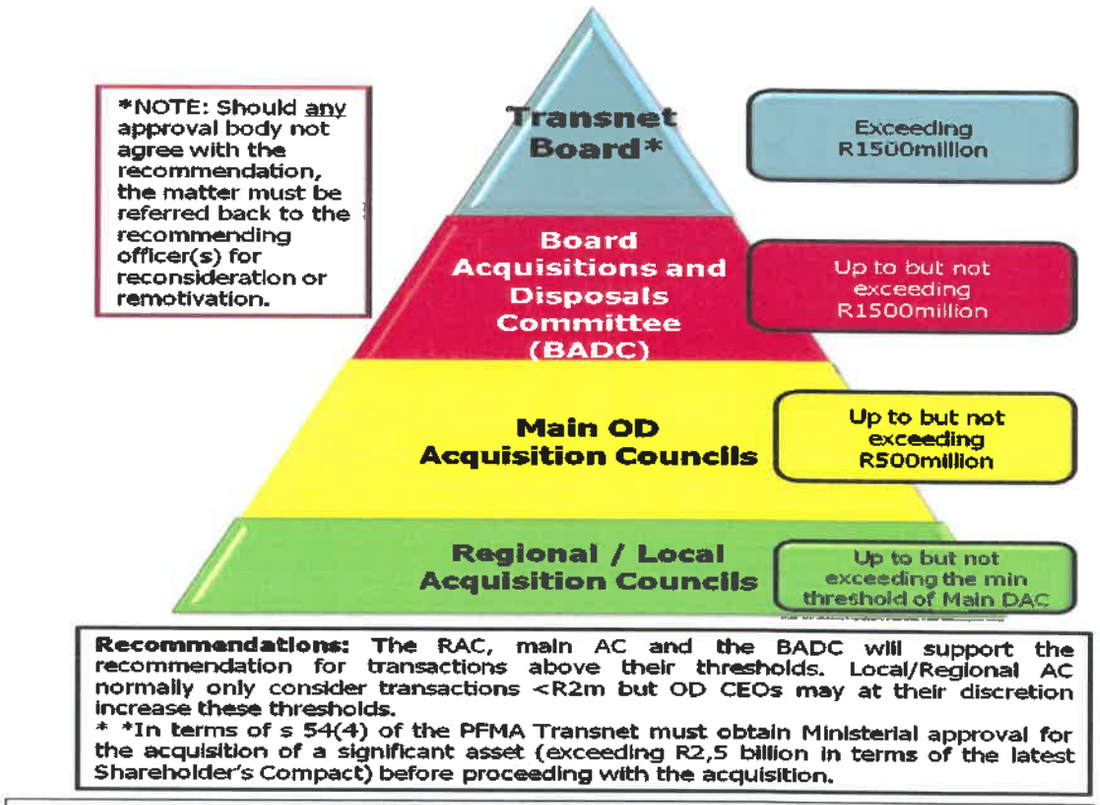


Figure [38] – Thresholds for process approval

The **Transnet Acquisition Council** ("**TAC**") has similar roles and responsibilities to that of the ODs' main ACs but it caters for the Group Corporate Head Office requirements, as well as centre led transversal contracts. The TAC has no higher status than the ODs' main ACs.

24.1.1 Composition of the Main AC

The main AC is constituted as a governance committee of the OD CEO and shall consist of senior management members within the OD. The main AC or CEO shall have the discretion to create regional and/or local ACs, hereinafter referred to as secondary ACs. An AC shall be comprised of the following persons:

a) A Chairperson, who will either be the CEO, or an executive or senior management member, shall be appointed by the CEO of the OD. The Chairpersons of secondary ACs will likewise be appointed by the main AC or CEO.

b) A Deputy Chairperson, who shall be one of the members mentioned in paragraph (c) below and who shall be appointed by the OD CEO or elected by the AC at a properly constituted meeting.

c) Members, all of whom are senior Transnet employees in the particular OD or where applicable seconded from Transnet Group, selected by virtue of their specific expertise or business focus, appointed by the CEO, with the clear proviso that the heads of Procurement, Finance, Legal and Risk in the OD will be mandatory appointments.

(i) Members must be capable of exercising sound, unbiased judgement and offer constructive comment.

(ii) It is a minimum requirement for members and appointed alternates to attend the annual training course on AC Roles and Responsibilities, Procurement and Bid Evaluation, presented by the Group Governance Function.

d) ACs may, at the discretion of the OD CEO or Chairperson, opt to appoint alternates for its members. Should the AC opt to appoint alternates, each member may, in writing, nominate one alternate. Alternates must be formally appointed by the CEO. Should the member be unable to attend a scheduled meeting, the appointed alternate should attend in his/her stead. All alternates are to be of suitable seniority to represent the member adequately and to make decisions on the member's behalf.

e) ACs may, at the discretion of the CEO/Chairperson, opt to appoint members on an ex officio basis. Such members shall not be counted to constitute a quorum and shall have no vote.

f) Secretary: The CEO or duly authorised delegate shall appoint an employee of Transnet as secretary to the AC. The incumbent must have extensive procurement and governance knowledge and experience, and should ideally be part of the procurement structure of the particular OD. However, to ensure a proper segregation of duties, the Secretary should report directly to the chairperson for purposes of day-to-day operations and performance management. This is to avoid any perceived conflict of interest which may jeopardise the objectiveness of the Secretary, as procurement will inevitably be tabling the vast majority of submissions.

24.1.2 **Primary Mandate (Main AC)**

To consider all recommendations from the OD with regard to the award of external contracts for the procurement of Goods and Services, or the disposal of scrap, where the total value of the business exceeds R2 million (subject to the discretion of the CEO to lower such threshold, or to create secondary ACs – see paragraph 24.1.3 below). Likewise such ACs will also consider any subsequent amendments to the contracts falling within their jurisdiction.

24.1.3 **Secondary Acquisition Councils**

The Main AC or the CEO of an OD may at their discretion decide to lower the limit set in paragraph 24.1.2 above and/or introduce similar secondary structures on local or regional level, to cater for matters falling below the jurisdiction of the main AC. The Terms of Reference of all ACs have been standardised, except for the ambits and delegations applicable to secondary ACs. The thresholds must be clearly stipulated in the relevant appendices to the Terms of Reference of the respective Main and secondary ACs. It is also a requirement that the Divisional Delegation of Authority, applicable to the signing authorities of individuals (similar to the Transnet DOA

Framework) be included as part of the relevant main and secondary ACs' Terms of Reference so as to ensure that there is no uncertainty as to the approval thresholds.

(Refer to DOA Summary Section A, Chapter 6)

Figure [39] below illustrates the current AC hierarchy within the Transnet Group.

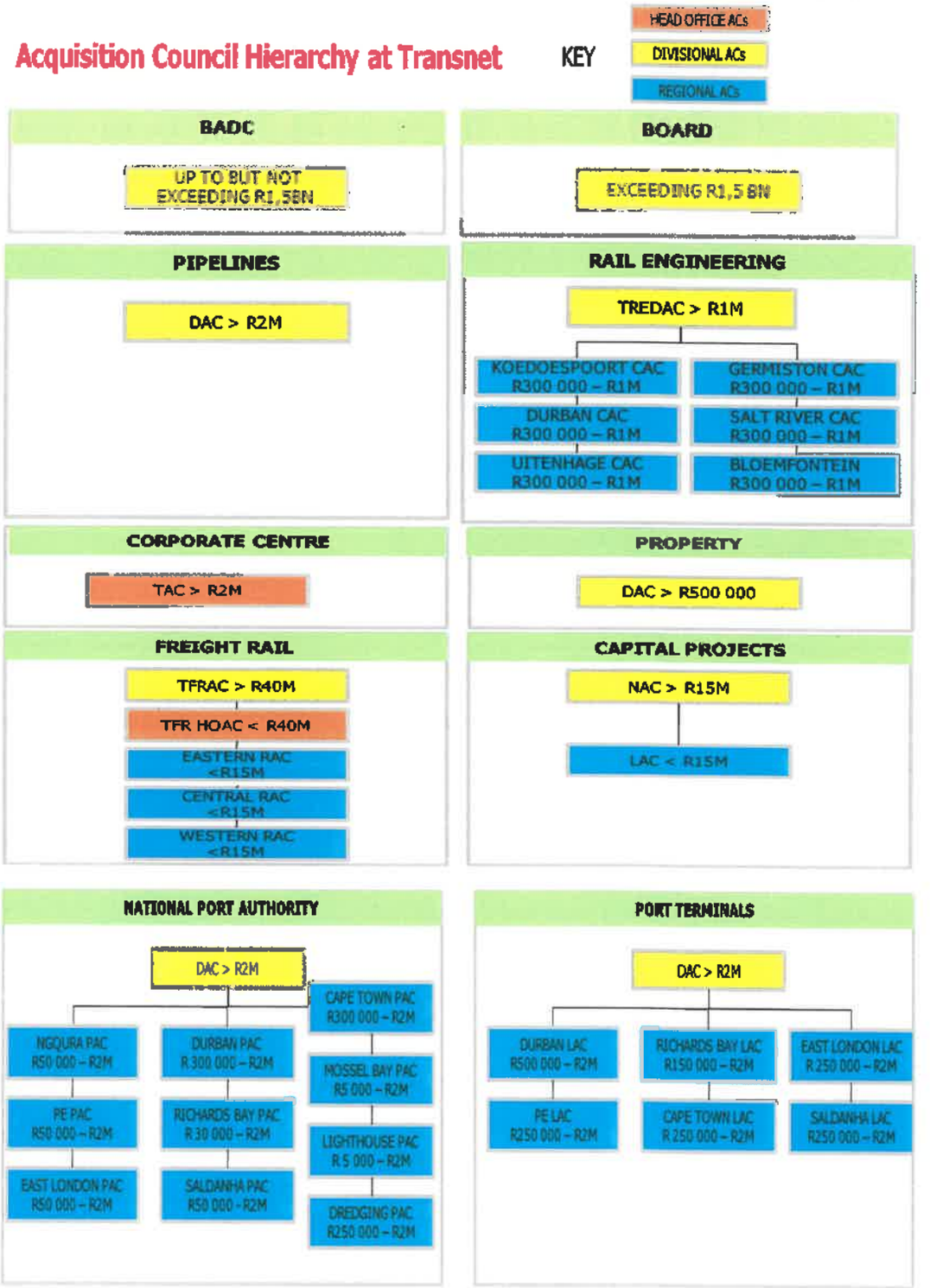


Figure [39] – Acquisition Council Hierarchy at Transnet

24.1.4 Term

Members and alternates will be appointed for a specific term. The letter of appointment shall clearly state the term of appointment (start and end dates) and also whether the appointee is a full member or an alternate to a specific member. The OD CEO shall have the power to, at any time, remove any member from the AC and fill the resulting vacancy.

24.1.5 Confidentiality

Members are required to treat all information they receive as AC members/alternates as strictly confidential. A confidentiality agreement shall be signed by the member at the start of his/her tenure. Information shall not be divulged without proper and specific authority.

Should a member wish to have anything clarified or explained prior to a scheduled meeting or during circulation of a matter, such query should be referred to the AC Secretary.

All AC records shall be kept securely in the custody of the Secretary of the AC. These records shall not be disclosed without proper approval. Likewise, third party confidential information shall not be disclosed unless required by legislation or a court of law.

24.1.6 Conflict of Interest

Instances may arise when a member of the AC or an alternate has a direct or indirect interest in a particular transaction/project or has been or can be deemed to have been personally involved in the RFX process or business decision which gave rise to a recommendation to the AC. In such cases, he/she shall declare such interest by means of a standard declaration of interest form before the meeting commences and also when the AC deliberates the specific matter. Declaration of a **direct interest** will result in automatic recusal. Should an AC member declare an **indirect interest** in a matter before the AC, he/she must declare his/her interest and the Chairman will determine whether the member should recuse him/herself. The reasons for this decision must be officially recorded and kept on file. This will also apply to circulation ('Round Robin' items).

24.1.7 Meetings / Attendance

The AC shall meet at predetermined intervals. Where there is the need, special meetings may be convened by the Chairperson.

Members are required to attend all meetings of the AC. For this reason, AC meetings shall be scheduled well in advance. Should a member not be able to attend a specific meeting, his/her alternate must attend. Attendance and participation by members should be a SPO or at least a KPI, on the member's performance management scorecard. This should be measured by the Chairperson of the AC.

Should a member be absent for more than three consecutive meetings, the Chairperson shall pursue the matter with the member concerned and may recommend to the CEO that such member vacates his/her position on the AC.

Individuals who are not members or alternates may, at the invitation of the Chairperson, attend a meeting of the AC in an *ex officio* capacity or to provide clarification on a specific matter(s). Such individual(s) shall be informed that the information which they will be providing will be formally recorded as part of the minutes of the meeting.

24.1.8 Quorum

A majority of the members/alternates appointed at any given time shall form a quorum.

Should exceptional circumstances necessitate that, both a member and his/her alternate attend the same proceeding, both votes may be taken into consideration to form a quorum as members. Their alternates shall then be appointed on the AC by virtue of their own specific expertise. The provisions of paragraph 24.1.7 above should however be observed.

24.1.9 Voting and deliberation

The Chairperson shall submit any matter to the vote of the members of the AC in the event of a difference of opinion or when requested to do so by a member of the AC.

In the event of a tie, the Chairperson shall have a casting vote in addition to his/her deliberative vote.

24.1.10 Duties of the AC

a) **Chairperson**

The Chairperson of the AC shall chair the proceedings at the meetings and exercise the powers vested in him in terms of these procedures and any other DoA.

b) **Deputy Chairperson**

In the absence of the Chairperson, the Deputy Chairperson shall act in his/her stead and shall be empowered to perform all the duties and exercise all the powers vested in the Chairperson under the laid-down procedures and any other DOA.

In the absence of, both, the Chairperson and the Deputy Chairperson from a meeting of the AC, a Chairperson shall be elected out of the members/alternates who are present.

c) **Secretary**

The Secretary shall undertake the tasks as imposed upon him/her by the Transnet Supply Chain Policy and Procurement Procedures Manual (PPM) and other relevant directives, or by the Chairperson of the AC or the GISCM Function or the CEO of the OD.

The Secretary is regarded as the "gatekeeper" of the AC and he/she has to be a person with impeccable integrity and honesty, who has the assertiveness to make a positive contribution to the effective functioning of the AC. The Secretary:-

(i) has the duty to act in good faith, duty of care, with skill and diligence and avoid conflicts of interest;

(ii) shall keep a central bid (RFX) register and shall be responsible for the issuing of RFP, RFQ and RFI numbers in respect of all bids issued by the OD to the external market, falling within the monetary ambit of the AC. He/she will report on progress with regards to completion of the process. (Register template available on the iSCM Transnet Intranet);

(iii) shall give impartial advice and act in the best interests of Transnet and hence should not be subject to undue influence by any of the AC Members. The integrity of the Secretary's position must be protected as it is one of the most effective internal controls available in governance;

(iv) shall be the only person, apart from the AC Chairperson, to consider authorising procurement staff to communicate with Bidders in the period between the closing of the bids and the award of the business;

(v) shall keep the AC members abreast of the latest policies and procedures and any amendments thereto;

(vi) shall provide the AC, as a whole and members individually, with comprehensive, practical support and guidance as to how their responsibilities should be properly discharged in the best interest of Transnet;

(vii) has an important role to play in the induction of new or inexperienced members and shall assist the chairperson in determining the annual AC meeting schedule, training plan and administration of other issues relevant to the AC; and

(viii) provides a central source of guidance and advice to bid and contract administrators throughout the OD, end users and the bidding public.

Other responsibilities of the Secretary are to:

(ix) plan and arrange meetings of the AC, formulate and distribute proper agenda packs (submissions in the prescribed format) for the meetings of the AC. (Standardised submission templates are available on the iSCM Transnet Intranet);

(x) ensure that all members attending a specific meeting of the AC are provided with the necessary forms to declare any interest in matters serving before the AC in that meeting;

(xi) ensure that a proper register of these declarations of interest is kept with the minutes of that particular meeting;

(xii) arrange for and securely keep a voice recording of the proceedings and, in writing, record proper minutes of the proceedings, deliberations, decisions and resolutions of the AC. He/she should furthermore obtain the signature of the Chairperson on each individual resolution during or as soon as possible after the meeting, communicate such resolutions to the relevant role-players and securely keep copies thereof for record purposes.

The minutes shall contain -

- an outline of material proceedings and deliberations by the AC; and
- all recommendations, decisions, resolutions, provisional approvals and directives issued by the AC.

A draft copy of the minutes shall be circulated to members of the AC prior to the next scheduled meeting.

Before the next scheduled meeting, a member may request that the draft minutes be amended to include certain specific deliberations, etc. and such proposed amendments shall be included by the Secretary.

The Secretary shall table the draft minutes at the next meeting of the AC, for confirmation by the AC and signature by the Chairperson;

(xiii) ensure that, by means of a proper certificate as per the prescribed format (template, available on the Transnet ISCM Intranet), duly signed by the Secretary and the Chairperson of the AC, that no business is being recommended for award to an entity(ies) or person(s) appearing on Transnet's List of Excluded Bidders/Contractors(Blacklist). Such certificate should be kept and securely filed with the minutes of each meeting of the AC;

(xiv) be responsible for the receipt, opening and stamping of Bids where this duty has been assigned to the AC Secretary. (Refer to Chapter 17 for the rules and procedures pertaining to the bid opening process);

In respect of AC submissions:

(xv) verify the comparative schedule/evaluation, plus all the facts stipulated in submissions to the AC;

(xvi) ensure that authorities for all communication and negotiation are indicated in the submission to the AC, and the outcome of such communication/negotiation is stipulated in detail in the submission;

(xvii) ensure that documentary evidence is available (copies to be kept on AC file) in respect of all facts presented and statements made in the submission;

(xviii) proactively pursue the clarification of uncertainties prior to the meeting, so that matters are not referred back unnecessarily;

(xix) edit* submissions to ensure that all requirements are met before the matter is tabled at the meeting of the AC. (*Submissions are not physically edited but an annexure must reflect all corrections and queries resolved by the Secretary); and

(xx) draft "AC circulars" on behalf of the AC in respect of directives to be issued by the AC.

(xxi) ensure that members are provided with an agenda at least 3 Working Days before any scheduled AC meeting, in order for them the do the necessary preparation before the meeting. Should a member have any queries on a matter on the agenda, he/she should raise these with the Secretary timeously, in order that the Secretary may obtain clarity before the meeting.

24.1.11 **Responsibilities and Obligations of Members**

a) Members take collective and individual responsibility for processes followed, decisions taken and resolutions carried by the AC.

b) In performing their legal duties, each AC member shall -

(i) act honestly and in good faith, whilst taking into account the policies and business objectives of the company with a view to fostering the best interests of Transnet;

(ii) exercise the duty of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;

(iii) act fairly, impartially and objectively, and not allow prejudice or bias or influence of others to override objectivity; and

(iv) act professionally at all times.

c) Duty of care and diligence:

(i) Members owe a common law duty towards Transnet to act with due care and diligence. Members are consequently liable for any prejudice suffered through such Member's failure to carry on the business with the degree of care and diligence that may reasonably be expected from a person of his/her knowledge and experience. Hence, Members must fully inform themselves of all material information available in the AC Pack so as to ensure that they act with due care in the discharge of their duties.

(ii) Members shall study the AC pack and properly prepare for a meeting of the AC prior to AC meetings to ensure that they familiarise themselves with the matters so that there is optimum participation in deliberation and decision making. They shall also make every effort to attend all meetings of the AC.

d) Members shall:

(i) understand and weigh alternative courses of action;

(ii) weigh benefits versus potential harm when considering specific courses of action; and

(iii) ensure that there is no breakdown in effective corporate governance and no impairment in their ability to carry out their responsibilities.

e) Duty to act honestly, ethically and in good faith:

(i) Members shall always act honestly, ethically and in good faith with a view to the best interests of Transnet. Members shall avoid a conflict between the interest of Transnet and their own and, in particular, shall not derive any personal benefit from matters submitted to the AC for consideration.

(ii) Members shall not act in bad faith due to bad judgement or negligence.

e.g. Members do not act in good faith when they know they are making material decisions without adequate preparation and deliberation and simply do not care if their decisions cause breach of governance principles and promote Fruitless and Wasteful Expenditure and consequent financial loss to Transnet.

24.1.12 **Functions of the AC**

a) To consider all recommendations from the OD with regard to the award of external contracts for the procurement of Goods and Services, or the disposal of scrap metal, where the total value of the business exceeds R2 million (subject to the discretion of the CEO to lower such threshold).

b) To consider all subsequent amendments to material provisions (i.e. which have a cost or risk implication) of contracts exceeding R2 million or where the original value of the contract plus the cumulative value of the amendments will exceed R2 million.

c) To consider and approve the non-award of business against any RFX falling within its ambit.

d) To consider recommendations to approach the market to solicit Bids in respect of a contract with a period of more than two Years, regardless of the value (alternatively RFX to provide for different options).

e) The AC must be proactive and clarify uncertainties emanating from submissions, prior to the meeting. This will ensure that matters are not referred back unnecessarily, causing delays. Under no circumstances should matters be referred back by ACs for trivialities.

f) To consider all recommendations in respect of bids as well as any extension of existing contracts of which the original period, or the original period plus the extension of the period together is/are longer than two Years regardless of monetary value, and all subsequent amendments of material provisions to such contracts.

g) With regard to paragraphs 24.1.12 a) and b) above, ACs or the CEO may at their discretion lower these limits and/or introduce similar structures on local or regional level, to cater for matters falling below the jurisdiction of the AC.

h) To consider and approve the framing of the OD's Lists of Approved Suppliers/Goods, as well as any amendments to such Approved Lists, and to administer such Approved Lists utilised within the OD. This function may not be delegated to Local / Regional ACs.

i) To consider and make recommendations to the Group ISCM regarding all aspects pertaining to Transnet's List of Excluded Bidders. The GISCM shall administer the List on behalf of the Transnet Group.

j) Secondary ACs to refer recommended exclusion matters to the main OD AC (where applicable), which will consider and if supported, refer to Group ISCM for finalisation and onward transmission to the GCFO for approval. Refer to Chapter 23 for Blacklisting procedure.

k) To monitor/administer the opening of all bids irrespective of the value. ACs may at its own discretion and depending on internal structures, delegate the opening of bids under a certain monetary value, to procurement offices or secondary ACs, provided that it has satisfied itself that proper procedures and controls as specified in the PPM are in place and are monitored on an on-going basis.

l) To obtain statistics and review, at regular intervals, details of all transactions falling below the AC's jurisdiction (See template available on the Transnet GISCM Intranet). Any alleged irregularities or trends that may arise out of the purchase, sale, hiring or letting of Goods and the procurement of Services, shall be investigated and corrective measures recommended by the AC if deemed necessary.

m) To refer to the Governance COE, (GISCM) for guidance/direction, any policy and/or legal question/s which arise out of the laid-down procedures or out of a bid, contract or contract amendment.

n) To exercise such powers and perform such duties as may be conferred or imposed by the laid-down procedures.

o) To perform other functions as the BADC, the GCE, the Governance COE (Group ISCM) or the OD CEO may determine or deem necessary from time to time.

Notes:

- Purely income generating contracts fall outside the scope of this document. However, the acquisition of Goods and Services to give effect to such income generating contract, fall within the scope of the PPM.
- The AC may refer a matter back only for reconsideration or re-motivation. It may under no circumstances change a submission or change the award of the business. On receipt of a revised/re-motivated submission the AC will again consider the matter. Refer to paragraph 24.1.16d) below for the procedure to be followed in instances where the AC still does not agree with the revised/re-motivated submission of the Manager/procurement.

24.1.13 **Powers of the AC**

When considering any new transaction or any Material Amendment/s to an existing contract, the AC has the power to, at its discretion:-

a) call for any files or papers dealing with offers, enquiries, the invitation and evaluation of Bids in the procurement of Goods and Services;

b) request any information which any employee may have at his disposal relating to the supply of, and/or payment for Goods or Services;

c) require any employee to provide information/advice or to attend any AC meeting in an advisory capacity;

d) invite any Consultant from the private sector to provide additional skills to the AC when necessary;

e) consider and recommend the condonation of any non-compliance with the laid down policies, procedures or directives for sign-off by the CEO en-route to the GCE or higher in terms of the Transnet DoA Framework;

f) offer comments, or note matters submitted for information;

g) refer any submission back for reconsideration/re-motivation;

h) withdraw an item from the agenda of any meeting of the AC, provided that the reasons for such withdrawal are duly recorded in the minutes of the meeting and communicated to the submitter by the Secretary;

i) report any anomalies, irregularities or non-compliance with laid-down policies, procedures or directives to the CEO (should the AC not be chaired by the CEO himself / herself);

j) exercise a discretion in those instances not explicitly provided in the laid-down procedures or as may be entrusted to it by the relevant policies and procedures or the Board Acquisitions and Disposals Committee, the Governance COE (Group iSCM) or the OD's CEO;

k) refer any matter or issue arising from the exercise of the powers or the performance of the aforementioned duties to the Governance COE (Group iSCM);

l) issue 'AC Circulars' to address any trends or issues arising from matters serving before the AC; and

m) periodically review copies of procurement gift registers.

24.1.14 **AC approvals and provisos**

a) The AC does not possess any executive authority to award external contracts for the procurement of Goods and Services or disposal of assets.

b) All AC approvals are subject to the following provisos:

(i) there is still the need for the purchase, sale, hiring, or letting of Goods and procurement of Services before the non-acceptance/regret letters to the unsuccessful Bidder/s and the acceptance of the winning Bid to the Successful Bidder are communicated by a Manager with the appropriate delegation of authority to sign the contract;

(ii) the financial provision is adequate;

(iii) the best interest of Transnet is being served at the time of concluding the contract, and

(iv) the contract is signed by the Manager with the appropriate delegation of authority.

24.1.15 **Recording of votes via circulation ('Round Robin')**

a) In urgent cases where the OD would be substantially prejudiced if a submission is held over until the next scheduled meeting of the AC, the papers relating to the specific matter may be circulated to the members of the AC. This will be at the discretion of the Chairperson, but subject to the right of any member to demand a meeting. There should be a pre-determined deadline by which all members respond (depending on the urgency). The members who respond by the deadline must record their votes in writing.

(i) Unanimous approval by a quorum of members so made by the stipulated deadline shall be deemed to constitute a resolution of the AC. Such resolution shall be communicated to the recommending officer by the Secretary as soon as possible thereafter.

(ii) The Secretary may extend the deadline should a quorum of votes not be attained by the initial deadline. Alternatively, a special meeting of the AC must be called by the Secretary, with the consent of the Chairperson. Members have the right to cast their vote until the deadline, irrespective of whether a quorum has already been attained.

(iii) If the deadline has lapsed, and a unanimous vote by a quorum of members has been attained, no further votes will be considered.

(iv) A resolution taken in such manner shall be officially noted and recorded in the minutes of the next scheduled meeting of the AC.

b) In exceptional circumstances and only due to the non-availability of members, the votes of a member and alternate may be taken into account in order to attain a quorum. The stipulation contained in paragraph 24.1.7, should, however, be observed.

24.1.16 **Disagreement with a decision of the AC**

a) In the event of a matter being referred back by the AC for reconsideration of the recommendation made by the recommending officer/evaluation panel, the recommending officer/evaluation panel shall:-

b) make a revised submission to the AC; or

c) should he/she disagree with the reasoning of the AC he/she shall, with the concurrence of his/her executive officer, re-motivate the recommendation and resubmit to the AC, whereafter the AC shall reconsider the matter; and

d) should the AC still not concur in the revised recommendation, the recommending officer shall refer the matter to the CEO, who shall rule on the matter.

24.1.17 **Interpretation of PPM and Government Policy**

In cases where the AC requires guidance on Government policy matters and in terms of interpretation of the PPM, guidance must be sought from the GCSCO.

24.1.18 **Submissions to the AC (Précis)**

a) All submissions to the AC shall be in the required format. The Secretariat may provide assistance to draw up a précis. (Refer to SAP CLM and the Transnet Group iSCM Intranet for the generic templates).

b) The Governance Function of Group iSCM is the custodian of all submission templates and any suggested changes thereto must be recommended to that office for consideration and implementation.

c) All submissions to the AC must be accompanied by all the relevant supporting documentation, e.g. original bid documents, authority to communicate or negotiate, etc.

d) All submissions should be submitted to the secretariat well before the scheduled meeting, to afford the secretariat enough time to properly vet the submissions. It is suggested that submissions are handed in by **12h00**, seven Working Days before a scheduled meeting of the AC.

24.1.19 **Reporting/Monitoring**

a) The main OD AC reports to the CEO through its chairperson.

b) Secondary ACs report to the main ACs, and are responsible to monitor transactions falling below their minimum thresholds, except for TCP, where the Local ACs act autonomously.

c) Reports of all the ACs must include the following:

(i) statistics required for the compilation of the Group iSCM Governance dashboard;

(ii) updates about the council's activities, as appropriate;

(iii) sensitisation on trends, irregularities and other anomalies or matters that may significantly impact on the management of contracts and bids of the OD or cause reputational harm to Transnet.

d) The performance of the main OD AC shall be monitored by the CEO.

e) Local / Regional ACs' performance will be monitored by the main OD AC.

f) The performance of the individual members and secretariat shall be monitored by the chairperson of the AC.

24.2 TRANSNET ACQUISITION COUNCIL (TAC)

24.2.1 Role and Functions of the TAC

The TAC has similar roles and responsibilities to that of the OD main AC's. It will cater for the Group Corporate Head Office requirements, as well as centre led transversal contracts. OD-led transversal contracts will be dealt with by the leading OD main AC. The TAC will have no higher status than the ODs' main AC's.

24.2.2 Refer to section 24.1 regarding the main OD AC as this paragraph is also applicable to the TAC. Any powers assigned to a CEO with regard to the Main AC will apply to the GCFO (or his delegate) as far as the TAC is concerned.

24.2.3 Composition of the TAC

a) The TAC shall consist of senior management members within Group Corporate Head Office who shall be appointed by the GCFO for a specific term:

(i) A Chairperson, who will either be the GCFO or an executive or senior management member appointed by the GCFO;

(ii) A Deputy Chairperson, who shall be one of the members mentioned in paragraph c) hereof;

(iii) Members with alternates, all of whom are Transnet employees in the Group Corporate Head Office, selected by virtue of their specific expertise or business focus. They must be capable of exercising sound, unbiased judgement and offer constructive comment.

(iv) The Heads of Procurement, Legal, Financial Planning, Tax and Risk in the TCC shall be mandatory appointments.

24.3 PROCUREMENT OMBUDSMAN

The Transnet Procurement Ombudsman (the Ombudsman) is appointed to provide Bidders as well as Transnet with a fair, expeditious, and effective dispute resolution process. The Ombudsman acts independently and objectively in resolving disputes and is not influenced by anybody in making his or her decisions.

Below is a short summary of the role of the Ombudsman. For more information, refer to the Terms of Reference of the Procurement Ombudsman, available on the iSCM Transnet Intranet.

24.3.1 The role of the Procurement Ombudsman

a) The role of the Ombudsman is to enhance the integrity and fairness of Transnet's procurement processes by providing an independent and objective assessment of complaints which are lodged by unsuccessful Bidders regarding any aspect of Transnet's bid process.

b) As a general rule, the Ombudsman will only consider complaints pertaining to bids valued at R5 million and above.

c) Complaints involving bids below R5m must be sent to the CPO of the relevant Transnet OD for review.

24.3.2 Powers of the Ombudsman

a) The Ombudsman has the power to conduct a full investigation of a complaint and to make appropriate recommendations to the CPO and the CEO of the relevant OD of Transnet regarding the appropriate remedial measures to be undertaken.

b) Such measures may include, but are not limited to the following:

(i) cancelling a bid if there is a material irregularity;

(ii) referring a bid back for re-evaluation;

(iii) amending a bid decision;

(iv) recommending that letters of censure be sent to any Transnet official; and/or

(v) the institution of disciplinary, civil or criminal proceedings where appropriate.

c) The Ombudsman may also on his own initiative launch a review of any bid award, regardless of whether a formal complaint was received or not.

d) An investigation by the Ombudsman of any bid award may also be initiated by an internal referral.

e) In most instances the Ombudsman will conduct the investigation without the need for a formal, oral hearing. However, in highly exceptional circumstances, the Ombudsman may in his sole discretion conduct an oral hearing if it would assist with the resolution of the matter.

24.3.3 The obligations of Transnet's Operating Divisions

a) Transnet's ODs shall:-

(i) immediately refer any complaints received over the threshold referred to in paragraphs 24.3.1b) and 24.3.1c) above to the Ombudsman;

(ii) act within these Terms of Reference;

(iii) expeditiously comply with requests made by the Ombudsman in terms of the Terms of Reference and Operational Procedures;

(iv) provide the Ombudsman with unrestricted access to relevant information, documentation or persons in relation to an investigation; and

(v) abide by the decision of the CPO and the CEO of the relevant OD of Transnet regarding the implementation of the Ombudsman's recommendation.

b) Transnet's ODs shall not:

(i) prevent a Bidder from making use of the services of the Ombudsman;

(ii) provide the Ombudsman with any misleading information; or

(iii) act vindictively toward a Bidder who made use of the services of the Ombudsman.

24.4 CAPITAL INVESTMENT COMMITTEE (CAPIC)

24.4.1 Purpose

The CAPIC shall ensure that the resources that Transnet SOC Ltd ("**the Group**") invests for the development of capital projects are strategically managed and shall to this end-

a) Ensure that decisions relating to capital expenditure are consistent with the strategic focus of the Group; and

b) Ensure that capital expenditure complies with the budget and business plans approved by the Board.

24.4.2 Composition

CAPIC is constituted as a committee of the Transnet SOC Ltd Group Executive Committee:

- *Chairperson* - GCFO
- *Secretary* - Group Company Secretary

The following shall be members of CAPIC:

- GCFO (Chairperson)

- GCE (*ex officio*)
- Group Executive - Transnet Capital Projects
- Chief Executive Officers - TNPA, TPT, TFR, TRE and Pipelines
- Chief Information Officer
- Group Treasurer
- General Manager - Group Financial Planning
- Group Chief Supply Chain Officer

The GCE may at any time change the composition of this Committee or determine that a person other than the GCFO chair meetings of CAPIC.

The Committee may invite such other officers of the Group as it deems fit to be in attendance at CAPIC meetings.

24.4.3 Terms of Reference

CAPIC shall:

a) Ensure that investment in respect of capital projects is consistent with the strategic focus of the Group and deals with the business of the Group in an integrated manner;

b) Ensure that capital expenditure is in accordance with the budget and business plans approved by the Board;

c) Determine the factors that shall inform the prioritisation of any capital expenditure project over another;

d) Monitor the implementation of project plans to ensure that approved capital expenditure projects are carried out with minimum delays;

e) Review and amend, subject to the limitations of the Board approved budget, expenditure plans in respect of any project should it, as a result of any unforeseen and unavoidable circumstances, it be necessary to effect such amendment;

f) Ensure that in respect of each capital investment project proposed for consideration by CAPIC, certification is given that there was proper compliance with applicable processes relating to amongst others, risk management and that such projects reflect optimum value for money; and

g) Conduct post-implementation reviews through, amongst others, external auditors, to determine, amongst other things, whether value has indeed been derived by the Group as a result of the relevant capital investment.

24.5 BOARD ACQUISITIONS AND DISPOSALS COMMITTEE (BADC)

24.5.1 Purpose

To ensure that the Board's composition and structure enables it to fulfil the obligations of the Board mandate and advance and maintain the Group's acquisition and disposal policies.

24.5.2 Composition

a) The Group Acquisition and Disposal Committee ("the Committee") is constituted as a committee of the Transnet Limited Board.

b) At least four directors of the Group shall be members of this Committee, the majority of whom must be independent non-executive directors. The GCFO and the GCE shall be ex officio members of the Committee.

c) The members of the Committee will be selected by virtue of their specific expertise or business focus, but with a preference to members with specific experience in procurement practices, law and finance. They must be capable of exercising sound, unbiased judgment in order to fulfil their duties.

d) The Secretary shall be the Group Company Secretary.

e) The remuneration of the Chairperson and Committee members will be determined by the Group Remuneration Committee and approved by the Board in accordance with the fee structure approved by the Shareholder.

The following shall attend by invitation:

a) The Group Chief Supply Chain Officer; and

b) Such other persons determined by the Committee, who may include, where deemed necessary by the Committee, members of senior management and independent acquisition and disposal experts.

24.5.3 Roles and Responsibilities

a) The Committee has an independent role, operating as an overseer of the acquisition and disposal function within Transnet. The Committee will also have the power to consider and approve acquisitions and disposals in terms of its mandate from the Board.

b) The Committee does not assume the functions of management, which remain the responsibility of the executive directors, officers and other members of senior management.

24.5.4 Authority

a) The Committee has authority to:-

(i) have access to any information it needs to fulfil its responsibilities;

(ii) seek independent advice at the Group's expense, subject to Transnet's procurement policies and procedures;

(iii) have direct access to any executive of the Group or its subsidiaries; and

(iv) make amendments to the mandate subject to approval by the Transnet SOC Ltd Board.

b) The Committee may form, and delegate authority to, committees and may delegate authority to one or more designated members of the Committee.

c) The Committee shall make the recommendations to the Board that it deems appropriate on any area within the ambit of its terms of reference where action or improvement is required.

24.5.5 Terms of reference

The Committee shall:

a) Oversee an annual review of Transnet's Procurement Procedures Manual and the Construction Procurement Policy, Processes, Procedures and Methods within Transnet Capital Projects and ratify any amendments thereto;

b) Pre approve bids within its delegated authority up to the maximum of investment decision/budget, before the bids are issued to market. This includes acquisition and disposal of movable and immovable property, capital investments, operational expenditure, the provision and acquisition of Services, maintenance, refurbishment and the establishment of infrastructure, purchasing of fuel, but excludes guarantees, indemnities and securities;

c) Monitor trends in general procurement spend;

d) Monitor trends in SD spend and progress on plan (includes support of National Growth Plan, SD, preferential procurement, and Enterprise development);

e) Monitor compliance with PFMA and related supply chain management norms and standards and advise the Board of potential risks in relation to irregular as well as Fruitless and Wasteful Expenditure emanating from procurement practices;

f) Consider strategic acquisitions and disposals and make recommendations to the Board;

g) Consider, for recommendation to the Board, potential private sector participation models;

h) Approve, where so delegated by the Board of Directors, the award of bids in accordance with the Company's Delegation of Authority Framework. The Committee may approve modifications to bid awards where the cumulative value of the contract plus the modification does not exceed the limits of its delegation of authority as stated in the Delegation of Authority Framework document.

i) In considering the approval of a bid or Confinement, the Committee shall have regard to any recommendation made by the relevant AC or senior official within Transnet.

j) The Committee shall submit a list of all bids falling within its delegated authority and approved by it to the Board for information purposes only. With regards to matters above its maximum threshold, it will consider such matters in the normal manner, and then make a recommendation to the Transnet Board.

k) When considering any Bid or any amendments thereto, the Committee may:-

   (i) investigate any activity within its Mandate;

   (ii) ask questions and request information or advice from any person;

   (iii) request any employee to appear before the Committee;

   (iv) refer the submission back for reconsideration;

   (v) note matters presented to it for information, and/or offer comments; and

   (vi) reserve a decision pending further information or clarification of a specific matter.

l) The Committee shall also approve disposals in line with the Delegation of Authority Framework document.

24.6 INTEGRATED SUPPLY CHAIN MANAGEMENT (ISCM)

24.6.2 Composition

Using best practice principles, and undertaking a collaborative approach across all ODs and Group, an integrated 'one supply chain management (iSCM)' strategy and operating model has been developed with centre led Centres of Excellence (COEs) with cross-functional teams, comprised of divisional and corporate task team members, to deliver value through improved efficiencies and compliance to the regulatory environment. The iSCM Governance hierarchy is depicted in the flow chart below.

iSCM Governance Structure

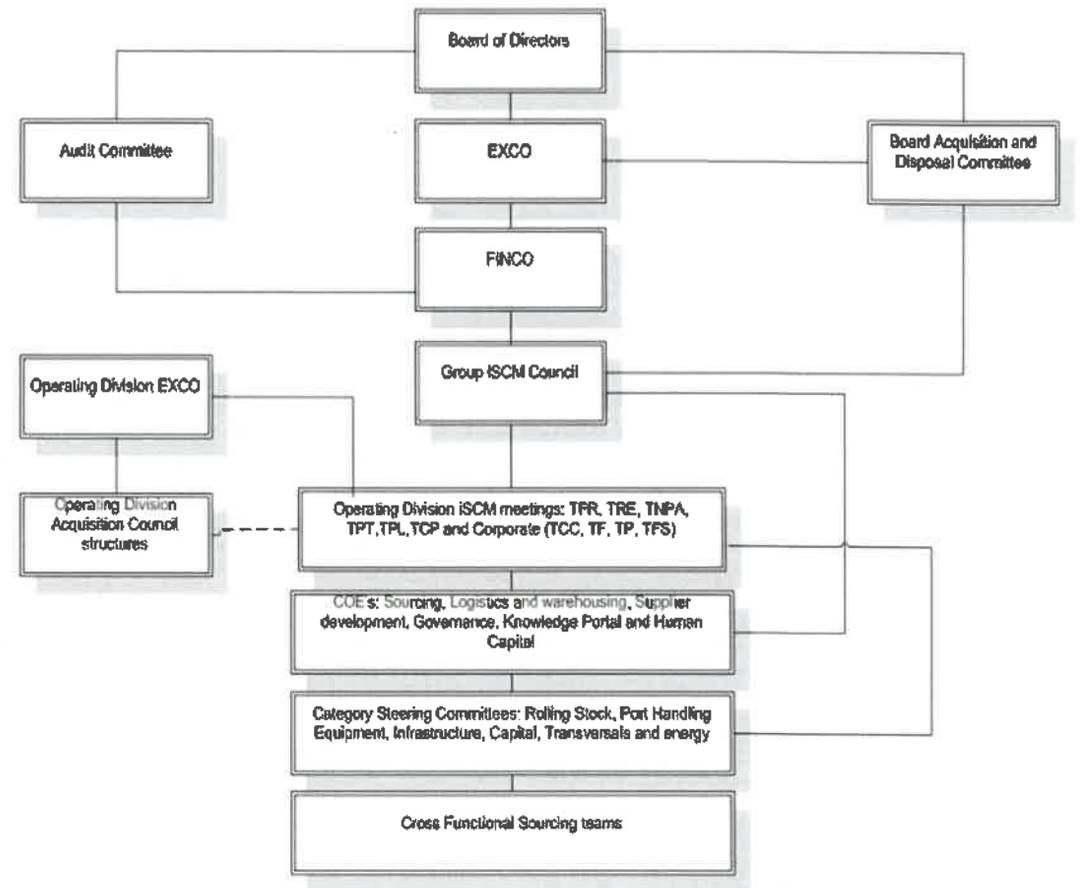


Figure [40] – iSCM Governance hierarchy

24.6.3 Centres of Excellence

a) Centres of Excellence (COEs) are cross-divisional teams focusing on a particular functional area. They focus on tactical issues relating to the functional area, and are aimed at identifying and leveraging on the areas of excellence in Transnet. Key strategic objectives will be executed through the COEs with a risk mitigation plan supported by Enterprise Risk Management (ERM).

The current COEs within iSCM are as follows (*Figure [41]*):

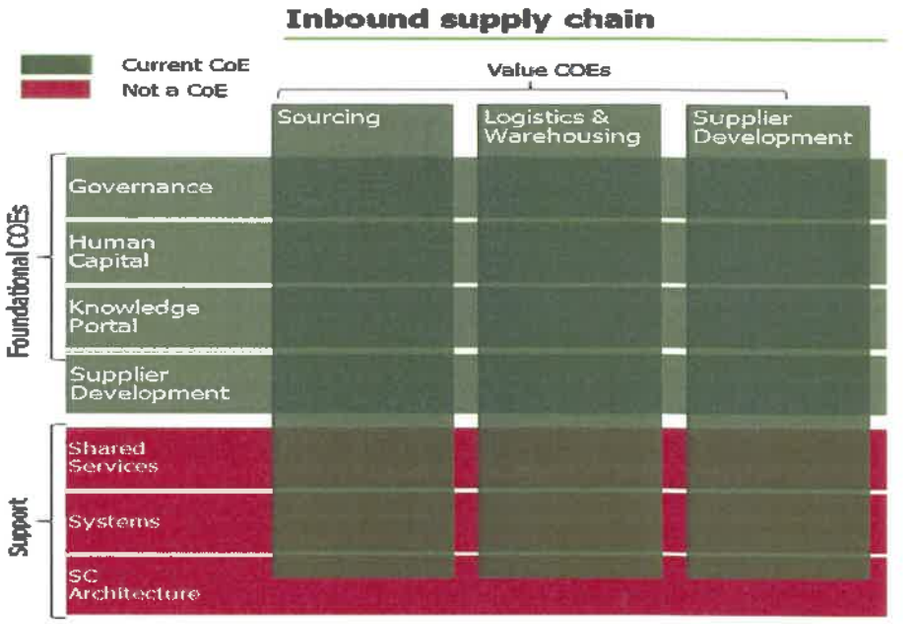


Figure [41] – Centres of Excellence

24.6.4 Integrated Supply Chain Management (ISCM) Strategic Themes

The following are the key strategic iSCM themes:



Figure [42] – iSCM themes

24.6.5 Group iSCM Governance

The Group iSCM governance function is the author and custodian of the Transnet Supply Chain Policy and the PPM.

Some of its key functions are to:-

a) issue and review the Transnet Supply Chain Policy and PPM (including standard bid documents and templates);

b) monitor correct interpretation/adherence to policies and control measures in collaboration with audit;

c) conduct research and development applicable to compliance;

d) maintain the iSCM Transnet Intranet as well as update the external website in respect of procurement policies, procedures and bid related matters;

e) continuously build capacity at OD level;

f) administer Transnet's List of Excluded Bidders; and

g) provide assistance and expertise on all governance related issues.

24.6.6 Role and Function of Group Chief Supply Chain Officer (GCSCO)

The GCSCO is the head of the Group iSCM Function. He/she is responsible for the whole of the supply chain function within the Transnet Group. Although the OD CPOs report directly to the OD CEOs, collaboration and synergies between the relevant supply chain functions are achieved via the iSCM Council. This forum meets at predetermined intervals and has representation from all the OD CPOs.

Apart from chairing the iSCM Council, the GCSCO is responsible to vet and recommend all supply chain related submissions requiring Group approval (e.g. confinements, condonations, new contracts and amendments exceeding the DoA of the OD CEOs).

24.6.7 Terms of Reference of the iSCM Council

Group iSCM has been mandated to effectively integrate all supply chain management (SCM) activities across Transnet's core businesses, to ensure that the efficiency and effectiveness of doing business in South Africa is drastically improved through SCM best practices. The iSCM Council is a structure set up to ensure that the iSCM mandate is carried out effectively and efficiently.

The Council will develop the Supply Chain Management Strategy for Transnet, based on consolidation of the individual ODs critical paths.

The Council will ensure alignment of all Operating Divisions' SCM functions in terms of:

- Processes and Procedures;
- Systems;
- Human Capital Development;
- Strategic Sourcing;
- Contract and Supplier Management;
- Capital Procurement;
- Warehousing and Logistics Management;
- Policy and Governance; and

- Knowledge Management.

The Council will also ensure a uniform strategy with regard to Broad-Based Black Economic Empowerment. It will drive the implementation of B-BBEE initiatives with regard to Preferential Procurement and Enterprise and Supplier Development in terms of the Government's New Growth Path strategy, to ensure that Transnet's obligations in terms of these important issues are met.

In addition, the Council will be the custodian/guarantor of world class standards in supply management, professionalism, ethics and the proper implementation of related policies and procedures throughout Transnet. It will also identify commodity groups where standardisation across the Transnet Group, or the consolidation of spend on commonly used Goods and Services can lead to financial and other benefits for Transnet as a whole – transversal contracts.

24.6.8 Composition of iSCM Council

The Forum will consist of the following members:

- Group Chief Supply Chain Officer, (Chairperson)
- Executive Manager (Supply Chain)
- Executive Manager (Strategy & Execution)
- Executive Manager (Supplier Development)
- Executive Manager (Strategic Sourcing)
- CPO – Transnet Freight Rail.
- CPO – Transnet Rail Engineering.
- CPO – Transnet Port Terminals.
- CPO – Transnet National Ports Authority.
- CPO – Transnet Pipelines.
- CPO – Transnet Capital Projects.
- CPO - Transnet Properties.
- CPO – Transnet Corporate Centre.

The following Managers will attend meetings of the Forum on an ex officio basis as and when required:

- All COE Leads.
- Manager: Policy, Governance & Standards, iSCM.
- Manager: Compliance & Risk, iSCM
- Manager: Contracts, iSCM.

For the complete iSCM Council Terms of Reference please refer to the Group iSCM Intranet website)

24.6.9 Role and Function of the Chief Procurement Officers (CPOs)

The CPOs of the Transnet ODs are the heads of procurement (see Section A, Chapter 6, for the role's detailed delegation).

He/she is also responsible for the day-to-day procurement activities of the OD. The role of the CPO is also to ensure that the procurement function runs according to accepted world best practice and that optimal value is achieved when procuring Goods/Services for his/her OD.

IN THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE
(HELD IN JOHANNESBURG, BRAAMFONTEIN)

AFFIDAVIT

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I, the undersigned

DORIS TSHEPE

do hereby make oath and say as follows:

INTRODUCTION

1. I am a practising attorney of the High Court. I depose to this affidavit in response to the request (**"the Request"**) of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (**"the Commission"**). The Request to which I respond in this affidavit is dated 29 July 2020.

2. The Commission seeks an explanation of my conduct in the context of my previous position, as a director and member of the Board of Transnet SOC Limited (**"the Board"**). I served on the Board of Transnet from December 2010 to December 2014. I am grateful for the opportunity to respond to the Request, and I do so to the best of my ability.

3. I have also received a further document from the Commission, namely a Notice in terms of Rule 3 of the Commission's Rules, dated 7 September 2020 (**"the Notice"**). The Notice refers to oral testimony which has been sought by the Commission from Mr Christopher Todd (**"Mr Todd"**), and invites me to apply to, amongst other things, cross-examine Mr Todd, if I wish to do so. I am not specifically named in Mr Todd's affidavit, and I accordingly do not seek leave to cross-examine Mr Todd at this time. However, I otherwise reserve my rights, in respect of testimony and may seek the leave of the Commission in due course.

4. Unless the context indicates otherwise, the facts deposed to in this affidavit are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

5. For reasons that will appear below, it will be necessary for me to advance certain propositions of law. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I accept as correct.

PURPOSE AND OVERVIEW OF THIS AFFIDAVIT

6. I understand the Request to be concerned with a specific issue, namely the events that led to an agreement (**"the settlement agreement"**) concluded between Mr Siyabonga Gama and Transnet SOC Limited (**"Transnet"**). I confirm that I was indeed a member of the Board, at and around the time that the settlement agreement was concluded. I can furthermore confirm that the decision to conclude the settlement agreement arose at or near my very first involvement with Transnet, as a Board member. I therefore do not have direct personal knowledge of the history that preceded it, except from what I read from Transnet documents that I had access to and discussions that took place in meetings of the Board and its committees

7. The Request expresses a concern about the reasons why Transnet concluded the settlement agreement, which is expressed in the Request, in the following terms:

> *"[I]t prima facie seems to the Chairperson of the Commission that the settlement agreement Transnet concluded with Mr Gama may not have been in the interests of Transnet and may have been one sided in favour of Mr*

Gama. This may mean that you, as a member of the Transnet Board of Directors at the time, may have acted in breach of your fiduciary duties".[1]

(My emphasis).

8. I confirm that I supported the decision to conclude the settlement agreement. I emphasise at the outset however that my support of the decision was not premised on my perception of Mr Gama's innocence or guilt. I accepted that Mr Gama was guilty of misconduct, as explained in the affidavit furnished to the Commission by Mr Todd.

9. I was not a member of the Board at the time that a decision was taken to charge Mr Gama with misconduct, nor was I a member of the Board at the time his employment was terminated.

10. My support of the settlement agreement at the time was made in circumstances where, as I have said, I had limited direct personal knowledge of the history relating to Mr Gama and Transnet. I supported the decision to conclude the settlement agreement having regard to broader issues than those concerning the merits of Mr Gama's case, specifically concerning his guilt. The facts that informed my decision to support the decision were subsequently investigated and verified by independent auditors, namely KPMG and Nkonki. On the basis of the information that served before the Board, I believed that the decision would be in Transnet's best interests.

11. For reasons on which I shall expand below, I respectfully submit that I did not act in breach of my fiduciary duties in supporting the decision to conclude the

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1 At paragraph 6.

settlement agreement. I therefore respectfully disagree with the view expressed in the Request. In summary, the reasons are as follows:

11.1. I understand that the question of whether I exercised my discretion as a director unlawfully will not be determined in hindsight, but rather on the basis of the information that was available to me at the time. I am advised and submit that the decision is evaluated against a subjective standard, which permits necessary flexibility to a director's exercise of her discretion. I am advised that the discretion must be exercised in accordance with the director's own reasonable business judgment.

11.2. The reason that Mr Gama was reinstated was not concerned with his guilt or innocence, but rather with the question of the justification for the sanction imposed on Mr Gama, which was one of dismissal. Employment law requires consistency of discipline. In line with this principle, the conclusion of the settlement agreement was considered not in light of Mr Gama's case in isolation, but rather in the light of all of the relevant facts. The inconsistent imposition of discipline and dismissal as a sanction was the prime motivation for the settlement when the matter served before the Board.

11.3. I understand that the submissions of Mr Todd are solely premised on the circumstances pertaining to Mr Gama's case, in isolation. I exercised my discretion in the light of broader factors. It was my *bona fide* view that, in the light of all relevant circumstances, a decision to reinstate Mr Gama was prudent and fair.

12. I accept that reasonable people may have disagreed with my conclusion at the time, but I am advised and submit that this is not the applicable legal test. When measured against the appropriate standard, I respectfully submit that my decision to support the settlement was lawful and appropriate.

13. I shall furnish the context to my decision to support the settlement in the paragraphs below. I make these introductory submissions in order to summarise the key facts of which I am personally aware, and also to underscore those facts of which I do not have direct personal knowledge, given my period of service on the Board. I shall organise the remainder of my submissions in this affidavit under the following themes:

    13.1. First, it is important to explain the manner in which Transnet's failure to furnish me with documents relevant to the Request has hampered my ability to depose to this affidavit. I am forced to depose to this affidavit based on my recollection of past events. If I am furnished with the requested documentation, it may be necessary for me to supplement this affidavit, and I will seek leave to do so.

    13.2. Second, I shall summarise my understanding of the context within which the decision was made. My direct personal knowledge in this regard was limited, given that, at the time of the decision, I was a very recent appointee to the Board.

    13.3. Third, I shall turn to the allegations regarding the settlement agreement. I shall summarise the facts which arose after Mr Gama's dismissal, which were relevant to my decision to support Mr Gama's reinstatement. Those

include the position of other employees within Transnet, as well as the systemic difficulties extant in Transnet at the time.

13.4. Fifth, I shall summarise what I am advised are the applicable legal requirements that pertain *inter alia* to the decision in relation to Mr Gama, and the exercise of my discretion as a director. On an application of those principles, I shall submit that my decision was not unlawful, and also why I submit that it meets the requirements of my fiduciary duties as a director.

13.5. Sixth, I shall respond to each of the allegations in the Request. I shall also, to the extent possible, respond to relevant allegations contained in affidavits that serve before the Commission, with which I have been furnished.

14. I shall summarise my conclusions in the final section of this affidavit. In summary, I shall submit that, when the decision to conclude the settlement agreement is viewed in its proper context, I conducted myself in a lawful manner, and in accordance with my best business judgment at the time.

TRANSNET'S FAILURE TO FURNISH RELEVANT DOCUMENTS AND THE DIRECTIVE SOUGHT FROM THE COMMISSION IN CONSEQUENCE

15. In order to respond to the Request it is obviously important that I be furnished with the documents that the Board and I considered at the relevant time. This is important not only in order to refresh my memory about long-past events arising almost a decade ago, but also, I am advised, so that the issues that arise may be adequately ventilated. The proper ventilation of the issue furthers the mission of the Commission to seek the truth.

16. I have repeatedly sought the disclosure of relevant information from Transnet. However, to date, some of the crucial information requested from Transnet is yet to be provided. This despite the following repeated efforts of my attorneys:

16.1. On 14 August 2020, my attorneys wrote to MNS Attorneys seeking various documents that I submit are necessary for the purposes I have described above. I have attached a copy of this correspondence to this affidavit, marked "**DT1**".

16.2. On 19 August 2020, MNS Attorneys responded to my attorneys. A copy of this response is similarly attached hereto, marked "**DT2**". For reasons unknown to me, the response made clear that Transnet was less than willing to assist.

16.3. The time provided to me by the Commission in order to depose to this affidavit continued to run. Given the urgency of the information required from Transnet, my attorneys directed a further letter to MNS Attorneys, on 24 August 2020. That letter is attached hereto marked "**DT3**". It reiterates the need for the requested documents.

16.4. MNS Attorneys responded to the latter letter on 28 and 31 August 2020. In each response, Transnet disclosed only some of the documents requested, without furnishing what I am advised is an adequate reason as to why the other documents I requested were not provided.

16.5. My attorneys thus immediately responded to MNS Attorneys, on 31 August 2020. The correspondence is attached hereto marked "**DT4**", and it lists the documents that remained outstanding, at that point.

16.6. On 4 September 2020, I instructed my attorneys to direct a letter to the Commission, which (*a*) recorded the prejudice caused by Transnet's unexplained failure to furnish the necessary documents; and (*b*) sought a directive from the Commission, in order to ensure that Transnet's intransigence was brought to an end.

16.7. After receipt of my latter correspondence seeking *inter alia* a directive from this Commission, and on 5 September 2020 (some 48 hours before this affidavit was initially due to be filed, prior to receipt of the Notice), MNS Attorneys sent a number of documents to my attorneys. The documents did not include the full set of documents requested. Many of the documents were in fact simply duplicates of the documents that had already been furnished.

16.8. I have been furnished with further documents since the Commission's extension of the time required to furnish this affidavit. However, even to date, I am yet to be provided with all of the documents I requested. Transnet has since furnished me with the following documents:

16.8.1. In-Committee minutes of the meeting of the Board of Directors held on 25 January 2011;

16.8.2. Board of Director meeting pack of meeting held on 25 January 2011;

16.8.3. Audio recording of the Corporate Governance and Nominations Committee meeting held on 3 February 2011;

16.8.4. In-Committee minutes of meeting No. 11/4 of the Board of Directors of Transnet held on 16 February 2011;

16.8.5. Meeting pack special Corporate Governance and Nominations Committee meeting held on 7 March 2011;

16.8.6. Audio recording of the Human Resources and Remuneration Committee ("REMCO") meeting on 11 April 2011;

16.8.7. Minutes of meeting of the Board of Directors held on 20 April 2020; and

16.8.8. Meeting pack of the Board of Directors meeting held on 20 April 2020.

17. The documents that remain outstanding are important, and are summarised in the attachment hereto marked "**DT5**". Included amongst the outstanding documents are among other things written legal opinions that were provided to the Board. These and other documents with which I have not been furnished would have informed my decision relating to the settlement agreement (whether for or against the decision). They may be materially relevant to the decision that was ultimately taken.

18. In the circumstances, I am now placed in the invidious position of deposing to facts, under oath, without the long-requested documents that have still not been received.

19. I do not raise these issues in order to advance trifling or technical complaints. I do so because the non-disclosure is materially prejudicial to my ability fully to

respond to serious allegations, and my rights to procedural fairness, particularly in circumstances where the Commission has expressed a *prima facie* view. The documents that remain outstanding are summarised in the attachment hereto marked "**DT5**".

20. This affidavit must of necessity be regarded as incomplete. If the documentation requested is furnished, it may be necessary for me to supplement this affidavit and I reserve my right to do so. This is necessary to avoid the risk of being subjected to an adverse finding being made against me in circumstances where I am deprived of an opportunity meaningfully to respond.

RELEVANT CONTEXT

21. I mentioned above that I was appointed to the Board from December 2010 to December 2014. I therefore have no direct personal knowledge of the facts arising before that date. My knowledge of historical facts was based on information received from longer-serving Board members, and from documents which served before the Board at material times.

22. In summary, the relevant background of which I was aware is as follows:

    22.1. I learned that, historically, deviations from procurement processes within Transnet generally, were a regrettably frequent occurrence, and that deviations were sought to be condoned after-the-fact. There are various scenarios in which a procurement deviation may be justified in good faith and for the benefit of an organization. I accept however that *ex post facto* condonation should scarcely be the norm, and I was involved in the steps

taken by the Board in order to address this problem. I return to them further below.

22.2. Prior to Mr Gama having been charged with misconduct, he had been assessed as a high performing employee.

22.3. Mr Gama had been found guilty of misconduct, and he had accepted that he had committed the acts for which he was originally charged. However, he was not the only employee who had committed similar acts, and other similarly positioned employees had not been charged for misconduct. The inconsistency of discipline applied to Mr Gama was informed by concerns expressed by the Chairperson in a Board meeting, at which I was present. Those same concerns were investigated at the instruction of the Board, and verified, by independent auditors, in the "**KPMG/Nkonki Report**" (which is attached hereto, marked "**DT6**").I shall return to this further below.

22.4. Although the decision to charge Mr Gama was not a unanimous decision of the Board, those members of the Board who disagreed with the decision based their objections on the view that Mr Gama was being singled out, as opposed to whether he was in fact guilty or innocent.

23. I now proceed to set out the facts which informed my decision to support the settlement agreement, which post-date my appointment to the Board. I confirm that I have direct personal knowledge with regard to the facts I set out below.

AM

THE SETTLEMENT AGREEMENT

(a) Issues arising at the time that the settlement agreement first arose

24. Mr Gama was in the process of contesting his dismissal in the Transnet Bargaining Council at the time that I was first appointed to the Board. Transnet was opposing the litigation, in which Mr Gama raised a complaint not of his innocence of the charges, but of inconsistency in the application of discipline.

25. There was information that served before the Board suggesting to me that Mr Gama's assertion of selective discipline was justified. The information was furnished at that time, by the Chairperson, in the form of a list setting out approximately 30 similar transgressions. It was subsequently investigated at the instruction of the Board, and it was confirmed in the KPMG/Nkonki Report. The KPMG/Nkonki Report concluded, in relevant part, as follows:

25.1. Ms Moses and Mr van Niekerk, both executives at the same level or higher in relation to Mr Gama, namely the Transnet Capital Projects' Chief Executive and Transnet's Group Chief Operations Officer, had exceeded their respective delegated authorities by amounts in the hundreds of millions, and had not received censure for their conduct. Mr Gama by comparison had been fired for exceeding his authority by no more than R10 million – which is clearly a far lesser amount:

25.1.1. Ms Moses approved additional work on a contract with HMG Joint Venture ("**HMG JV**") that far exceeded her lawful delegated authority, and furthermore signed the contract for additional work before an actual offer from HMG JV had been

made. She also authorised the implementation of a bonus scheme for non-Transnet employees retrospectively, to the tune of "*R185.4 m (per an agreement in 2008, payment commencing January 2009) ... without taking cognisance of any funding challenges*".[2]

25.1.2. Mr van Niekerk's conduct was implicated in the same transaction, *inter alia* in that he did not have the requisite authority to appoint HMG JV as a consultant to Transnet. He was also involved in agreeing to and approving a "*R960 million contract of VAE for the acquisition rails, maintenance thereof, etc*", in circumstances where he was was only "*authorised to approve amounts up to but not exceeding R200 million*".

25.2. Mr van Niekerk was not the only Transnet employee whose conduct was implicated in the VAE transaction referred to above. Mr Chris Wells ("**Mr Wells**"), at the time Transnet's CFO, was implicated as well. KPMG/Nkonki concluded that Mr Wells, among others, had approved increases to the contract value on the VAE contract, in the tens of millions of rands, without the requisite authority.[3] The conduct of Mr Wells and Mr van Niekerk could not be pursued further by KPMG/Nkonki, given that they had, by then, left Transnet's employ.[4]

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2 Page 219 of the KPMG/Nkonki Report.

3 Page 76 of the KPMG/Nkonki Report.

4 Page 76 of the KPMG/Nkonki Report.

25.3. The practice in general at Transnet is more in line with "*condoning*" in that irregularities on the part of personnel are treated as "*forgivable*" or "*disregarded without protest or censure*";

25.4. With regard to the Gama matter and a review of similar fact matters, the disciplinary action instituted for the committed irregularities appeared to be the exception rather than the rule.

25.5. The disciplinary process was not consistently applied to all transgressions but rather a process of condonation was consistently applied with no disciplinary action being taken against offenders. These observations were in line with Mr Gama's view that "*he ([Mr] Gama) was doubtful that other employees who had acted in a way similar to the way he had, had been charged for tender irregularities and therefore that there was selective bringing of charges*".

26. The KPMG/Nkonki Report was not before the Board at the time that I supported the settlement agreement. However, as I have said, the KPMG/Nkonki Report considered the same acts that were raised as a concern at the relevant Board meetings. As a result of these concerns, the Board at its meeting of 25 January

2011 requested that these matters be investigated.(I attach the instruction letter hereto in this regard, marked "**DT7**").

27. I relied on the same information at the time that I made my decision to support the conclusion of the settlement agreement. I explain the relevant discussions of the Board members in this regard, in more detail, below.

(b) <u>The initial discussions of the Board</u>

28. As an attorney, I was well aware that settlement of disputes is encouraged. I am advised that this has been confirmed by the Appellate Division (as it then was)[5] as well as more recently, by the Constitutional Court.[6] The corollary, I am advised, is that parties are discouraged from resorting to adversarial litigation, where this is avoidable.

29. As I have stated previously, I was appointed to the Board during December 2010. The issue of Mr Gama's settlement agreement was first raised with the Board within a month of my appointment, to the best of my recollection. I believe that it

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5 See *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677B-D; and *Bradford & Bingley plc v Rashid* [2006] 4 All ER 705 at para 38.

6 *Eke v Parsons* 2016 (3) SA 37 (CC).

occurred at a Board meeting on 25 January 2011. I have been furnished with the relevant Board Minute, which is attached hereto marked "**DT8**".

30. At the Board meeting of 25 January 2011, the minute records that the Chairman of the Board, Mr Mkhwanazi, indicated the following which is relevant to the Request:

30.1. He had spoken with Mr Gama about possible settlement agreement on 22 January 2011;

30.2. The matter of a potential settlement would be further deliberated at the Corporate Governance and Nominations Committee meeting;

30.3. Subsequent to the latter deliberation, the issue would be presented to the Board on 16 February 2011.

30.4. When Ms Mnyaka, another Board member, raised the issue of "*fairness in treatment of Executive*" vis-à-vis Mr Gama, she indicated that fairness could only be determined by investigating what sanctions were imposed on other executives who committed offences similar to Mr Gama's offences;

30.5. In response, the Chairman stated that he was occupied with 30 cases with similar allegations as those levelled against Mr Gama by Transnet;

30.6. The Chairman further stated that there was evidence that there is a culture of condonation for exceeding delegated authority within Transnet.

31. In light of the above, I understood from the discussion that the treatment of Mr Gama had the potential to cause problems for Transnet from a broader

perspective, in relation to governance going forward. It was thus decided that the matter of settlement should to be subjected to further deliberation before it returned to the Board for consideration. It was resolved that it would be discussed at the level of the Corporate Governance and Nominations Committee ("**CGN Committee**") before any recommendation of the Board would follow. The Board would then reconvene to discuss the issue on 16 February 2011.

(b) <u>Events that transpired at and after the relevant meeting of the CGN Committee</u>

32. A meeting of the CGN Committee, of which I was a member, was then held on 3 February 2011. The relevant minutes are attached hereto marked "**DT9**".

33. The minutes demonstrate that the following matters of significance were discussed at that meeting:

33.1. The Chairman stated that Transnet had made a written settlement offer to Mr Gama. He reported that some of the issues were still under negotiation. These included the date of re-instatement and quantum to be contributed towards his legal fees.

33.2. Mr Mapoma took the Committee through the proposed settlement agreement between Transnet and Mr Gama. Mr Mapoma indicated that an agreement on certain issues remained outstanding at that time.

33.3. Mr Mapoma further informed the CGN Committee that Mr Gama wanted to be reinstated to his TFR position. He also informed the Committee that Mr Gama wanted the company to cover all of his disciplinary costs and the High Court application costs.

34. I have, additionally, been furnished with a transcript of the recording of the same CGN Committee meeting, which I have read and considered. I have attached the transcript to this affidavit marked "**DT10**". I submit that the contents of the transcript makes the following clear:

34.1. I asked a number of questions in the meeting. The nature of my questions evidences that I applied my mind to the issue of settlement, and that I did so in good faith.

34.2. I expressed concern about why we should settle if we had strong prospects of winning the case, and about the legal issues arising at the meeting, generally. There were differing views expressed on this issue.

34.3. In relation to the issue of whether Mr Gama's reinstatement would render him eligible for the contest for the position of GCE, I pointed out that, while Transnet was empowered to conclude the settlement agreement in its own sole discretion, as an organ of state, that discretion was not unconstrained. A rational basis for a decision would always be required.

34.4. I asked the Committee about the strength of the case against Mr Gama, in the context of the question of sanction. I was furnished with differing assessments in this regard. I understood from the Chairperson that Transnet's case in regard to sanction was finely balanced ("*50/50*"). It was only on the question of Mr Gama's guilt that I understood Transnet would have a strong chance of winning the case. At this time, as a member of the CGN Committee, I had not been provided with the memorandum from Mr Todd and I was not aware of its existence.

34.5. There was no legal opinion on the issue of sanction that I was furnished with or served before the CGN Committee. Reference to Mr Todd's memo was only made at the end of the meeting. We therefore postponed the issue for further discussion to a meeting to be held on 11 February 2011.

(c) <u>The further relevant meetings of the Board and its committees after the meetings of the CGN Committee</u>

35. I do not have any recollection of whether or when the proposed meeting for further discussion of the issue of settlement took place. My attorneys have asked for records of this meeting repeatedly, but no records have been furnished by Transnet, to date. It may be necessary for me to supplement this affidavit if the information is furnished to me in due course and I reserve my right to do so.

36. I remained uncertain about the prospects of justifying Transnet's decision against Mr Gama, on sanction. What I can confirm is that my concerns in relation to supporting the settlement agreement were satisfied by the time of the conclusion of the meeting of the Board, on 16 February 2011. The information that was considered at that meeting justified my support of the settlement, as I explain in more detail, below. In summary, I had considered Mr Todd's memo and noted that it did not address the issue of the inconsistency of discipline and the facts raised by the Chairperson on this issue. I was satisfied that the issue of the inconsistency of the discipline was weighty enough to justify settlement.

37. The Board met again on 16 February 2011 (the relevant minute is attached hereto marked "**DT11**"), and I can recall *inter alia* being present at that meeting. There, it was resolved by majority that reinstatement would be fair and prudent in the circumstances, given *inter alia* that Mr Gama had been selectively

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disciplined by the company. In relation to the minute and to the meeting itself, I am advised that the following facts bear emphasis:

37.1. In the minute, the Chairman took the Board through a draft settlement agreement. Transnet has not furnished me with the contents of that draft settlement agreement, and I am forced to reserve my rights in that regard, as previously stated.

37.2. The Chairman furthermore confirmed that there was a list of contraventions that were comparable to the case of Mr Gama, and it seemed to me that the instances were so numerous that mass discipline could have de-stabilised the organization, or at a minimum posed a serious set-back to the best interests of Transnet as a whole.

37.3. The Board resolved that it supported the acting GCE/Chairman in his endeavours to settle Mr Gama's matter. It was on this basis, as I recall, that the acting GCE was given a mandate to finalise the settlement agreement's terms. This, in my view at the time, was consistent with the reports I had received that Mr Gama was selectively disciplined. Given these conclusions, Mr Gama's dismissal seemed to me to be unfair and there was at least a risk that a court could in the end so find.

37.4. After concluding that Mr Gama's reinstatement would be fair and prudent given *inter alia* that he had been selectively disciplined by the company, the Chairman indicated that the necessary settlement agreement would be finalised in March 2011. He further informed the Board that there were human resources issues that would be referred to the Group Remuneration Committee ("**REMCO**"), for its consideration.

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38. The minute reflects that there were dissenters from the majority decision of the Board. I can confirm that I was not one of the dissenters, and that I supported the decision of the majority of the Board. I acknowledge that the Commission takes issue with this decision in the Request, but I can confirm that I did so in the following circumstances:

38.1. Having considered Mr Todd's written advice, which was before the Board.

38.2. In the light of all the information available to the Board at the time, which as I have said went beyond Mr Gama's case in isolation.

38.3. In my best judgment of that information, and of Transnet's bests interests, in the light of that information.

38.4. Having considered the fact that the finding of guilt against Mr Gama would be confirmed, albeit in my view not with the sanction of dismissal.

38.5. Taking into account the various documents and legal advice that served before the Board. I have consistently requested copies of these documents, to no avail. I cannot now recall what the advice and information at the time contained, but I can confirm that it would at least have been taken into account.

39. I accept that another person possessed of the same facts might have taken a different position in relation to the decision. That, I am advised, is not the test for

the breach of one's fiduciary duties as a director. I shall expand on what I am advised in relation to the test to be applied to my conduct later in this affidavit.

40. The matter was then finalised in the REMCO meeting referred to at the meeting of 16 February 2011, which was ultimately held on 11 April 2011. The memorandum which was considered at the said meeting is attached hereto marked "**DT12**". As indicated in the memorandum, REMCO considered the Long Term Incentive payment for Mr Gama. Consistently with the principles of reinstatement, it concluded that "*[a]ny employment benefits that were due to him for the intervening period of 30th June 2010 to 23 February 2011 in terms of his employment contract shall be deemed to be fully restored*".

41. The proposal was subsequently approved, and a Press Statement on the issue was issued by the Chairman, on 23 February 2011 ("**Press Statement**"). I have attached the Press Statement hereto marked **"DT13"**. It provides in relevant part as follows:

> "*We would like to reiterate that Transnet is satisfied with the finding of the disciplinary forum but after careful consideration, the Board took the view that the sanction meted out, taking all factors into account, was harsh. Therefore, we resolved that a 6 months final written warning was a fair and just sanction, given that he was not found guilty of corruption and/or dishonesty. The Board is of the view that such a decision is in the best interest of the company.*
>
> *In addition, the Board considered the reputational impact of the ongoing uncertainty surrounding this litigation, which has dragged for more than a year. Mr Gama was appealing against the dismissal. The settlement, the Board believes, brings finality to this matter, and would bring to an end harmful publicity surrounding it, especially now that a new GCE has been appointed.*

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As a result of this decision, it will be possible for Mr. Molefe to reassess all acting positions at executive level within the company. The various acting arrangements were due to the litigation with Mr. Gama. Also, we believe, that this decision will assist in focusing all management efforts on making Transnet, especially TFR, a world class operation.

Finally, the Board mandated me to handle the Gama matter to its conclusion. This includes facilitating the cultivation of cordial relations between Mr. Gama, his colleagues in the executive committee and the rest of Transnet's employees".

42. I can confirm that the Press Statement is an accurate reflection of my understanding of the processes followed by the company. The Board then proceeded to draw a line in the sand after issue of Mr Gama's reinstatement had been considered and, in my judgement, addressed.

THE REMEDIAL MEASURES TAKEN BY THE BOARD

43. The KPMG/Nkonki Report confirms that, after the condonation of the conduct of Ms Moses and Mr van Niekerk, Mr Gama was the last similarly-positioned executive who had committed similar acts. Their conduct and transgressions, in my judgement and that of the Board, were symptoms of what was a more serious problem. After the decision to reinstate Mr Gama, the Board resolved to address and reverse the culture of condonation that had taken root.

44. We did so as a Board within the statutory limits of our powers. We considered that the optimal course of action would be to address the systemic culture of condonation in a structural manner, to provide for clear requirements and furthermore, where non-compliance was concerned, to impose enhanced

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obligations of enforcement. The measures taken by the Board in this regard included the following:

44.1. The Board at its Special Board meeting instructed Mr Mkhwanazi who was the Chairman and Acting GCE at the time, to ensure that employees at Transnet were explicitly informed of the new policies in relation to condonation, and that the previously existing culture of condonation would no longer be tolerated.

44.2. The Board saw to it that terms of reference were implemented for the establishment of a Board Acquisition Disposal Committee. This measure was implemented on 31 August 2011. I have attached those terms of reference hereto, marked "**DT14**".

44.3. The Board saw to it that amendments were made to Transnet's Procurement Policy Framework, a copy of which is attached hereto, marked "**DT15**". These amendments were made during August 2012, and included –

44.3.1. the clarification of the rules in relation to condonation in the course of procurement processes; and

44.3.2. the establishment of checks and balances in respect of the delegated authority of the GCE.

44.4. The Board saw to it that the previously existing norms in relation to these matters were tightened into binding legal obligations, such that violation of those obligations would have the potential that any such procurement

decisions were invalidated, and such that it should trigger disciplinary action against any person found to be in contravention of these rules.

45. These measures were all taken in the best interests of Transnet, with the goal of reversing the culture of condonation and ensuring better corporate governance, going forward. They were also taken in the light *inter alia* of the independent advice which was sought by the Board, and furnished to Transnet by KPMG and Nkonki.

MY DECISION WAS NOT UNLAWFUL

46. In the light of the facts that I have addressed above, I am advised and respectfully submit that my support of the decision to conclude the settlement agreement was not unlawful, or in breach of my statutory duties. I respectfully submit that –

46.1. it was consistent with what I am advised is the parity principle under labour law; and

46.2. it was consistent with the fiduciary duties of directors under the common law and the Companies Act 71 of 2008 ("**the Companies Act**"), *inter alia* in that, even if reasonable people might have disagreed with the decision, on the facts available at the time, the decision –

46.2.1. accords with my duty to act in good faith and in the best interests of Transnet;

46.2.2. accords with my duty as a director to act for a proper purpose at all material times; and

46.2.3. did not fall outside of the proper exercise of a director's 'business judgment', as that term is legally defined and understood.

47. I shall now summarise what I am advised are the applicable legal principles in respect of the parity principle, together with the applicable requirements of company law. For reasons on which I shall expand, I respectfully submit that the requirements referred to in the Request were met.

(a) Mr Gama's case raised concerns regarding the parity principle

48. It is a clear principle of employment law that an employer is required at all times to be "*consistent*" in the application of disciplinary action, and concomitantly that an employer should avoid inconsistency. In labour-law parlance, I am advised that the principle is referred to as the 'parity principle'. The relevant principles in this regard are summarised as follows:

48.1. The principle expresses that it would be unfair to measure the seriousness of the acts of misconduct by a different standard than the standard that was applied to others who have committed the same or comparable acts of misconduct.

48.2. It entails a fact-specific enquiry,[7] and does not necessarily mean that the same sanction must be applied in every instance of the same act of misconduct. It does however require at a minimum that the same

7 *National Union of Metalworkers of SA & Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A)

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procedure must be applied in addressing similar instances of the same act of misconduct.

48.3. The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, and a value judgment must be exercised, and this must be informed by the relevant circumstances.

49. I have explained why I considered that, regardless of Mr Gama's guilt on the charges, a selective discipline issue that had been sufficiently substantiated warranted consideration. I have referred to the examples of Ms Moses and Mr van Niekerk, whose conduct was condoned, and to the fact that the KPMG/Nkonki report confirms that this was a concern. I confirm that the parity principle informed my decision. In the circumstances, I am advised and submit that my decision was lawful and appropriate.

(b) The decision accorded with the applicable duties of directors under company law

50. In terms of section 66(1) of the Companies Act, the business and affairs of a company must be managed by or under the direction of its board of directors, which has the authority to exercise all of the powers and perform any of the functions of the company. The primary way in which a board discharges this responsibility, and especially in circumstances where the Board of Transnet was vested with powers of a non-executive nature, is through the CEO of the company responsible for the implementation of the board's policies and directions.

51. As a general principle, a director such as myself owed a fiduciary duty to Transnet as a company. My paramount duty was to act in good faith and therefore for Transnet's overall benefit.[8] I am advised that the basic goal of directors is the company's success and collective best interest of the shareholders, without ulterior motives. I am further advised that the directors must consider both the short-term and long-term consequences of their actions for the company.

52. The duties of the directors of a company include the duty of acting in the best interests of the company, the duty to avoid a conflict of interest and the duty of care, skill and diligence when acting on behalf of the company.

53. These duties have now been codified in sections 75 to 77 of the Companies Act. I am advised that there are 3 such duties that are relevant to the issue in respect of which the Commission has invited submissions to be made. I address them separately below.

I discharged the duty to act in good faith and in the best interests of the company

54. The duty to act in the best interests of the company is the main fiduciary duty of a director under the common law as well as the Companies Act. Section 76(2)(b) provides for the duty of disclosure of any material information that a person obtains as a director.

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8 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (1) All SA 150 (SCA) at para 22.

55. According to the Companies Act, a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director in the best interests of the company.[9] This fiduciary duty, I am advised, is owed to the company alone, and therefore only the company can enforce the duties against the director who has breached them.[10]

56. My role in supporting the decision to reinstate Mr Gama, in my respectful submission, accorded with my duty to act in good faith and in the best interests of the company. I respectfully submit that this is evident from my submissions above, namely:

56.1. I supported the decision to reinstate Mr Gama. I did so in a context where I had recently been appointed to the Board, and my direct personal knowledge of the history of the matter was limited to the information before me.

56.2. I did so on the basis of the information before the Board, which included the fact that Mr Gama had indeed been selectively disciplined. The fact that these concerns were valid is confirmed in the KPMG/Nkonki Report.

56.3. I also considered it to be in the best interests of Transnet to draw a line in the sand, and I submit the Board did so to the best of its ability, after the inconsistency in discipline was addressed. The Board imposed structural

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9 Section 76(3) of the Companies Act

10 Section 165 of the Companies Act. Also see *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (1) All SA 150 (SCA); and *Prudential Assurance Co Ltd v Newman Industries Ltd* (1982) CH 204.

reforms to reverse the culture of condonation, which was also in Transnet's best interests.

I discharged the duty to act for a proper purpose

57. The duty to act for a proper purpose is provided for in section 76(3) of the Companies Act.[11] This duty, I am advised, derives from the common law and continues to apply under the regime imposed by the Companies Act. Although I am advised that 'proper purpose' is not defined in terms of the Companies Act, the common law requires that directors must exercise their powers for the objective purpose for which the power was given to them and not for other ulterior purposes or motive.[12]

58. I respectfully submit that the discharge of my duty to act for a proper purpose has been clearly established. At all times, I considered the issue of the settlement agreement in an open manner, and at no time did I harbour any ulterior purpose. There is no evidence with which I have been furnished which suggests otherwise. I had absolutely nothing to gain personally from supporting the settlement.

59. The purpose for which I exercised the powers, as I have explained, was to ensure fairness and parity of discipline, whilst simultaneously seeking to address systemic maladies within the organization broadly, which are both considerations that are in Transnet's best interests.

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11 Cassim *et al* at 487.

12 Cassim *et al* at 487.

The duty of care skill and diligence & the 'business judgment' rule

60. I am advised that the duty of care, skill and diligence is provided for in sections 76(3)(c)(i) and (ii) of the Companies Act. I am advised that:

60.1. The Companies Act lays down a subjective test in determining the liability of the director as far as her general knowledge is concerned. Even if an objective test were applied, I respectfully submit that my conduct cleared the bar. As I have explained, from my perspective, the interests of fairness and parity of discipline broadly outweighed considerations of whether in the particular case Mr Gama was guilty of the misconduct, which I accepted.

60.2. The duty of care and diligence is a flexible duty and it is not rigid. This is so for good and practical reasons. I am advised that it is designed to be interpreted contextually, and that in each case it will be given a commercially sensible meaning, which permits directors to exercise judgment in affairs of the company without straitjacketing their discretion. This consideration is referred to as the 'business judgment rule', I am advised that this rule is the standard against which a director's decision will be assessed.

61. I am advised that the rationale for the rule is that it is designed to protect the decisions of honest directors from inevitable commercial risks that are inherent to the function of directors, namely the risk of making unsuccessful decisions. This facilitates the legitimate objective of optimal business growth, which requires that certain risks be taken.

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62. The rule, I am advised, states that a director shall be deemed to have fulfilled certain of her duties if she complied with a number of requirements set out in section 76(4) of the Companies Act. In accordance with recent case law, I am advised that, a director will have acted in accordance with the business judgment rule in the event that she –

62.1. took reasonably diligent steps to become informed about the matter in question;

62.2. had no material personal financial interest in that matter, or if she did, followed the requisite disclosure and recusal provisions contained in section 75 of the Companies Act; and

62.3. had a rational basis for believing, and did believe, the decision to be in the best interests of the company, at the time.

63. In these circumstances, I am advised that a director in question will have acted unimpeachably,[13] even in the event that, with the benefit of hindsight, a decision proves to have been activated by an error in judgment. I submit that my conduct meets this requirement for reasons above and below.

64. The 'reliance rule', in sections 76(4)(b) and (5) of the Companies Act, complements the 'business judgment rule' and provides that, in exercising her functions as such, a director is entitled to rely on others (such as employees, committees or advisors of the company) reporting to her, as well as opinions and

13 See *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC).

information provided to her. That is what I did in the context of the present issue. This is clear because –

64.1. even the limited documents furnished by Transnet to date demonstrate that I considered all relevant issues in order to ensure that I was fully apprised of all relevant information;

64.2. the questions I asked in the meeting of the CGN Committee, in my respectful submission, demonstrate that I attempted to come to grips with the issues arising with Mr Gama, and that I did so in good faith;

64.3. there can be no suggestion I had a personal financial (or other improper) interest in the matter, and no such suggestion has been made; and

64.4. given the clear and independently verified selective application of discipline at Transnet, I submit that I had a rational basis for believing, and did believe, the decision to conclude the settlement agreement to be in the best interests of the company.

INDIVIDUAL RESPONSES

65. I have now set out what I am advised and submit are the applicable legal principles, in context. I now turn to deal with –

65.1. the relevant contents of the Request;

65.2. the relevant contents of the affidavit of Ms Mohlabi, which was given to me by the Commission, and which I have read; and

65.3. the relevant contents of the affidavit of Mr Todd.

66. Insofar as any specific allegation is not dealt with, it is to be taken as denied insofar as it is inconsistent with my submissions in this affidavit.

(a) <u>Individual responses to the Request</u>

67. **Ad paragraphs 1 to 2**

67.1. Of relevance in these paragraphs is the allegation that I was "*a member of the Transnet Board of Directors at the time when a settlement agreement was concluded*".

67.2. As is evident from my submissions earlier in this affidavit, I admit the contents of these paragraphs. However, I point out that I became an appointed director after Mr Gama had been charged and dismissed.

68. **Ad paragraph 3**

I admit the contents of this paragraph. However, I wish to point out that my decision to support the settlement of Mr Gama did not relate to issue that the Commission is investigating, in particular that he was reinstated in order to facilitate wrongdoing such as corruption or acts of state capture.

69. **Ad paragraphs 4 to 5**

I admit the contents of these paragraphs.

70. **Ad paragraph 6**

70.1. I note that it "*prima facie seems to the Chairperson of the Commission that the settlement agreement Transnet concluded with Mr Gama may not*

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have been in the interests of Transnet and may have been one sided in favour of Mr Gama":

70.2. However, I respectfully deny that the agreement was not in Transnet's interests, when assessed against the information that was available at the time. I refer to my submissions above in this regard.

70.3. I note the Commission's suggestion that it believes I "*may have acted in breach of my fiduciary duties*". I respectfully deny that this was the case, for reasons I have traversed comprehensively above.

70.4. Given *inter alia* the independently verified facts that Ms Moses and Mr van Niekerk had gone unpunished for similar transgressions, I submit that the decision to conclude the settlement agreement was consistent with the parity principle under labour law. I further submit that it constituted the proper discharge of my fiduciary and statutory duties.

70.5. I do not understand there to be any suggestion that the individual terms of the settlement are in issue. It is the very fact of settlement that I am required to address. As is self evident, settlement is always a matter of give and take.

71. **Ad paragraphs 6(a) to 6(c)**

71.1. These paragraphs are concerned with the issues of (*a*) the reinstatement of Mr Gama; (*b*) the retrospectivity of Mr Gama's reinstatement; and (*c*) the fact that Mr Gama's sanction was changed to a final written warning.

71.2. I understand that the paragraphs may suggest that there was no basis for any of these decisions. I respectfully deny this suggestion, for reasons given above.

71.3. Mr Gama's misconduct predates my appointment to the Board. However, I submit that there was a sound basis for me to conclude in my judgement that Mr Gama had been disciplined for acts other employees had been forgiven for, under analogous circumstances (i.e. the quantum, seriousness, facts and the respective positions of seniority of the employees were similar to Mr Gama).

71.4. I submit that there was accordingly reliable information before me that Mr Gama had been targeted for selective discipline, I respectfully submit that there was indeed reason to reinstate him.

71.5. I further submit that my support for the decision constituted the proper discharge of my fiduciary duties.

72. **Ad paragraphs 6(d) to 6(f)**

72.1. These paragraphs are concerned with the issues of the contents of the settlement agreement as it concerned the issue of legal costs. Although the issue of costs was discussed at the CGN Committee to which I have referred, I do not recall whether this was finally resolved at Board level, and I have not been furnished with information to suggest otherwise.

72.2. As pointed out above, settlement is always about give and take. I was not involved in the negotiations at all. I deferred to those who were, leaving

the detail to them, once I had accepted the principle reasons for entering into the settlement.

73. **Ad paragraphs 7 and 8**

73.1. I have set out my explanation of why I considered the settlement agreement to be the appropriate course in all the circumstances. Whether or not my business judgment proved to be correct, in hindsight, I respectfully submit that it was lawfully exercised, taking account of all relevant circumstances.

73.2. I can confirm that no member of Cabinet exercised any pressure on me regarding the settlement agreement, and I confirm that my decision to conclude the settlement agreement was not informed by the conduct of any member of Cabinet.

(b) <u>Responses to the affidavit of Ms Makwena Pertunia Mohlabi</u>

74. Ms Mohlabi has deposed to an affidavit which I have read. Ms Mohlabi contends that she is currently the Group Company Secretary of Transnet. I admit this allegation.

75. Ms Mohlabi contends that she has been Group Company Secretary since 1 May 2020. I do not understand her to suggest that she has personal knowledge of the relevant events prior to her appointment.

76. Ms Mohlabi's evidence before the Commission is limited to referring the Commission to relevant documents that she has on file. I have referred *inter alia*

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to the same documents in this affidavit. I admit the contents of those documents to the extent that they are not inconsistent with my prior allegations.

77. I furthermore admit that the documents referred to by Ms Mohlabi are relevant documents for the Commission to consider. I point out, however, that Ms Mohlabi does not refer to the entirety of the documents that are relevant. In this affidavit, I have referred to certain documents that are additional to those referenced by Ms Mohlabi.

78. I have also sought the disclosure of further documents from Transnet which I believe to be relevant. To date, those documents have not been forthcoming. I have attached the relevant correspondence in this regard. I refer to my submissions above.

(c) <u>Responses to the affidavit of Mr Todd</u>

79. I understand that the affidavit of Mr Todd was deposed to at the request of the Commission, and that the affidavit was requested from Mr Todd on account of his involvement in issues concerning Mr Gama, as a partner of the firm that Transnet instructed in that matter.

80. Mr Todd alleges that he "*was at all material times the attorney responsible for discharging the firm's mandate*" in regard to Mr Gama's matter. I admit that allegation. However, it appears to me that Mr Todd's personal knowledge of Transnet's affairs may have been limited to the issues of Mr Gama's case alone,

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as opposed to the broader considerations, confirmed in the KPMG/Nkonki report, which led to my support for the settlement.

81. I note that Mr Todd makes no allegation in his affidavit against me, specifically. He does however draw inferences in his affidavit, to which I am advised that it is prudent for me to respond. I do so below.

82. **Ad paragraphs 1 to 8**

82.1. I admit the contents of these paragraphs.

82.2. I point out that Mr Todd does not attest to any personal knowledge outside of the issues pertaining to Mr Gama, specifically.

83. **Ad paragraph 9 to 10**

83.1. I have no personal knowledge of whether the Commission has been furnished with copies of the two findings of the chairperson in Mr Gama's disciplinary proceedings.

83.2. Save as aforesaid, I admit the contents of these paragraphs.

84. **Ad paragraph 11**

84.1. I admit the contents of these paragraphs.

84.2. I reiterate that I understood Mr Gama to be guilty, as he then admitted, and that the decision to reinstate him was not concerned with his innocence or guilt of the charges. I have explained this above.

85. **Ad paragraphs 12 to 18**

I admit the contents of these paragraphs.

86. **Ad paragraphs 19 to 20**

86.1. I have no personal knowledge of whether Mr Todd received a telephone call from Mr Ndiphiwe Silinga ("**Mr Silinga**").

86.2. I can however confirm that Mr Silinga was a Transnet internal legal advisor at the relevant time.

86.3. Save as aforesaid, the contents of these paragraphs are admitted.

87. **Ad paragraphs 21 to 25**

87.1. I admit that Bowmans prepared a report to Transnet, and that Transnet was taking legal advice from Deneys Reitz, in addition, at the time referred to in these paragraphs.

87.2. Deneys Reitz's advice has not been given to me, despite repeated requests from my instructing attorney.

87.3. I can however confirm that the report served before the Board at the time that it made its decision to reinstate Mr Gama, and furthermore that I considered the report. I have traversed the reasons I did so above.

87.4. Save as aforesaid, I have no knowledge of the contents of these paragraphs, which are concerned with Mr Silinga and Mr Mkhwanazi.

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88. **Ad paragraph 29**

88.1. I admit that the agreement appears to have been signed by Mr Mkhwanazi himself. I understood Mr Mkhwanazi to be authorised to do so, and as I have said, I supported the decision on settlement for reasons that were concerned with broader considerations than Mr Gama's guilt or innocence.

88.2. Save as aforesaid, I have no personal knowledge of the allegations in this paragraph.

89. **Ad paragraphs 30 to 30e.**

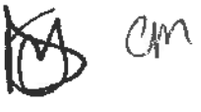
89.1. I admit that Transnet changed course in deciding to conclude the settlement agreement. I deny that there was anything untoward in doing so, to the extent that this is suggested.

89.2. I deny the contents of these paragraphs to the extent inconsistent with my narrative above.

89.3. Save as aforesaid, the contents of these paragraphs are admitted.

90. **Ad paragraph 31**

90.1. I can confirm that the Board considered legal advice beyond solely the report furnished to it by Bowmans. The further legal advice that was furnished in written form has not been disclosed to me, despite repeated requests.



90.2. In addition to considering the Bowmans report and the further legal advice, I can confirm that I relied further upon my own knowledge and expertise, as a practicing attorney. In all the circumstances I have described above, it seemed to me to be prudent and fair to reinstate Mr Gama, notwithstanding his guilt on the charges.

90.3. The contents of this paragraph are thus denied, to the extent inconsistent with the facts that I have set out above.

91. **Ad paragraph 32**

91.1. I deny Mr Todd's assumption that the contents of the Bowmans report "*were completely ignored by those who decided to conclude the settlement agreement*". I have explained further above that my support for the decision bore that advice in mind.

91.2. Due to the fact that the further documents and written advice I have requested have not been provided to me, I cannot comment further on the issue.

91.3. I admit the contents of this paragraph only to the extent that it is consistent with my submissions above. Save as aforesaid, the contents of this paragraph are denied.

92. **Ad paragraphs 33 to 33e**

92.1. I admit that my support for the decision to conclude the settlement agreement was not ultimately motivated by Transnet's legal position in the arbitration, when viewed in isolation. I reiterate that it was informed by

broader considerations of governance, and I respectfully refer to my submissions above in this regard.

92.2. I admit that Transnet's case against Mr Gama had strong prospects of success insofar as Mr Gama's guilt was concerned, given that Mr Gama had admitted to the misconduct. I reiterate that colleagues at Mr Gama's level were not disciplined by Transnet for analogous conduct, which subsequently came to light. I furthermore reiterate that the Board implemented structural reforms to reverse the process, thereafter.

92.3. I note that Mr Todd suggests that the decision to conclude the settlement was irrational, in these paragraphs under reply. I am advised and submit that it was indeed rational as a matter of law, given the contextual circumstances that I have set out further above.

92.4. Save as aforesaid, the contents of these paragraphs are denied to the extent that they are inconsistent with my submissions in this affidavit.

93. **Ad paragraph 34**

93.1. Mr Todd himself avers that he does "*not have any personal knowledge of why the [settlement] agreement was concluded*", which I admit.

93.2. However, Mr Todd then proceeds to infer that the decision to conclude the settlement agreement "*was taken elsewhere, outside the governance structures of Transnet*". For reasons traversed above, I can confirm that Mr Todd is not correct. I am not aware of any facts that support Mr Todd's inference. And any suggestion in my case that the decision was "*taken elsewhere*" is simply false.

CM

93.3. From Mr Todd's admittedly limited knowledge, he proceeds to contend that the terms of the settlement agreement "*were not rationally connected to the legal, financial or governance interests of Transnet*", and that "*the decision could not rationally have been taken by the board of Transnet if its members had exercised their fiduciary duties and had applied their minds to the best interests of the company*". I have explained above why I respectfully submit that Mr Todd is incorrect in seeking to draw this inference, and I am advised and submit that it is unsubstantiated.

93.4. I therefore deny the allegations in these paragraphs, and I refer the Commission to my submissions further above. The decision was taken in light of considerations outside of the narrow issue of which Mr Todd has personal knowledge. From my perspective, the decision was made with the legal, financial and governance interests of Transnet being at the front of mind. I can confirm that I supported the decision in good faith and in a manner that accorded with my best business judgment at the time.

94. **Ad paragraphs 35 to 38**

94.1. I admit that Mr Gama's conduct had adverse consequences for Transnet. I reiterate that the same applies to other similarly situated employees, who experienced no adverse consequences for their conduct.

94.2. I point out that, by comparison with Ms Moses and Mr van Niekerk, Mr Gama's breach of his authority involved far lower amounts than the latter two former employees. I have also drawn attention to the measures that were put in place to bring an end to the culture of condonation.

94.3. I note that Mr Todd avers that he does not know "*what motivated Mr Mkhwanazi, or anyone else involved in the decision, to make that decision*". I have submitted further above that the law encourages the settlement of litigation, and I have explained the relevant context to my decision to support the conclusion of the settlement agreement in my submissions further above. To the extent that the contents of these paragraphs are inconsistent with my submissions in this affidavit, they are denied.

95. **Summation on Mr Todd's affidavit**

Mr Todd, to sum up, was apprised of information relating only to the issue of Mr Gama. The Board however was differently positioned, and was required in all the circumstances to take a decision in the interests of Transnet as a whole, which called for a holistic view of all relevant circumstances. Save to state the above, I deny the contents of Mr Todd's affidavit to the extent inconsistent with my submissions in this affidavit.

CONCLUSION

96. It was in the circumstances above that the decision to support the settlement agreement was made. I respectfully submit that I have demonstrated that I supported the decision in good faith. For all the reasons above, I reiterate that I

acted at all times in a manner that I considered to accord with Transnet's best interests.

97. When my decision is placed in its proper context, as I have attempted to do in this affidavit, I respectfully submit that no cogent reason has been presented to conclude otherwise.

DEPONENT

I certify that on the 29 **day of SEPTEMBER 2020** and at Johannesburg the above deponent appeared before me and that he acknowledged to me that he knows and understands the contents of the above Affidavit, which Affidavit was signed and sworn to in my presence in accordance with the requirements of Regulation No. R1428 dated 16 November 1984, as amended, which have been fulfilled.

Commissioner of Oaths

FULL NAMES:
CAPACITY:
ADDRESS:

MMUDI CECILIA MABUYA
Commissioner of Oaths
Administration Clerk
5th Floor, Katherine and West
114 West Street, Sandton
Johannesburg, South Africa
REFERENCE No: 47/03/2012

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Mr Siyabulela Xhanti Mapoma
General Manager: Legal Services
Transnet Limited
Room 4713, 47th Floor
Carlton Centre
150 Commissioner Street
Johannesburg
2001

Our ref L21101-5001

12 January 2011

Dear Sir

Forensic Services for Transnet: Engagement terms and conditions

1 Introduction

Pursuant to our meeting on 11 January 2011, we confirm and thank you for requesting us to assist in providing Forensic Review services to Transnet Limited ("Transnet") as described more fully below.

This letter sets forth the terms of our engagement and the nature and extent of the services that KPMG Services (Pty) Ltd ("KPMG") and Nkonki Inc. (Nkonki) will be providing.

2 Objectives

The primary objectives of our assignment are to assess whether a former employee code named AA was treated fairly by Transnet in terms of:

- Human Resources Policies and Procedures pertaining to the dismissal of AA
- Common precedent at Transnet in respect of matters similar to those under which AA was dismissed
- Labour Law practice
- Whether the processes followed during the investigation process, in charging the employee, and the disciplinary process were fair and objective
- Report on our factual findings together with supporting exhibits

3 Scope

Our scope will focus on the objectives detailed in paragraph 2. The level and depth of the procedures performed will be determined by us and will be dependent on time or other constraints, where applicable.

The Scope of the assignment will include perusing at least the following documents:

- The Ernst & Young (E&Y) Investigation Report pertaining to the dismissal of AA;
- Letter from the Public Protector to Transnet Limited (addressed to Mr M Mkwanazi) dated 2010-12-22;
- The Transcript of AA's interview which formed part of the E&Y investigation;
- The Transcript of AA's Disciplinary Hearing;
- Legal Opinions obtained from E&Y, Edward Nathan Sonnenbergs and Bowman Gilfillan;
- Review of consistency with any other similar cases against other Transnet Employees; and
- Any interviews that might be considered necessary to complete the forensic review;

In addition, we are to investigate and advise Transnet whether irregularities occurred or whether governance was flouted in respect of:

- Nqgura Container Terminal;
- Durban Harbour Entrance;
- Cape Town Container Terminal;
- Transnet Pipelines NMPP; and
- Phase 2 of the Orex feasibility Study, as alleged on the second bullet point on page 5 of the letter from the Public Protector

We are also to investigate the allegations made on the Public Protector Complaint regarding HMG (as per the fourth bullet on page 5 of the letter from the Public Protector).

Should the scope of our engagement be restricted in any way, such restriction may require us to either qualify our report accordingly or to review our position in respect of this engagement. We will have the right to terminate this engagement if we are not given access to persons, information and records pertinent to the engagement or if material misrepresentations are intentionally made to us by Transnet or by persons under your control, or if a conflict of interest arises.

We confirm that we will not provide legal opinion and that any references to relevant laws and/or legislation, contained in our report, are not to be construed as providing legal advice. Any legal opinion required will be provided by an appointed legal counsel.

4 Engagement approach

In order to achieve the objectives, we confirm Transnet has agreed that we conduct the investigation in the following phases:

Phase 1 – Planning and preliminary enquiries
During this phase of the investigation the following procedures, *inter alia*, will be performed:

- We will request all documentation we believe would be relevant for the purposes of our assignment
- We will briefly review such documentation in order to gain an understanding of the pertinent issues relevant to this assignment
- Compile a project plan with timelines and key milestones

Phase 2 – Detailed investigation
During this phase of the investigation the following procedures, *inter alia* will be performed:

- Study the relevant documentation thoroughly as they pertain to this assignment
- Conducting interviews with relevant persons
- Obtaining and studying further documentation identified
- Utilising legal counsel as and where required

Phase 3 – Feedback and reporting
During this phase of the investigation the following procedures will be performed:

- Compiling a draft report together with exhibits and annexures setting out our findings

- Discussing the draft report with yourselves with the view to finalising it
- Issuing a final report

5 Deliverables

The primary deliverables for this engagement are as follows:

- Progress reports as agreed for 26 January 2011
- Draft report together with annexures and exhibits
- Final report together with annexures and exhibits

We shall report back to you on the objectives detailed in section 2 above.

We confirm that we will report all our findings arrived at and issues identified during the course of conducting the engagement as described above.

The draft deliverables will be provided to the project sponsor, Mr Siyabulela Mapoma, for review, comment and approval prior to final delivery.

The deliverables presented as part of this engagement are for the internal use of Transnet, within the explicit context of this specific engagement and its intended purpose, and are not to be distributed externally to third parties, in whole or in part, without prior written consent from KPMG and Nkonki in each instance, or used for any other purpose. We disclaim any intention or obligation to update or revise any of our findings whether as a result of new information, future events or otherwise after the delivery of our final report.

Our report(s), and other deliverables, will be issued to you in hard copy. Should you require us to issue our report(s), or other deliverables, in electronic format, we cannot be held liable for the unauthorised publication or dissemination of our report(s), or any other deliverables, as a result of it/them having been issued in electronic format and KPMG and Nkonki accepts no responsibility in this regard. Furthermore, only the final hard copy report should be viewed as our work product.

Please refer to the "Third party rights" clause in our attached Standard Terms and Conditions.

6 Timetable

We will be in a position to commence work upon receipt of a signed copy of this engagement letter

7 Engagement team

Engagement Leader: Sindi Zilwa (Nkonki) and Kevin West (KPMG) will be jointly the Engagement Leaders for this assignment. Sindi Zilwa will also act in her capacity as the Client Relationship partner.

General Quality Assurance and Relationship Management: Tshidi Mokgabudi (KPMG) will be responsible for general Quality Assurance of the assignment and client relationship.

Engagement Partners: The engagement will be co-ordinated by Jafta Mabunda (Nkonki) who can be reached 073 678 1076 (mobile) and Johann Stander (KPMG) who can be reached at 083 284 9850.

Engagement Managers: The engagement managers for this assignment will be Winston Tong (Nkonki) and a manager to be provided by KPMG.

Engagement Staff: We will also assign professionals with the necessary skills and experience to assist with fieldwork as appropriate.

Engagement Quality Control Review: Herman de Beer (KPMG) and Mitesh Patel (Nkonki) will be responsible for performing technical forensic quality reviews on the work being performed.

Legal Practitioners: We will appoint legal practitioners when necessary, to support us in the performance of this assignment.

Circumstances may require certain members, initially assigned to this engagement, to be substituted and we reserve the right to do so at our discretion. We will endeavour to provide you with reasonable notice and to provide replacement staff of equivalent ability, in the event of any substitution becoming necessary.

8 Client participation and responsibilities

During the development of this engagement letter, we were guided by certain assumptions about the project scope, and level of involvement and support from Transnet.

8.1 Client support

We will require the support of Transnet personnel in order to achieve timely completion of the project. Support includes, but is not limited to, the collection of all relevant documentation (paper or electronic) and the scheduling of interviews and coordination of meetings

8.2 Access to information

In order to successfully complete our engagement, we will require access to relevant records, documents and information from Transnet and, where applicable, from relevant third parties.

We look forward to full co-operation with your staff and we trust that they will make available to us whatever records, documentation and other information we may request, in connection with our engagement.

We will rely on your assistance to obtain access to relevant records, documentation and other information in the possession of third parties.

8.3 Office accommodation and co-operation

We confirm that we will require office accommodation at your premises.

When necessary, we may also require co-operation from your professional service providers, for example, external legal representatives or past and present personnel.

8.4 Project management

Transnet will designate a management level individual to oversee the conduct of this project, including coordination of Transnet resources needed and to review draft deliverables. Transnet personnel assigned to the project will review draft deliverables on a timely basis.

9 Professional fees

Our fees are based upon the degree of responsibility and skill involved and the time necessarily incurred on the work, charged at our normal rates for work of this nature, plus the reimbursement of our expenses.

9.1 Fees

Given the nature of this engagement it is difficult to accurately estimate our costs relating to the engagement.

Our current charge-out rates per hour, excluding VAT, are as follows:

Level	Standard rate R	Transnet discounted rate R
Partner	3 500	2 975
Associate Director	2 700	2 295
Senior Manager	2 100	1 785
Manager	1 600	1 360
Investigator	500 – 1 170	425 - 995
Investigative Assistant	400	340

Our rates have been discounted by 15% and are revised in March and September of each year.

The fees of legal practitioners will be recovered at cost.

We will invoice you for our fees and disbursements on a monthly basis. Fee notes are payable within 7 days of presentation. Each firm will invoice separately.

In the event of fees due and payable not being settled in accordance with the terms of this agreement we will have the right to retain all documentation in our possession or under our control and to withhold our findings or to withdraw our report, until such time as the fees and disbursements owed, have been paid.

Please refer to the "Fees" clause in our attached Standard Terms and Conditions.

9.2 Travel, subsistence and disbursements

We confirm that we will be entitled to recover outlays for travel, subsistence and disbursements, in terms of the attached Standard Terms and Conditions. Any material costs will be cleared with you before being incurred.

We confirm that we will be entitled to recover any of the following costs should they be applicable:

- Any costs incurred by our firm or staff assigned to this engagement as a result of our firm or its employees being *subpoenaed* to testify regarding the subject of the engagement, for either civil, criminal or disciplinary actions.
- Any costs incurred by our firm as a result of you requesting our firm, to seek protection against disclosure of *subpoenaed* materials in our possession, custody or control.
- Reasonable legal and professional costs that may be incurred by our firm in defending any claims that may arise out of the engagement, other than those arising as a result of our negligence.

10 Other matters

10.1 Limitation of scope

This engagement will not be performed by us in the capacity of a Registered Auditor and the engagement does not constitute an audit or review, other assurance engagement or an agreed-upon procedures engagement, performed in accordance with International Standards on Auditing (IASs), International Standards on Review Engagements (ISREs), International Standards on Assurance Engagements (ISAEs) or International Standards on Engagements to perform Agreed-upon Procedures regarding Financial Information.

Accordingly, these services will not result in the issue of a written report to third parties by KPMG and Nkonki directly reporting on financial data or internal control or expressing any form of assurance.

10.2Independence

We will conduct this engagement objectively and independently and will require full co-operation from you and, where necessary, from your legal and other professional representatives.

Appropriate safeguards have been implemented by us to ensure that our independence in the conduct of this engagement is not compromised by any party.

10.3Conflicts of interest

We confirm that to the best of our knowledge we would not be acting in conflict with the interest of any other KPMG or Nkonki client by accepting this engagement.

We confirm that we have discussed with you any possible conflict of interest with any other KPMG and Nkonki client, arising from this engagement, and that you are not aware of any such conflict that would affect our acceptance or continuance of this engagement.

10.4 Indemnity

KPMG Services (Pty) Limited and Nkonki Inc., its directors, employees and agents will not be liable for any loss, damages, costs or expenses, which may arise or be incurred as a result of information supplied by, or misrepresentations, fraudulent acts or willful default on the part of Transnet, its directors, employees or agents. Transnet indemnifies KPMG Services (Pty) Limited and Nkonki Inc., its directors, employees and agents, against any and all losses, damages, costs or expenses in this regard.

10.5Debriefing

On completion of the engagement, as part of our commitment to the quality of our service, we would welcome the opportunity to receive your views on the work carried out by us and the service delivered.

11 Terms of business

The Standard Terms and Conditions, as set out in Appendix A, will be applicable jointly for both KPMG and Nkonki. Wherever the word "KPMG" appears in the Standard Terms and Conditions, this should be read to include "Nkonki".

We accept this engagement and will commence work on the basis that our Standard Terms and Conditions, as set out in Appendix A, will apply to this work and govern our relationship with you. The Standard Terms and Conditions shall be treated as being an integral part of this agreement. This letter is the 'engagement letter' mentioned in our Standard Terms and Conditions.

Unless otherwise agreed, this engagement letter and the attached Standard Terms and Conditions of business will also apply to any engagement extension or future instructions you may give us.

12 Conclusion

If you are in agreement with the contents of this engagement letter, and if the arrangements are in accordance with your requirements, kindly sign a copy of this letter in the space provided below and initial each page of this letter and the Standard Terms and Conditions, and return both the letter and the attached Standard Terms and Conditions to us.

We look forward to working with Transnet. If we can provide you with any additional information, please feel free to contact me on .

Yours faithfully

	DIRECTOR	19/01/2011
Signature: Tshidi Mokgabudi	***Position***	***Date***
On behalf of KPMG		
	CEO	20/01/2011
Signature: Sindi Zilwa	***Position***	***Date***
On behalf of Nkonki Inc.		

M.E. Mkwanazi have read and agree to the terms of this agreement. I confirm that I am duly authorised to accept the terms of this agreement.

	Chairman	24/01/2011
Signature and name	***Position***	***Date***
On behalf of Transnet Ltd		

Enclosed:
Appendix A: Standard Terms and Conditions

KPMG Services (Proprietary) Limited
Standard Terms and Conditions – for non-audit work at audit clients and non-audit clients

Appendix A

These standard terms and conditions apply to services rendered by KPMG to a client pursuant to a letter recording the engagement ("the engagement letter") enclosing these standard terms and conditions or incorporating them by reference.

Definitions

The meanings of the following words and phrases, which are widely used in these standard terms and conditions, shall be as set out below:

colleagues or a **colleague**: collectively or individually, KPMG persons who are not members of the engagement team.

confidential information: means all documents, software, reports, data, records, forms and other material obtained by KPMG from you in the course of performing the services under the engagement letter:

- that have been marked as confidential;
- whose confidential nature has been made known by you to KPMG; or
- that due to their character and nature, a reasonable person under like circumstances would treat as confidential.

engagement team: collectively or individually, KPMG Persons who are involved in delivering the services.

KPMG or **we** (or derivatives): The KPMG contracting party as identified by our letterhead.

KPMG persons: The KPMG contracting party, each and all of our, directors, employees and agents as the case may be, together with any other body or entity controlled by us or owned by us or associated with us and each and all of its directors, employees and agents and "KPMG person" shall mean any one of them.

other beneficiaries: Any and each person or organisation whose activities you may control, or any other organisation or entity associated with you, if any such person or organisation is identified in the engagement letter as a recipient or beneficiary of the services or any product thereof and agrees to be bound by this service contract and any and each person or organisation which we and you agree may be so treated.

services: The services to be delivered by us under the engagement letter.

services contract: These standard terms and conditions and the Engagement Letter together with any documents or other terms applicable to the services ("additional terms") to which specific contractual reference is made in the engagement letter.

you (and derivatives): The client.

the Act: The Auditing Profession Act, Act 26 of 2005.

Service delivery

1. We will seek to ensure that our service is satisfactory at all times and delivered with reasonable skill and care. If at any time you would like to discuss with us how the service can be improved, you are invited to telephone the director identified in the engagement letter.

2. The engagement will be governed and interpreted in accordance with the laws of South Africa and shall be subject to the exclusive jurisdiction of its courts.

3. Where individuals are to be involved in delivering the services, which individuals are named in the Engagement Letter, we shall use reasonable endeavours to ensure that they are so involved. We may substitute for those named others of equal or similar skills, but we shall consult you before doing so.

Our services and responsibilities

4. We may acquire confidential information concerning your business or affairs in the course of delivering the services. In relation to confidential information we shall comply with the confidentiality standards of our regulatory bodies, the Independent Regulatory Board for Auditors and the South African Institute of Chartered Accountants as well as with the Act. This clause shall not apply where confidential information is part of or enters the public domain or where we may be required to disclose it to our insurers, legal advisers or under legal compulsion, or information independently developed by us or where it is received by us from a third party without restriction and without a breach of an obligation of confidentiality. We may disclose confidential information as necessary to perform our normal review processes.

5. In the event that we have been appointed as your registered auditor, we may have a duty in terms of section 45 of the Act to send a written report to the Independent Regulatory Board of Auditors when we are satisfied or have reason to believe that a reportable irregularity has taken place or is taking place at the entity. A reportable irregularity means any unlawful act or omission committed by any person responsible for management of the entity which:

   - Has caused or is likely to cause material financial loss to the entity or to any partner, member, shareholder, creditor or investor of the entity in respect of his, her or its dealings with the entity; or
   - Is fraudulent or amounts to theft; or
   - Represents a material breach of fiduciary duty owed by such person to the entity or any partner, members, shareholder, creditor or investor of the entity under any law applying to the entity or the conduct or management thereof.

In performing this duty in terms of section 45 the Act, KPMG must have regard to all the information which comes to its knowledge from any source, including knowledge gained when providing other services to you, or when providing services to other clients.

6. Prior to completion of the services we may supply oral, draft or interim advice or reports or presentations, but in such circumstances our written advice or our final written report shall take precedence. No reliance shall be placed by you on any draft or interim advice or report or any draft or interim presentation. Where you wish to rely on oral advice or on an oral presentation made on completion of the services, you shall inform us and we shall supply documentary confirmation of the advice concerned.

7. Save as may be required by law, we shall not be under any obligation in any circumstances to update any advice, report or any product of the services, oral or written, for events occurring after the advice, report or product concerned has been issued in final form, unless otherwise specifically agreed in the body of the engagement letter.

8. Save for reports expressly prepared for publication, any product of the services released to you in any form or medium shall be supplied by us on the basis that it is for your benefit and information only and that it shall not be copied, referred to or disclosed, in whole or in part (save for your own internal purposes) without our prior written consent. The services shall be delivered on the basis that you shall not quote our name or reproduce our logo in any form or medium without our prior written consent. You may disclose in whole any product of the services to your bankers and legal and other professional advisers for the purposes of your seeking advice in relation to the services, provided that when doing so you inform them that:

   - disclosure by them (save for their own internal purposes) is not permitted without our prior written consent, and
   - we accept no responsibility or liability whatsoever and neither do we owe any duty of care to them in connection with the services.

9. Any advice, opinion, statement of expectation, forecast or recommendation supplied by us as part of the services shall not amount to any form of guarantee that we have determined or predicted future events or circumstances.

10. It may become necessary as the services contract proceeds to change the scope of the services to include matters you may deem appropriate. You will discuss and agree such changes with us, which will include the payment of any additional fees and the period to provide any additional services. Significant variations in the scope of the services will be the subject of a supplementary engagement letter.

11. We may share confidential information within KPMG and within KPMG international and its member firms in order to allow us to identify and offer you additional services or products that may be of interest to you.

Ownership

12. We shall retain ownership of the copyright and all other intellectual property rights in the product of the services, whether oral or tangible as well as ownership of our working papers. For the purposes of delivering services to you or other clients, we and other member firms of KPMG International shall be entitled to use or develop and share with each other knowledge, experience and skills of general application gained through performing the services. You agree to keep confidential any methodologies and technology used by us to carry out our services.

13. We have the right to use your name as a reference in proposals or other similar submissions to other prospective clients, unless you specifically forbid such disclosure. If we wish to use details of the work done for you for references purposes, we will obtain your permission in advance.

14. In addition, for the purposes of marketing and publicizing or selling services, we, KPMG international and its member firms may disclose that it has performed services for you, in which event we may identify you by name and will indicate only the general nature or category of such services and any details that have properly entered the public domain.

Fees

15. We shall render invoices in respect of the services comprising fees, disbursements and VAT thereon (where appropriate) together with any other foreign taxes that might be payable thereon ("fees"). Details of our fees and any special payment terms shall be set out in the engagement letter.

16. Our fees are based on the time spent on your affairs by KPMG persons or agents, as the case may be and on the levels of skill and responsibility involved, the nature and complexity of the services, and the resources required to complete the engagement. The fees may differ from estimates that may have been supplied, which estimates shall be provisional only. Stringent reporting requirements or deadlines imposed by you might require work to be carried out at a higher level than usual or outside normal working hours. This may result in increased costs and additional fees may also be as a result of material changes in the services or difficulties in obtaining information which could not reasonably have been foreseen.

17. Disbursements in respect of travelling expenses, photocopies, stationery, revenue stamps, postage and telephone calls will be recoverable at our predetermined rates.

18. In return for the delivery of the services by us, you shall pay our fees, without any right of set-off, on presentation of our invoice. If you are not in agreement with any fee note, you are required to notify us in writing of your objection within 21 working days of the date reflected on the fee note. Failure to do so will constitute acceptance of the fee.

19. We will be entitled to charge interest (at the maximum rate allowed by law) on all amounts outstanding, for whatsoever reason, older than 30 days from the date reflected on our fee note. Such interest will be calculated on a monthly basis. All

payments will be allocated first to interest, then to disbursements and then to the oldest outstanding fee. Should you fail to effect timeous payment of the amount of any invoice, we shall be entitled, without prejudice to any other right, to stop the further rendering of services in terms of the service contract until such payment is made.

20. In the event of your appointing another advisor in our stead, or otherwise terminating our mandate, we will be entitled to raise a fee note upon receipt of such notification for all work done to date and not yet billed, at our standard charge-out rates, including disbursements incurred. In such event, you undertake to settle our account in full prior to us handing over books and records to you or to your appointee.

Your responsibilities

21. You shall retain responsibility and accountability for:

- the management, conduct and operation of your business and affairs
- any representations made by the company to third parties including published information
- the maintenance of the accounting records, the preparation of the annual financial statements and the safeguarding of the assets
- the adherence to the adopted policies and prescribed procedures for the prevention of errors and irregularities, including fraud and illegal acts
- the use of, extent of reliance on or implementation of advice or recommendations supplied by us or other product of the services
- making any decision in respect of the services delivered or any use of the product of the services
- the delivery, achievement or realisation of any benefits directly or indirectly related to the services that require implementation by you
- ensuring that all arrangements are made for access, security procedures, virus checks, facilities, licences and/or consents (without any cost to us), where you require us or the nature of the services is such that it is likely to be more efficient for us to perform work at your premises or use your computer systems or telephone networks.

Information

22. To enable us to perform the services, you shall use your best endeavours to procure and promptly to supply all information and assistance, and all access to documentation in your possession, custody, or under your control, and to personnel under your control, where required by us. Where such information and/or documentation is not in your possession, custody or under your control, you shall use your best endeavours to procure the supply of the information, assistance and/or access to all the documentation.

23. You shall inform us of any information or developments which may come to your attention during the duration of the services contract, which might have a bearing on or be relevant to the services we have agreed to provide.

24. We may rely on any instructions or requests made or notices given or information supplied, whether orally or in writing, by any person whom we know to be or reasonably believe to be authorised by you to communicate with us for such purposes ("an authorised person").

25. We may choose to communicate with you by electronic mail where an authorised person wishes us to do so, on the basis that in consenting to this method of communication, you accept the inherent risks of such communications (including the security risks of interception of or unauthorised access to such communications, the risks of corruption of such communications and the risks of viruses or other harmful devices) and that you shall perform virus checks. We will use commercially reasonable procedures to check for the most commonly known viruses before sending information electronically.

26. If our communication relates to a matter of significance on which you wish to rely and you are concerned about the possible effects of electronic transmission, you should request a hard copy of such transmission from us. If you wish us to password protect all or certain documents transmitted, or if you wish us to encrypt electronic mail communication you should request us to do so and we will do this where possible.

27. We process your information using our communication systems, knowledge management, and information technology facilities and applications in our audit and other client service engagements. In connection with that use, your data (including confidential information) may be transferred across national borders and processed or stored in remote locations. We and KPMG international take reasonable steps to preserve the confidentiality of such data.

28. Where necessary and in order to enable us to deliver the Services to you, we shall have your authority to process personal data (ie. any information relating to an individual) on your behalf in accordance with this clause. We shall otherwise act on your instructions when processing personal data, save as required by law, or the order of a competent court or any regulation or professional requirement. Where we do so, we shall take reasonable measures against unauthorised or unlawful processing of personal data and against accidental loss, destruction of, alteration of, or damage to, personal data. We shall not sub-contract our processing of personal data (save that we may sub-contract and, in doing so, transfer personal data, to KPMG Persons or third parties who are bound by appropriate confidentiality and security obligations) without your prior written consent. We shall respond to your reasonable enquiries to enable you to monitor our compliance with this clause. The information in our possession with regard to individuals in your organisation may be used by KPMG Persons to provide our services to you and occasionally provide marketing communications, which we believe may be of interest. Any individual who does not wish to receive this information can at any time request that such communications cease.

29. We may receive information from you or from other sources in the course of delivering the services and:

    - we shall consider the consistency and quality of information received by us
    - we shall not seek to establish the reliability of information received from you or any other information source. Accordingly we assume no responsibility and make no representations with respect to the accuracy, reliability or completeness of any information provided to us
    - we shall not be liable to you for any loss or damage suffered by you arising from fraud, misrepresentation, withholding of information material to the services or other default relating to such material information, whether on your part or that of the other information sources.

30. We may share confidential information with KPMG International and its member firms in order to improve our understanding of clients and their business processes and metrics, and to develop our intellectual capital. To the extent that intellectual capital derived from client data is disclosed to third parties such information is rendered anonymous and not subject to association with any identifiable client.

31. You undertake to supply information in response to our enquiries to enable us to comply with our statutory obligations relating to the Financial Intelligence Centre Act 38 of 2001 and the Prevention of Organised Crime Act 121 of 1998.

Knowledge and conflicts

32. The engagement team shall not be required, expected or deemed to have knowledge of any information known to colleagues which is not known to them personally or be required to obtain such information from colleagues. Save to the extent required by law the engagement team shall not be required to make use of, or to disclose any information to you, whether known to them personally or known to colleagues, which is confidential to another client of KPMG.

    We or other KPMG persons may be approached to advise another party or parties who are in dispute with you, or to advise or represent the interests of a party or parties whose interests are opposed to yours through their material concern in matters to which the services are specifically and directly related ("adversarial conflicts"). We seek and shall continue to seek to identify adversarial conflicts. If you know or become aware of any which may arise, you shall inform us promptly.

34. We shall endeavour to have mechanisms operating between KPMG persons designed to facilitate the protection of each clients interests through the use of, inter alia, one or more of the following safeguards: separate teams, geographical separation, operational independence.

35. We shall not accept an engagement which may give rise to an adversarial conflict for the engagement team. Colleagues may accept such an engagement where appropriate and where effective barriers exist to prevent the flow of confidential information from the engagement team to colleagues and from colleagues to the engagement team. We may accept such an engagement only when the adversarial conflict is disclosed to all the parties involved and their consent is obtained. The existence of such barriers shall constitute full compliance with our duty of confidence in relation to adversarial conflict.

36. We or other KPMG persons may be approached to advise another party or parties where there is no adversarial conflict but whose interests compete with yours specifically and directly in relation to the subject-matter of the services ("competing party" or "competing parties"). We seek and shall continue to seek to identify competing parties. If you know or become aware that a KPMG person is advising or proposing to advise a competing party, you shall inform us promptly. In such situations we shall take appropriate measures to ensure that strict confidentiality is maintained in all respects.

37. Where a party being advised by us, has been identified by us or notified by you as a competing party, we shall activate appropriate barriers and when operating we shall be entitled to advise the competing party concerned at any time and in any capacity (save in relation to an adversarial conflict). We will supply you with the detail of the potential competing party and how this will be approached either before we commence work in accordance with these standard terms and conditions or during the engagement. The existence of such barriers shall constitute full compliance with our duty of confidence in relation to competing parties.

38. Where a party has engaged our services, and during the delivery of our services we are of the opinion, even with the barriers introduced, that your or the other party's interests are likely to be prejudiced, we may, after consultation with you, choose to terminate the services contract and we shall be entitled to do so on notice, and which termination will be effective immediately. We shall not be responsible for any costs that you may incur in securing other professional services.

The services contract

39. The services contract sets out the entire agreement and understanding between us in connection with the services. Any modifications or variations to the services contract must be in writing and signed by an authorised representative of each of us. No variation of the terms and conditions of the engagement will be of any force or effect, unless reduced to writing and signed by all of the signatories thereto. In the event of any inconsistency between the engagement letter and any other elements of the services contract, the engagement letter will prevail. In the event of any inconsistency between these standard terms and conditions and additional terms that may apply, the additional terms shall prevail. These standard terms and conditions will be applicable to all work undertaken by KPMG prior to and pursuant to signature of the engagement letter.

Third party rights

40. The services contract shall not create or give rise to, nor shall it be intended to create or give rise to, any third party rights. We may agree to allow a third party to use or have access to the services upon terms and conditions acceptable to us and after having received your written authority to do so. Any contractual

agreement between you and the third party, which seeks to impose such requirements upon us, will not be binding on us.

Circumstances beyond your or our control

41. Neither of us shall be in breach of our contractual obligations nor shall either of us incur any liability to the other if we or you are unable to comply with the services contract as a result of any cause beyond our or your reasonable control. In the event of any such occurrence affecting one of us, that one shall be obliged as soon as reasonably practicable to notify the other, who shall have the option of suspending or terminating the operation of the services contract on notice, which notice will take effect immediately on delivery thereof.

Waiver, assignment and sub-contractors

42. Failure by any one of us to exercise or enforce any rights available to us shall not amount to a waiver of any rights available to either of us.

43. Neither of us shall have the right to assign the benefit or burden of the services contract without the written consent of the other. Provided that, KPMG may, without your written consent, cede in securitatem debiti any right to or claim for fees.

44. We shall have the right to appoint sub-contractors or other members of KPMG International to assist us in delivering the services.

45. Where we appoint sub-contractors and/or other member firms of KPMG International to assist us, you agree that we may share confidential information with sub-contractors and/or other member firms of KPMG International in the course of and for the purpose of delivering the agreed services.

Exclusions and limitations on our liability

46. The maximum liability of the KPMG persons or any KPMG person in respect of direct economic loss or damage suffered by you or by other beneficiaries in the aggregate arising out of or in connection with the services, shall be limited to two times the fees which are both charged and paid for the services. However where we have concluded a general or master services letter or agreement with you for the delivery of more than one engagement under that letter or agreement, our maximum liability shall be limited to two times the fees both charged and paid for the relevant engagement. The maximum liability shall be an aggregate liability for all claimants and all claims arising out of or in connection with the services, or relevant engagement, as the case may be, whether under statute, in contract or delict, or by wilfulness, negligence, gross negligence or otherwise.

47. The KPMG persons or any KPMG person shall have no liability to you and to other beneficiaries whether under statute, in contract or delict, or by wilfulness, negligence, gross negligence or otherwise, for any indirect or consequential economic loss or damage (including loss of profits) suffered by you (or by any such other party) arising from or in connection with the services, or relevant engagement, as the case may be, however the indirect or consequential economic loss or damage is caused.

48. In determining the liability of the KPMG persons or a KPMG person in terms hereof, a court or an arbitrator shall limit their liability to that proportion of the loss or damage suffered by you which is ascribed to them by such court or arbitrator allocating a proportionate responsibility having regard to the contribution to the loss or damage in question by you or any other person based upon relative degrees of fault; it being a term of the services contract that the provisions of Section 1 of the Apportionment of Damages Act, 1956, will apply to all claims between us and that liability in contract or delict or negligence or under statute or otherwise and loss or damage as used herein shall be deemed to fall within the meanings of "fault" and "damage" as contained in the said section of the above Act.

49. Our liability to you shall in no circumstances exceed the lower of the amount determined by the application of the monetary limit based upon fees charged to, and recovered from, you and the amount determined by the apportionment of responsibility as the case may be.

50. You and other beneficiaries shall not bring any claim personally against any individual KPMG person but only against the KPMG contracting party in respect of loss or damage suffered by you or by other beneficiaries arising out of or in connection with the services. This restriction shall not operate to limit or exclude the liability of the KPMG contracting party as a company for the acts or omissions of its, directors, employees and agents. Any claim from you or other beneficiaries must be made (for these purposes a claim shall be made when court or other dispute resolution proceedings are commenced) within two years of the date on which you or they became aware, or ought reasonably to have become aware, of circumstances giving rise to a claim or potential claim against us.

Third parties

51. You shall indemnify the KPMG contracting party and any KPMG persons and hold the aforesaid parties and/or persons harmless against any loss, damage, expense or liability incurred by the parties and/or persons as result of, arising from or in connection with a combination of the following two circumstances:

    - any breach by you of your obligations under the services contract and
    - any claim made by a third party or any other beneficiaries which results from or arises from or is connected with any such breach.

Termination

52. Each of us may terminate the services contract or suspend its operation by giving thirty (30) days notice in writing to the other at any time or as otherwise agreed between us. Termination or suspension under this clause shall be without prejudice to any rights that may have accrued for either of us before termination or suspension and all sums due to us shall become payable in full when termination or suspension takes effect. We will be entitled to raise a fee note upon receipt of such notification for an amount adequate to cover all work done to date and not yet billed including disbursements incurred. On termination each of us on

request will, return any property belonging to the other that it has in its possession. We may retain one copy of any documentation upon which the services are based to enable us to maintain a professional record of our involvement.

53. The expiration or termination of this contract shall not affect the provisions of this contract that expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the provision or clauses of this contract themselves may not expressly provide for this.

Severability

54. Each clause or term of the services contract constitutes a separate and independent provision. If any of the provisions of the services contract are held by any court or authority of competent jurisdiction to be void or unenforceable, the remaining provisions shall continue in full force and effect.

acity

55. You agree to and accept the provisions of the services contract on your own behalf and as the agent for other beneficiaries. You shall procure in such circumstances that any other beneficiaries shall act on the basis that they are a party to the services contract, as if they had each signed a copy of the engagement letter and agreed to be bound by it. However, you alone shall be responsible for payment of our fees.

Staff

56. Our staff undergoes periodic training and this, together with the taking of annual leave, may lead to staff turnover and lack of continuity. We will use our best endeavours to avoid any disruption to an engagement's progress.

57. You agree not to make any offer of employment or to employ any member of the engagement team during the duration of this services contract. You further agree not to employ such a person or use such a person's services as a consultant either independently or via a third party for a period of 6 months following the end of any involvement by the individual concerned without our consent.

58. The parties agree to treat each others directors and staff with courtesy and respect at all times.

DT 9

CONFIDENTIAL

MINUTES OF MEETING NO. 11/3 OF THE CORPORATE GOVERNANCE AND NOMINATIONS COMMITTEE 3 FEBRUARY 2011 AT 10:00 IN BOARDROOM 4906, 49TH FLOOR, CARLTON CENTRE, JOHANNESBURG

For attention/ Resolution No

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES, SIGNING OF ATTENDANCE REGISTER AND ADOPTION OF AGENDA**

1.1 **Welcome, Constitution of Meeting and Signing of Attendance Register**

The Chairman welcomed all members and attendee present and having noted that there was a quorum, declared the meeting duly constituted. The Attendance Register was circulated for signature.

1.2 **Present**

Mr ME Mkwanazi	Chairman
Ms T Mnyaka	Member
Ms DLJ Tshepe	Member
Mr IM Sharma	Member

1.3 **In Attendance**

Ms ANC Ceba	Group Company Secretary

1.4 **Partial Attendance**

Ms Z Stephen	Group Executive : Legal, Corporate and Public Affairs
Mr B Khumalo	Leaders Unlimited
Ms G Barrick	Leaders Unlimited
Mr M van der Walt	Manager: Enterprise Performance Management
Mr S Mapoma	General Manager: Group Legal

1.4 **Apologies**

None.

1.5 **Adoption of Agenda**

The agenda was adopted as tabled subject to the following:

- Addition of Item 6.7: Report back from the advert process;
- Addition of Item 7.2 : Detail of Mr Gama's investigation from inception; and
- Items 4, 5, 6.1, 6.2, 6.5 and 6.6 were deferred to the next meeting.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety briefing and evacuation procedures for the 49th floor were taken as read and noted, as contained in the pack.

3 **DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

4 **APPROVAL AND NOTING OF THE MINUTES THE MEETINGS HELD ON 26 NOVEMBER 2010, 7 JANUARY 2010 AND 23 JANUARY 2011 RESPECTIVELY**

The matter was deferred to the next meeting.

5 **MATTERS ARISING FROM THE MINUTES OF PREVIOUS MEETINGS HELD**

The matter was deferred to the next meeting.

6 **MATTERS FOR DISCUSSION**

6.1 **Draft Corporate Governance and Nominations Committee Mandate**

The matter was deferred to the next meeting.

For attention/ Resolution No

6.2 **Group Audit Committee composition**

The matter was deferred to the next meeting.

The Chairman requested that Item 6.7 be dealt with next.

6.3 **Investigations by the Public Protector**

The matter is discussed under Item 6.9 below.

6.4 **Shareholder Compact for the 2011/12 financial year**

The matter is discussed under Item 6.8 below.

6.5 **Review of the Mandates**

The matter was deferred to the next meeting.

6.6 **Group Chief Executive's Performance Contract for 2011/12**

The matter was deferred to the next meeting.

Mr Khumalo and Ms Barrack joined the meeting at 10h12.

6.7 **Report back from the advert process**

6.7.1 The Chairman requested Mr Khumalo to update the Committee on the advert process while noting that the Committee had committed to doing more interviews if good candidates came after the 29th January 2011. Mr Khumalo circulated a document for discussion in the meeting. The document was collected at the end of the discussion. He took the Committee through the advert process and stated that 30 applicants applied for the GCE position. He gave a brief resume of the applicants.

6.7.2 Ms Mnyaka indicated that she would have preferred to receive background history on the candidates. Ms Tshepe questioned the purpose of the exercise and enquired if the Committee was re-opening the short-listing process. The Chairman indicated that the intention of reviewing the advert process applicants was to promote transparency.

6.7.3 Ms Barrick stated that Mr Simo Lushaba had requested to be re-considered for the position on 1 February 2011. Mr Sharma cautioned the Committee not to intertwine the two processes, as Mr Lushaba was from the previous process. He stated that the candidates whose resume impressed the Committee were interviewed on 29 January 2011.

The Committee **agreed** to eliminate Mr Lushaba from the GCE selection process.

6.7.4 Mr Khumalo stated that the document was presented to evaluate if there were any candidates from the list that can beat the "Top 5" that was yielded by the previous two prongs of the GCE selection process. He indicated that he was of the view that the document had candidates that would have been likely considered for interviews on 29 January 2011.

6.7.5 Ms Ceba cautioned the Committee against inconsistent reporting. She stated that Mr Khumalo had informed the Board on 1 February 2011 that the advert process had not yielded any good candidates. Ms Mnyaka stated that the Committee must address the inconsistency in the reporting, but must not prejudice good applicants to cover up the process. She raised concern that the selection process was rushed, hence some applicants were missed.

6.7.6 Ms Tshepe stated that the correct decision should be made and requested the Committee to be consistent in its activities. The Committee proposed that a few names from the advert list be selected and interviewed. Mr Khumalo informed the Committee that he will avail a comprehensive document on the proposed applicants for short-listing.

Chairman/ Mr Khumalo

For attention/ Resolution No

6.7.7 The Committee was requested to nominate not more than 5 candidates each for short-listing. Ms Tshepe withheld her vote on Mr Gama pending the outcome of the legal opinion on Mr Gama's application. At the end of the nomination process, the following candidates were nominated for interviews:

a. Mr Ike Nxedlana;
b. Mr Mninawe Silinga;
c. Mr Monwabisi Kalawe; and
d. Mr Siyabonga Gama (possibly).

It was *agreed* that the interviews will be held 11 February 2011.

Mr Khumalo and Ms Barrick left the meeting at 11:15.

Mr van der Walt and Ms Stephen joined the meeting at 11:17.

6.8 **Shareholder Compact for the 2011/12 financial year**

The Chairman requested Mr van der Walt to give the Committee an update on the 2010/11 Shareholder Compact as well as inform the Committee on the proposals for the 2011/12 Shareholder Compact. Mr van der Walt handed out a copy of his presentation at the meeting.

6.8.1 **Revised 2010/11 Shareholder Compact**

6.8.1.1 Mr van der Walt took the Committee through the submission and stated that the Company suffered a 3 to 4 weeks strike in May 2010. He indicated that the impact of the strike on the 2010/11 Corporate Plan was assessed and shared with the Shareholder Minister. He informed the Committee that the Company developed and implemented emergency recovery plans to normalise the operations and clear the backlog volumes as fast as possible including, amongst others, focus on priority commodities. He took the Committee through the cumulative volumes lost as a result of the strike. He highlighted that :

- Some of the lost volumes were irrecoverable;
- Due to the impact of the May 2010 industrial action and a number of unprecedented derailments on the iron ore line, the Company suffered a volume loss of 3 004 800t, and this necessitated a review of the 2010/11 Compact with the Shareholder Minister;
- It was agreed, in principle, with DPE to allow for deduction of targets on volumes that were lost due to strike; and
- A submission had been prepared for the Board to consider and approve revised targets on Annexure A of the 2010/11 Shareholder Compact, which will be submitted to the Shareholder Minister for approval after the Board meeting of 16 February 2011.

The Committee **RESOLVED** that it approves that the Revised 2010/11 Shareholder Compact be recommended to the Board for approval. 11/4/1

6.8.2 **Progress on 2011/12 Shareholder Compact**

6.8.2.1 Mr van der Walt took the Committee through the submission that was circulated in the meeting.

6.8.2.2 Mr Sharma stated that the Company's expansion programme cannot be met through the balance sheet and tariff increases, but emphasised that the Company needs to boost operational efficiency. Mr van der Walt stated that the targets were benchmarked with various peers on terminal operations, not on the ports. He added that some targets are impacted upon by ports that are not structurally efficient. The Chairman requested Mr van der Walt to submit the benchmarks reports for consideration at the Board Workshop. Ms Ceba

6.8.2.3 Ms Tshepe enquired why improvements/efficiencies were not obtainable in the medium-term. She stated that she needed more detail on the Company's plans to obtain operational efficiency in the medium-term. Chairman/ Ms Ceba

6.8.2.4 The Committee recommended that "*Reducing cost of doing business*" should remain a key objective for the Company.

6.8.2.5 Mr van der Walt stated that Transnet agreed to have a zero target on employee fatalities.

For attention/ Resolution No

6.8.2.6 On a question by Mr Sharma if there were any KPI's on transformation, Mr van der Walt stated that BEE did not have a specific target, but a broad developmental objective. Ms Tshepe stated that agreement needed to be reached on the BEE targets in Annexure A. Ms Mnyaka stated that a KPI on transformation in the Shareholder Compact would be an ideal for the Committee. She added that transformation was critical and should be included in the Shareholder Compact.

6.8.2.7 The Chairman requested the Company to include KPIs on the New Growth Path. Mr van der Walt stated that the KPI on the New Growth Path will be included in the Corporate Plan, and further translated into the individual executive's performance agreements.

6.8.2.8 Mr van der Walt took the Committee through the Way Forward for the 2011/12 Shareholder Compact and highlighted, amongst others, the following :

6.8.2.9 - Annexure A – Key Performance Indicators: A dedicated "rail session" had been scheduled with DPE on 3 February 2011 where Transnet Freight Rail's current targets (alignment with current Transnet Freight Rail plans) and context thereof will be shared with DPE. Feedback on the Ports and Pipelines current KPI targets (as per Transnet's current plans) will also be provided to DPE for their review and consideration.

Mr van der Walt stated that Transnet Freight Rail will make a presentation to DPE on its plans to achieve the Company's targets.

6.8.2.10 The Committee noted the 2011/12 Shareholder Compact. The Committee agreed to uplift the BEE target from the Corporate Plan to Annexure A of the Shareholder Compact.

Mr van der Walt was excused from the meeting at 11:52.

Mr Mapoma joined the meeting at 11:54.

6.9 **Investigations by the Public Protector**

6.9.1 Mr Mapoma took the Committee through Senior Counsels' opinion that was obtained with regard to Mr Gama's application for the GCE's position. He highlighted that the legal opinion was based on the following 3 issues :

- Does the guilty verdict against Mr Gama exclude him from being considered in the current GCE selection process underway?
- How does the pending appeal affect the Board decision to interview or not?
- Does the Public Protector complaint currently being dealt with have a bearing on the selection process?

6.9.2 Mr Mapoma informed the Committee that Senior Counsels' opinion was that Mr Gama should not be excluded from the current GCE selection process underway. Ms Tshepe indicated that Senior Counsel's opinion was not the same as the lawyers' opinion. She stated the general rule was that in terms of clause 4.8.4 of the Company's Recruitment Policy, the Company may deviate from the Policy if there are exceptional circumstances that warrant the deviation.

6.3.4 Mr Mapoma further took the Committee through the proposed settlement agreement between the Company and Mr Gama and stated that there was no agreement on the following issues with Mr Gama's Legal Team:

- The date of reinstatement;
- The position in which Mr Gama will be reinstated into;
- The Company's proposed contribution to Mr Gama's legal fees;
- The sentence that will be imposed on Mr Gama; and
- The retraction of the PFMA Report that was submitted to the Auditor-General by the External Auditors in February 2010.

6.3.5 He informed the Committee that Mr Gama wanted to be reinstated to his TFR position on either 14 or 21 February 2011. He also informed the Committee that Mr Gama wanted the Company to contribute 100% to his disciplinary proceeding costs and the High Court

For attention/ Resolution No

application costs. He stated that the Company was awaiting a bill of costs from Mr Gama's Team. He reported that the attachment processes to recover the costs of fees from Mr Gama were halted pending the finalisation of the settlement agreement. He indicated that the Company will pay Mr Gama his salary retrospectively from the date of dismissal, and further award him his Long-Term Incentive Scheme and Short-Term Incentive Scheme grants.

6.3.6 Ms Tshepe stated that she was uncertain of the basis that was being used to exclude Mr Gama from participating in the current GCE selection process. She further sought clarity as to why Mr Gama will only be reinstated in April 2011. The Chairman stated that the Company was proposing a reinstatement date of 1 April 2011 so as to monitor the performance of the executives until 31 March 2011. He explained to the Committee the complexity of reinstating Mr Gama back to TFR and the chain of events that will unfold as a result thereof.

6.3.7 Mr Mapoma informed the Committee that Mr Gama was of the view that his name will only be cleared if he was immediately reinstated into TFR and when the PFMA Report to the Auditor-General is retracted.

6.3.8 Mr Sharma stated that a decision was needed on whether Mr Gama can be considered for the GCE's selection process. He further stated that terms of the settlement agreement were not discussed in the Committee and there was no universal agreement that Mr Gama will be re-instated into his former position.

6.3.9 The Chairman stated that the Company had made a written settlement offer to Mr Gama, however, he reported that some of the issues were still under negotiation, amongst others, the date of re-instatement and quantum to be contributed towards his legal fees.

6.3.10 Mr Sharma stated that Mr Gama's re-instatement will be a proposal until both parties agree on all the terms. Ms Tshepe stated that the current settlement discussions with Mr Gama were, in her view, sound rational for deviating from Clause 4.8.4 of the Company's Recruitment Policy.

6.3.11 Mr Mapoma stated that he was uncertain if the current settlement discussion qualified for an exemption. He indicated that the he Committee must act in the best interest of the business.

6.3.12 Ms Mnyaka stated that the Committee must take a decision on what had been presented and decide what was in the best interest of the Company. She added that she was supportive of the proposal to deviate from Clause 4.8.4. Ms Tshepe seconded the proposal by Ms Mnyaka and requested a debate on the matter.

6.3.13 **Deviation from Clause 4.8.4**

6.3.13.1 Ms Tshepe and Ms Mnyaka stated that the current settlement negotiations with Mr Gama were a rational for deviation from Clause 4.8.4. Mr Sharma disagreed and stated that it was not in the best interest of the organisation to deviate from Clause 4.8.4.

6.3.13.2 Mr Sharma stated that he was unhappy with how Mr Gama's matter was being handled. He indicated that he was of the view that the Committee was not considering the best interest of the Company, but that of an individual.

6.3.13.3 The Committee voted on whether or not it should deviate from Clause 4.8.4, and there were three votes against one in favour of deviation against Clause 4.8.4.

6.3.13.4 Mr Sharma proposed an investigation on the Committee as information on the deliberations of the Committee had been leaked to Mr Gama.

The Committee **RESOLVED** that it recommends that Mr Gama be considered for the GCE selection process. 11/4/2

The Committee further **RESOLVED** that it recommends that the proposed forensic investigation be referred to the Board for approval. 11/4/3

Ms Mnyaka recused herself from the meeting at 12:58.

For attention/ Resolution No

7 **GENERAL**

7.1 **Corporate Governance and Nominations Committee Mandate**

The Committee noted the Corporate Governance and Nominations Committee Mandate.

7.2 **Detail of Mr Gama's investigation from inception**

7.2.1 Mr Mapoma advised the Committee that he had acquired a detailed account on Mr Gama's matter, and he circulated a document on the matter to the Committee.

The Committee noted the submitted report.

8 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 13:00.

CHAIRMAN
Date:

GROUP COMPANY SECRETARY
Date:

DT 10

TOPTranscriptions
we play with words

CERTIFICATE OF VERACITY

We hereby certify that in as far as it's audible the aforegoing is a true and correct transcript of the recording provided by you in the matter:

2011.02.03_CORP GOV BOARD MEETING (TAPE 2)

DATE COMPLETED	:	16/09/2020
NUMBER OF PAGES	:	27

Date of Meeting: 2011.02.03 Corporate Governance

Present:

Mr Mafika E Mkwanazi	Chairperson
Ms Tembakazi Mnyaka	Member
Ms Doris LJ Tshepe	Member
Mr Iqbal M Sharma	Member

IN ATTENDANCE

Ms Ayanda NC Ceba	Group Company Secretary

PARTIAL ATTENDANCE

Ms Zola Stephen	Group Executive: Legal, Corporate and Public Affairs
Mr B Khumalo	Leaders Unlimited
Ms G Barrick	Leaders Unlimited
Mr M van der Walt	Manager: Enterprise Performance Management
Adv Siyabulela Mapoma	General Manager: Group Legal

CHAIRPERSON: Maybe success start with Mr Gama's matter now and from there go to the Public Protector and from there share with the Board a little bit some of the other issues that we are dealing with which maybe from tomorrow we left consequences to people in the organisation. Some of them are for information, some are truly for the Board to apply its mind like the Gama matter, the opinion that the Board requested I think they've got it.

SIYABULELA MAPOMA: Thank you Chair. It did go to everyone.

DORIS TSHEPE: Oh.

SIYABULELA MAPOMA: Chair, when we were at the Board on the 25th, there was a request made that we need to provide an account of the Gama matter from its inception until now. We have that document; we...

CHAIRPERSON: Sorry, when I said the Gama matter, the fact that he applied.

DORIS TSHEPE: Yes.

CHAIRPERSON: And that one is going to take a little bit longer.

DORIS TSHEPE: You want the...

CHAIRPERSON: That one is going to take two hours.

SIYABULELA MAPOMA: Alright.

CHAIRPERSON: Please come back to the urgent one.

SIYABULELA MAPOMA: Okay, no, it's fine. We were asked to ask our lawyers for an opinion on three issues, on whether the guilty verdict against Siyabonga disqualifies him from being considered for the GCE position and secondly whether the impact, what is the impact of the impending appeal on the Board's decision whether to intervene or not and thirdly, the impact, if any, of the investigation by the Public Protector to the complaint that was made to them. So, the three issues that we asked our lawyers an opinion on. We have received two opinions on this one from the attorneys themselves and another one that we received this morning, this one is waiting outside from our own counsel on the matter and this has all been provided on an urgent basis. However, both opinions say the same thing but the one that we received this morning disqualifies this a little bit further. I'll start with the first question. Does the guilty verdict disqualify Gama from being considered for the GCE position? The lawyers opine that from a legal perspective, there's nothing which disqualifies him from being considered as a candidate for the position of GCE as per [the source? 14:31] since there's a strong possibility that the matter may be resolved on the basis that Gama should be reinstated to his former position with a final written warning. Now, ...

SIYABULELA MAPOMA: Can I just ask. How did they come up with that assumption of the settlement?

CHAIRPERSON: Maybe, let me assist. We are in the middle of a written negotiation which already Gama has got by the way and which we gave the lawyers as well, so that they are privy to the fact that we are in negotiations, even though we've not concluded.

SIYABULELA MAPOMA: Oh, but they can't pronounce the outcome of it. The fact that there's a negotiation ....

CHAIRPERSON: Ja, that they can't pronounce on the outcome.

SIYABULELA MAPOMA: You can't pronounce on the possible outcome ...

DORIS TSHEPE: Can you just say that you said there's a possible, he didn't say that he will be reinstated, he will come back ...

SIYABULELA MAPOMA: Ja, let me ....

DORIS TSHEPE: So, CORP says that when you negotiate, you negotiate with either ...

TEMBAKAZI MNYAKA: Possible outcome.

DORIS TSHEPE: .... possible or it may be impossible. That is how I understood that.

SIYABULELA MAPOMA: I don't think I agree.

CHAIRPERSON: And also, for the benefit of the Board, [SAPO? 15:35], you've dealt with that matter. I indicated to you that this Board needs to have visibility of what had been offered to Gama and his response, because there's still a gap, okay.

SIYABULELA MAPOMA: Awesome. I will just read this again and I will talk to it. It is at follows: This means that from a legal perspective, there's nothing which disqualifies Mr Gama from being considered as a candidate for the position of GCE of Transnet. This is especially sore since there is a strong possibility that the matter may be resolved on the basis that Mr Gama should be reinstated to his former position with only a final written warning. That is the first question, however, our counsel this morning also agrees with this but qualifies it as follows: "There is a policy that Transnet has which is the Recruitment and Selection Procedure Policy and paragraph 4.84 thereof requires Transnet provides that where you have been dismissed, as an employee of Transnet, you should not be considered for any position within the company." Therefore, they opine as follows: "Mr Gama has been dismissed from his position as chief executive of TFR due to him having been found guilty of three accounts of misconduct, therefore in the ordinary course in terms of clause 4.84 of the recruitment procedure, Mr Gama may not be considered as a candidate for the position of Group Chief Executive, however, clause 2 of the recruitment procedure provides that Transnet may in its sole discretion divert from the policy where necessary in respect of executive appointments. Transnet may therefore deviate from clause 4.84 at its sole discretion. However, the discretion to deviate from clause 4.84 is not an unconstrained one. This discretion must be exercised after consideration of all relevant circumstances. Furthermore, since Transnet is an organ of State, decisions taken by Transnet are in exercise of public power and therefore need to comply with a minimum threshold of professionality." What this means is that for Gama to be considered for this he must be reinstated first, unless we are going to deviate from this, from the procedure as a company. Now, company policy is not law, the company is entitled to deviate from that as long as it has its own valid reasons for doing so, which there are the normal public policy rationality issues. Now, the second question that we asked them was what is the impact of the impending appeal and the Board's decision to interview him or not. They opine that our view accordingly be that the Board should exercise its discretion as to whether Mr Gama should be included as one of the candidates for the GCE position, especially because it will take some time

before his appeal is finalised. The appeal was previously postponed in order to enable the parties to resolve the matter amicably. Now, the appeal process as it were was postponed on the 24th indefinitely and there's no date for it, but it can be revived by either of the parties. If it's get revived and one of the parties is unhappy, the other party may appeal further and there are a number of other forums where this process can be taken to, one being the Labour Court, the Labour Appeal Court and if one is not satisfied with that, you can take the matter further to the SCA or to the Constitutional Court. So, we don't know what that appeal process, how long that appeal process is going to be. So, what they are saying is we should not be held to ransom to that; we can continue; that appeal process is another process that cannot be used to hold the GCE employment process to ransom. Thirdly, what is the impact of the complaint to the Public Protector on the selection process. In the event that the Public Protector makes a decision, which is adverse to Transnet, for instance that a disciplinary enquiry was conducted with a view to derailing the chances of Mr Gama being appointed to the position of GCE, that in our view will be no more than an opinion expressed by the Public Protector on the motive behind the institution of disciplinary charges against Mr Gama. It would not be decisive of whether Mr Gama's guilty of the offences, which are proffered against him. That decision will still be the decision of the Chairperson of the Appeal and of the arbitrator should the matter be referred for arbitration. Counsel also agrees with this, that the public protector process on its own cannot be used to stop any other process that the company wants to proceed with. It's a process that is following its own procedures and cannot be used to stop any labour appeal process. Those are the three matters that we asked counsel an opinion on and those are the three answers that I have for you.

CHAIRPERSON: Sorry, ja, Doris?

DORIS TSHEPE: So, let me understand because the first question is the important question and in fact, counsel's opinion is not necessarily the same as the attorneys. So, counsel is saying and, which is what I was asking this leg of the recruitment policy, the recruitment policy says anyone who's dismissed cannot be considered and clause 2 says that you can deviate and that deviation though has to be based on rationality. So, my understanding is that the general rule therefore is we cannot consider Mr Gama because of clause 4.8.4 unless, as the Board, we want to deviate from that clause and we have to have good reasons for deviating from that clause.

That's the essence of...and it's not about interviewing, it's actually about considering his application. So, that's the, am I correct?

SIYABULELA MAPOMA: You are correct.

DORIS TSHEPE: We should have, we should've been given copies of that as well, just as a matter of process so that we can sit, but that's how I'm understanding it, am I correct?

SIYABULELA MAPOMA: You are correct.

IQBAL SHARMA: And just to get clarity, the motivation for deviating would be on the basis of this...well, even if we, he would have to be reinstated. So, it would have to be on the base of the settlement which we don't know when it's going to finish and it has to go to Board.

DORIS TSHEPE: Not really. I think the reason for the deviation, I'm just giving an example, it could be, although Mr Gama is dismissed, because the disqualification is not a guilty verdict, it's a dismissal. So, you could deviate on the basis that at the moment as the Board we're considering to overturn ...

CHAIRPERSON: The dismissal.

DORIS TSHEPE: ... the dismissal and then have him reinstated and because of that, we want to deviate from 4.8.4 because this is where we're leading to. So that could be, and it sounds like a reason ...

CHAIRPERSON: Rationale.

DORIS TSHEPE: ...rationale reason and I think the ...

IQBAL SHARMA: That card is not on the table, is it?

DORIS TSHEPE: But that is, that's the next step and we've now been given advice by the lawyers. So, now as the CGC we must then say, do we want to deviate from 4.8.4 and what would be the basis for that deviation?

IQBAL SHARMA: Ja, but the basis is what you're saying.

DORIS TSHEPE: Yes, that would be the basis.

IQBAL SHARMA: But the solution is not before us. In fact, there's no, it's all up in the air right now.

DORIS TSHEPE: But that's what the Chair must tell us.

TEMBAKAZI MNYAKA: It's at the discretion of the board.

DORIS TSHEPE: But that's what the Chair must tell us because Chair already he says...

CHAIRPERSON: Let's, let's hear the solution.

SIYABULELA MAPOMA: Ja, perhaps, perhaps if he's spot-on you're going to allow me then to go into the discussions that we have had with him on the issues of reinstatement, for instance and so on Chair. We have had a number of discussions with Mr Gama, I think there have been three or four meetings that have been held with him and his team already, but where we are now is on the date of reinstatement. Initially we wanted, we proposed to him that he should come and be in the Chairman's office here at the Corporate Centre and he wanted be reinstated at TFR we have since considered to that, that the reinstatement must be at TFR and we proposed to him that it must be with effect from the 1st of April. His counterproposal is that he wants to be reinstated with effect from the 14th of February or the 21st of February, that is the first issue that are apart on. Secondly, we proposed to him that because there's a dismissal finding against him, which has not been overturned at the moment, and he himself in his own papers before the appeal process, before the Bargaining Chamber, he is not opposing the disciplinary process but only the sanction. He has considered that he's guilty of the three accounts of which he was found guilty of but he only is appealing against the sanction that was the sentence. The sentence was dismissal because of that we proposed to him that when he comes back, the company then gives him a written warning valid for three months, that is if it's April, it would be April, May and June. After June, then that process is deemed to be closed. He's refusing that; he says he has suffered enough at the hands of Transnet and it was, he doesn't want any form of warning at all. He just wants to be brought back to work without any other sanction whatsoever. Secondly, we proposed to him we'll contribute 75% of his legal costs of the disciplinary process. He wants us to contribute 100% to his legal costs, both for the High Court application and the disciplinary process that subsequently followed. We are not reaching each other there. We also wanted them to tell us, to give us a bill of costs, what is it that actually we will be paying even if we contributed 75%, we need to know and to have it with us, and if [he wants it? 26:00] to be taxed. If it is not taxed, then let us have sight of it so that we can see what we are paying, reasonable cost or not. He has not yet furnished us with that and then we have not yet agreed in principle, even though that scope because he wants us to contribute to everything and we say we cannot do that. We have stopped the process that was reported on in the media and maybe you know about that because when we had that case at the High Court, the case was dismissed against him with costs and the attorneys that were represented us at the time subsequently followed that and they

attached some property and they couldn't attach any property because he apparently has no property to be attached. Then they attached the shares that he has in Italtile. We stopped that process also as a way of showing the government's bona fides to come to some settlement here. So that process has been held in abeyance. We then said that process must not go ahead because in terms of the PFMA, he was only required to recover that money in any event. Then we said, okay, let's stop this process for now and see what the settlement negotiations will eventually lead to. So, those are the, this is where all of us are now.

CHAIRPERSON: And also, if I recall in there, we are going to pay him his salary.

SIYABULELA MAPOMA: Retrospectively.

CHAIRPERSON: Retrospective.

IQBAL SHARMA: He should have a very small one.

SIYABULELA MAPOMA: Because we have included them in the short-term and then long-term incentives ...

CHAIRPERSON: That's correct.

SIYABULELA MAPOMA: .... where it is due to him that we've made an undertaking to do.

IQBAL SHARMA: Chair?

DORIS TSHEPE: Can I ask...?

CHAIRPERSON: Iqbal then Doris.

IQBAL SHARMA: In terms of the settlement proposal, because there's initial pleadings also made; he wanted the CEO post, he said he was second and he was entitled to the post. So, in terms of the settlement, what discussion have you had around the CEO post with him?

SIYABULELA MAPOMA: When we...at GCE?

IQBAL SHARMA: The GCE post.

CHAIRPERSON: I made him aware that I would not qualify him.

IQBAL SHARMA: Ja, but what does he ....

CHAIRPERSON: Is he commenting on that?

IQBAL SHARMA: In terms of the settlement, what is the, his position on that?

SIYABULELA MAPOMA: When we met him, we said to him that, Mr Chairman said that the process is ongoing and if it he should not put his name in the hat and he is saying, no, he wants to put his name on the hat because he believes that in, during the first round when this happened, he was, he was recommended, he was second on

the list and he feels that he has a chance and he wants the current Board and the current Minister, the current shareholder to make a call on this thing because themselves [is a shareholder? 28:45].

IQBAL SHARMA: On the one hand he wants to throw his hat into the GCE process and the other hand he wants the security of getting his old job back.

SIYABULELA MAPOMA: He wants his job back, ja, and he wants also to ...

IQBAL SHARMA: He wants the bread buttered on both sides.

TEMBAKAZI MNYAKA: I think ... ja, I think it's, sorry.

CHAIRPERSON: Doris, and then Tembakazi.

DORIS TSHEPE: I'm not sure, like obviously, settlement discussions are, we all put in what we want, but I'm not sure to what extent we could, I mean it sounds a bit like blackmailing Siya, that we're agreeing to reinstate you but please don't put your name in the GCE process. I'm not sure we can honestly do that given that the only reason he can be excluded and that's why I was asking Zola about what our recruitment process is saying and if our, if our policy, the only exclusion from the policy is about dismissal, then what is the basis for us to stop him from being considered and that, Chair, having heard what our policy is saying, I just need to understand the basis of us asking him not to put in his name in the hat, and Chair, the next question I want to understand is: why are we not agreeing to give, why reinstatement in April only. I know Chair you raised that issue previously but it was said in passing, I need to understand the basis.

SIYABULELA MAPOMA: Let me explain the basis and to say, don't forget from where I sit, to say you are reinstating him to TFR from the first of April, it does not imply that he does not come into the company and work with me in between, you've got a situation where you've got people who are acting in positions. Now, if I were to bring him in on the 14th of Feb to go to TFR it will destabilise the organisation for the rest of the financial year. You've got people who have got contracts and things that need to be evaluated at the end of March. So, I want to achieve being able to do the performance of those people who are in those positions until the end of March. That's why then I was saying to him come to my office to help me with a few other things, on the first of April you are in TFR.

DORIS TSHEPE: Okay. So, he is reinstated not from the first, he comes back to the organisation not from the first of April, he comes into the organisation from the date of signature of the settlement agreement.

SIYABULELA MAPOMA: Once we agree …

DORIS TSHEPE: But not to TFR.

SIYABULELA MAPOMA: Not necessarily to TFR, but we'll announce when he comes back that from the 1st of April, he goes to TFR.

TEMBAKAZI MNYAKA: Was that explained to him properly because okay, I wasn't part of the negotiations so, but my understanding was that he'll only come back on the first of April and I also had that same question of why and from your discussion last time you said that he said he doesn't want to go into your office.

SIYABULELA MAPOMA: That's correct.

TEMBAKAZI MNYAKA: So, if you were saying to him, I mean, I feel that it would be a reasonable request to say you are coming back into the organisation say for instance in February, it must be stated, right, or whatever time in February because that's what he wants. In February you are coming back into the organisation but because of these issues, right, which seem reasonable to me, we cannot immediately reinstate you to TFR, therefore the TFR reinstatement will be in April. So, what that does is because I think in his mind, he's thinking I'm going to be stuck there in the Chairman's office. If that's something that he's going to be stuck there in the Chairman's office I would not, even myself, I would not take the position because there's a risk of being stuck there forever whereas if as part of the [second one? 32:48] this is step one and step two is this one. I don't think it would be unreasonable, it would be unreasonable to reject, I mean, to reject that. Was it stated clearly [Sacks? 33:01]?

SIYABULELA MAPOMA: It was stated clearly Board member. The other things that he raised with us. He says that we need to clear his name, right, and he doesn't think that his name will be cleared if he's not immediately reinstated to TFR and secondly, he wants us to, there's a finding that was made by the external division of Transnet which was subsequently reported to the Auditor General's office in terms of the law that governs that process and he wanted us to retract that report because he says that's a report that will tarnish his image and his reputation.

TEMBAKAZI MNYAKA: What report is this? Sorry Sacks, I didn't get it.

SIYABULELA MAPOMA: Where there is a PFMA finding, negative findings that has been made by external auditors, they're requested by law to report it to Auditor General's office.

TEMBAKAZI MNYAKA: Yes.

SIYABULELA MAPOMA: So, this is the report that they made on the finding, on the GMS company; contract, that 18 million was spent [inaudible 34:02]. I am just using this word loosely. So, it was reported to the Auditor General's office and he wants us to retract that report in the process of us clearing his name.

[cross talk 34:11]

SIYABULELA MAPOMA: Yes, it's not. I'm trying to give context to say that he says that his name will not be cleared if we don't put him immediately there where he was at TFR if we say we are reinstating him. He wants reinstatement fully where he was and not anywhere else in the company.

DORIS TSHEPE: But sorry Chair? Can I ask?

CHAIRPERSON: Doris?

DORIS TSHEPE: I want to understand, can't we reinstate him to TFR with the processes? I'm just trying to understand.

CHAIRPERSON: Let me explain the problem.

DORIS TSHEPE: No, I hear. Sorry Chair, you don't understand me. So, the reinstatement is that you're reinstated to your old position as CE of TFR. Anything else still gives, he is right, anything else still gives you a feeling that you're not sure, yeah, you're not sure whether he is. If he is reinstating him, you are reinstating him to TFR. I'm not an organisational person but I'm just saying can't you find some OD to see how you remedy the organisational issues that you're talking about. If we want to resolve this thing Chair and want to resolve it quickly, I don't think that should be a stumbling block especially if we think we're taking him back to TFR. It's how do we put the other processes in place for me that is different?

SIYABULELA MAPOMA: Can I explain that, the complexity? You've got three executives, four executives who are acting. You've got TFR acting, you've got TPT acting, you've got corridors and marketing on commercial acting. Now if then, I think those are the ones that will be affected.

DORIS TSHEPE: Ja.

CHAIRPERSON: If then I bring Gama on the 14th of Feb or whenever to go back to TFR, it creates a chain event, and everybody goes back to what they were, the organisation will feel it, financially, the organisation will feel it, negatively.

IQBAL SHARMA: Chair? Chair, there are two things here and I don't want this to get bogged down in the debate about Gama, we've got the legal opinion. The legal opinion

suggests that the dismissal then is not illegible unless we deviate and we can deviate on the basis of resolution.

CHAIRPERSON: The negotiations, yeah.

IQBAL SHARMA: Now, the solution, the negotiation process is not close to being resolved but at the meantime we are in a process. So, it doesn't look like because it's a first time in this committee that we are hearing about the proposals that were given to Gama about coming and sitting in the Chairman's office, it's the first time.

CHAIRPERSON: For eight weeks.

IQBAL SHARMA: Yeah. Whatever it is.

DORS TSHEPE: But that's not the first time. The Chair mentioned it previously that was the initial proposal.

IQBAL SHARMA: I don't recall it.

CHAIRPERSON: I did mention it, yeah.

DORIS TSHEPE: He did mention that. That was the first proposal which has since been [cross talk 37:26].

TEMBAKAZI MNYAKA: Oh, ja, that made us actually to say that okay if you...

IQBAL SHARMA: We have to make a decision on the current process, there's an advertisement that's out, the man has applied on the basis of that application, can we entertain him to be considered for interviews? I think that's a decision you have to make now. There is no settlement proposal in front of us. So, I mean, factually the settlement is neither here nor there. No one can say it's 99% done, we're just waiting to sign, no one with confidence can say that.

SIYABULELA MAPOMA: I cannot with confidence say that.

IQBAL SHARMA: So, there is no apparent deal on the table that we can entertain.

DORIS TSHEPE: Ja. I'm not sure.

CHAIRPERSON: Tembakazi and then Doris.

TEMBAKAZI MNYAKA: I think Chair, the intention has been stated, we can't run away from the fact that and intentionally stated that we want to reinstate you. So, that for me is a fact. If it comes from the Chairman's it's a fact that the only issues that they are fighting about now is when and how. Their intention is 99% certain that we will reinstate you. The issues that we are dealing with is the when and the how. So, we can't run away from that.

CHAIRPERSON: Doris?

IQBAL SHARMA: Point of correction. Point of correction. It is a proposal. It's not the intention of this, it's not my intention, I cannot put my intention on the line. It is a proposal that will have to come back to this committee for consideration. No individual can speak on behalf of this committee. Am I correct? I just want to be factually correct.

TEMBAKAZI MNYAKA: No, no, we deploy the Chairman. No, no, hold on.

IQBAL SHARMA: Not with the view to bringing someone back to the organisation with a view to settling the matter.

TEMBAKAZI MNYAKA: But what was the terms of the settlement?

IQBAL SHARMA: You recall, Chair?

CHAIRPERSON: Ja.

IQBAL SHARMA: On the 7th of January when we were here, you even indicated to us that you have no intention of bringing him back to the organisation and you know for a fact that he has another job offer.

SIYABULELA MAPOMA: Can I clarify something here? No, no, it's fine. I've shared with the Board this intention to settle this matter. Now, why I'm bringing the matter here because I've been verbally indicating and I felt that, no, no, no, at some stage you need to know what is on the table and yes what I want to propose, first to this committee, is to find a solution and a solution based on the discussions we've had an offer. There was a written offer that he was responding to that he is going to be reinstated to TFR on the 1st of April, and in between then if we reinstate him earlier, he will sit in my office because I do have a lot of work that needs somebody to give it attention and, and, and. That is a proposal to his lawyers to that effect. Now, what then I'm doing from a process, this matter comes here first and I'm indicating that even though we are engaging there are still a few niggly points. It's the date and it's the quantum and it's the fact that he doesn't even want a final written warning. Those are still the niggly points which I must go back to him and based on this discussion to say this committee is of the view that maybe that's the final offer, I don't know. That's the advice I need because I can't go to him and offer him to pay all his legal fees. In actual fact to me I was generous, by the way, in terms of where I am right now.

IQBAL SHARMA: Chair, there's a lot of subjectivity in that. I mean, you could say 50% is generous or 75/80.

SIYABULELA MAPOMA: True.

IQBAL SHARMA: So, but we don't have anything on the table, that's what I'm trying to get at. What do we have on the table? We have nothing.

DORIS TSHEPE: But if, you know, you're raising many issues and I just want to understand where we're coming from. The Chair indicated that we're offering him reinstatement to come back. I hear you're saying no one can make that on behalf of the committee maybe that's a process point that we should have …

IQBAL SHARMA: It's a proposal.

DORIS TSHEPE: No, but it's been already given. If it was a proposal it's already…

IQBAL SHARMA: It's on the terms.

DORIS TSHEPE: No, no, no, but the proposal is that he be reinstated to his position as CE of TFR with effect from 1 April, that proposal has gone to him. I'm just saying, so are you saying …?

IQBAL SHARMA: These are all without prejudice. These discussions are all without prejudice.

[cross talk 42:12]

TEMBAKAZI MNYAKA: But you're reneging now if you are to change it.

IQBAL SHARMA: No, you are not reneging, you can change your mind tomorrow morning.

TEMBAKAZI MNYAKA: Yes, we do that, yes.

IQBAL SHARMA: That's the nature of this thing but he is coming with his terms that I want this report expunged, I want this done and if we are not able to live up to those terms. So, it's only a proposal until we can accept all the terms on both sides.

DORIS TSHEPE: But I'm assuming and this is what I'm trying to get at and to do this, is we can go back to him and say the only term we're willing to agree with you on is your reinstatement to TFR with effect from 1st April 2011 and to pay 75% of your taxed costs and that's where we end and if that's the final offer we give to him he accepts or rejects. So, I'm saying that intention about him coming back is there; so, what is it that is that effect? I agree there's no settlement, I mean, if there was a settlement, we wouldn't be having this debate, we're saying …

IQBAL SHARMA: The intention for him to come back, it's only an idea, it cannot be cast in stone.

DORIS TSHEPE: What if he accepts Iqbal, that's what I'm asking? If today he comes back …

IQBAL SHARMA: There's a counter proposal from him. There's a counter proposal; a counter proposal. So, our proposal is now off, now we have to respond to his counter proposal.

DORIS TSHEPE: Yes, and we go back and we say we don't accept any of these, our proposal as we presented to you stands. What is your…

IQBAL SHARMA: Well, as it stands today there is no decision to reinstate and therefore, we cannot use the exemption.

DORIS TSHEPE: But no, the exemption is not, you see that's what I want you to get to. The exemption is not that we have settled with him, if we had settled with him there will be no dismissal and therefore 4.8.4 doesn't apply. The exemption is he is currently dismissed but we are still in negotiations with him about settlement for him to get back and so because of this process that we are undertaking we then have agreed to exclude, to deviate from 4.8.4 and that's what I'm saying. If the settlement process it's, the settlement discussions with him that would be the rationale for deviating from 4.8.4, that is what it is but do you accept that as a …?

CHAIRPERSON: It's a valid logic for deviation.

DORIS TSHEPE: But that is what our policy says. Forget whether the settlement process is a valid reason but that is how the process should be. In terms of 4.8.4 we can't consider you if you're dismissed but we can deviate from 4.4 for …

TEMBAKAZI MNYAKA: For rationale reasons.

DORIS TSHEPE: Based on a good reason and then the point then becomes do we have a good reason. The reason is that there is this settlement discussion in terms of which we are willing to expunge the dismissal sanction and give him a written warning and for that it means if we had agreed with him earlier he wouldn't be hit by 4.8.4, therefore we want you to, that is the rationale for that, that's what I'm saying would be the basis for deviating from 4.8.4. I mean, the lawyers should tell us, would this be a good enough reason for that.

CHAIRPERSON: Zola, Sacks you are the lawyers in this room.

SIYABULELA MAPOMA: I'm not sure.

DORIS TSHEPE: You're not?

SIYABULELA MAPOMA: I'm not sure Chair.

IQBAL SHARMA: I would agree.

DORIS TSHEPE: Why not?

CHAIRPERSON: What are you saying Sacks?

DORIS TSHEPE: I want to understand why.

CHAIRPERSON: Explain further.

SIYABULELA MAPOMA: The first problem that we have is how we differentiate this matter from other dismissals that the company has had because other employees can equally come and say I was dismissed and I need my case to be reviewed as Mr Gama was reviewed. That's a hurdle for me that we're going to struggle with, and secondly, what benefit to the business, that is Transnet, this will have or maybe to TFR, I suppose. That is another question that we have to answer and if we are putting him back with the intention that he must leave very shortly then we are not doing this for the benefit of the business. We're doing it for the benefit of the person that is him and that might not be in my mind a good reason and we have execution where he himself has not appealed against the dismissal but only against the sanction of the dismissal. He has admitted that he committed the offences for which he has been found guilty and it weighs against him in this process. I think those are four reasons for me for now are things that I can think of off my head. I'm sure you can find counters to that, you know, given time. Just as I am sitting here …

CHAIRPERSON: One clarification Sacks, as we are reinstating him, we don't know what his future is, his future is TFR. What he then does after he is in TFR, for the record let's just note that it's for him, the individual. Doris, you had your hand up.

DORIS TSHEPE: Chair? Sacks, you have to forget the other issues that you know on the…your organisational issues. The exclusion on 4.8.4 is dismissal, nothing else. So, that there is a guilty verdict, doesn't mean you can exclude him, if I understand your reading of what 4.8.4 says. So, if Siyabonga was found guilty and given a final written warning valid for six months and that six month period we are in now we would consider him. That's the first point to one of the issues you have and so that, he is only appealing the dismissal and not the verdict would not…does not…it's neither here nor there for purposes of this issue. You must differentiate between Gama and any other employee who is dismissed for purposes of this discussion and I'll tell you why. At that point when the Board decides whether or not to implement 4.8.4 or to deviate, they will look at the circumstances of that particular employee as to whether they want to deviate or not. So, that for me, on the business side, if we're wanting to reinstate him it must be good for the business and so I don't know how that then is not good for the business if we can consider him …

CHAIRPERSON: It's just that.

DORIS TSHEPE: Yes, but I'm assuming, I'm moving from an assumption that if you have gone to the lawyers and written a letter offering him reinstatement into TFR that must be good for business unless you're telling me otherwise.

SIYABULELA MAPOMA: What I'm saying is our case is not strong, this is my opinion on this thing. Our case might not be strong. We have to think about it and make it. We can make a case; I don't disagree with you on that but I was just saying there is a counter argument to all these things and we need to be alive to that. We can't just assume that we will just sail into this thing without anybody telling them. So, we need to be alive to those kinds of challenges and prepare for them properly as well.

CHAIRPERSON: Tembakazi?

TEMBAKAZI MNYAKA: Chair, I do not believe that we can actually exhaust all the arguments unless we are trying to be in court the whole day. Now, what needs to happen is that this committee must take a decision now in terms of what has been presented and in terms of what we believe as the committee is the best thing to do. As far as I'm concerned an intention has been, what is this, communicated and I myself would actually support the issue of the suspension or whatever of that clause of the deviation of that clause and then becomes a decision but what I do not want is a situation when because my understanding is that when we gave the Chair the powers to settle this matter we had all the confidence. I don't want us to start now reverting and saying you cannot be speaking on my behalf because you delegate a matter to someone because you believe that person has the capacity to actually do that. So, it would actually be an indictment on the Chair and our belief in the Chair if we are starting to start saying now that we did not ask you to say the things that you said because we asked you to settle in the best way how. That is why it was not me or somebody else who was chosen. So, I wouldn't want us to start casting aspersions on the Chair and the Chair's integrity now in terms of what he's supposed to do. From my side, when I said go and settle, you are speaking for this company and you know what is in the best interest of this company unless someone wants to dispute that you know what is, I mean, we've given you that authority.

CHAIRPERSON: Iqbal?

IQBAL SHARMA: Chair, it is true that we gave the Chair the mandate to settle the matter. It is not true that we discussed any terms of the basis that settlement here. We did not discuss the proposal of his reinstatement because we were told in fact quite categorically on the 7th of January that the Chair has full knowledge that this

person does not want to come here and in fact has another offer to go somewhere else because we debated exhaustively the idea of settling the matter and allowing him to throw his name into the hat by clearing his name and settling the matter between the 7th and the 26th which was not possible. So, we don't have a full proposal. Secondly, if you recall the discussions in the Board meeting of Tuesday night there was no universal acceptance that he will come back because the debate did talk about him that he's going to come back into his old post. In fact, there was a serious debate about his suitability to even come back into the organisation in any capacity. So, I don't think that we can just take it for granted that there is a firm proposal on the table. There are clearly discussions without prejudice that are going on to explore settlement and there are some back and forth proposals going on and right now there's a counter proposal we're entertaining. On the basis where we sit currently and in the interest of the organisation and the mandate we have, we have to consider that. So, my recommendation is that he be excluded on the basis of the rule of dismissal. That dismissal has not been overturned. It may or may not be overturned, we don't know. We cannot with full confidence presume the outcome of a settlement which is still in negotiation process.

TEMBAKAZI MNYAKA: Can we get a settlement to that proposal?

CHAIRPERSON: One second. Doris wants to …

DORIS TSHEPE: I want us to, I wanted to second the proposal by Tembakazi where he says the Board must decide on this issue as to whether we're deviating from 4.8.4 or not, I mean this committee. That was the proposal by Sister Tembakazi and I want us to have that discussion but just before I've said that's what I'm seconding that we must then debate that proposal. What I want to understand from Iqbal and Iqbal this is very important, you know, I know these are without prejudice, I know I am a lawyer and I understand that process but are we questioning that the Chair has gone out and made this proposal, because if we go back now to Siya and say we don't accept your counter proposal, what remains is what we've offered you and Siya accepts.

IQBAL SHARMA: I don't know.

DORIS TSHEPE: But Iqbal, I'm just wanting, because when we get out of here the Chair must and the legal people must have a process of what they're going to do because if we're questioning what they have done and we're saying they don't have that authority they must just write a letter to Siya and say listen guys, we don't accept your counter proposal, the settlement process is not happening anymore and leave it

at that. If I'm understanding your questioning the authority of what those terms are, unless I'm not understanding you and that's why I'm saying from a process point of view I think I'm seconding the proposal by Sister Tembakazi for the committee to make a decision on that but I just need for going forward that process.

IQBAL SHARMA: Let me clarify what I'm saying. The reason for deviation, in my mind, cannot simply be the intention that we want to bring this person back but it must be a real expectation. Okay?

DORIS TSHEPE: From who? From whom? Like real expectation.

IQBAL SHARMA: From both sides because these are subject to terms. So, we are saying come back to TFR, the Chair is proposing come back to TFR, okay? He is saying I will come back on these terms. What if we can't deliver those terms? There're too many what ifs?

DORIS TSHEPE: Can I, because from a process point of view, I think where you are at now and that's why I wanted to distinguish the two issues. Where you are at now you are debating what Sister Tembakazi said we must do, i.e. let the committee debate whether or not we want to deviate from 4.8.4, let's do that, that's what you're doing now. Then let that be the debate so that we can make a decision and then we will talk about the other issues subsequent to that. So, Sister Tembakazi, do you want to say, I mean, sorry Chair, I'm taking your job.

TEMBAKAZI MNYAKA: I've already from my side actually stated an intention that I believed that the fact that we are in negotiations with him, the fact that we want to bring him back into the organisation is for me a rational decision for the deviation.

CHAIRPERSON: Doris?

DORIS TSHEPE: I agree.

CHAIRPERSON: Iqbal?

IQBAL SHARMA: I disagree. I disagree that there's no basis for us to deviate given the facts that are presented to us on the table and looking at the best interests of the organisation.

DORIS TSHEPE: Chair can I ask Iqbal, do you want to elaborate, I mean, I want to understand what do you mean it's not in the best interest of the organisation?

IQBAL SHARMA: Well it's, you know, the way in which this whole process has been handled, there's no confidentiality in the matter, there is no … sorry?

DORIS TSHEPE: Which matter?

IQBAL SHARMA: This matter here, Siyabonga Gama's matter. Siyabonga Gama. And I think that, personally I think we're losing sight of what's best for the organisation and we are focusing on what's best for a particular individual and the way I see my job here is not really to look after interest of individuals but to look after interests of the organisation, that's the basis I'm coming from.

DORIS TSHEPE: Sorry Chair. Iqbal, you must understand I'm moving from the same point of view as you, and I'm assuming everyone else but I'll speak for myself now. Although I've already indicated what I think is correct, I need you to explain to me so I understand where you're coming from. Why do you say Siya's...why do you think considering deviating from 4.8.4 would not be in the best interest of the organisation? It's important for me so that I can make, and that's why we have committees that we're not sitting at home. Sorry, let me finish? That's why we're not sitting at home and saying this is my vote, this is my vote and we're having these discussions because where I'm sitting it's simply this: we have clause 4.8.4 that disqualifies Siya because he's dismissed, he has appealed, Sacks, our lawyer, no can I explain to you my thought process to how I arrived at this? Sacks say, actually our case is weak from the appeal, our case is not strong, I'll use his words. Our case is not strong on the appeal for his dismissal, that's what Sacks is ...

CHAIRPERSON: No, Sacks is not saying that. Please, Sacks, can you?

DORIS TSHEPE: Sacks said that.

CHAIRPERSON: No, he said it but in context.

[cross talk 1:00:35]

DORIS TSHEPE: No, before he does that can I finish my thought process?

IQBAL SHARMA: What was the rule, the exception? Can you just read to us on what basis can we deviate? Just read us that.

TEMBAKAZI MNYAKA: Clause two? Clause two of the...in the best interest of the organisation [inaudible 1:00:56]? So, that is why he is saying. Why do you think the best interest of the...?

DORIS TSHEPE: That's what I'm asking.

TEMBAKAZI MNYAKA: We are putting a case of saying it's in the best interests of the organisation, right? You are putting a counter to say it's not in the best interest of the organisation and we are saying, can you qualify why you think it's not in the best interest of the organisation.

[cross talk 1:01:18]

SIYABULELA MAPOMA: Clause 2 of the recruitment procedure provides that Transnet may in its sole discretion deviate from the policy where necessary in respect of executive appointments. Transnet may therefore deviate from clause 4.8.4 at its sole discretion however that...

DORIS TSHEPE: Sole discretion, that's number one.

TEMBAKAZI MNYAKA: That's clause 2?

SIYABULELA MAPOMA: That's clause 2.

DORIS TSHEPE: No, no, but what counsel is saying and that's what I was talking about what counsel is saying is that that discretion to deviate, although we're saying sole discretion, because we are an SOE that discretion is not unconstrained and what constraints that discretion is rationality. So, the basis upon which we can deviate has to be a rational basis and so where I go to is that the fact that we are in the process of wanting to settle with Siya with the intention of expunging the dismissal sanction and getting him back into one of our most important divisions for me is rational enough to deviate from 4.8. That's all I am saying.

IQBAL SHARMA: Is there a reasonable possibly that we cannot conclude this to submit? In your mind, is there a reasonable possibility that the settlement can amount to nought and both parties walk away?

DORIS TSHEPE: From how the discussion has been happening? In my mind the settlement is going to happen, I may be wrong.

IQBAL SHARMA: So, there's no reasonable chance that the settlement could not be realised. In my mind there's a very reasonable chance that settlement cannot be realised.

DORIS TSHEPE: I'm looking at, you see, I'm having, I mean you have done negotiations of the level of this. I see here are the big issues in the settlement negotiations and I can never predict how it's going to come but the big issues are: you are expunging dismissal and remember that's what he wants and therefore want to reinstate him into his old position, those are the big things he wants. You are contributing to his costs. The other things that are coming, for me they are ancillary, they are niggly points and you can work on them. If I'm sitting at Siya, it appears reasonable that Siya will accept these big picture points and leave there. I mean, obviously, I'm not in the negotiations and I think Chair and Sacks, you must guide us here but that's how I'm seeing it. I'm seeing it from this point of view and given what, Sacks will also have to explain Chair as I understood, the reason we are in fact wanting

to settle with Siya is because, and this is not the first time Sacks is saying this, even at the seven meeting, 7 January meeting said is that we are also not confident about our case and so it has been said. So, I'm …

IQBAL SHARMA: That's not something, I mean, that's …

CHAIRPERSON: Our case is strong Doris.

DORIS TSHEPE: Is it?

CHAIRPERSON: Ja.

DORIS TSHEPE: The appeal on the sanction Chair.

CHAIRPERSON: No, no, no.

DORIS TSHEPE: But Chair that is …

CHAIRPERSON: Can you explain our case?

IQBAL SHARMA: Also, you know, I've had a lot of experience in negotiations.

DORIS TSHEPE: I know that.

IQBAL SHARMA: But I can tell you one thing, the devil is always in the details, nothing is niggly. You may think something is niggly but actually it can be a deal breaker. I have experience on many, many occasions about that, you know. So, no negotiation, I have concluded a negotiation, shook hands with the European Union and the next day they renege on it. So, there is nothing cast in stone but it's a matter of opinion.

DORIS TSHEPE: I hear you Iqbal. I'm just saying let's, you asked me what my view is on the settlement. I'm giving you the things that I'm taking into account to say that, reasonably speaking, I think we're going towards settlement and my response then to you is that and in fact that's where I'm seeking guidance from the Chair and Sacks, is to say guys you are at the cold phase, give us guidance, where are we going, because if we're going to settle for me then…

IQBAL SHARMA: You gave us your view.

[cross talk 1:05:23]

CHAIRMAN: Can you comment on that, the appeal process? Can you comment?

SIYABULELA MAPOMA: Siya is not appealing against the dismissal with all intents. He is appealing the sanctions.

DORIS TSHEPE: But the sanction is the dismissal.

TEMBAKAZI MNYAKA: No, he is not appealing against…

[cross talk 1:06:00]

TEMBAKAZI MNYAKA: We agree with that.

SIYABULELA MAPOMA: He's not appealing against the finding of guilty, he's appealing against the dismissal. Now I said …

DORIS TSHEPE: Which is the disqualification. Sorry Sacks, I just want you to understand which is the disqualification of 4.8.4.

[cross talk 1:06:16]

SIYABULELA MAPOMA: Right. Now I advised the Chair to say if we, as Transnet, go to the appeal and oppose the appeal, we stand a very good chance of winning that appeal, that was my view at the time. Where I'm saying we are not strong Doris is, if we have to explain the rationality of why we are settling, I don't think we're on very strong grounds on that, that is my view but on the disciplinary process itself and if we go and argue that matter on the appeal, we stand a very good chance of succeeding. Siya can win but we can also win as Transnet but we have a very, very good case against him there. That is why we said, let us rather postpone to the 24th of April Chair after another hearing so that we pursue the settlement process. So, the dismissal…

DORIS TSHEPE: Sorry Chair? I'm very confused. Then you have to explain to me why we're settling, if we're going to win this case …

CHAIRPERSON: We don't know.

DORIS TSHEPE: But Sacks say we stand a very good chance of winning.

CHAIRPERSON: It's 50 / 50.

TEMBAKAZI MNYAKA: I think Chair let's move it from legal now because that's the problem. I think let's move it from legal, he's given his opinion which I by the way don't agree with necessarily. It's his opinion, I have an opinion, he shares an opinion, everybody else here has an opinion. Now, the accountability and the decision making comes from this committee and let's decide at this committee what are we deciding on this deviation.

CHAIRPERSON: Colleagues, I will deviate from clause 4.8.

TEMBAKAZI MNYAKA: I will do the same.

IQBAL SHARMA: I will not.

CHAIRPERSON: We'll record it.

TEMBAKAZI MNYAKA: It's three against one.

CHAIRPERSON: Yes. We'll record it.

IQBAL SHARMA: Chair?

CHAIRPERSON: Yes?

CM

IQBAL SHARMA: Also, I want us to discuss the [inaudible 1:08:22] into this whole GCE process.

CHAIRPERSON: Right.

IQBAL SHARMA: And all members of the committee should also be subject to that because it is out of this committee that information has been going out directly to the Siyabonga.

CHAIRPERSON: We are the subcommittee, [and this matter needs? 1:08:42] go to the Board from a privacy perspective and institutional rights of people because as soon as you start something like that the Board must take full accountability of the fact that we might start bugging people's phones and, and, and, and, and. So, that's how I would like the matter, you're proposing it, I'm recommending that it goes to the Board. Sacks?

SIYABULELA MAPOMA: Thank you Chair, on the settlement issues that we're still a part on, you know, we will need also instructions so that we close this thing quickly.

CHAIRPERSON: Yes.

SIYABULELA MAPOMA: It's imperative that we finish this thing very, very quickly and the issue of the date of the reinstatement, either the 14th or 21 Feb from the side which is his counter proposal and ours still stands at 1st of April, we need instruction on that so that we can take it…

CHAIRPERSON: Sacks, we need to go to the Board of the 16th of Feb, that is where that decision can be taken. We cannot commit here. He must know that that decision can only happen on the 16th of Feb at Board level in terms of the date and other things but on the other matters by the way this committee can give me guidance. I think I don't want to move any further on the other matters, whether it's the assistance with legal fees and all the other things. I'd like to go back and indicate to him that I'm not moving on these points. The only thing that I would say is not firm is the fact that the Board sits on the 16th in terms of the date of reinstatement or whatever we call it.

TEMBAKAZI MNYAKA: But we can also inform him Chair that even if you were to reason on appeal about dismissal the idea that there can be no sanction is a dream from him.

CHAIRPERSON: That as well comes from this committee.

TEMBAKAZI MNYAKA: He has been found guilty of the offence and there has to be sanction. He can't then say there is no sanction because he has suffered, that's not a process.

CHAIRMAN: I agree.

TEMBAKAZI MNYAKA: So, I think there are certain things that we can tell Siya about and that are clear. One of that is that the auditor's issue as well, that obligation doesn't sit with us, it sits with the auditors when they submit that. So, those two issues, they are not, we cannot even ...

SIYABULELA MAPOMA: Sanction against [inaudible 1:11:16] because the finding of dismissal was made at the pivotal date; we never explored with him the retrospectivity of the sanction, they also never brought it forward I mean to us as well, it's something that committee maybe can also just be forgetting about.

DORIS TSHEPE: Yes, but there will be a sanction Sacks. Whether we say the sanction is from June until it's for six months meaning it would have ended in December. The fact of the matter is in his file there would have been a sanction.

CHAIRPERSON: That's correct.

DORIS TSHEPE: So, as to when that sanction will operate from is not an issue.

TEMBAKAZI MNYAKA: It is a matter that can be negotiated.

DORIS TSHEPE: It is a matter that can be negotiated but at the end of it all it's going to be sanctioned and the fact is we are negating the dismissal retrospectively. So, meaning there would not have been a sanction and we are paying him, there's a back pay. So, then the last issue from my point is on costs and I don't know what the basis of us agreeing to 75% is. While I don't mind it, I do want us to take cognisance of wanting it taxed you know, if Siyabonga Gama and Thembalanga have agreed that Thembalanga will charge him R3,000 an hour and he will also provide psychological assistance to Siyabonga Gama. I don't think that should then be a cost at Transnet, even at 75% that's the cost at which Transnet should be assisting him. I agree we can assist him but there has to be some reasonable basis for that and I would, even if we don't tax it at the end there has to be a bill that is justifiable that you as lawyers can go through and be certain that it is reasonable, it's not just telephone calls or discussions.

SIYABULELA MAPOMA: That's two matters, that's the high court matter in which he was interdicting the Board and determined from the GCE process and then there's the disciplinary process itself now. So, there are two matters on which he wants us to assist him with. So, are we authorised to assist him on both or only on the one or the disciplinary only?

TEMBAKAZI MNYAKA: What are the costs Sacks, do you know?

SIYABULELA MAPOMA: It's quite a lot. It's more than 500,000 on that first one alone, on this one I don't know because it's still not finalised. So, they have not yet taxed it at cost that one.

CHAIRPERSON: Sacks, on the costs, if I recall, he's supposed to give you the invoices and what have you and then we will then assess whether they are valid or not valid as to which one or not which one. Let's have a discussion after this meeting. Ja, colleagues, I think we've come to the end of that meeting.

TEMBAKAZI MNYAKA: Which meeting?

CHAIRPERSON: Timewise, unless if the two colleagues have got no…

IQBAL SHARMA: I have a pressing engagement.

CHAIRPERSON: That is what I suspected.

DORIS TSHEPE: Chair? Can I just go back and say that we must remember that what we, that the decision is about and I just want it very clear about the deviation is to consider Siyabonga?

CHAIRPERSON: Yes. For interviews.

DORIS TSHEPE: Yes.

CHAIRPERSON: That is correct.

DORIS TSHEPE: Yes. I just wanted …

TEMBAKAZI MNYAKA: [inaudible 1:14:50] deviation against clause four.

DORIS TSHEPE: Yeah, meaning we can consider him for recruitment processes.

IQBAL SHARMA: You still have to make up your mind on that.

DORIS TSHEPE: Yes. That's why I'm raising that. So, then you have three if I may say that, yes.

TEMBAKAZI MNYAKA: We have three votes.

IQBAL SHARMA: We defer this.

SIYABULELA MAPOMA: We defer.

CHAIRPERSON: There's a matter colleagues the Board wanted to know about we've been calling it a blow by blow …

DORIS TSHEPE: Account.

CHAIRPERSON: Account of this matter. There is a thick document, I don't know how many pages, 30 or something which captures that. There's no time to deal with that today, we will adjourn so that unless if the, I think the Board members …

SIYABULELA MAPOMA: Chair, we received this thing this morning so we've just made copies for the Board members coming but we can email it to the other Board members on the committee.

CHAIRPERSON: But still this committee just need to be taken through it because there are certain...

DORIS TSHEPE: But then why are we giving it to the Board Chair? If it's going, if this committee still needs to debate...no, but Chair says that from a process point of view it has to be deliberated in this committee first and I think those things are very important because, you know, we run risk of not following proper processes. If it has to sit here, it must come here first, let's look at it and debate it.

CHAIRPERSON: The process is here first.

DORIS TSHEPE: And then it goes to the Board. There are things there that as a committee we don't agree with, we don't want to be raising that first at the Board I think that's basically what the...

CHAIRPERSON: Ayanda, let's adjourn this meeting. I'm aware that we will have another CTC in the near future. We will then take from there and do the minutes and also do the mandates, I don't think they will change.

IQBAL SHARMA: Can I propose that we meet on the 11th February?

CHAIRPERSON: Ja.

IQBAL SHARMA: At an interview place, maybe for two hours before?

DORIS TSHEPE: No, we start at eight, remember? So, how do we meet two hours before?

IQBAL SHARMA: Ja, but I think we should put them under pressure to shorten their timeframe.

CHAIRPERSON: We can shift the interviews.

IQBAL SHARMA: Ourselves as CGC. I'm not available actually. I'm going to Cape Town for Indaba and then there's Parliament. Next week I'm not around.

DORIS TSHEPE: Oh, I see.

IQBAL SHARMA: And if we have it the 11th it's a date already set.

CHAIRPERSON: Can we then meet at seven to nine for the CGC then from...

DORIS TSHEPE: No, no, no, seven to nine is fine, I can do seven to nine.

IQBAL SHARMA: No, just tell Brian to shorten that thing because two hours for each candidate is too long. We don't need half an hour breaks in between.

CHAIRPERSON: Thank you very much Ayanda. Thank you Sacks. I think we need to caucus Sacks a little bit in terms of the other matters and see how we take that forward.

[cross talk 1:17:48]

CHAIRPERSON: Oh yes. I'm seeing you later today.

TEMBAKAZI MNYAKA: I will give you my one. Let me see, I have all my things here.

[cross talk 1:17:58]

CHAIRPERSON: No, no, those copies you can give us. Just pick up a copy there.

TEMBAKAZI MNYAKA: Oh, so then they don't even need …

CHAIRPERSON: No, it's the VEE matter and the audit committee matter. That this committee will have sight of on the level.

SIYABULELA MAPOMA: So, this one is fine.

CHAIRPERSON: Yeah.

TEMBAKAZI MNYAKA: Sacks, you don't have more copies for Sister Magasi?

TEMBAKAZI MNYAKA: Chair, can I …

CHAIRPERSON: That's for all of you.

DORIS TSHEPE: I'm a bit concerned on these legal issues. I need [cross talk 1:18:48] I mean, you know what Sacks says and then he says again and that's why I cannot wait, I heard you very well and this is not the first time and I need to understand where the process is with the bigger legal advice that we've asked for from Denis Rheys which I …

CHAIRPERSON: Is it a public protector matter?

DORIS TSHEPE: Ja. I don't know but I…

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION")

AFFIDAVIT

I, the undersigned,

MANGALANI PETER MALUNGANI

do hereby state under oath as follows:

1. I am an adult male businessman and entrepreneur.

2. The facts deposed to in this affidavit are, save where otherwise stated or apparent from the context, within my personal knowledge and are, to the best of my belief, true and correct.

INTRODUCTION

3. I have been requested by the Commission to furnish an affidavit in which I explain:

   3.1. my role, as a non-executive director of Transnet Limited ("**Transnet**"), in the conclusion of the settlement agreement

between Transnet and Mr Siyabonga Gama ("**Mr Gama**") on or about 23 February 2011 ("**the Settlement Agreement**"); and

3.2. indicate whether any member(s) of the Cabinet played any role, directly or indirectly, in the matter being settled or being settled on the terms on which it was settled.

4. For ease of reference, I attach the letter addressed to me by the Commission dated 29 July 2020, marked as "**PM1**".

5. At the outset, it bears mentioning that the events surrounding the Settlement Agreement took place more than 9 years ago and at a time when, in addition, to serving as a non-executive director of the Transnet Board, I also occupied several other roles and positions including running a demanding business.

6. Despite this, I, hereunder, do my best to recollect the events raised by the Commission.

BRIEF BACKGROUND AND CONTEXT

7. As I recall, I was initially approached in early 2010, through the office of the then Minister of Public Enterprise, Mrs Barbara Hogan, to consider serving on the Transnet Board of Directors. During this discussion, I explained my capacity constraints and expressed my desire not to be appointed. Notwithstanding this, I was asked to keep an open mind and merely consider the role.

8. When I did not hear back from the Minister's office, I assumed that my reservations were accepted; however, much to my surprise, and following a reshuffle of cabinet which saw a new Minister of Public Enterprise being appointed (i.e. Mr Malusi Gigaba), I received a call from the Minister's office – on the very day that the new Board of Transnet was being announced – to inform me that the Minister, Cabinet and the President had agreed to my appointment as a non-executive director onto the Transnet Board. Within an hour or so of this call, my name was announced together with a list of other Board members. Mr Mafika Mkwanazi ("**Mr Mkwanazi**") was appointed as chairman. To my recollection, this all happened on 8 December 2010.

9. Mr Mkwanazi was also appointed as the Acting Group CEO in our first Transnet Board meeting.

10. I served as a non-executive director from December 2010 until I decided to step down to focus on my businesses in around December 2011. I however agreed to serve on the Board until the financial year end which was March 2012.

THE CONCLUSION OF THE SETTLEMENT AGREEMENT

11. Until the 16 February 2011 Board meeting (the minute of the meeting is attached as annexure MPM4 to Ms Mohlabi's affidavit), where I was in

attendance, the matter of Mr Gama had not previously served before the new Board. At that point, we were only two months into our appointment.

12. In fact, to the best of my recollection, the first time the matters surrounding Mr Gama was brought to the new Board was at this very meeting when the chairman, Mr Mkwanazi, made a presentation to the Board and sought a resolution from the Board to authorise the then Acting Group CEO, Mr Mkwanazi, to endeavour to settle the litigious matter with Mr Gama.

13. In addition, and I could be mistaken, I do not recall receiving any board pack prior to the meeting or the "*Report for Transnet on Disciplinary Process involving Mr S Gama*" dated 2 February 2011 (attached as annexure MPM6 to Ms Mohlabi's affidavit).

14. My recollection is that the Chairman, Mr Mkwanazi, presented to the Board the events leading up to a possible settlement with Mr Gama.

15. I listened to the presentation which made various points, some of which I recall was that:

15.1. the litigation process was ongoing and it would be best to simply settle the dispute amicably;

15.2. the Chairman had received legal advice that the sanction of dismissal was too harsh;

15.3. Mr Gama had now accepted the finding of guilt, etc.

16. I cannot recall the precise detail of the debate that then ensued but I do clearly remember that I was opposed to the resolution in so far as the settlement was concerned.

17. Despite the limited information (in and before the Board meeting), the motivation for settlement of the dispute which effectively would do away with the legal processes and recommendations made by independent parties, and (what seemed to me) the one-sided demands made by Mr Gama - which were set out in the draft Settlement Agreement - simply did not seem right and I (together with others, who I cannot recall offhand) opposed the resolution.

18. The minute of meeting (annexure MPM4) correctly records that "*there was a minority not in support of the reversal of Mr Gama's sanction*".

19. The majority of the Board were in favour of the resolution and, consequently, the resolution was passed.

20. Given the passage of time, I cannot recall where some of the points I raise above were discussed because the matter was also tabled at the Remuneration Sub-Committee of the Board - in which I served - and where Mr Mkwanazi also served. Mr Mkwanazi, as I recall, also presented Mr Gama's matter in that committee as the committee was mandated to deal with remuneration matters for the Board. I likewise in this committee expressed my reservations on the nature of the settlement. The sequence

of events between the Board meeting, the Remuneration Committee meeting and the Nominations Committee meetings in relation to discussions around the settlement agreement is something I cannot recall.

INVOLVEMENT OF ANY MEMBERS OF THE CABINET

21. I am not aware of any involvement of any members of Cabinet in matters being settled with Mr Gama and/or on the terms on which it was settled.

22. In particular, no member of cabinet contacted me in this regard.

MANGALANI PETER MALUNGANI

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Rosebank on this the 16th day of ~~AUGUST~~ September 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity:

NIKSHA BHAGA
COMMISSIONER OF OATHS
PRACTISING ATTORNEY (RSA)
43 Bath Avenue, Rosebank, Johannesburg 2196
P.O. Box 2458, Houghton 2041
Tel: 011 268 6900

"PM1"

2nd Floor, Hillside House
17 Empire Road
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email:
inquiries@sastatecapture.org.za
Website:
www.sastatecapture.org.za

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

Date: 29 July 2020
Our reference: Ms Farrhah Khan
Email: farrhahk@commissionsc.org.za

Mr Mangalani Malungani
By Email: peterm@peu.co.za

Dear Sir

Request for an affidavit

1. I write this letter on the directions of the Chairperson of the Commission.

2. It has come to the attention of the Commission that you were a member of the Transnet Board of Directors at the time when a settlement agreement was concluded between Transnet and Mr Siyabonga Gama on 22 February 2011. For your convenience a copy of that agreement is attached to this letter marked "A".

3. One of the matters that the Commission is investigating is the allegation that in certain state-owned entities certain senior managers or executives were removed from certain positions because they were not prepared to facilitate wrongdoing such as corruption or acts of state capture and that those pursuing state capture

or those who sought to loot public resources wanted to have malleable individuals appointed to those positions so that they could carry out acts of corruption or acts of state capture.

4. Mr Gama had been employed as the Chief Executive Officer of Transnet Freight Rail (TFR). He was dismissed after a disciplinary inquiry chaired by an independent chairperson, namely, Advocate Antrobus SC who found Mr Gama guilty of three acts of serious misconduct and recommended that he be dismissed. The three acts of serious misconduct of which Mr Gama was found guilty were that:

   (a) "he negligently authorised the conclusion of a contract for the provision of security services by GNS on confinement and failed to carry out his duties as CEO in the manner expected of him; and he negligently failed to take appropriate steps to investigate the irregularities associated with the halting of the open tender process and the replacement thereof with the GNS confinement tender process and the presentation to him of a document for approval which was the product of a confinement process but which was presented to him on the basis that it was an open tender process.";[1]

   (b) he "was negligent when he signed the "50 like new" contract without securing the work of TRE as was specifically required by the board resolution which he was tasked with implementing";[2] and

   (c) he "either directly or through his attorneys during the course of the

[1] As per paragraph 203 on page 106 of the disciplinary inquiry Chairperson's ruling on guilt.
[2] As per paragraph 332 on page 163 of the disciplinary inquiry Chairperson's ruling on guilt.

investigation and the High Court proceedings, and more recently made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified and unreasonable and calculated to cause harm. It is also contended that they indicate an irretrievable breakdown in the trust relationship between Gama as the CEO of TFR and Transnet."[3]

5. For your convenience and in order to refresh your memory, I attach to this letter marked "B" and "C", respectively, the rulings that the Chairperson of the disciplinary inquiry released which contained the reasons for his findings of guilt against Mr Gama and for his decision to recommend that Mr Gama be dismissed. I also attach to this letter a copy of the Transnet Company Secretary's affidavit as well as a copy of Mr Chris Todd's affidavit marked "D" and "E", respectively, of which you need to be aware.

6. Given the above, it *prima facie* seems to the Chairperson of the Commission that the settlement agreement Transnet concluded with Mr Gama may not have been in the interests of Transnet and may have been one sided in favour of Mr Gama. This may mean that you, as a member of the Transnet Board of Directors at the time, may have acted in breach of your fiduciary duties. In this regard the following can be noted:

(a) <u>Reinstatement</u>

the Transnet Board decided to settle the matter on the terms on which it was settled including reinstating Mr Gama in circumstances where

[3] As per paragraph 332 on page 164 of the disciplinary inquiry Chairperson's ruling on guilt.

Transnet had strong or reasonable prospects of successfully defending Mr Gama's dismissal in the arbitration or where there was no sound reason for the Board to reinstate Mr Gama or to settle the matter on the terms on which it settled it;

(b) Retrospectivity of the reinstatement

the Transnet Board decided to award Mr Gama full backpay and gave him all benefits covering nine months in circumstances where it was highly unlikely that, if the arbitrator reinstated Mr Gama, the reinstatement would have been fully retrospective or that the arbitrator would have awarded Mr Gama full backpay, especially because Mr Gama accepted that he had been properly found guilty of three serious acts of misconduct and, therefore, should not have been dealt with as if he was innocent of any misconduct;

(c) Final Written Warning

despite the fact that Mr Gama accepted that he was guilty of three serious acts of misconduct, the Transnet Board decided to impose on him a final written warning valid for six months that was deemed to have commenced running from Mr Gama's date of dismissal and had, thus, expired by the time the settlement agreement was concluded which allowed Mr Gama to return to Transnet as someone with a clean disciplinary record as if he had not been found guilty of any misconduct; in other words, the Board decided to impose an ineffective final written warning when it could have imposed an effective warning that could have commenced running on his return to Transnet;

Costs

(d) the Transnet Board undertook to pay 75% of Mr Gama's costs in respect of a High Court application that Mr Gama had brought against Transnet to interdict his disciplinary hearing which was dismissed and Mr Gama had been ordered by the High Court to pay Transnet's costs as well as the legal costs of certain members of the Board of Directors of Transnet including the costs of two Counsel. This undertaking was made in circumstances where there appears to have been no justification at all for it because that High Court litigation had been finalised. Furthermore, there was no risk that, if the arbitration was pursued in the Transnet Bargaining Council, the arbitrator could have ordered Transnet to pay Mr Gama any costs for the High Court application; indeed, the arbitrator would have had no power to do so;

(e) the Transnet Board undertook to pay Mr Gama's costs in regard to the unfair dismissal dispute in the Transnet Bargaining Council in circumstances in which not only was it unlikely that the arbitrator would order Mr Gama's reinstatement but also there was no reasonable prospect or risk that if Mr Gama was successful in the arbitration, the arbitrator would order Transnet to pay Mr Gama's costs in regard to the unfair dismissal dispute; and

(f) the Transnet Board, without any valid reason or any justification, instructed Transnet's then attorneys, Bowman Gilfillan, not to take any further steps to recover an amount of R 423 666,00 which represented taxed costs due by Mr Gama to Transnet as a result of an order of the High Court; it is difficult to understand what possible justification the

Transnet Board may have thought there was to not only effectively give Mr Gama an amount of R423 666,00 in taxed costs that he owed Transnet but also to undertake that Transnet would pay 75% of Mr Gama's legal costs in circumstances in which hardly any justification could be advanced.

7. The Chairperson of the Commission has directed me to request you to furnish the Commission on or before 20 August 2020 with an affidavit or affirmed declaration in which you explain why you, as a member of the Board of Directors of Transnet at the time, considered it correct or proper or justified to conclude the settlement agreement on the terms on which it was concluded. You are also requested to indicate whether any member(s) of the Cabinet played any role directly or indirectly in the matter being settled or being settled on the terms on which it was settled.

8. Your kind co-operation will be highly appreciated.

Yours sincerely

[redacted]

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

THE JUDICIAL COMMISSION OF INQUIRY
INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

DECLARATION OF ISRAEL BIZIWE SKOSANA

I, the undersigned,

ISRAEL BIZIWE SKOSANA

do hereby declare and state that:

1. I am an adult male born on 15 July 1953. I am 67 years old.

2. I am a former member of the Board of Directors of Transnet SOC Limited ("Transnet") having held that position for a period of four (4) years effective from 13 December 2010 to 11 December 2014.

3. The facts contained in this declaration fall within my personal knowledge, or appear from documents under my custody or control, or from copies of documents I have seen. To the best of my knowledge and belief, the facts set out in this declaration are true and correct.

4. **INTRODUCTION**

4.1. I depose to this declaration on the request of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State established in terms of Proclamation 3 of 2018, published in Government Gazette 41403 of 25 January 2018 ("the Commission"). The request of the Commission is recorded in a letter dated 28 July 2020 addressed to myself (attached to this declaration marked "Annexure A") in which it requests that I furnish

BB 1687

an affidavit or affirmed declaration in which I explain why myself and/or the Board of Directors of Transnet considered it correct or proper or just to conclude the Settlement Agreement in question between Transnet and Mr. Siyabonga Gama ("Gama"), the then Chief Executive of Transnet Freight Rail ("TFR") an Operating Division within Transnet on the terms on which it was concluded as well as indicate whether any member(s) of Cabinet played any role directly or indirectly in the matter being settled or being settled on the terms on which it was settled.

4.1. I was appointed to serve on the Board of Transnet by the former Minister of Public Enterprises, Mr. Malusi Gigaba. (Letters of appointment and termination are attached to this declaration marked "Annexure B")

4.2. During the period in which I served as a member of the Board; Mr. Gama had been in the employ of Transnet as the Chief Executive Officer of Transnet Freight Rail ("TFR").

4.3. Mr. Gama has a long history with Transnet dating back to 1994. In 2005, he was appointed as the Chief Executive of Transnet Freight Rail ("TFR").

5. FORENSIC INVESTIGATION REPORT BY KPMG – NKONKI

5.1. Immediately after our appointment to the Board, Transnet appointed KPMG and Nkonki to investigate a number of issues around Procurement at Transnet on the basis of the Public Protector allegations as well as Gama's appeal on the sanction of dismissal (attached to this declaration marked "Annexure C"). For purposes of this declaration, specific reference will be given to the Gama matter as well as the finding of this report in respect of similar fact matters not dealt with through the disciplinary process.

5.2. Mr. Gama was found guilty on charges of misconduct which subsequently led to his dismissal from Transnet, these charges include:

5.2.1. Authorizing the conclusion of a contract for the provision of security services by GNS on confinement in excess of his delegated authority which allegedly

BN2 18

constituted negligence and failure to carry out his duties in a manner expected of him and thus resulted in breach of the PFMA. ("Charge 1")

5.2.2. Failing to comply with the terms of the Board Resolution of 26 April 2007 which approved the acquisition of the 50 like new locomotives. He failed to conclude the contract in compliance with the condition set by the board. ("Charge 2")

5.2.3. Gama was also charged with unwarranted criticism of Transnet and its Executives which constituted serious disrespect and gross insubordination. ("Charge 3")

5.3. Mr. Gama was subsequently dismissed following a disciplinary inquiry into the charges brought against him however Mr. Gama then referred the matter to Transnet's internal Bargaining Council on the basis that the dismissal was unfair.

6. APPLICATION OF CONDONATION AT TRANSNET

6.1. The National Treasury note 4 of 2008/2009 allows for condonation of irregular expenditure such as:

6.1.1.1. Expenditure incurred as a result of institutions procuring goods or services by means other than through competitive bids and where reasons for deviating from inviting competitive bids have not been recorded and approved by the Accounting Officer or Accounting Authority; and

6.1.1.2. Irregular expenditure incurred as a result of non-compliance with a requirement of the institutions Delegations of Authority Framework ("DOA") issued in terms of the PFMA.

6.2. The abovementioned categories suggest that the Board is required to condone non-compliance with policies and procedures in respect of confinement of tenders as well as non-compliance with DAF.

6.3. Similarly, Transnet had adopted the practice of condonation for non-compliance and procurement irregularities across its operating divisions, only if good reasons exist for such cases.

6.4. Condonements in Transnet were essentially applied for in respect of procurement irregularities *such as:*

6.4.1. Irregular expenditure incurred as a result of contracts not extended correctly;
6.4.2. Contracts amended without the appropriate authorisation;
6.4.3. Issuing of tenders for a five - year contract contrary to the limited two-year period as per PPM;
6.4.4. Condonements to pay for security services rendered without contracts in place; and
6.4.5. Condonations for the confining and awarding of business.

6.5. There had been a number of instances which are similar in nature to Charge 1 in respect of Mr Gama's matter which relates to delegated authority which could have resulted in financial, regulatory or reputational risk to Transnet however, as the findings of the KPMG – Nkonki Report suggests, these matters were condoned and furthermore there was no disciplinary action implemented against those responsible for such non-compliance.

6.6. Evidence in the KPMG-Nkonki report shows that in respect of the procurement irregularities which Mr Gama was found guilty of (Charge 1), he was not given the opportunity to apply for condonement for irregular expenditure in respect of the GNS Service contract.

6.7. Notwithstanding the fact that the conduct was in fact irregular, Transnet had a history of condoning such irregularities and furthermore, no disciplinary action was taken against individuals for whom condonement was granted. This was however not the case for Mr. Gama.

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7. DECISION OF THE BOARD IN RESPECT OF MR GAMA'S DISMISSAL

7.1. Following a disciplinary inquiry which was held in respect of Mr Gama's matter, he was dismissed from Transnet.

7.2. Following deliberation by the Board, it was resolved that given the circumstance of the matter, the sanction of dismissal was in fact too harsh. The fact that Mr. Gama could still add immense value to Transnet was one of the factors that was considered. Furthermore, taking into account what is stated above, the Board instead supported a sanction of a Final Written warning valid for a period of six months.

7.3. In view of avoiding the matter possibly becoming litigious, Transnet Bargaining Council ("TBC") resolved to enter into settlement with Mr. Gama during the appeal of the matter.

7.4. The Board had a number of Committees, one of which was the Corporate Governance and Nominations Committee. The proposed Settlement Agreement between Transnet and Mr. Gama would have been discussed at this Committee's meeting prior to being recommended or escalated to the Board.

7.5. Given the fact that the Board was in agreement that the sanction of dismissal imposed on Mr. Gama was too harsh, it was resolved that Mr. Gama be given a Final Written warning valid for a period of six months, as a result thereof, he had to then receive his employee benefits and assistance towards his legal costs as per the Settlement Agreement. The objective of the Settlement Agreement would have been to place him in a position which he would have been in had the dismissal not occurred.

7.6. To the best of my knowledge, I am not aware of any member or members of the Cabinet playing any role directly or indirectly in the matter being settled or being settled on the terms on which it was settled.

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8. CONCLUSION

8.1. The above factors, information at the Boards disposal, as well as the Legal Opinion sought by the Board, were considered during the Board resolution to enter into the Settlement Agreement with Mr. Gama. The Board having been tasked with stabilizing Transnet, dealing with procurement irregularities as well as transformational issues at Transnet, considered its resolution to be in the best interests of Transnet at the time.

8.2. I have been unable, notwithstanding attempts by my Attorneys, to get a copy of the Legal Opinion considered by the Board in this regard.

9. I trust that the above information will be of use to the Commission in fulfilling its mandate.

ISRAEL BIZIWE SKOSANA

This declaration was signed and sworn to before me at Ballito

On this 31 August day of 2020.

FULL NAMES: Bonani Mgaba

ADDRESS:

COMMISSIONER OF OATHS
BRANCH MANAGER: ZIMBALI
SHOP 28, LIFESTYLE CTR
BALLITO 4420
DATE: 2020-08-31

DESIGNATION: _____

AREA: _____

STAMP:

ANNEXURE "A"

2nd Floor, Hillside House
17 Empire Road
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email:
inquiries@sastatecapture.org.za
Website:
www.sastatecapture.org.za

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

Date: 29 July 2020
Our reference: Ms Farrhah Khan
Email: farrhahk@commissionsc.org.za

Mr Israel Skosana
By Email: israels@kapelainvestments.co.za

Dear Sir

Request for an affidavit

1. I write this letter on the directions of the Chairperson of the Commission.

2. It has come to the attention of the Commission that you were a member of the Transnet Board of Directors at the time when a settlement agreement was concluded between Transnet and Mr Siyabonga Gama on 22 February 2011. For your convenience a copy of that agreement is attached to this letter marked “A”.

3. One of the matters that the Commission is investigating is the allegation that in certain state-owned entities certain senior managers or executives were removed from certain positions because they were not prepared to facilitate wrongdoing

such as corruption or acts of state capture and that those pursuing state capture or those who sought to loot public resources wanted to have malleable individuals appointed to those positions so that they could carry out acts of corruption or acts of state capture.

4. Mr Gama had been employed as the Chief Executive Officer of Transnet Freight Rail (TFR). He was dismissed after a disciplinary inquiry chaired by an independent chairperson, namely, Advocate Antrobus SC who found Mr Gama guilty of three acts of serious misconduct and recommended that he be dismissed. The three acts of serious misconduct of which Mr Gama was found guilty were that:

   (a) "he negligently authorised the conclusion of a contract for the provision of security services by GNS on confinement and failed to carry out his duties as CEO in the manner expected of him; and he negligently failed to take appropriate steps to investigate the irregularities associated with the halting of the open tender process and the replacement thereof with the GNS confinement tender process and the presentation to him of a document for approval which was the product of a confinement process but which was presented to him on the basis that it was an open tender process.";[1]

   (b) he "was negligent when he signed the "50 like new" contract without securing the work of TRE as was specifically required by the board resolution which he was tasked with implementing";[2] and

[1] As per paragraph 203 on page 106 of the disciplinary inquiry Chairperson's ruling on guilt.
[2] As per paragraph 332 on page 163 of the disciplinary inquiry Chairperson's ruling on guilt.

(c) he "either directly or through his attorneys during the course of the investigation and the High Court proceedings, and more recently made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified and unreasonable and calculated to cause harm. It is also contended that they indicate an irretrievable breakdown in the trust relationship between Gama as the CEO of TFR and Transnet."[3]

5. For your convenience and in order to refresh your memory, I attach to this letter marked "B" and "C", respectively, the rulings that the Chairperson of the disciplinary inquiry released which contained the reasons for his findings of guilt against Mr Gama and for his decision to recommend that Mr Gama be dismissed. I also attach to this letter a copy of the Transnet Company Secretary's affidavit as well as a copy of Mr Chris Todd's affidavit marked "D" and "E", respectively, of which you need to be aware.

6. Given the above, it *prima facie* seems to the Chairperson of the Commission that the settlement agreement Transnet concluded with Mr Gama may not have been in the interests of Transnet and may have been one sided in favour of Mr Gama. This may mean that you, as a member of the Transnet Board of Directors at the time, may have acted in breach of your fiduciary duties. In this regard the following can be noted:

(a) <u>Reinstatement</u>

[3] As per paragraph 332 on page 164 of the disciplinary inquiry Chairperson's ruling on guilt.

the Transnet Board decided to settle the matter on the terms on which it was settled including reinstating Mr Gama in circumstances where Transnet had strong or reasonable prospects of successfully defending Mr Gama's dismissal in the arbitration or where there was no sound reason for the Board to reinstate Mr Gama or to settle the matter on the terms on which it settled it;

(b) Retrospectivity of the reinstatement

the Transnet Board decided to award Mr Gama full backpay and gave him all benefits covering nine months in circumstances where it was highly unlikely that, if the arbitrator reinstated Mr Gama, the reinstatement would have been fully retrospective or that the arbitrator would have awarded Mr Gama full backpay, especially because Mr Gama accepted that he had been properly found guilty of three serious acts of misconduct and, therefore, should not have been dealt with as if he was innocent of any misconduct;

(c) Final Written Warning

despite the fact that Mr Gama accepted that he was guilty of three serious acts of misconduct, the Transnet Board decided to impose on him a final written warning valid for six months that was deemed to have commenced running from Mr Gama's date of dismissal and had, thus, expired by the time the settlement agreement was concluded which allowed Mr Gama to return to Transnet as someone with a clean disciplinary record as if he had not been found guilty of any misconduct; in other words, the Board decided to impose an ineffective final written

warning when it could have imposed an effective warning that could have commenced running on his return to Transnet;

Costs

(d) the Transnet Board undertook to pay 75% of Mr Gama's costs in respect of a High Court application that Mr Gama had brought against Transnet to interdict his disciplinary hearing which was dismissed and Mr Gama had been ordered by the High Court to pay Transnet's costs as well as the legal costs of certain members of the Board of Directors of Transnet including the costs of two Counsel. This undertaking was made in circumstances where there appears to have been no justification at all for it because that High Court litigation had been finalised. Furthermore, there was no risk that, if the arbitration was pursued in the Transnet Bargaining Council, the arbitrator could have ordered Transnet to pay Mr Gama any costs for the High Court application; indeed, the arbitrator would have had no power to do so;

(e) the Transnet Board undertook to pay Mr Gama's costs in regard to the unfair dismissal dispute in the Transnet Bargaining Council in circumstances in which not only was it unlikely that the arbitrator would order Mr Gama's reinstatement but also there was no reasonable prospect or risk that if Mr Gama was successful in the arbitration, the arbitrator would order Transnet to pay Mr Gama's costs in regard to the unfair dismissal dispute; and

(f) the Transnet Board, without any valid reason or any justification, instructed Transnet's then attorneys, Bowman Gilfillan, not to take any further steps to recover an amount of R 423 666,00 which represented

taxed costs due by Mr Gama to Transnet as a result of an order of the High Court; it is difficult to understand what possible justification the Transnet Board may have thought there was to not only effectively give Mr Gama an amount of R423 666,00 in taxed costs that he owed Transnet but also to undertake that Transnet would pay 75% of Mr Gama's legal costs in circumstances in which hardly any justification could be advanced.

7. The Chairperson of the Commission has directed me to request you to furnish the Commission on or before 20 August 2020 with an affidavit or affirmed declaration in which you explain why you, as a member of the Board of Directors of Transnet at the time, considered it correct or proper or justified to conclude the settlement agreement on the terms on which it was concluded. You are also requested to indicate whether any member(s) of the Cabinet played any role directly or indirectly in the matter being settled or being settled on the terms on which it was settled.

8. Your kind co-operation will be highly appreciated.

Yours sincerely



_____

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations
of State Capture, Corruption and Fraud in the Public Sector including Organs of State

ANNEXURE "B"

MINISTER
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, 0028 Tel: 012 431 1118 Fax: 012 431 1039
Private Bag X9079, Cape Town, 8000 Tel: 021 461 6376/7 Fax: 021 465 2381/461 1741

Mr Israel Skosana
P.O. Box 98938
Sloane Park
Bryanston
2152

Tel: 011 7064957
Fax: 011 4637588

Dear Mr Skosana

Appointment as Non-Executive Director to the Board of Transnet

I am pleased to inform you of your appointment as a Non-Executive Director of Transnet's Board of Directors, effective from 13 December 2010, for a three (3) year term, subject to annual confirmation.

Your appointment is regulated by the provisions of the Companies Act No. 61 of 1973, as amended, Public Finance Management Act No. 1 of 1999, as amended, the Protocol on Corporate Governance in the Public Sector, Transnet's Articles of Association as well as the Shareholder Compact between Transnet and the Shareholder.

Your fee structure will be based on the DPE-approved Remuneration Guidelines for State-Owned Enterprises. The fee is on a retainer basis. Additional fees are payable for participation in any sub-committees of the Transnet Board.

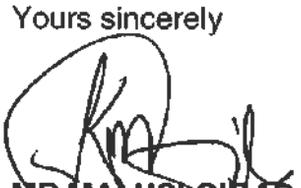
I take this opportunity to congratulate you on your appointment and wish you all the best in the discharge of your responsibilities.

I am confident that you will make a real contribution to the future success of Transnet.

Please confirm your acceptance hereof by signing the statement below and returning a copy to myself.

I trust you will find the above in order.

Yours sincerely



MR MALUSI GIGABA, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 2010/12/09

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

I, _____, hereby accept the appointment as Non-Executive Director on the Board of Transnet. I undertake to observe and comply with the principles and provisions of all legislation relevant to Transnet, the Protocol on Corporate Governance and the provisions of the Shareholder Compact between Transnet and Government, to devote sufficient time for the execution of my responsibilities, to utilise my skills to the best of my ability, to initiate, develop and implement systems or mechanisms for the effective and efficient management of Transnet, and to maintain and observe the highest standards of integrity and probity in the execution of my responsibilities.

_____ _____

Mr I Skosana **Date**

ANNEXURE "C"

MINISTER
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, 0028 Tel: 012 431 1118 Fax: 012 431 1039
Private Bag X9079, Cape Town, 8000 Tel: 021 461 6376/7 Fax: 021 465 2381/461 1741

Mr Israel Skosana
18 Portman Road
Bryanton
2152

Tel: 011 706 4957
Email: israels@kapelainvestments.co.za

Dear Mr Skosana

Rotation as Non-Executive Director of the Transnet Board of Directors

In light of the resolution taken at the AGM held on 27 June 2014, I have concluded the review of the Board composition and hereby inform you that your term of office as Non-Executive Director on the Transnet Board of Directors concludes with effect from 11 December 2014.

I would like to take this opportunity to thank you for your time and efforts towards building a sustainable Company. Performing a major public service is not something that every citizen has the opportunity or the sense of public duty to undertake. I would like to express my most sincere thanks and appreciation for the contribution you have made as a Non-Executive Director of the Board during your term of office.

I wish you all the best in your future endeavours.

Yours sincerely

MS LYNNE BROWN, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 10/12/2014

The Board of Directors
c/o Group Company Secretary
Transnet SOC Ltd
Room 4737, Carlton Centre Office Towers
150 Commissioner Street
JOHANNESBURG

Dear Board of Directors

RESIGNATION FROM THE BOARD OF DIRECTORS OF TRANSNET SOC LTD

I hereby tender my resignation from the Transnet Board of Directors with effect from 10 December 2014.

I would like to take this opportunity to thank the Department of Public Enterprises Ministry and Cabinet for the honour to serve on the Board of Transnet. My gratitude also goes to the Executives and Board of Transnet for their support.

I wish Transnet success in its major role in the realisation of South Africa as a developmental state.

Kind regards

ISRAEL BIZIWE SKOSANA
Date: 11/12/2014.

IN THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

AFFIDAVIT

I, the undersigned,

ZANDILE ELLEN TSHABALALA

do hereby make oath and state that:

1. I am adult female South African Citizen, the former Transnet non-executive director.

2. The content of this affidavit is true and correct and falls within my own personal knowledge, unless the contrary clearly appears from the context or is otherwise stated.

BACKGROUND

3. I depose this affidavit in an effort to place on record, to the best of my recollection, facts relating to the reinstatement of Mr Siyabonga Gama as an employee of Transnet in 2011. I further indicate that a considerable amount of time has elapsed since the event and therefore some precise information that I may have had at the time may not be in my personal possession.

4. On or around November 2010 we assumed duties as a board. At the time of assumption of duties, there were several burning platforms that we had to attend to, among them the precarious financial position of the company and low morale among the employees.

5. There had also been widespread reports in the media about the very public and grueling dismissal of Mr Siyabonga Gama, a key CEO at Transnet who had been running the largest division, Transnet Freight Rail ("TFR"). One of the fundamental issues also at stake was that TFR had begun to underperform under an acting CEO, Mr Tau Morwe.

6. When we took over as a board, Transnet company was already seized with discussions with Mr Gama as a result of his appeal at the Transnet Bargaining Council against his sanction of dismissal. On or arounds September or October Mr Gama lodged a dispute against the company for unfair dismissal. There were also other ongoing investigations by the Public Protector that had been lodged by or on behalf of Mr Gama and others around the exercise of public power by Transnet in this matter.

7. When the parties had started to engage, and Transnet had requested that it be allowed to consider whether it would be able to settle given the veracity of Gama's appeal. Mr Gama had lodged a comprehensive appeal against the company and as directors, it was our duty to clinically, and without bias or a jaundiced eye, assess the details of his appeal.

8. The corporate governance and nominations committee of the board was therefore seized with this matter and had to share and report to the rest of the Board on progress relating thereto.

9. Naturally, the Board had sought legal advice and opinion based on Mr Gama's pleadings lodged at the Bargaining Council. I do not have the legal opinion in my possession but the Group Executive responsible for Corporate Governance, Risk and Legal at Transnet would have secured same for discussion by the Board.

10. Any settlement agreement between the parties was the outcome of protracted and intense discussions between the parties. The Directors of Transnet took decisions in the best interests of the company based on the information provided to them and after robust reflection and discussions.

MR GAMA AND THE TRANSNET DISCIPLINARY HEARING AND ITS OUTCOMES

11. When the Board made its assessments, there were many contradictions and irregularities regarding the disciplinary hearing, the findings by the Chairperson and

the sanction on each charge. In addition, I found inconsistencies in the application of discipline. Further, there were people who could have been charged with Mr Gama, but were not charged, and only Mr Gama had been charged.

12. There were audit reports that reflected that Transnet had tolerated much more serious and significant procurement lapses than the ones that Mr Gama had been charged for. These failures included failure to follow process, policies and procedures had been contravened in the awarding of tenders. In a lot of those cases, more than 40 (fourty) of them if my memory serves me right, the procurement authority, being the Chief Executive of Transnet, had granted condonations to those employees. The audit report had concluded that in many instances of tender irregularities, Transnet had simply not taken any action, except the sole case of Mr Gama. Mr Gama had raised these inconsistencies issues both at the disciplinary hearing as well as in his appeal.

13. The Transnet processes allowed for Mr Gama to obtain a condonation for procurement lapses relating to emergency procurement. The procurement manuals allowed for retrospective approval in the case of emergency. Transnet never allowed Mr Gama to follow this process and the procurement authority would have been able to authorize and regularize the GNS procurement in this way. We gained insights that showed that within Transnet there had been numerous instances where condonations had been granted. However, in the case of Mr Gama he had not been allowed by the Transnet top management to attempt to remedy the defect. This was a material irregularity.

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FINDINGS BY THE CHAIRPERSON OF THE DISCIPLINARY HEARING

14. The contention that Mr Gama was found guilty of "*serious misconduct*" are Chairperson's own gross exaggeration which manifests in his desire to put emphasis on the findings "*of misconduct*" by the presiding officer. We must agree at the outset that the emphasis on *serious misconduct* is his own and does not appear in the findings section of the Chairman's report. The findings of guilt would find Mr Gama guilty only of negligence, and yet in recommending a sanction, this would be changed to gross negligence. This contradiction between the finding of guilt and the harsh finding on sanction was a gross irregularity.

15. As an example, in the disciplinary documents you append, paragraph 202 at page 106, the presiding officer notes:

> *I find that I am unable to conclude that it is more probable than not that Gama signed knowing that he was approving a confinement and that Transnet has therefore failed to show that Gama acted willfully rather than merely negligently*
> The Chairman found that the inference that Gama acted willfully which was sought to be drawn by Transnet as to Gama's knowledge has *"simply not in my view been shown to be the most probable inference".* Thus the Chairman specifically exonerated Mr Gama of acting willfully. He finds he acted merely negligently but not willful negligence.
> The finding, which is at paragraph 203 is that he "is guilty of misconduct"....
> There is nowhere as you attempt to manipulate in paragraph 4 of your letter that it says he is "*guilty of serious misconduct".*

16. This is important because when I obtained independent legal opinion and assessed the sanctions versus the findings, it became patently clear that, the starting point, which should have been the contract of employment, the Transnet disciplinary procedure and code of conduct, had not been referenced in applying the sanction. In general, the Chairman's assessment of sanction against his findings were manifestly unbalanced.

17. The Transnet disciplinary code applies the principle of progressive discipline. The code of good practice stipulates that it is generally not appropriate to dismiss an employee for a first offense, except if the misconduct is so serious or of such gravity that it made a continued employment relationship intolerable. This means that you cannot just apply dismissal for first offenses. Dismissal is the most severe and punitive measure that Transnet as an employer may impose. The code of good practice in our LRA lists first offenses sufficient to warrant dismissal as being cases where the employee commits intentional misconduct. This list includes gross dishonesty, willful damage to property, willful endangering of safety of others, physical assault, and gross insubordination. Negligence is not mentioned as grounds for summary dismissal.

18. The code lists secondary offenses for which there is a lesser sanction such as minor incidents of negligence or non-adherence to or failure to comply with Transnet policies or procedures. Before considering dismissal, it is also important to consider all mitigating circumstances, length of service, personal circumstances, and previous disciplinary records.

19. With regard to Charge 2, the conclusion-for that matter is reflected on paragraph 332 at page 163. The Chairperson's caption in his letter to me at 4b is quoted from this paragraph. He have decided to omit the first part of the Chairman's findings which I summarize here:

> *" In conclusion therefore on this charge, I find that Transnet has failed to establish on the balance of probabilities that Gama willfully signed the 50 like new contract in the knowledge that according to the terms of the contract STS would perform the local work rather than TRE. **(own emphasis)**. Transnet has however established that Gama was negligent when he signed the contract without securing the work for TRE as required by the board resolution which he was tasked to implement".*

20. As can be seen from the aforegoing, the finding of the Chairman was that there was no willful negligence on the part of Mr Gama. He also accepted that Transnet's legal advisors were negligent in not incorporating this condition of the delegation when they prepared the final contract. However, nothing was being said about why the legal personnel were not called to account for not drafting the contract with the stipulated conditions.
21. During the deliberations of the Transnet Board on these matters, it was clear that the Chairperson of the disciplinary hearing had found on sanction that Mr Gama was genuinely under the impression that he had been provided with the necessary legal advice. This was a substantial mitigating factor in Mr Gama's favor. When the Board deliberated in inconsistencies in the application of discipline at Transnet, it

was established that both Mr Kahla and Mr Wells, who sat on the Board of Transnet had been copied documents relating to the contract. Mr Kahla had been the one to motivate for the change in the resolution to the Board on 26 April 2007. If Mr Gama, had to been charged, they also needed to have been charged but were never charged. In fact, the finding was that Mr Gama, as a lay person, was entitled to rely on the advice of the legal personnel such as Mr Kahla. Nothing had been said inside Transnet when drafting charges for Mr Gama about why the legal personnel were not called to account for not drafting the contract with the stipulated conditions. Drafting of legal documents had never been Mr Gama's task, but no one had ever been charged. It was found that Mr Gama was entitled to rely on the expertise of Transnet's legal department which he *bona fide* did.

22. Charge 4 had been added during the hearing as a result of Mr Gama's report when he realized that Transnet was conducting his trial by media. Mr Gama had been substantially provoked when Transnet publicized his disciplinary hearing. They disclosed the charges against him and identified him by name in a press statement dated 26 August 2009, which had previously never happened as companies routinely treat this as an employer / employee relationship private matter. Mr Gama had authorized his attorneys to reply to the provocations he believed were orchestrated by Transnet. The Chairman's assessment of the breakdown of trust was manifestly unbalanced. The main players in this were Mr Gama and Mr Wells. Mr Gama never personally made any statements. The Chairman failed to take into account the remorse shown by Mr Gama in that he had been prepared to apologize to Mr Wells. In any event, during these deliberations, Mr Wells had signaled his intent to leave Transnet and the fact of their relationship became moot.

23. Mr Todd was the lawyer from Bowman Gilfillan during the disciplinary hearing. Mr Todd is privy to the pleas by Mr Gama at the Bargaining Council. It is strange that in his affidavit, he has chosen not to discover and therefore attach Mr Gama's copy of the pleadings. In his omission, he has also therefore omitted to indicate that when the appeal was being held, it was Transnet who requested a postponement. The postponement was occasioned to give an opportunity to Mr Gama and Transnet to explore settlement discussions. This failure and omission are glaring. The dates of January 24, 2011 had been kept in the diary of the Transnet Bargaining Council in order to ratify a settlement agreement between Mr Gama and Transnet. The appeal itself had been postponed *sine die* in October 2010 at the request of Transnet when the heads of argument were laid down by Mr Gama and His Counsel. Those dates were not kept there to continue with the appeal. In any event, at a point in December and January, the Transnet Board had sought independent legal advice from another international reputable firm to advise it on the matter. The Board had seen it fit to take out emotions and bias in the matter and try and evaluate the matter in totality for Transnet.

24. *The Transnet Board* applied its mind thoroughly when it negotiated the settlement agreement with Mr Gama, having regards to his appeal pleadings, having regard to the inconsistencies in discipline as well as many people, who ought to have been charged, and some had left the organization, who should have been charged because of more serious issues at the organization. The Board appointed Nkonki and KPMG to look at the different matters at Transnet. For instance, there were issues of consultants at the Capital Projects department where hundreds of millions

had been exceeded. There were also billions in cost overruns at the Pipeline unit which had never been attended to. There were issues of intercepting of mobile communications of whistleblowers that were being handled by the public protector and a myriad of very large and real issues which had not been tackled.

25. The Board of Transnet took its fiduciary duties very seriously in the Gama matter. It stopped an injustice that was being performed when there was an overzealous pursuit of one individual. The context of how and when charges had been proffered on Mr Gama nearly 3 (three) years after they had been allegedly committed was not lost on the board. Glaring misdemeanors that had not been dealt with, and senior employees allowed to leave Transnet were also manifest.

26. The commission must discover the appeal pleadings of Mr Gama and place it before itself. It cannot be that those who are being persecuted for being upright and standing up to bullying, like Mr Gama, are also the ones perpetually being tainted and aspersions cast on them. Mr Gama had spent many years at Transnet and demonstrated achievements of results. In the period since he was reinstated as the CEO of TFR, he contributed immensely to the turnaround of the business. It would be instructive to make an assessment of the business results of TFR, and therefore Transnet for the period ended March 2012 when the then GCE singled out Mr Gama for making a sterling contribution to the turnaround of Transnet.

27. I need not repeat that the notion of Mr Gama being found guilty "of three serious acts of misconduct" is not borne by the facts or the report of the chairperson of the hearing. It is a maligned and biased emphasis that does not appear in the

disciplinary report. In his plea, Mr Gama would have highlighted all these inconsistencies in the sanction which allowed the Board to reflect deeply on the matter. Indeed, he had been found guilty of misconduct which he accepted. However, he remains the only senior executive of Transnet who was charged for a condonable act, as well as the only executive at Transnet who was charged because the legal personnel had not done their work. All of these was ostensibly done to enable him to take responsibility for actions that he should have been allowed to discipline his subordinates for, albeit he was denied that opportunity.

28. Despite all the idiosyncrasies visited on him, Mr Gama had accepted what had happened with humility and embraced a role in Transnet because he believed that his training and expertise in logistics would advance the interests of Transnet.

29. If my recollection is correct, there had also been a matter relating to Transnet repudiating the agreement to arbitrate. The employment contract provided for a pre dismissal arbitration process. However, Transnet had unilaterally substituted the agreed process and decided to proceed with a disciplinary hearing. This breach by the employer, we were advised, would also have rendered the dismissal unlawful and unfair. In addition, contrary to the agreement that the Chairman should be a person who had not done work for either Transnet or Bowman Gilfillan, it was discovered at the tail end that the Chairman had been doing work for both Transnet and Bowman Gilfillan. This could not be obviated because the appointment was a unilateral decision by Transnet.

30. Cumulatively and given what we had learnt at the time we concluded the settlement agreement; I am satisfied that the decision we took was justified and well considered. I am not aware of any member of cabinet that played any role in the decision that the board made regarding this matter.

DEPONENT

I certify that the Deponent has acknowledged that she knows and understand the contents of the Affidavit which was signed and sworn to before me at ..Johannesburg at this the 21st day of ..September 2020, the regulations contained in Government Gazette No R1258 of July 1972 and R1648 of 1997 having been complied with.

COMMISSIONER OF OATHS

BRIAN KAHN INC ATTORNEYS
KERISHA REDDY
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
GAUTENG RSA
Umlilo House
2 Burnside Island
410 Jan Smuts Avenue,
Craighall Park, 2196

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

AFFIDAVIT

I, the undersigned,

MTHANDAZO PETER MOYO

do hereby make oath and say:

1. I am an adult male businessman residing within the province of Gauteng

2. The facts contained herein are within my personal knowledge, unless the context indicates otherwise and are to the best of my belief both true and correct.

3. This affidavit is being provided in response to the letter from the Commission of Inquiry into State Capture dated 29 July 2020 ("**the Commissions letter**") wherein I was requested to furnish an affidavit explaining why I as a member of the Board at the time considered it correct or proper or justified to conclude the settlement agreement between Transnet and Mr. Siyabonga Gama (" **Mr. Gama**") on the terms on which it was concluded, in particular the following :

3.1. The decision by the Board of Transnet to reinstate Mr. Gama;

3.2. The retrospectivity of the reinstatement of Mr. Gama;

3.3. The decision of the Board to impose a sanction of a written warning valid for a period of six months; and

3.4. The decision to pay Mr. Gama's legal cost.

BACKGROUD

4. I was appointed as a director of Transnet on 25 July 2008 and served until 6 July 2012. The matters referred to in the Commissions letter occurred during this period.

5. On or about 08 December 2010, the then Minister of Public Enterprises, Mr Malusi Gigaba appointed a new Board of Directors to Transnet. I, together with Ms. Gcaba and Ms. Ntshingila were the only three members who were appointed from the previous Board to serve on the new Board

SETTLEMENT AGREEMENT - MR SIYABONGA GAMA

6. Before I turn to deal with the specific questions raised in the Commissions letter, I first wish to state that I have never sought to dispute the fact that Mr. Gama had committed some wrong doing during his tenure as the Chief Executive Officer of Transnet Freight Rail ("**TFR**"). My position has always been that the manner in which Mr. Gama was treated in relation to his wrong doing was grossly unfair, discriminatory and inconsistent.

7. On or about 02 September 2009, Mr. Gama was placed under suspension and subsequently dismissed after he was found guilty of serious breaches of governance requirements in respect of procurement contracts.

8. The three acts of serious misconduct that Mr. Gama was found guilty of related to the following:

8.1. The contract with GNS on confinement for the provision of security services;

8.2. The fifty "like new" contract without securing the work of TRE as was specifically required by the board; and

8.3. Statements which were critical of the senior executives of Transnet.

9. When Mr. Gama was suspended, I was not happy with the process leading up to the suspension and subsequent dismissal. I informed the old Board and the then Chairman, Mr. Everingham.

10. I felt that Mr. Gama had been unfairly and inconsistently treated compared to other executive members of Transnet. On the issue of the security contract it was normal for Transnet to go through a condonation process if an executive exceeded the limits of their authority. In fact, I was aware at the time that Exco and the Group CEO had condoned such conduct from other executives and in some instances for amounts larger than what Mr. Gama had transgressed. The Board was not asked to consider a condonation for Mr. Gama in this regard.

11. In respect of the issue relating to the "fifty like new" locomotives, I agreed with the fact that Mr. Gama had acted contrary to the instructions of the Board. I felt however, that if Transnet were to discipline Mr. Gama for this, it also ought to have disciplined the then Acting Chief Executive Officer (who was Chief Financial Officer at the time for the same alleged misconduct.) , Mr. Chris Wells, together with Mr. Vuyo Khahla executive (who was an executive in the GCE office). They were both involved in the conclusion of the contract with a third-party service provider for the refurbishment of the locomotives.

12. Mr. Wells was a member of the Board. Mr. Khahla by virtue of his position attended all Board meetings. Both Mr. Wells and Mr. Khahla were in the meeting where the Board gave the instruction that Transnet Rail Engineering must be used to refurbish the locomotives.

13. From my recollection, despite this knowledge they both reviewed and approved the contract that Mr. Gama entered into with the third-party service provider for the refurbishment of the locomotives, contrary to the instruction from the Board. No disciplinary steps were taken against them in this regard.

14. At the time the disciplinary steps were taken against Mr. Gama, Mr. Wells was the Acting CEO and was the one leading the charges against Mr. Gama. This matter was also discussed at the Board meeting of 21 September 2009 wherein I stated that the Board must be seen to be fair in this matter and ensure that all executives that have been implicated in the matter of the "fifty like new locomotives" respond to the allegations leveled against them. A copy of the extract of the minutes of the special meeting is attached hereto and marked as Annexure "**PM1**".

15. Furthermore, as is evident from the minutes of the special meeting held on 21 September 2009 ("PM1"), I was not satisfied with the process that had been followed. Ms Nunu Ntshingila and myself, chose to be represented by different lawyers from the rest of the Board because, we did not fully agree with how the disciplinary process had been handled.

16. When the new Board was appointed and the matter of Mr. Gama was discussed I reiterated my views to the new Board at a Special Meeting held on 01 February 2011 when Mr. Mkhwanazi was Chairman and the new Board was asked to

NPJM

consider the issue of the appointment of the new Group Chief Executive Officer for Transnet.

17. At this meeting the Board was discussing whether Mr. Gama was eligible to apply for the position of the Group Chief Executive Officer and the issue of settlement discussions with Mr. Gama was also discussed. I attach a copy of the minutes of the meeting as annexure "**PM2**" (see paragraph 4.1.8)

18. As it is evident from the extract of the minutes, I reiterated my position that I was of the view that Mr. Gama was treated unfairly and inconsistently.

19. I supported the reinstatement of Mr. Gama when it was brought to the board in early 2011. There was no pressure brought to me by anyone, not even by the Chairman of the board who at the time was also acting Group Chief Executive.

20. I was also of the view that Mr. Gama had been put through an unfair process and on review I was happy for him to be reinstated. I also felt he should never have had to incur the huge legal expenses and hence I was happy that the company pays some, if not all of his legal expenses.

21. After deliberations with the board regarding the sanction to be imposed on Mr. Gama, I agreed that six months was a competent sanction. Even though by the time he returned to office, the period of his written warning had expired, this remained a part of his record at Transnet.

22. I also supported the back pay because in my view a reinstatement should restore a person to a position that they would have been had it not been for the intervening act, in this case the disciplinary process. The decision however, regarding the amount that Mr. Gama would ultimately receive, rested with the

Group CEO at the time as he had been mandated by the Board to settle the matter and finalise the settlement agreement. See minutes of meeting held on 16 February 2020 authorising the GCE to finalise the settlement agreement which I attach hereto and mark as annexure "**PM3**".

CONCLUSION

23. I never believed at the time that Mr. Gama's reinstatement was to facilitate state capture. I certainly was never put under any pressure to have Mr. Gama reinstated by any member of the Cabinet.

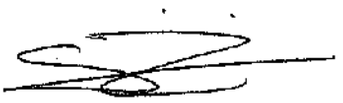
24. I at all times acted in good faith and in accordance with my fiduciary duties as a member of the Board and sought to ensure that there was reasonableness and fairness in the decisions taken by the Board.

25. While I believed that Mr. Gama had indeed committed some wrong doing for which he was charged, I did not believe that any of them warranted the type of disciplinary process that was followed and the subsequent dismissal. I was at the time of the view that the process was unfair and inconsistent with the way similar issues had been dealt with

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Illovo on this 3rd day of **SEPTEMBER 2020**; the Regulations contained

in Government Notice R1258 of 21 July 1972, as amended, having been complied with.



COMMISSIONER OF OATHS

NOSISA PHYLLIS JULLIET MATSEBULA
COMMISSIONER OF OATHS
GROUND FLOOR, 33 FRICKER ROAD
ILLOVO, JHB, 2196
FAIRBRIDGES WERTHEIM BECKER ATTORNEYS

Full Names:

Full Address:

Area:

Capacity:

156

"PM2"

MINUTES OF SPECIAL MEETING NO 09/8 OF THE BOARD OF DIRECTORS OF TRANSNET LIMITED HELD ON 21 SEPTEMBER 2009 AT 10:00 IN BOARDROOM 4901, 49TH FLOOR, CARLTON CENTRE, 150 COMMISSIONER STREET, JOHANNESBURG

Resolution No/ For Attention

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER**

The Acting Chairman welcomed all the members and attendees present. Having noted that there was a quorum, he declared the meeting duly constituted.

1.1 **Present**

Prof GK Everingham	Acting Chairman
Mr CF Wells	Acting Group Chief Executive
Ms NBP Gcaba	Non-Executive Director
Mr M Hankinson	Non-Executive Director
Dr ND Haste	Non-Executive Director (*Tele-conference*)
Ms NNA Matyumza	Non-Executive Director
Mr MP Moyo	Non-Executive Director
Ms NR Ntshingila	Non-Executive Director
Mr A Singh	Acting Chief Financial Officer

1.2 **In attendance**

Mr VD Kahla	Group Executive: Office of the Group Chief Executive
Ms ANC Ceba	Group Company Secretary

1.3 **Apologies**

Mr PG Joubert	Non-Executive Director
Ms KC Ramon	Non-Executive Director

1.4 **Adoption of Agenda**

The agenda was adopted as tabled.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The safety brief and evacuation procedures were conducted by means of a visual and audio recording.

3 **MINUTES OF SPECIAL BOARD MEETING OF 10 SEPTEMBER 2009**

The minutes of the Special Board meeting held on 10 September 2009 were circulated for approval. The minutes were corrected and approved with amendments in respect of the following portions thereof:

(i) Item 4.1.1, should read "The Acting Chairman stated that the Board had been subjected to adverse media publicity in the past month, but the Shareholder Minister was of the view that the Board should remain silent and not be seen to ***be*** interfering with the disciplinary process";

(ii) Item 4.1.3, should read "Mr Wells advised the Board that he was currently managing Transnet Freight Rail to ensure that there was minimal ***disruption*** to the governance processes at the Operating Division";

ANC NRJM

1.57

CONFIDENTIAL

Resolution No/
For Attention

(iii) Item 4.1.8, should read "Ms Matyumza emphasised the importance of managing the disciplinary proceedings correctly ***and the continued respect for his position as an executive of the Company***. Mr Moyo ***supported this.***"

(iv) Item 5.2.1, should read "The Acting Chairman reported that the Shareholder Minister had advised that ***the*** process of appointing a Group Chief Executive had stalled pending the outcome of the disciplinary proceedings."

Ms Ntshingila requested the Chairman's Notes from the meeting of 24 August 2009. — Secretariat (Matters arising)

4 MATTERS FOR DISCUSSION/APPROVAL

4.1 Update on the legal process

The Acting Chairman requested Mr Kahla to address the Board on the two written resolutions namely, Written Resolution 2009/P8 and 2009/P9, which had been circulated. Mr Kahla stated the following:

- Written Resolution 2009/P9 had been withdrawn and therefore nothing further needed to be said thereon.
- With regard to Written Resolution 2009/P8 some Board members had difficulty with Clause 4, to the effect that, in the event that any Director considered any position he/she wanted pursued in respect of the litigation between Mr Gama and the Company, its directors and officers to be in conflict with that of the officers and/or the Board of Directors of the Company, he/she could instruct attorneys independent to those of the Company, its directors and officers.
- He indicated that the intention was that the Board should be represented by a single firm of attorneys to limit legal costs and to allow those not comfortable with such attorneys or in any way in a position of a conflict of interests to use, only in such circumstances, other attorneys. Some of the Board members were, however, uncomfortable with Clause 4 which suggested that having chosen not to use a firm of attorneys that had given independent legal advice to the Acting Chairman would be construed as having a conflict of interest with the position of the Company, its officers and its Board.
- To avoid such concern in respect of Clause 4 of Written Resolution 2009/P8, this resolution, was therefore being submitted for approval by the Board of Directors without Clause 4 thereof.

Ms Ntshingila clarified that her difficulty with Written Resolution 2009/P8 was that there was no resolution required to appoint a particular firm to represent individual Board members as Board members have a right to use any lawyers they so choose. Mr Moyo added that it was irregular to give authority on issues that affect individual Board members and not the Company.

The Acting Chairman clarified that his Answering Affidavit in response to the application by Mr Gama included, as agreed by the Board of Directors at its meeting of 10 September 2009, an attack on the applicant's misjoinder of Board members in the legal proceedings. He added that, as he was also acting on behalf of the Board, and needed authority to act for them in this regard.

Mr Kahla clarified that the directors were not cited in their individual capacities,

ANC NBM

Resolution No/ For Attention

but as directors of the Company due to the fact that they had knowledge of, and may have dealt with, issues the executives of the Company are probably not well informed of. This included that, as alleged by Mr Gama, some directors may have, in breach of their fiduciary responsibilities to the Company and principles of sound corporate governance, addressed Mr Gama on the deliberations of the Board. All the directors had, however, in reply to an enquiry by the Group Company Secretary, denied that they had breached their legal obligations to the Company as implied in submissions made by Mr Gama in his Founding Affidavit. He added that while the directors could have chosen to respond individually through a series of law firms, that would neither be advisable nor be cost effective for the Company, particularly where their positions were not conflicted and all the directors, with the exception of Ms Ntshingila and Mr Moyo, had no objection to the attorneys that had previously provided independent advice to the Acting Chairman.

Ms Gcaba joined the meeting.

The Acting Chairman emphasised that the Board needed to remain united through all the current challenges.

The Board noted the update and **RESOLVED**, with the exception of two directors, that Written Resolution 2009/P8 (excluding Clause 4 thereof) be approved on the terms that:

1 The Board of Directors **NOTES** the Court Application brought by Mr Siyabonga Innocent Gama against Transnet Limited and others cited. 09/8/1

2 The Board of Directors **NOTES** in particular that individual Directors have been cited as co-respondents and further **RESOLVES** that:-

2.1 the Company, its Officers and the Board of Directors oppose the Application;

2.2 the Directors of the Company support the Company and its Officers in opposing the Application;

3 Professor G.K Everingham (Acting Chairman) act on behalf of the Board of Directors of the Company in opposing the Application and be authorised to perform and take such actions as are necessary to oppose the Application, including, but not limited to :-

3.1 instructing Attorneys and Counsel to act on behalf of the Board of Directors;

3.2 to depose to such affidavit(s) as may be necessary; and

3.3 generally do all such things as he may consider necessary to defend the interests of the Company, its officers and its Board. 09/8/2

4.2 **Update on the disciplinary proceedings**

Mr Wells reported that he had not yet appointed a dedicated acting functionary in the place of Mr Gama at Transnet Freight Rail. He added that he would formally appoint someone to act if the process prolonged post the end of September 2009. He stated that he was currently the functionary for the approval of Transnet Freight Rail's matters that are delegated to its Chief Executive.

The Acting Chairman added that the appointment of an acting Chief Executive for

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Transnet Freight Rail was dependant on the outcome of the court proceedings. The Company would need to re-evaluate the situation post the court proceeding scheduled for 25 September 2009.

Ms Ntshingila stated that she had asked for a meeting as she had some discomfort with the process that had been initiated upon by the Board, and her aim was to secure a common view and understanding on the situation by the Board as a collective. She highlighted, amongst others, the following issues, as being her concerns:

- Some of the decisions that were taken by the Board were made in the absence of all relevant information on the matter being made available to each and every member of the Board. She added that after reading all the documentation that had been made available to her post the decision being made, she was of the opinion that there were questions that needed to be answered by Mr Gama as well as other executives in the Company on the matters at hand;
- In the circumstances, in her view, the process should have been handed over to an independent person from inception and not to Mr Wells;
- The Board needed a common recollection of the events relating to the deliberations of the Board on 13 February 2009;
- She lacked clarity on what the Company was charging Mr Gama on.
- There was an impression created at the closed session of 13 February 2009 that the Tip-Offs had been received shortly before 13 February 2009 and not the previous year.

Mr Moyo confirmed that Ms Ntshingila's concerns were representative of his state of mind on the matter as well. He claimed that the sequence of events in the Acting Chairman's Affidavit was therefore incorrect.

Ms Matyumza emphasised, however, that, as is commonly the case when the Board elects that a dedicated sub-committee attend to, and make recommendations on, any matter such sub-committee is mandated to deal with, the Board has limited access to information due to the fact that all relevant information is submitted to the Board sub-committee mandated to deal with such a matter. She submitted that it must therefore have been expected that the sub-committee established on 28 July 2009 would have been granted access to more information than the Board, otherwise there would have been no purpose in appointing a dedicated sub-committee of the Board to consider the matter fully and make such recommendations to the Board as it considered appropriate having considered all the relevant information. She further indicated that, even after the Board had passed the 24 August 2009 resolution and received such other relevant information as had been sought by some of the directors, such information had not provided a basis for the Board to rescind its resolution of 24 August 2009 at its subsequent meeting on 10 September 2009.

Ms Gcaba stated that the sequencing in Mr Gama's affidavit was, however, incorrect in some material respects. Mr Wells suggested that Mr Phaswana be consulted on the issue relating to the sequencing of Board deliberation on 13 February 2009 as Mr Phaswana had deposed to a confirmatory affidavit in this regard.

Ms Ntshingila emphasised that while her sequencing of the events of 13 February 2009 was different to that of others, she continues to concur with the position that

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the Board had agreed to give the Shareholder Minister one name for appointment to the position of the Group Chief Executive on the merits of that candidate being head and shoulders above the other candidates, and that the discussion on the forensic investigations did not influence her support for the Board's preferred candidate as Mr Gama had been assessed on merit taking into account, amongst other things, the psychologist's assessments.

Mr Moyo stated that he had confirmed the sequence of events on 13 February 2009. He further recalled that the former Chairman of the Board had confirmed to the Board that he had discussed the top 5 names with both Ministers Radebe and Mabandla before the Board's strategy session on 13 February 2009.

To clear up any confusion that may exist arising from the aforementioned concerns of Ms Ntshingila, the Acting Chairman requested the Board to confirm their support for the affidavit that had been lodged on their behalf. He added that if some of the Board members' recollection of the sequence of the Board's deliberations on 13 February 2009 differed from that contained in his affidavit, he would file a supplementary affidavit to that effect, and further state that the Board firmly believes that it was not influenced by the forensic investigations in its choice of a preferred candidate for the succession process.

The Board **RESOLVED** that a supplementary Affidavit be deposed to by the Acting Chairman indicating that, while the Acting Chairman and others believe in the correctness of his sequencing of events as set out in his Answering Affidavit, there were directors who hold a different belief in respect of the sequencing of the deliberations of the Board of Directors on 13 February 2009. The Board of Directors further **RESOLVED** to re-affirm that its decision not to recommend Mr Gama for appointment had been taken on its own merits and had not been influenced in any way by the former Group Chief Executive's report on the matters that were a subject of a forensic investigation.

The Acting Chairman requested Mr Wells to address the Board on the charges against Mr Gama. Mr Wells reported, amongst others, the following:

- There are currently charges that had been brought against Mr Gama relating to the security tender and the 50 "Like New" contract.
- In respect of the charges on the security tender, the internal investigators were of the opinion and that the issues in the contract were still being compounded, and that the contract's extension should, in terms of the relevant Acquisition Council's decision, not have been continued post February 2009. Mr Wells confirmed that there will be charges raised against all the officials implicated in the security tender matter.
- Mr Gama was charged for his alleged approval of the security tender above his delegated limits of authority and his alleged failure to take corrective measures to fix the irregularities in the security contract post all the discussions that had been held with him on the matter.
- Mr Wells indicated that the forensic investigation on the "*50 Like New*" contract process had been long and intricate. The "50 Like New" charges included an alleged failure on the part of Mr Gama to comply with, and execute the terms of, the Board Resolution on the "50 Like New" contract, in particular the condition of that Resolution relating to Transnet Rail Engineering.

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- Arising from such failures and the legal, commercial and financial prejudice the Company had, as a result, become exposed to, Transnet's independent legal advisors had advised that the Company and its Board had no option but to institute necessary disciplinary action.

Dr Haste was disconnected from the meeting.

Mr Kahla advised the Board that Group Legal had raised a potential conflict of interest in respect of Werksmans' acting for any directors in Mr Gama's legal proceedings based on the fact that Werksmans is representing STS in the legal disputes on the 50 "Like New" and 212 locomotive processes, and that this legal firm may, arising from its representation of directors in Mr Gama's matter, potentially gain access to information that could be beneficial to STS in its litigation matters against the Company.

Mr Singh stated that the Company currently is a party to a contract on the 50 "Like New" that is inconsistent with the dictates of the mandate of the Board regarding such contract and was thus placed in an invidious position of having expenditure that could be perceived as irregular. He added that the Company had to take such steps as it has taken, to ensure that any contracting irregularities were corrected, as there would be an offence in terms of Section 83 of the PFMA on the part of the Board if no action to effect such correction is taken.

Mr Hankinson left the meeting.

Mr Moyo stated that the Board must be seen to be fair in the matter, and further ensure that all executives that have been implicated in the matter respond to the allegations levelled against them.

In closing, the Acting Chairman confirmed that the Board's submissions in Mr Gama's matter would be heard in court on 25 September 2009. He thanked the members of the Board for being diligent in the execution of their duties.

5 **GENERAL**

None.

6 **CLOSE**

There being no further business to conduct, the Acting Chairman declared the meeting closed.

ACTING CHAIRMAN
DATE: 14 OCTOBER 2009

GROUP COMPANY SECRETARY
DATE: 14 OCTOBER 2009

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"PM2"

PRIVILEGED AND CONFIDENTIAL

MINUTES OF SPECIAL MEETING NO. 11/2 OF THE BOARD OF DIRECTORS OF TRANSNET LIMITED HELD ON 1 FEBRUARY 2011 AT 19:00 IN BOARDROOM 4901, 49TH FLOOR, CARLTON CENTRE, JOHANNESBURG

Resolution No/ For Attention

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER**

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. He apologised for the two hour delay in starting the meeting. He introduced Mr Brian Khumalo and Ms Georgina Barrack from Leaders Unlimited to the Board.

1.1 **Present**

Mr ME Mkwanazi	Chairman
Mr MA Fanucchi	Non-Executive Director
Ms NBP Gcaba	Non-Executive Director
Mr BD Mkhwanazi	Non-Executive Director
Ms T Mnyaka	Non-Executive Director
Ms N Moola	Non-Executive Director
Mr MP Moyo	Non-Executive Director
Ms NR Ntshingila	Non-Executive Director
Mr IM Sharma	Non-Executive Director
Ms E Tshabalala	Non-Executive Director
Ms DLJ Tshepe	Non-Executive Director
Mr IB Skosana	Non-Executive Director

1.2 **In attendance**

Mr B Khumalo	Leaders Unlimited (Partial)
Ms G Barrick	Leaders Unlimited (Partial)
Ms ANC Ceba	Group Company Secretary

1.3 **Apologies**

Mr HD Gazendam	Non-Executive Director
Mr MP Malungani	Non-Executive Director
Prof JE Schrempp	Non-Executive Director
Mr A Singh	Acting Chief Financial Officer

1.4 **Adoption of Agenda**

The agenda was adopted as tabled.

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The Chairman took the Board through the safety briefing and evacuation procedures for the 49th Floor.

3 **DIRECTORS' DECLARATION OF INTERESTS**

The Declaration of Interests Register was circulated to all members and attendees for signature.

4 **MATTERS FOR DISCUSSION/APPROVAL**

4.1 **Feedback on the GCE's succession process**

4.1.1 The Chairman invited Mr Khumalo to take the Board through the GCE succession

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process thus far.

4.1.2 Mr Khumalo took the Board through the background on the process and stated that the process had three prongs to it namely, nomination of candidates by the Board, targeted search process by Leaders Unlimited and a public advert calling for applications that was placed in three daily newspapers on 26 January 2011.

4.1.3 Mr Khumalo informed the Board of the selection process before the advert calling for application, and indicated that the Corporate Governance and Nominations Committee ("the Committee") is of the view that the two processes had yielded good candidates, and decided to interview the candidates on 29 January 2011. He informed the Board that the interviews were conducted with a proviso that if there were any good candidates that will emerge from the advert process, such candidates will be interviewed at a later stage.

4.1.4 Mr Khumalo advised the Board that he had received 29 other applications through the advert process, inclusive of Mr Gama's application. He indicated that he was comfortable that none of the candidates that came through the advert process qualified for short-listing. He stated that Mr Gama might have been a strong candidate but will not have been recommended for short-listing based on reputational issues. He advised the Board that legal advice concurs that since Mr Gama was found guilty of misconduct by an independent tribunal, he did not qualify to be shortlisted.

4.1.5 The Board sought clarity on the following issues:

- When did the advert process close?
- Were all candidates that came through the advert process fairly evaluated?
- Were all the candidates that were nominated by the Board contacted and requested to submit their curriculum vitae before the short-listing process?
- Were integrity checks conducted for all the candidates?

4.1.6 Mr Khumalo advised the Board that the advert process closed at 17h00 on 1 February 2011. He stated that Leaders Unlimited did not contact some of the candidates that were nominated by the Board, if the candidates did not meet the minimum criteria. He stated that the initial evaluation of candidates was conducted based on the information that was available in the public domain. He informed the Board that the initial nomination did not disadvantage any candidate, and further stated that :

- It was undesirable that the three pronged processes were running concurrently due to time constraints;
- No thorough integrity check was conducted; and
- Mr Gama would have failed the integrity check based on what is in the public domain.

4.1.7 Mr Mkhwanazi stated that the Board needs assurance that the Committee was diligent on the GCE process. Ms Tshabalala indicated that she is of the view that the process was not fair to all the candidates that had submitted their applications for consideration.

4.1.8 Mr Moyo raised concern that the Board meeting was scheduled to commence at the same time as the advert process was closing. He stated that the Company stands the risk of being accused of a compromised process, and further emphasised the importance of adhering to the administrative justice provisions. He indicated that Mr Gama was found guilty of exceeding his mandate, but he was uncertain if all the executives that exceed their mandates are disciplined the same way as Mr Gama.

Mr Khumalo and Ms Barrick were excused from the meeting at 19:40.

4.1.9 Ms Gcaba indicated that she was keen on the legal opinion on Mr Gama's application for

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the GCE's position. She stated that she was uncertain if he can be disqualified from being considered from the GCE process when his appeal is still pending.

4.1.10 The Chairman stated that he was in settlement discussions with Mr Gama. He stated that Mr Gama was only appealing the sentence that was imposed. He added that the Committee was currently reviewing Mr Gama's sentence, and the proposed settlement agreement would be presented to the Board for approval on 16 February 2011. Chairman

4.1.11 The Chairman informed the Board that the Shareholder Minister will be presenting the recommended candidate for appointment to the President on 2 February 2011. Mr Mkhwanazi cautioned against hastily dispensing of the process, and further indicated discomfort with the process thus far.

4.1.12 Ms Ntshingila requested feedback on the Top 3. Mr Sharma informed the Board that 13 names were initially proposed by the Board and that 20 names were proposed by Leaders Unlimited. He stated that each panel member was requested to submit a Top 10 list. He advised the Board that the interviews were rigorous and sufficient time was spent with all the candidates. He indicated that the Top 2 were impressive in their performance. He stated that the top-scoring candidate has a good understanding of the financial matters and can assist with the Company's funding plans.

4.1.13 The Chairman proposed that a meeting be convened for 2 February 2011 to give comfort to the Board members that the advert applicants were not unduly prejudiced. Ms Mnyaka stated that the Board should engage the Shareholder Minister and request an extension. Mr Skosana agreed that the process should be fair to all the applicants and he also supported approaching the Shareholder Minister for an extension. He stated that the Board needs to be comfortable with the integrity of the process.

4.1.14 Mr Sharma supported the request for an extension from the Shareholder Minister, and further indicated that he is of the view that the Board did not manage the process well as it was given enough time to finalise the process. Mr Mkhwanazi was concerned that the process might have missed a number of "suitable" candidates for consideration. He stated that the Board has to be comfortable with the process thus far.

4.1.15 Ms Ntshingila stated that the real issue was the "late advert" long into the process. She stated that the Board needs comfort that the process was robust and vigorous.

4.1.16 Mr Mkhwanazi requested the Board to avoid adverse market perceptions. He indicated that the market already knew who the GCE would be long before the process began, and the identified name is part of the Top 5. The Chairman informed the Board that the Committee worked independently and had no external influence. Mr Mkhwanazi stated that he was not casting aspersions on anyone on the table.

4.1.17 Mr Mkhwanazi suggested that the Board should submit three names to the Shareholder Minister according to the Guidelines. The Chairman stated the meeting should be adjourned for a few days and requested the Committee to continue with the selection process. He requested that another Special Board be convened as soon as the Committee has finalised its work. Ms Ceba

4.1.18 Ms Tshabalala appealed for confidentiality from the Board on its deliberations.

4.1.19 Some Board members were not comfortable with the manner in which Mr Khumalo dealt with the issue of intergrity.

The Board noted the update and **agreed** that a letter would be sent to the Shareholder Minister providing an update on the GCE selection process. Chairman

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4.2 **Consideration of Mr Gama's application for the GCE process**

4.2.1 Ms Mnyaka stated that the Board must discharge of Mr Gama's matter urgently. She added that excluding him from the GCE process on subjective basis is unfair, and requested guidance from the Board on how to proceed with the matter.

4.2.2 Ms Tshepe stated that the Committee was advised that Mr Gama should not be interviewed based on the issue of integrity. Mr Skosana stated that he supports the Committee's view in light of the fact that Mr Gama has been found guilty. He indicated that he supports the proposed settlement discussions that are being held with Mr Gama.

4.2.3 Ms Tshepe informed the Board that the Committee will seek a legal opinion on whether to (or not to) consider Mr Gama from the process. Ms Tshabalala indicated that Mr Gama's matter is *sub judice*. Mr Sharma requested the Board not to debate the merits and de-merits of the Mr Gama's appeal case. He indicated that he will be uncomfortable if the Board should consider an application from a dismissed employee.

4.2.4 Mr Moyo cautioned the Board not to intertwine Mr Gama's application for the GCE's position and the Public Protector process. He stated that the appointment of the GCE is a political issue, and it should be treated sensitively.

4.2.5 Ms Ntshingila requested the Board to distinguish between "*being interviewed*" and "*being appointed*" to the GCE's position. She indicated that she is not opposed to Mr Gama being interviewed. Ms Tshabalala indicated that she supports that Mr Gama be Interviewed.

4.2.6 Mr Fanucchi stated that if Mr Gama is considered for participation in the GCE process, the Company should be prepared to appoint him to the GCE's position if he performs well in the interviews.

The Board noted the update and **agreed** that the Committee will seek legal advice on how to dispense with Mr Gama's matter.

5 **GENERAL**

None.

6 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed.

CHAIRMAN
DATE 22/02/2011

GROUP COMPANY SECRETARY
DATE: 17 FEBRUARY 2011

"PM3"

PRIVILEGED AND CONFIDENTIAL

MINUTES OF MEETING NO. 11/4 OF THE BOARD OF DIRECTORS OF TRANSNET LIMITED HELD ON 16 FEBRUARY 2011 AT 12:30 IN THE ROYAL ELEPHANT CONFERENCE CENTRE, CENTURION, PRETORIA

Resolution No/
For Attention

1 **WELCOME, CONSTITUTION OF MEETING, APOLOGIES AND SIGNING OF ATTENDANCE REGISTER**

The Chairman welcomed all members and attendees present and having noted that there was a quorum, declared the meeting duly constituted. He thanked the Board for their contribution and commitment during the Corporate Plan Workshop from 14 to 16 February 2011.

1.1 **Present**

Mr ME Mkwanazi	Chairman
Mr A Singh	Acting Chief Financial Officer
Mr MA Fanucchi	Non-Executive Director
Mr HD Gazendam	Non-Executive Director
Ms NBP Gcaba	Non-Executive Director
Mr MP Malungani	Non-Executive Director
Mr BD Mkhwanazi	Non-Executive Director
Ms T Mnyaka	Non-Executive Director
Mr MP Moyo	Non-Executive Director
Mr IM Sharma	Non-Executive Director
Ms E Tshabalala	Non-Executive Director
Ms DLJ Tshepe	Non-Executive Director
Mr IB Skosana	Non-Executive Director

1.2 **In attendance**

Ms Z Stephen	Group Executive: Legal, Corporate and Public Affairs
Ms ANC Ceba	Group Company Secretary

1.3 **Apologies**

Ms N Moola	Non-Executive Director
Ms NR Ntshingila	Non-Executive Director
Prof JE Schrempp	Non-Executive Director

1.4 **Adoption of Agenda**

The agenda was adopted as tabled.

1.5 **Partial attendance**

Mr M Gregg-Macdonald	Acting Group Executive: Commercial and Freight Corridors
Mr M Descoins	Portfolio Manager - Coal: Transnet Freight Rail
Mr N Thomson	Chief Financial Officer: Transnet Freight Rail

2 **SAFETY BRIEFING AND EVACUATION PROCEDURE**

The Chairman took the Board through the Safety Procedures for the conference room.

The Chairman requested that Item 8.14, 8.11 and 8.12 be dealt with next. These minutes reflects the order of the meeting.

Messrs Gregg-Macdonald, Descoins and Thomson joined the meeting.

8.14 **81mt coal contracts and business case**

8.14.1 Management took the Board through the submission as contained in the pack. The submission was taken as read. The following matters, amongst others, were highlighted to the Board :

- The history of the coal line including the proposed expansion to 81mt;
- The significance of the coal line's contribution to TFR's turnover; and
- The significance of the proposed coal expansion project.

8.14.2 Management indicated that the required capital will elevate the asset to the required

8.14.3

8.14.4

8.14.5

8.14.5.1

8.14.5.2

8.14.5.3

8.14.5.4

8.14.5.5

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Messrs Thomson, Gregg-Macdonald and Descoins were excused from the meeting.

8.11 **Presentation of Mr Gama's disciplinary proceedings**

Mr Singh, Ms Stephen and Ms Ceba were recused from the meeting.

8.11.1 The matter was extensively discussed.

The Board **RESOLVED** that it supports the acting GCE in his endeavours to settle Mr Gama's matter and mandates the Company to finalise Mr Gama's Settlement Agreement. 11/4/2

8.12 **Public Protector matters**

The Chairman indicated that the matters had been referred to the Corporate Governance

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feedback on the deliberations and decisions that were taken.

13 **CLOSE**

There being no further business to conduct, the Chairman declared the meeting closed at 21:18.

CHAIRMAN
DATE: 21/04/2011

GROUP COMPANY SECRETARY
DATE: 21 APRIL 2011